

1998

Congress, the Court, and the Constitution:
Hearing before the Subcommittee on the
Constitution of the Committee on the Judiciary,
House of Representatives, One Hundred Fifth
Congress, Second Session

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Repository Citation

Canady, Charles T.; Scott, Robert C.; Fisher, Louis; Currie, David P.; Devins, Neal; Kinkopf, Neil; Strossen, Nadine; Franck, Matthew J.; Clinton, Robert L.; Hyde, Henry J.; and Watt, Melvin L., "Congress, the Court, and the Constitution: Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, One Hundred Fifth Congress, Second Session" (1998). *Congressional Testimony*. 2.
<https://scholarship.law.wm.edu/testimony/2>

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CONGRESS, THE COURT, AND THE CONSTITUTION

HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FIFTH CONGRESS
SECOND SESSION

JANUARY 29, 1998

Serial No. 124



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1999

58-804

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-059740-4

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CONGRESS, THE COURT, AND THE CONSTITUTION

THURSDAY, JANUARY 29, 1998

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:32 a.m., in Room 2226, Rayburn House Office Building, Hon. Charles Canady [chairman of the subcommittee] presiding.

Present: Representatives Charles T. Canady, Henry J. Hyde, Ed Bryant, William L. Jenkins, Bob Goodlatte, Bob Barr, Asa Hutchinson, Robert C. Scott, Maxine Waters, and Melvin L. Watt.

Staff present: John Ladd, Counsel; Keri Folmar, Chief Counsel; Brett Shogren, Research Assistant; Michael Connally, Staff Assistant; Brian Woolfolk, Minority Staff; Julian Epstein, Minority Staff Director, and Robert Carry, Counsel.

OPENING STATEMENT OF CHAIRMAN CANADY

Mr. CANADY [presiding]. The subcommittee will be in order.

The subcommittee is holding this hearing today to examine the respective roles of the Congress and the Supreme Court in interpreting the Constitution. With the help of our witnesses today, we will consider whether one branch of our Federal Government has a monopoly on Constitutional interpretation.

I believe the framers of our Constitution expected the Congress to play an important role in debating and legislating our constitutional issues. It is important to the Congress to ask itself if deference to the Supreme Court is always the order of the day. We have a responsibility to consider the circumstances under which the Congress should or should not defer to the Supreme Court in making Constitutional interpretations. And we have the duty to ensure that the requirements of the Constitution are consistently recognized and honored in the legislative process.

While the exclusive focus of today's hearing is not the Court's *Boerne v. Flores* decision of last term, that case does represent the most recent expression of tension in an ongoing relationship between the Congress and the Court. Despite the Court's holding in *Boerne*, Justice Kennedy stated to the Court that, and I quote, "When the Congress acts within its sphere of power and responsibility, it has not just the right but the duty to make its own informed judgment of the meaning and force of the Constitution."

In light of the result in *Boerne*, it is incumbent on Members of Congress to reflect on the scope of our sphere of power and respon-

sibilities so that we can exercise our duty, as Justice Kennedy put it, "to make our own informed judgment on the meaning and force of the Constitution."

I look forward to hearing from our witnesses today, and I now recognize Mr. Scott for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman, and I appreciate the opportunity we're taking to examine the relationship between Congress, the Court, and the Constitution. Constitutional tension between Congress and the judiciary is nothing new. The drafters of the Constitution established three branches of Government, all with equal responsibilities, to protect and uphold the Constitution.

The strength of our system of Government is based on the interdependence of three separate but equal branches of Government. The fact that from time-to-time the branches disagree is a tribute to our democracy and in no way threatens the sovereignty of its people. We should take pride in knowing that our vigorous system of checks and balances not only protects us from external threats at home and abroad, but also protects us from the greatest threat ever imagined by our Founding Fathers, and that threat is ourselves.

I understand that there have been a number of proposals intended to minimize the healthy tension now existing between Congress and the courts. I am particularly concerned by the suggestion by some that we should more frequently exercise our impeachment powers to rid ourselves of the actions of activist judges who thwart the will of the people, and we should investigate these judges, Mr. Chairman.

I understand that in the 1996-97 term of the Supreme Court, four of the seven acts of Congress reviewed were invalidated. Only two justices voted to invalidate all seven of the acts of Congress considered in the most recent term, taking every opportunity they had to thwart the will of the people. There was another judge that voted six out of seven times to thwart the will of the people, and we should investigate and expose these justices for thwarting the will of the people. And Mr. Chairman, we need to do some research to find out who these justices are.

Mr. CANADY. Wait—

Mr. SCOTT. Wait a minute, Mr. Chairman. My staff has already supplied me with that information—seven out of seven; Justice Scalia and Justice Thomas—six out of seven; Chief Justice Rehnquist. I look forward to the testimony of the witnesses, Mr. Chairman, to see whether or not we would have been better off without these activist judges on our Court. [Laughter.]

So I look forward to the testimony of the witnesses, Mr. Chairman, and thank you for calling the hearing. I am particularly looking forward to hearing from Professor Devins, who is a professor at William and Mary Marshall School of Law, which, depending on the actions of the General Assembly tomorrow and the next day, may be in or out of my district. [Laughter.]

Thank you, Mr. Chairman.

Mr. CANADY. Thank you, Mr. Scott. With the General Assembly meeting on a such a matter today, I'm very pleased that you were able to be here. [Laughter.]

Mr. SCOTT. I'm well-represented today in Richmond, you can be sure.

Mr. CANADY. I'm sure you are.

We're very pleased to have a distinguished panel of Members to start off the hearing today. We have four Members on this panel. The first to testify will be the Honorable Ron Lewis. Congressman Lewis represents the 2nd District of Kentucky and serves on both the Agriculture and National Security Committees in the U.S. House of Representatives.

Next we will hear from the Honorable John Hostettler. Representative Hostettler, who represents the 8th District of Indiana, has recently published an article entitled "The Constitution's Final Interpreter: We the People," in the *Regent University Law Review*.

The Honorable Barney Frank will be the next to testify. A member of the House Judiciary Committee and former ranking member of this subcommittee, Representative Frank has represented the 4th District of Massachusetts since 1981.

Finally, on our first panel, we will hear from the Honorable Tom Campbell. Representative Campbell, who serves the people of the 15th District of California, has taught constitutional law at Stanford University.

Without objection, your written statements will be made a part of the permanent record, and I would ask you to do your best to summarize your testimony in no more than 5 minutes; we'll have the light on. Unless some member of the subcommittee insists, we won't stay strictly to the 5-minute rule, but as close as you could come to that, we would appreciate it.

So with that we welcome you all, and I'll recognize Representative Lewis.

STATEMENT OF LOUIS FISHER, SENIOR SPECIALIST IN SEPARATION OF POWERS, CONGRESSIONAL RESEARCH SERVICE

Mr. FISHER. Mr. Chairman, I want to thank you for holding these hearings. I'm not aware of another time where a congressional panel has held a hearing on a broad topic of what the role of Congress is in constitutional interpretation and how that role fits with the President and with the courts.

As you mentioned in your opening statement, people today seem to think that the Court has a monopoly on constitutional interpretation. That certainly could not be true for the early decades. Professor David Currie has written about this, as have others, to show that the prominent constitutional decider in those early years was Congress, with the President. The courts played very little role. There were few decisions at that time from the courts to guide Congress, so it was up to the two branches, executive and legislative, to decide.

In recent decades, probably the last 40 to 50 years, there has been this tendency, both in the Supreme Court and with professors, to read Court decisions as the ultimate and final word, with the Court having some exclusive role on the meaning of the Constitution.

The Supreme Court frequently today cites language from *Marbury* that it is emphatically the province and duty of the courts to say what the law is; that is true. It's also emphatically the province and duty of Congress to say what the law is. It's emphatically the province and duty of the President to say what the law is through his veto power and through the President's responsibility to enforce the law.

So that part of *Marbury* doesn't get you very far, and anyone who looks at *Marbury* in 1803 would know that Chief Justice John Marshall never made the claim that he had some exclusive roll in interpreting the Constitution. He knew politically at that time, after the election in 1800, that the Court was not in a position to dictate to the other branches.

And in my testimony I have the letter that he sent to Justice Chase saying that if Members of Congress disagree with a Court decision, it's not necessary to roll out impeachment; rather, you work through your regular legislative process, and we have a dialogue between the branches on shaping the meaning. The Marbury decision is always taken out of context to say something that Marshall never meant.

Last year in the Harvard Law Review there was an article by Professors Alexander and Schauer arguing that the Court should be the exclusive interpreter of the Constitution, and that that would produce political stability. Neal Devins and I talked about that article as to when in American history you could ever say that the Court helped settle issues, transcendent or otherwise. Certainly on slavery, on child labor—you can go down the list—where Court decisions did not settle these issues, that it was left to the larger political process.

Neal Devins and I did an article that will be in the Virginia Law Review next month to say that all three branches participate in the meaning of the Constitution; the States, as well and the general public, as well, and that this larger dialogue is what creates political stability, not an exclusive role for the Court.

My statement talks about the role of Congress in three senses: before the Court ever decides, when it decides that something is constitutional, and when it decides that something is not constitutional. Before the Court decides, Members of Congress have a huge role on many matters that either never get to the Court, or if they get to the Court the Court ducks it on various grounds, various thresholds. These are important matters. Many of the issues are the veto power, the pocket veto, covert spending, foreign affairs, war powers, and so forth, that are basically left to Members of Congress—the commerce power, spending power.

Now when the Court does take a case and decides that something is constitutional, that's not the last word because it is simply stated by the Court that if the other branches want to do this it's okay by the Constitution, an example being McCulloch with the U.S. Bank. The Court said it was constitutional. That did not prohibit President Jackson later, when a bill came to reauthorize the bank, to say, "According to me, it's unconstitutional. I'm going to veto it on that ground."

A contemporary issue is the independent counsel. Although that was upheld by the Court in Morrison, if Members of Congress wanted to say at the next reauthorization of the independent counsel that you have serious constitutional doubts, you don't have to reauthorize; or if you do, and it gets to the President, the President could veto it by saying that even though the Court says it doesn't encroach that much on executive power, I think it does and I'm going to veto it on constitutional grounds.

Another recent example: In 1986 the Supreme Court upheld the Air Force regulation that prohibited members of the military from wearing a yarmulke indoors while on duty, and Congress the next year overturned that by statute, and that's the meaning of the Constitution on how you balance military duties versus religious freedom.

Even when the Court finds unconstitutionality, Congress is a participant. I talk about the Boerne case, which I don't think is persuasive; I think it's internally inconsistent. I think there is plenty of room for Congress to revisit the issue with new legislation.

And I conclude by saying that at certain times in our history there is a basis for finality by the Supreme Court, the examples being the Little Rock crisis, the Watergate tapes case. But by and large, American history, I think, is very convincing that the reading of the Constitution is better left to the flow of considerations by all three branches, by the States, and by the general public.

Thank you very much.

[The prepared statement of Mr. Fisher follows:]

PREPARED STATEMENT OF LOUIS FISHER, SENIOR SPECIALIST IN SEPARATION OF
POWERS, CONGRESSIONAL RESEARCH SERVICE

Mr. Chairman, I appreciate the opportunity to testify on the role of Congress in interpreting the Constitution. To my knowledge, this is the first time that congressional hearings have been used for the purpose of understanding the contributions made by legislators in shaping and protecting constitutional values. Too often, especially in recent years, it is assumed that the judiciary has a monopoly on constitutional interpretation and that Congress must defer to the courts.

The framers expected Congress to play a pivotal role in debating and legislating on constitutional issues. Most of the important constitutional issues in the early decades were decided almost exclusively by Congress and the President. There were few decisions by federal courts to guide the elected branches. The record of this early period has been ably covered by David Currie in a number of law review articles, brought together in his book *The Constitution in Congress* (1997). As he explains in the concluding chapter, it was "in the legislative and executive branches, not in the courts, that the original understanding of the Constitution was forged."

Particularly in the twentieth century, scholars, judges, and sometimes Members of Congress claim that the U.S. Supreme Court has the "last word" on the meaning of the Constitution. Under this theory, if Congress disagrees with a Court ruling the only alternative is to pass a constitutional amendment to overturn the Court. This belief in judicial supremacy overlooks much of the flexibility and political considerations that characterize the relationship between the judiciary and other elements of the political system: Congress, the President, the states, and the general public.

What About Marbury?

In recent decades, much has been made of the statement by Chief Justice John Marshall, in *Marbury v. Madison* (1803), that it is "emphatically the province and duty of the judicial department to say what the law is." Does that mean that the Court alone delivers the "final word" on the meaning of the Constitution? According to a unanimous ruling by the Court in the Little Rock crisis, *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution." *Cooper v. Aaron*, 358 U.S. 1 (1958). That principle was reasserted by the Court in the reapportionment case of *Baker v. Carr* (1962): "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and a responsibility of this Court as ultimate interpreter of the Constitution." Seven years later, in the exclusion case of Adam Clayton Powell, the Court again referred to itself as the "ultimate interpreter" of the Constitution. *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

These statements distort what Chief Justice Marshall decided in *Marbury*. While it is "emphatically the province and duty of the judicial department to say what the law is," certainly the same can be said of Congress and the President. All three branches say what the law is. The Court states what the law is on the day a decision comes down; the law may change later by actions taken by the elected branches. I will give a number of prominent examples of this institutional interplay.

In 1803, Marshall did not think he was powerful enough to give orders to Congress and the President. After the elections of 1800, with the Jeffersonians in control of Congress and the Presidency, the Federalist Court was in no position to dictate to the other branches. Marshall realized that he could not uphold the constitutionality of Section 13 of the Judiciary Act of 1789 and direct Secretary of State

James Madison to deliver the commissions to the disappointed would-be judges. President Thomas Jefferson and Madison would have ignored such an order. There is no reason to think that Marshall believed that the Court was supreme on matters of constitutional interpretation.

This conclusion is borne out by the impeachment hearings of Judge Pickering and Justice Chase. *Marbury* was decided on February 24, 1803. The House impeached Pickering on March 2, 1803 and the Senate convicted him on March 12, 1804. As soon as the House impeached Pickering, it turned its guns on Chase. If that move succeeded, Marshall had reason to believe he was next in line. With these threats pressing upon the Court, Marshall wrote to Chase on January 23, 1804, suggesting that Members of Congress did not have to impeach judges because they objected to their judicial opinions. Instead, Congress could simply review and reverse objectionable decisions through the regular legislative process. Here is Marshall's language in the letter to Chase:

I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault.

The meaning of *Marbury* is placed in proper perspective when we recall that Marshall never again struck down a congressional statute during his long tenure on the Bench, which lasted from 1801 to 1835. Instead, he played a consistently supportive role in upholding congressional interpretations of the Constitution. In the years following *Marbury*, Marshall upheld the power of Congress to exercise the commerce power, to create a U.S. Bank (even though no such power is expressly provided in the Constitution), and to discharge other constitutional responsibilities. The judiciary functioned as a yea-saying, not a negative, branch.

The respect of the Court for congressional judgments is evident in some decisions in the 1850s. In 1852, the Supreme Court held that the height of a bridge in Pennsylvania made it "a nuisance." Congress responded with legislation that declared the bridges at issue to be "lawful structures," and the Court then ruled that the bridges were no longer unlawful obstructions.¹ In the second decision, Justices McLean, Grier, and Wayne objected that Congress could not annul or vacate a court decree and that the congressional statute was an exercise of judicial, not legislative, power. Yet the Court has never adopted that position. As the Court noted in 1946: "whenever Congress' judgment has been uttered affirmatively to contradict the Court's previously expressed view that specific action taken by the states in Congress' silence was forbidden by the commerce clause, this body has accommodated its previous judgment to Congress' expressed approval."²

Settling Constitutional Issues

In the May 1997 issue of *Harvard Law Review*, Larry Alexander and Frederick Schauer argue that the Supreme Court should be the exclusive and authoritative interpreter of the Constitution. Although they caution that their study is not based on historical precedents, they conclude that the Court is best situated to decide and settle constitutional issues, particularly transcendent questions. They believe that vesting such power in the courts would contribute to political stability.

Neal Devins and I talked about this article. We tried to recall a time when the Court ever "settled" a constitutional issue, transcendent or otherwise. Certainly the decision in *Dred Scott* did not settle the slavery issue. Judicial resistance, over a period of almost forty years, to the use of the commerce power by Congress did not settle the issue of national regulation. Eventually the Court gave way. *Roe v. Wade* did not settle the abortion issue. In 1992, the Court jettisoned the trimester standard that had drawn criticism from many quarters. The decision in *Furman v. Georgia* (1972) to strike down death-penalty statutes in Georgia and Texas as cruel and unusual did not settle that issue. Under heavy public pressure the Court later acknowledged that the death penalty, if accompanied by revised procedures, was constitutional.

¹ *Pennsylvania v. Wheeling &c. Bridge Co.*, 13 How. (54 U.S.) 518 (1852); 10 Stat. 112, §6 (1852); *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. (59 U.S.) 421 (1856).

² *Prudential Ins. Co. v. Benjamin*, 326 U.S. 408, 425 (1946). In 1985, the Court said that when Congress "so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp v. Board of Governors*, FRS, 472 U.S. 159, 174 (1985). In a concurrence in 1995, Justices Kennedy and O'Connor noted: "if we invalidate a state law, Congress can in effect overturn our judgment." *United States v. Lopez*, 514 U.S. 549, 580 (1995).

Even for more popular decisions, such as the desegregation case of 1954, little was settled by the Court's ruling. More than a decade later, a federal appellate court noted: "A national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. *The courts acting alone have failed.*"³ To deal with racism and segregation, it was necessary for Congress and the President, with bipartisan majorities, to pass such statutes as the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

Devins and I concluded that judicial exclusivity in constitutional lawmaking would be contrary to American history, the framers' intent, and legal development. We also believe that it would lead to political instability, not stability. Our response to the Alexander-Schauer article will appear in the February 1998 issue of *Virginia Law Review*.

To explain the breadth of congressional activity in interpreting the Constitution, the following three sections discuss (1) how Congress resolves these issues before the Court decides, (2) what it may do when the Court upholds the constitutionality of a measure, and (3) what it may do when the Court decides that a measure is unconstitutional. The meaning of the Constitution is not fixed by any one branch, but is rather that product of all three branches acting in concert with the states and the public at large.

Before the Court Decides

Congress frequently must act on constitutional matters before there are useful precedents from the courts. Many of the difficult issues related to the veto power, the pocket veto, recess appointments, the incompatibility and ineligibility clauses, war powers, covert operations, and other disputes are generally resolved by Congress with little input from the courts.⁴

Occasionally these issues move toward the Supreme Court, but just as quickly they are turned back by various threshold tests. In the 1970s, covert funding of the intelligence community was challenged as a violation of the Statement and Account Clause. In 1974, the Court held that the litigant lacked standing to bring the suit. *United States v. Richardson*, 418 U.S. 166. That issue was left to Congress and the President to decide. In 1987, when it appeared that the Court would decide the constitutionality of a pocket veto by President Reagan, the case was dismissed on grounds of mootness. *Burke v. Barnes*, 479 U.S. 361. That issue, too, was pushed back to elected officials to resolve. A variety of other doctrines—political questions, ripeness, prudential considerations, nonjusticiability, and equitable discretion—are used by the court to sidestep constitutional issues. The result is that a number of constitutional issues are returned to the elected branches.

When the Court Upholds Constitutionality

When the Court decides that a congressional statute is constitutional, the controversy may remain open for different treatment by the legislative and executive branches. For example, President Andrew Jackson received a bill in 1832 to recharter the United States Bank. Although the Court in *McCulloch v. Maryland* (1819) had ruled that the bank was constitutional, Jackson vetoed the bill on the ground that it was unconstitutional. His veto message said that he had taken an oath of office to support the Constitution "as he understands it, and not as it is understood by others." His position on the veto power has been followed by all subsequent Presidents. Regardless of the constitutional decisions reached by Congress and the courts, Presidents may independently analyze the constitutionality of bills presented to them.

To take a contemporary example, Presidents Reagan and Clinton signed bills reauthorizing the office of independent counsel. The Court in *Morrison v. Olson* (1988) upheld the constitutionality of the independent counsel statute. Nevertheless, President Clinton or any future President has the independence to veto a reauthorization bill on the ground that the office of independent counsel encroaches upon the executive power granted to the President by the Constitution. For that matter, Members of Congress could decide at the next reauthorization stage that the office of independent counsel violates the Constitution. *Morrison* simply means that Congress and the President may create the office if they want to. They may rethink and revisit the statute at any time.

³ *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 847 (5th Cir. 1966), cert. denied sub nom., *East Baton Rouge Parish Sch. Bd. of Davis*, 389 U.S. 840 (1967) (emphasis in original).

⁴ Louis Fisher, "Separation of Powers: Interpretation Outside the Courts," 18 *Pepperdine L. Rev.* 57 (1990); Louis Fisher, *Constitutional Conflicts between Congress and the President* (4th ed. 1997).

My attached CRS Report, "Congressional Checks on the Judiciary," contains a number of other examples of Congress acting by statute to neutralize a constitutional decision by the Court. In 1986, the Court upheld the constitutionality of an Air Force regulation that prohibited Captain Simcha Goldman from wearing his yarmulke indoors while on duty. The Court decided that the needs of the Air Force outweighed Goldman's constitutional right to freely exercise his religion. *Goldman v. Weinberger*, 475 U.S. 503. Within a year, Congress attached to a military authorization bill language permitting military personnel to wear conservative, unobtrusive religious apparel indoors, provided that it does not interfere with their military duties. 101 Stat. 1086-87, sec. 508 (1987). The Court decided the conflict between Air Force needs and religious freedom one way; Congress decided it the other way.

When the Court Finds Unconstitutionality

If the Court decides that a governmental action is unconstitutional, it is usually more difficult for Congress and the President to challenge and override the judiciary. But even in this category there are examples of effective legislative and executive actions in responding to court rulings.

In his inaugural address in 1857, President James Buchanan announced that the dispute over slavery in the territories "is a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled." Two days later Chief Justice Taney handed down the Court's decision in *Dred Scott*, holding that Congress could not prohibit slavery in the territories and that blacks were not citizens. That decision was eventually overturned by the Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—but before those amendments were ratified Congress and the President had already reversed *Dred Scott*. In 1862, Congress passed legislation to prohibit slavery in the territories, 12 Stat. 432, and in that same year Attorney General Bates released a long opinion which held that neither color nor race could deny American blacks the right of citizenship. 10 Op. Att'y Gen. 382 (1862).

In 1916, Congress relied on the commerce power to enact a child labor law. In *Hammer v. Dagenhart* (1918), the Court held that the statute was unconstitutional. A year later Congress passed new child labor legislation, this time relying on the taxing power. Again the Court, in *Bailey v. Drexel Furniture Co.*, struck it down. Congress passed a constitutional amendment in 1924 to give it the power to regulate child labor but ratification proved impossible. In 1938, Congress returned to the commerce power to regulate child labor and this time the Court, unanimously, upheld the statute. *United States v. Darby*, 312 U.S. 100 (1941).

This record—from 1916 to 1941—was an exceptionally lengthy dialogue between Congress and the Court, with the legislative branch eventually prevailing. The Court later admitted that "the history of judicial limitation of congressional power over commerce, when exercised affirmatively, has been more largely one of retreat than of ultimate victory." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415 (1946).

The Court's decision last year in *Boerne v. Flores*, striking down the Religious Freedom Restoration Act (RFRA), raises a number of issues about judicial finality. In deciding that Congress had exceeded the scope of its enforcement power under Section 5 of the Fourteenth Amendment, and hinting that the Court has the last and final word in deciding the meaning of the Constitution, the Court nevertheless left the door wide open for future congressional action. The reasoning and premises in the decision are often unpersuasive and internally inconsistent. The Court invites future congressional action by noting that there "must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 117 U.S. at 2164. Does that mean that adjustments to a redrafted bill would pass muster? In comparing RFRA to the Voting Rights Act, the Court says that RFRA's "legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* at 2169. Is that the problem? If Congress, with findings, could identify recent examples of religious persecution, would RFRA be constitutional?

My CRS report includes other examples, but I will end with a dispute in 1970. The House Committee on Internal Security prepared a report on the honoraria given to guest speakers at colleges and universities. The study included the names of leftist or antiwar speakers and the amounts they received. The ACLU obtained a copy of the galleys and asked a federal district court to enjoin their publication. The court ruled that the report served no legislative purpose and was issued solely for the sake of exposure or intimidation. It ordered the Public Printer and the Superintendent of Documents not to print the report "or any portion, restatement or facsimile thereof," with the possible exception of placing the report in the *Congressional Record*. *Hentoff v. Ichord*, 318 F.Supp. 1175, 1183 (D.D.C. 1970).

The House of Representatives passed a resolution that told the courts, in essence, to step back. During the course of the debate, Members of Congress explained that it was not the practice of the House to print committee reports in the *Record*. Moreover, the judge's order "runs afoul not only of the speech and debate clause—article I, section 6—of the Constitution, but obstructs the execution of other constitutional commitments of the House as well, including article I, section 5, which authorizes each House to determine the rules of its proceedings, and requires each House to publish its proceedings." After the resolution was passed by a large bipartisan margin (302 to 54), the report was printed without any further interference from the judiciary.

This collision between Congress and the judiciary was unusually abrupt. For the most part, the legislative-judicial dialogue is more nuanced and subtle. In *INS v. Chadha* (1983), the Supreme Court struck down the "legislative veto" as unconstitutional. Congress no longer attempts to use one-House or two-House legislative vetoes to control the executive branch. On the other hand, it continues to use committee and subcommittee vetoes to monitor agency actions.⁵

Conclusions

At certain points in our constitutional history, there has been a compelling need for an authoritative and binding decision by the Supreme Court. The unanimous ruling in *Cooper v. Aaron* (1958), signed by each Justice, was essential in dealing with the Little Rock desegregation crisis. Another unanimous decision in *United States v. Nixon* (1974) disposed of the confrontation between President Nixon and the judiciary regarding the Watergate tapes. For the most part, however, court decisions are tentative and reversible like other political events.

There is no reason for Congress to defer automatically to the judiciary because of its supposed technical skills and political independence. Much of constitutional law depends on factfinding and the balancing of competing values, areas in which Congress justifiably can claim substantial expertise. Each decision by a court is subject to scrutiny by private citizens and public officials. What is "final" at one stage of our political development may be reopened at some later date, leading to revisions, fresh interpretations, and reversals of Supreme Court doctrines. Members of Congress have both the authority and the capability to participate constructively in constitutional interpretation.

Through this process of interaction among the branches, all three institutions are able to expose weaknesses, hold excesses in check, and gradually forge a consensus on constitutional values. Also through this process, the public has an opportunity to add a legitimacy and a meaning to what might otherwise be an alien and short-lived document.⁶

BIOSKETCH FOR LOUIS FISHER

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⁵ These provisions typically require agencies to obtain the prior approval of the Appropriations Committees; e.g., 110 Stat. 3009-321 (1996). See Louis Fisher, "The Legislative Veto: Invalidated, It Survives," 56 Law & Contemp. Prob. 273 (Autumn 1993).

⁶ I provide further details on three-branch interpretation in the following works: *Political Dynamics of Constitutional Law* (with Neal Devins) (2d ed. 1996); *American Constitutional Law* (2d ed. 1995); *Constitutional Dialogues: Interpretation as Political Process* (1988); "Congress and the Fourth Amendment," 21 Georgia L. Rev. 107 (Special Issue 1986); and "Constitutional Interpretation by Members of Congress," 63 N.C. L. Rev. 707 (1985).

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CRS Report for Congress

Congressional Checks on the Judiciary

April 29, 1997

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Congressional Research Service • The Library of Congress

Congressional Checks on the Judiciary

SUMMARY

This report identifies the methods available to Congress to check the judiciary. The first part is devoted to checks embedded in the text of the Constitution: statutes that define the jurisdiction of the Supreme Court, impeachment of judges, constitutional amendments, and limitations imposed on the Court by the Case or Controversy standard. The second part examines the claim of judicial supremacy on constitutional questions. The third focuses on constraints that operate through the regular political and legislative processes.

Although it is conventional to view the judiciary—and especially the Supreme Court—as the ultimate and final arbiter on constitutional law, numerous examples over two centuries suggest a more dynamic and less hierarchical model. Faced with challenges from Congress and the President, the Court has repeatedly recognized that it is not the only branch with the authority and capacity to interpret the Constitution. Included within this report are examples from a variety of constitutional disputes: the U.S. Bank, the Independent Counsel, women's rights, financial privacy, recess appointments, religious freedom, slavery, child labor legislation, sedition, congressional investigations, the commerce clause, criminal procedures, search and seizure, enforcement of the Civil War Amendments, and sex discrimination.

Congressional Checks on the Judiciary

This report identifies the methods available to Congress to check the federal courts. The first part of the report is devoted to checks embedded in the text of the Constitution: statutes that define the jurisdiction of the Supreme Court, impeachment of judges, constitutional amendments, and limitations imposed on the Court by the Case or Controversy standard. The second part examines the claim of judicial supremacy on constitutional questions. The third focuses on constraints that operate through the regular political and legislative processes.

Although it is conventional to view the judiciary—and especially the Supreme Court—as the ultimate and final arbiter of constitutional law, numerous examples over two centuries suggest a more dynamic and less hierarchical model. Throughout this period, Congress has disagreed with court decisions and has pressed its own independent views on the meaning of the Constitution, often with substantial effect. Similar challenges have come from Presidents, who assert their own right to reach independent and coequal constitutional opinions. In this ebb and flow, all three branches strive for ascendancy without ever attaining it. Repeatedly, the Court has recognized that it is not the only branch with authority and capacity to interpret the Constitution. The result is a judiciary that is regularly checked and guided by the other branches.

I. Constitutional Text

A. Withdrawing Jurisdiction

On a number of occasions, Congress has threatened to withdraw the Supreme Court's jurisdiction to hear appeals in such areas as abortion, school busing, and school prayer. This strategy is based on language in Article III of the Constitution: "The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make." The Exceptions Clause, it is argued, gives Congress plenary power to determine the Court's appellate jurisdiction. However, this grant of power must be read in concert with other provisions in the Constitution. An aggressive use of the Exceptions Clause would make an exception the rule and deny citizens access to the Supreme Court to vindicate constitutional rights. A broad interpretation would run counter to the basic principles of constitutionalism, separation of powers, and checks and balances.

In some early decisions, the Supreme Court recognized the power of Congress to make exceptions and to regulate the Court's appellate jurisdiction.¹ The leading case for empowering Congress to withdraw appellate jurisdiction from the Supreme Court came shortly after the Civil War. In 1868, Congress withdrew the Court's jurisdiction to review circuit court judgments on habeas corpus actions. The clear purpose was to prevent the Court from deciding a case on the constitutionality of the Reconstruction military government in the South, even though the Court had already heard oral argument in the case. On February 17, 1868, the Court dismissed the government's argument that the Court lacked jurisdiction to hear the case. *Ex parte McCordle*, 73 U.S. (6 Wall.) 318 (1868). The case was argued March 2, 3, 4, and 9. Before the Court could meet in conference to decide the case, Congress passed legislation to nullify the plaintiff's relief under an act of February 5, 1867, which allowed a petition to a federal circuit court for the writ of habeas corpus. The new legislation provided that the portion of the 1867 statute that authorized an appeal from the judgment of the circuit court to the Supreme Court, "or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed." 15 Stat. 44 (1868). The Court unanimously upheld the repeal statute and dismissed the case for want of jurisdiction. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869).

The Court retained access to Section 14 of the Judiciary Act of 1789 to review habeas corpus actions, but to rely on that authority in the face of the repeal statute invited a major collision with Congress. The House of Representatives had already passed legislation to require a two-thirds majority of the Court to invalidate a federal statute, and some of the more assertive Radicals wanted to abolish the Court.

During this same period, when the Court was very vulnerable, Congress passed legislation to remove from federal and state courts their jurisdiction to hear other cases arising from the Civil War. The legislation responded to the Court's decision in *Ex parte Milligan*, 4 Wall. (71 U.S.) 2 (1866), holding that military courts could not function in states where federal courts had been open and operating. Although cases were already pending with regard to the conduct of U.S. officials during and immediately after the war, Congress gave indemnity to all officials who implemented presidential proclamations from March 4, 1861, to June 30, 1866, with respect to martial law and military trials. The statute provides: "And no civil court of the United States, or of any State, or of the District of Columbia, or of any district or territory of the United States, shall have or take jurisdiction of, or in any manner reverse any of the proceedings had or acts done as aforesaid" 14 Stat. 432, 433 (1867).

Shortly after *McCordle*, the Supreme Court decided a case which involved a congressional attempt to use the appropriations power to nullify the President's power to pardon. The Court said that Congress had exceeded its

¹ *Wiscart v. Dauchy*, 3 Dall. 311 (1796); *Durousseau v. United States*, 10 U.S. (6 Cr.) 306 (1810); *Barry v. Mercein*, 5 How. 103, 119 (1847); *Daniels v. Railroad Co.*, 70 U.S. (3 Wall.) 250, 254 (1866).

authority, first by trying to limit a presidential power granted by the Constitution, and second by preventing a presidential pardon or amnesty from being admitted as evidence in court. The intent of the statute was to strip the Court of its jurisdiction over such cases. The Court agreed that the Exceptions Clause gave Congress the power to deny the right of appeal in a particular class of cases, but it could not withhold appellate jurisdiction "as a means to an end" if the end was forbidden under the Constitution. In this case, the effect of withholding appellate jurisdiction was to prescribe impermissible rules of decision for the judiciary in a pending case. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872).

Cases decided after *McCardle* and *Klein* have discussed the power of Congress to limit the appellate jurisdiction of the Supreme Court, provided that other provisions of the Constitution are given due regard.² The Court has allowed Congress to limit the availability of certain judicial remedies, such as prohibiting district courts from issuing injunctions to control labor disputes or the enforcement of price regulations. *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323 (1938); *Lockerty v. Phillips*, 319 U.S. 182 (1942). Although Congress has withdrawn jurisdiction from lower federal courts to adjudicate certain issues, the exercise of that power "is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation." *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948), cert. denied, 335 U.S. 887 (1948).

An appropriations bill enacted in 1989 raised a possible violation of *Klein*. The bill stated that Congress determined and directed that the management of forests covered by previous legislation was "adequate consideration for the purpose of meeting the statutory requirements" that were the basis for two pending lawsuits. The Ninth Circuit held that the language in the appropriations bill was unconstitutional under *Klein* because it attempted to direct courts to reach a particular decision, but a unanimous Supreme Court disagreed, concluding that the language in the appropriations merely changed the law underlying the litigation. *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429 (1992).

A 1996 decision by the Supreme Court concerned a possible challenge to the Exceptions Clause. A congressional statute placed limits on prisoners who seek to make successive habeas petitions to the Court. Such petitions must first be approved by a three-judge panel. The Court unanimously upheld the statute. *Felker v. Turpin*, 116 S.Ct. 2333 (1996).

² *United States v. Bitty*, 208 U.S. 393, 399-400 (1908). See also *The "Francis Wright"*, 105 U.S. 381, 385 (1881) and *Kline v. Burke Const. Co.*, 260 U.S. 226, 234 (1922).

B. Impeachment of Judges

The Constitution provides in Article II, Section 4, that the President, the Vice President, "and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Impeachment is done by majority vote in the House of Representatives; conviction in the Senate requires a two-thirds majority.

The first federal judge subject to the impeachment process was Judge John Pickering, who was removed in 1805. Impeachment efforts against Justice Samuel Chase (in 1805) and Judge James H. Peck (1830-31) failed. Judge West H. Humphreys was impeached and removed from office in 1862. In the twentieth century, an effort to impeach Judge Charles Swayne failed in 1905, Judge Robert W. Archbald was impeached and removed in 1913, Judge Harold Louderback survived an impeachment trial in 1933, and Judge Halsted L. Ritter was impeached and removed in 1936. The three most recent impeachment efforts led to the removal of Judges Harry E. Claiborne (1986), Walter Nixon (1989), and Alcee L. Hastings (1989).

Various grounds were cited for the impeachment of these judges. Judge Pickering was impeached and removed because of his handling of a case involving the ship *Eliza* and because of alcoholism. In the trial of the *Eliza*, Judge Pickering was accused of intoxication and the use of offensive language. Of the four articles of impeachment presented to the Senate, three dealt with *Eliza*. Article 1 described the allegedly improper return of the ship and cargo to the owner; Article 2 claimed that Pickering's return of the vessel was contrary to the law and a deprivation of revenue to the United States; and Article 3 charged that his refusal to allow an appeal derived from his "wickedly meaning and intending to injure the revenue of the United States."³ He was convicted on all four articles of impeachment.⁴

Much of the impetus behind the impeachment of Justice Chase related to his intemperate, partisan, and arbitrary behavior while on the bench. He was also charged, in his capacity as federal judge, with failing to comply with Virginia state laws. The charges against Judge Peck concerned a single issue: his decision to hold an individual in contempt of court and sentence him to jail.⁵

Seven articles of impeachment were brought against Judge Humphreys, including failure to hold court, gross misconduct, and treason for organizing armed rebellion against the United States. The unsuccessful charges against Judge Swayne of Florida focused on making unlawful claims for expenses, living in Delaware in defiance of federal law requiring judges to reside in their districts, and punishing three men for contempt of court.

³ Eleanore Bushnell, *Crimes, Follies, and Misfortunes: The Federal Impeachment Trials* 45-46 (1992).

⁴ *Id.* at 52.

⁵ *Id.* at 60-61, 93-96.

Judge Archbald was impeached and removed on grounds of personal corruption (using his office for personal profit). Judge Louderback was accused of favoritism in awarding receiverships to supervise ailing companies. None of the five articles of impeachment came close to the two-thirds required in the Senate. Judge Ritter, accused of practicing law after he had become a federal judge, was impeached and removed.

The three impeachment trials of the 1980s concerned judges who had been prosecuted for criminal conduct. Two of the judges were convicted: Clairborne for tax evasion and Nixon for perjury. Judge Hastings, after being acquitted in a bribery case, faced charges by a judicial council that he had committed bribery and should be removed from office. The Judicial Conference recommended to the House of Representatives that Hastings be impeached.

C. Constitutional Amendments

On four occasions, Congress has used constitutional amendments to reverse Supreme Court decisions. The Eleventh Amendment responded to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which decided that a state could be sued in federal court by a plaintiff from another state. To protect states from a flood of costly citizen suits, Congress passed a constitutional amendment which was subsequently ratified to provide that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Fourteenth Amendment nullified the Supreme Court's decision in *Dred Scott v. Sandford* (1857), which held that blacks as a class were not citizens protected under the Constitution. Section 1 of the Amendment provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The Sixteenth Amendment overruled *Pollack v. Farmers' Loan and Trust Co.*, 158 U.S. 601 (1895), which struck down a federal income tax. Ratified in 1916, the amendment gave Congress the power "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

The Twenty-sixth Amendment was ratified in 1971 to overturn *Oregon v. Mitchell*, 400 U.S. 112 (1970), a Supreme Court decision that had voided a congressional effort to lower the minimum voting age in state elections to 18. Congress sent a constitutional amendment to the states and, in record time, three months later, a sufficient number of states ratified this language: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or any State on account of age."

Unsuccessful constitutional amendments can sometimes prod the Court to address neglected issues. In 1970, the House of Representatives passed the Equal Rights Amendment. After Senate action, the language sent to the states

for ratification read: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." The ERA was never ratified, but the debate on the amendment highlighted what many legislators thought were inadequacies in judicial rulings. Congresswoman Martha Griffiths, during debate in October 1971, said that the whole purpose of the ERA was to tell the Supreme Court: "Wake up! This is the 20th century. Before it is over, judge women as individual human beings." 117 Cong. Rec. 35323 (1971). A month later, the Court invalidated an Idaho law that preferred men over women in administering estates. *Reed v. Reed*, 404 U.S. 71 (1971). The decision marked the first time in its history that the Court had struck down sex discrimination on constitutional grounds.

In addition to constitutional amendments aimed at particular decisions, there have been other proposals aimed at curbing the Court's strength by imposing certain procedural requirements. These amendments have in every instance been unsuccessful. Of recurring interest are the following: requiring more than a majority of Justices to strike down a statute; subjecting the Court's decisions to another tribunal, such as the Senate or a judicial body consisting of a judge from each state; submitting the Court's decisions to popular referenda; allowing Congress by two-thirds vote to override a Court decision just as it does a presidential veto; and making laws held unconstitutional by the Court valid if reenacted by Congress.

Other proposed amendments are directed at the Court's tenure and qualifications: allowing the removal of Supreme Court justices and other federal judges by majority vote of each House of Congress; restricting the term of a justice to a set number of years; having justices retire at the age of 75 years; requiring direct election from the judicial districts; itemizing the qualifications of justices, such as requiring prior judicial service in the highest court of a state or excluding anyone who has, within the preceding five years, served in the executive or legislative branch; and vesting the appointment of Justices in judges from the highest state courts.⁶

D. Case or Controversy Test

Article III limits judicial power to "cases" and "controversies." The case-or-controversy standard restricts federal courts "to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). By finding that a legal dispute is not a case or controversy, courts can push political controversies back to the elected branches for resolution. In deciding that a dispute is not a case or controversy, judges can determine that a litigant does not have standing to sue. By lowering the barrier for standing, courts can encourage more lawsuits and risk collisions with other branches of government. Justice Powell warned that a relaxed standing policy would expand judicial

⁶ Maurice J. Culp, "A Survey of the Proposals to Limit or Deny the Power of Judicial Review by the Supreme Court of the United States," 4 Ind. L. J. 386 (1929); Sheldon D. Elliott, "Court-Curbing Proposals in Congress," 33 Notre Dame Lawyer 597, 606 (1958).

power: "It seems to be inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government." *United States v. Richardson*, 418 U.S. 166, 188 (1974) (concurring opinion).

Litigants able to establish standing may find their personal stake diluted or eliminated by subsequent events, to the point that the case is moot and therefore dismissed. If the judiciary is unprepared or unwilling to decide an issue, perhaps to avoid a conflict with elected branches, mootness is one remedy. In 1987, it appeared that the Supreme Court might have to decide the constitutionality of a pocket veto by President Reagan. Instead, the Court held that the dispute was moot and therefore returned the issue to Congress and the President for possible resolution. *Burke v. Barnes*, 479 U.S. 361 (1987).

Just as a case brought too late can be moot, a case brought too early may not yet be ripe for judicial determination. A collision between certain Members of Congress and President Bush in 1990 over the war power was avoided by a federal court on the ground that the issue was not ripe for adjudication. *Dellums v. Bush*, 752 F.Supp. 1141 (D.D.C. 1990).

E. Political Questions

A number of important constitutional questions are resolved wholly by Congress and the President because the Court regards them as "political questions" unsuited for the judiciary. Efforts to litigate certain issues are unsuccessful if the Court decides that it is impolitic or inexpedient to take jurisdiction.

The Statement and Account Clause provides that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. Const., art. I, § 9, cl. 6. The purpose was to provide citizens with a regular accounting of public spending. However, funding for the Central Intelligence Agency and other parts of the intelligence community, with an aggregate budget of about \$30 billion, has not been made public since 1949. In 1974, the Court declined an opportunity to decide the meaning of this constitutional provision, holding that the litigant lacked standing to bring the issue. *United States v. Richardson*, 418 U.S. 166 (1974). As a result, the meaning of the Statement and Account Clause depends on whatever the executive and legislative branches decide.

The Constitution prohibits Members of either House from holding any other civil office. Called the Incompatibility Clause, the language provides that "No Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. Const., art. I, § 6, cl. 2. The Incompatibility Clause has existed for more than two centuries without any definition or application by federal courts. When the issue reached the Supreme Court in 1974, the Court held that the plaintiffs lacked standing to bring the case. *Schlesinger v. Reservists to Stop the War*, 418 U.S. 209 (1974).

The Constitution prohibits Members of Congress from being appointed to any federal position whose salary has been increased during their term of office. The constitutional language, called the Ineligibility Clause, provides that "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under which the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time." U.S. Const., art. I, § 6, cl. 2. Interpretations of this provision by Congress and the executive branch have far outweighed contributions from the courts. Efforts to litigate the issue have been unsuccessful, either because the plaintiff lacked standing or because a court decided not to decide. *Ex parte Levitt*, 302 U.S. 633 (1937); *McClure v. Carter*, 513 F.Supp. 265 (D. Idaho 1981), *aff'd sub nom. McClure v. Reagan*, 454 U.S. 1025 (1981).

Members of Congress have gone to court to contest military initiatives by the President, but those efforts are regularly turned aside by federal judges. Throughout the Vietnam War, such cases were regarded as political questions to be resolved solely by the elected branches.⁷ By the time of the Reagan and Bush years, federal judges offered other reasons to avoid decisions on such disputes: the issue was moot; it was not ripe; plaintiffs lacked standing; a variety of doctrines on judicial prudence and "equitable discretion;" and a finding of nonjusticiability because judicial resolution would require fact-finding better done by Congress.⁸ For the most part, constitutional questions of war and peace are left to the legislative and executive branches.

II. The Issue of Judicial Supremacy

Particularly in the twentieth century, scholars, judges, and sometimes Members of Congress claim that the U.S. Supreme Court has the "last word" on the meaning of the Constitution. Under this theory, if Congress disagrees with a Court ruling the only alternative is to pass a constitutional amendment to overturn the Court. This claim of judicial supremacy overlooks much of the flexibility and political considerations that characterize the relationship between the judiciary and other elements of the political system: Congress, the President, the states, and the general public.

⁷ E.g., *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1967); *Velvel v. Johnson*, 287 F.Supp. 846 (D. Kans. 1968); *Berk v. Laird*, 317 F.Supp. 715 (E.D. N.Y. 1970); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971); *Atlee v. Laird*, 347 F.Supp. 689 (E.D. Pa. 1972); *Gravel v. Laird*, 347 F.Supp. 7 (D.D.C. 1972); *DaCosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973); and *Mitchell v. Laird*, 488 F.2d 611 (D.D.C. 1973).

⁸ Mootness: *Conyers v. Reagan*, 765 F.2d 1124 (D.C. Cir. 1985); ripeness: *Dellums v. Bush*, 752 F.Supp. 1141, 1149-52 (D.D.C. 1990); standing: *Dornan v. U.S. Secretary of Defense*, 851 F.2d 450 (D.C. Cir. 1988); judicial prudence and equitable discretion: *Lowmyer v. Reagan*, 676 F.Supp. 338, 337-39 (D.D.C. 1987); *Conyers v. Reagan*, 578 F.Supp. 324 (D.D.C. 1984); nonjusticiability: *Crockett v. Reagan*, 558 F.Supp. 893, 898 (D.D.C. 1982); *Sanchez-Espinoza v. Reagan*, 568 F.Supp. 596, 600 (D.D.C. 1983).

There are many examples of judicial opinions being challenged and reversed through means other than constitutional amendments. Congress regularly overturns judicial rulings that involve statutory interpretations ("Statutory Reversals," treated in a subsequent section), but even when the Court renders a constitutional interpretation there are many methods available to Congress to counter the Court.

A. Judicial Positions on Finality

Justices of the Supreme Court have taken different positions regarding the finality of Court decisions. Some see a decision as wholly binding on nonjudicial parties, including Congress. Others leave room for a sharing of jurisdiction among federal institutions over statutory and constitutional questions.

Justice Robert H. Jackson once said: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953). However, the record of the last two centuries demonstrates convincingly that the Supreme Court is neither infallible nor final. Its decisions are regularly reshaped by other political institutions, both at the national and the state levels. In a speech, Jackson acknowledged the force of politics and majority rule in the shaping of constitutional values:

... let us not deceive ourselves; long-sustained public opinion does influence the process of constitutional interpretation. Each new member of the ever-changing personnel of our courts brings to his task the assumptions and accustomed thought of a later period. The practical play of the forces of politics is such that judicial power has often delayed but never permanently defeated the persistent will of a substantial majority.⁹

To Justice Frankfurter, "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (1939). Before joining the Court, he put the point more bluntly to President Franklin D. Roosevelt: "People have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is *they* who speak and not the Constitution."¹⁰

Chief Justice Earl Warren cautioned against an overreliance on the courts for the protection of constitutional rights. In an article in 1962 he spoke with regret about *Hirabayashi v. United States*, 320 U.S. 81 (1943), in which the Court unanimously upheld a curfew order directed against more than 100,000 Japanese-Americans, about two-thirds of them naturally born United States citizens. Warren said that the "fact that the Court rules in a case like

⁹ Robert H. Jackson, "Maintaining Our Freedoms: The Role of the Judiciary," delivered to the American Bar Association, Boston, Mass., August 24, 1953; reprinted in *Vital Speeches*, No. 24, Vol. XIX, p. 761 (October 1, 1953).

¹⁰ Max Freedman, anno., *Roosevelt and Frankfurter: Their Correspondence* 383 (1967).

Hirabayashi that a given program is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is." Earl Warren, "The Bill of Rights and the Military," 37 N.Y.U. L. Rev. 181, 193 (1962). The Court's failure to invalidate a governmental action did not, by itself, mean that constitutional standards had been followed. Warren emphasized that in a democratic society, "it is still the Legislature and the elected Executive who have the primary responsibility for fashioning and executing policy consistent with the Constitution." *Id.* at 202. He even warned against depending too much on Congress and the President: "[T]he day-to-day job of upholding the Constitution really lies elsewhere. It rests, realistically, on the shoulders of every citizen." *Id.*

At certain points in our constitutional history, there has been a compelling need for an authoritative and binding decision by the Supreme Court. The unanimous ruling in 1958, signed by each justice, was essential in dealing with the Little Rock desegregation crisis. *Cooper v. Aaron*, 358 U.S. 1 (1958). Another unanimous decision in 1974 disposed of the confrontation between President Nixon and the judiciary regarding the Watergate tapes. *United States v. Nixon*, 418 U.S. 683 (1974). For the most part, however, court decisions are tentative and reversible like other political events.

On February 19, 1997, the Supreme Court heard oral argument on the constitutionality of the Religious Freedom Restoration Act, which Congress enacted in 1993 in response to *Employment Division v. Smith*, 494 U.S. 872 (1990). Justice O'Connor asked one of the attorneys: "Do you agree that Congress can't overrule the court's interpretation of the Constitution?" The attorney replied: "We agree." 65 LW 3579. Examples will be provided in this paper where Congress does, in effect, overrule the court's interpretation of the Constitution.

B. The "Binding Precedent" of *Marbury*

The Supreme Court's 1803 opinion in *Marbury v. Madison* is the most famous case for the proposition that the Court is supreme on constitutional questions. Chief Justice John Marshall stated that it is "emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cr.) 137, 177 (1803). When this statement is placed in context, both legal and political, there is less sweep to Marshall's words than contemporary authors often imply. Nonetheless, *Marbury* is often cited by the Court as evidence that it alone delivers the "final word" on the meaning of the Constitution. According to a 1958 decision, *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution." *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). The Court reasserted this principle in 1962: "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation and a responsibility of this Court as ultimate interpreter of the Constitution." *Baker v. Carr*, 369 U.S. 186, 211 (1962). In a 1969 decision, the Court referred to itself as the "ultimate interpreter" of the Constitution. *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

"Ultimate interpreter" does not mean exclusive interpreter. The courts expect other branches of government to interpret the Constitution in their initial deliberations. As the Court noted in 1974: "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *United States v. Nixon*, 418 U.S. 683, 703 (1974).

The meaning of *Marbury* has been debated in recent confirmation hearings for Supreme Court justices. In 1986, when Justice William H. Rehnquist appeared before the Senate Judiciary Committee as nominee for Chief Justice, Senator Arlen Specter inquired about the "binding precedent" of *Marbury*. He asked Rehnquist whether the Court "is the final arbiter, the final decision maker of what the Constitution means." Rehnquist replied: "Unquestionably." Specter pursued the point. If the Court ruled on a legal issue, would the President and Congress "have a responsibility to observe the decisions of the Supreme Court of the United States on a constitutional matter?" Rehnquist answered: "Yes, I think they do." "Nomination of Justice William Hubbs Rehnquist," hearings before the Senate Committee on the Judiciary, 99th Cong., 2nd Sess. 187 (1986).

The same question, put to Supreme Court nominees Antonin Scalia, Anthony Kennedy, and Ruth Bader Ginsburg, yielded different and more measured responses. In his 1986 confirmation hearings, Scalia was asked by Senator Strom Thurmond: "Do you agree that *Marbury* requires the President and Congress to always adhere to the Court's interpretation of the Constitution?" Conceding that the case was one of the "great pillars of American law," Scalia hesitated to say whether "in no instance can either of the other branches call into question the action of the Supreme Court." "Nomination of Judge Antonin Scalia," hearings before the Senate Committee on the Judiciary, 99th Cong., 2nd Sess. 33 (1986). In this exchange, Scalia declined to state that the Court is the exclusive, final authority on constitutional questions.

A year later, Senator Specter and his colleagues on the committee listened to Anthony Kennedy challenge the notion of judicial supremacy. In 1982, while serving as a federal appellate judge in the Ninth Circuit, Kennedy had already expressed his view that other branches of government play major roles in interpreting the Constitution. He stated at that time: "As I have pointed out, the Constitution, in some of its most critical aspects, is what the political branches of the government have made it, whether the judiciary approves or not." "Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States," hearings before the Senate Committee on the Judiciary, 100th Cong., 1st Sess. 221 (1987).

At the hearings in 1987, Kennedy explained to the committee that in such areas as separation of powers, the office of the presidency, the commerce clause, and federalism, the meaning of the Constitution depends largely on the judgments of the executive and legislative branches, not the Court. Although he agreed that Supreme Court decisions are the law of the land and must be obeyed, he was "somewhat reluctant to say that in all circumstances each legislator is immediately bound by the full circumstances of a Supreme Court

decree." *Id.* at 221-22. He gave the following example. If the Supreme Court were to overrule *New York Times v. Sullivan*, exposing newspapers fully to libel suits, Kennedy said that legislators should challenge the Court: "I think you could stand up on the floor of the U.S. Senate and say I am introducing this legislation because in my view the Supreme Court of the United States is 180 degrees wrong under the Constitution." *Id.* at 222-23.

In her nomination hearings in 1993, Ruth Bader Ginsburg told the Senate Judiciary Committee that Justices "do not guard constitutional rights alone. Courts share that profound responsibility with Congress, the President, the States, and the people. Constant realization of a more perfect Union, the Constitution's aspiration, requires the widest, broadest, deepest participation on matters of government and government policy." "Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States," hearings before the Senate Committee on the Judiciary, 103rd Cong., 1st Sess. 50 (1993).

C. The Scope and Reach of *Marbury*

No specific language in the Constitution gives the Supreme Court the power to declare unconstitutional an act of Congress or the President. Several delegates at the constitutional convention at Philadelphia spoke in favor of judicial review when invoked against *state* laws. State actions inconsistent with the U.S. Constitution "would clearly not be valid," said Gouverneur Morris, and judges "would consider them as null & void." 2 The Records of the Federal Convention 92 (Max Farrand ed. 1937).

Judicial review over Congress and the President, as coequal branches, is much more difficult to establish. The Court would need power to strike down congressional legislation that threatened the integrity or existence of the judiciary. Such actions of self-defense were part of the system of checks and balances and separation of powers. Beyond those justifications, the picture was unclear.

From 1789 to 1803, several precedents suggested a broader role for judicial review when applied to congressional and presidential actions. A statute enacted in 1792 required federal judges to serve as commissioners on claims settlement. Since their decisions could be set aside by the Secretary of War, judges were essentially issuing "advisory opinions" and serving in a subordinate capacity to executive officials. Before the Court could rule on the constitutionality of the statute, Congress repealed the offending sections and removed the Secretary's authority to veto decisions rendered by federal judges.¹¹

In 1796, the Court upheld a carriage tax passed by Congress. *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796). If the Court had the power to uphold

¹¹ 1 Stat. 243-45 (1792); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); 1 Stat. 324-25 (1793).

a congressional statute, presumably it had the power to strike one down. Justices of the Court remained uncertain about their authority to invalidate congressional statutes. Justice Chase, writing in this case, said it was unnecessary "*at this time*, for me to determine, whether this court, *constitutionally* possesses the power to declare an act of Congress *void* ... but if the court have such power, I am free to declare, that I will never exercise it, *but in a very clear case*." *Id.* at 175 (emphasis in original). As late as 1800, the Court was still unsure about its authority to invalidate an act of Congress. *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800).

Chief Justice Marshall's decision in *Marbury* represents what many regard as the definitive basis for judicial review over congressional and presidential actions. But Marshall's opinion stands for a much more modest claim. He stated that it is "emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cr.) at 177. So it is, but Congress and the President are also empowered under the Constitution to "say what the law is." Marshall's statement can stand only for the proposition that the Court is responsible for stating what it thinks a statute means, after which Congress may enact another law to override the Court's interpretation. The Court states what the law is on the day the decision comes down; the law may change later. Several examples of this institutional interplay will be identified in this report.

It is evident that Marshall did not think he was powerful enough in 1803 to give orders to Congress and the President. He realized that he could not uphold the constitutionality of section 13 of the Judiciary Act of 1789 and direct Secretary of State James Madison to deliver the commissions to the disappointed would-be judges. President Thomas Jefferson and Madison would have ignored such an order.¹² Everyone knew that, including Marshall. As Chief Justice Warren Burger noted, "The Court could stand hard blows, but not ridicule, and the ale houses would rock with hilarious laughter" had Marshall issued a mandamus that the Jefferson administration ignored."¹³

Under these circumstances, it is doubtful that Marshall believed that the Court was supreme on constitutional interpretation. The impeachment hearings of Judge Pickering and Justice Chase add to these doubts. *Marbury* was issued on February 24, 1803. The House impeached Pickering on March 2, 1803 and the Senate convicted him on March 12, 1804. As soon as the House impeached Pickering, it turned its guns on Chase. If that move succeeded, Marshall had reason to believe he was next in line.

With these threats pressing upon the Court, Marshall wrote to Chase on January 23, 1804, suggesting that Members of Congress did not have to impeach

¹² 2 George L. Haskins & Herbert A. Johnson, *History of the Supreme Court of the United States* 185 (1981); 3 Albert J. Beveridge, *The Life of John Marshall* 126-27 (1919).

¹³ Warren E. Burger, "The Doctrine of Judicial Review: Mr. Marshall, Mr. Jefferson, and Mr. *Marbury*," in *Views From the Bench* 14 (Mark Cannon & David O'Brien eds. 1985).

judges because they objected to their judicial opinions. Instead, Congress could simply review and reverse objectionable decisions through the regular legislative process. Here is Marshall's language in a letter to Chase:

I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault.¹⁴

The use of impeachment to punish the Court for issuing unsound decisions has precedent dating back to such prominent works as *Federalist* No. 81, in which Alexander Hamilton denied that there was great danger of the judiciary encroaching upon executive authority. Congress had adequate checks to rein in an overactive Court:

[T]he inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations.¹⁵

As to the scope and reach of *Marbury*, it is highly significant that Marshall never again struck down a congressional statute during his long tenure, lasting to 1835. Instead, he played a consistently supportive role in upholding congressional power. After *Marbury*, Marshall upheld the power of Congress to exercise its commerce power, to create a U.S. Bank, and to discharge other constitutional responsibilities, whether express or implied, without being second-guessed by the Court. The judiciary functioned as a yea-saying, not a negative, branch. As Professor Walter Murphy has written, "For his part, Marshall in *Marbury* never claimed a judicial monopoly on constitutional interpretation, nor did he allege judicial supremacy, only authority to interpret the Constitution in cases before the Court."¹⁶

¹⁴ 3 Albert J. Beveridge, *The Life of John Marshall* 177 (1919).

¹⁵ *The Federalist* 508-09 (Benjamin Fletcher Wright ed. 1961).

¹⁶ Walter Murphy, "Why *Marbury* Matters," 1 *Constitution* 62, 68 (1989). For an analysis that concludes that *Marbury* did not vest in the Court the final authority to interpret the Constitution, see Robert Clinton, *Marbury v. Madison* and Judicial Review (1989). Another detailed critique of Marshall's reasoning in *Marbury* is by William W. Van Alstyne, "A Critical Guide to *Marbury v. Madison*," 1969 *Duke L. J.* 1.

III. Political and Legislative Pressures

Other than the checks expressly stated in the Constitution, federal courts are subject to constraints that arise through the regular functioning of the political system. These limitations operate not only when courts sustain the constitutionality of a statute but when they declare it to be invalid.

A. When the Court Upholds Constitutionality

When the Court decides that a congressional statute or a presidential action is constitutional, the controversy may remain open for different treatments by the legislative and executive branches.

U.S. Bank. In 1832, President Andrew Jackson received a bill to recharter the United States Bank. Several Presidents before him and previous Congresses had decided that the bank was constitutional. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 315 (1819), the Supreme Court ruled that the bank was constitutional. Nevertheless, Jackson vetoed the bill on the ground that it was unconstitutional. In his veto message, he said that he had taken an oath of office to support the Constitution "as he understands it, and not as it is understood by others." The opinion of judges, he said,

has no more authority over Congress than the opinion of Congress had over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.¹⁷

Jackson's position on the veto power has been followed by all subsequent Presidents. Regardless of the constitutional decisions reached by Congress and the courts, Presidents may independently analyze the constitutionality of bills presented to them.

Independent Counsel. Presidents Reagan and Clinton signed legislation creating and reauthorizing the office of independent counsel. In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court upheld the constitutionality of the independent counsel statute. Despite those actions, President Clinton or any future President retains the independence to veto a reauthorization bill on the ground that the office of independent counsel encroaches upon the executive power granted to the President by the Constitution. Similarly, Congress could decide at the next reauthorization stage that the office of independent counsel violates the Constitution. The holding of *Morrison* simply means that Congress and the President are at liberty to create this office if they want to. Both branches retain an independent capacity to rethink the constitutionality of the statute.

¹⁷ 3 *A Compilation of the Messages and Papers of the Presidents* 1145 (James D. Richardson ed. 1897).

Women's Rights. In 1873, the Supreme Court held that denying women the right to practice law was not a violation of the Fourteenth Amendment guarantee of privileges and immunities. *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1873). State courts reached similar conclusions in rejecting the efforts of women to practice law. *In re Goodell*, 39 Wis. 232 (1875). In 1878, the U.S. House of Representatives passed a bill to remove legal disabilities that prevented women from practicing law. When asked whether the question had ever been brought before the Supreme Court, Congressman Roderick Butler replied: "It has; and they have decided that as the law now stands women cannot be admitted." 7 Cong. Rec. 1235. The bill passed the House by a margin of 169 to 87.

The Senate Judiciary Committee reported the bill adversely, arguing that the Supreme Court and every other federal court are authorized to make their own rules regulating the admission of persons to practice, "so that there is now no obstacle of law whatever to the admission of women to practice in those courts." 7 Cong. Rec. 1821. Senator Joseph McDonald conceded that the Court might change its rules to permit women to practice before it, "but as it does not seem inclined to do so, I do not think it is wrong for us to prescribe in this case a rule for the Supreme Court." 8 Cong. Rec. 1083. Senator George Hoar rejected the argument that the Supreme Court should be left alone to decide by its own rules who may practice before it: "Now, with the greatest respect for that tribunal, I conceive that the law-making and not the law-expounding power in this Government ought to determine the question what class of citizens shall be clothed with the office of the advocate." *Id.* at 1084. The bill passed the Senate, 39 to 20. As enacted into law, the bill provided that any woman "who shall have been a member of the bar of the highest court of any State or Territory or of the Supreme Court of the District of Columbia for the space of three years, and shall have maintained a good standing before such court, and who shall be a person of good moral character, shall, on motion, and the production of such record, be admitted to practice before the Supreme Court of the United States." 20 Stat. 292 (1879).

Financial Privacy. In 1972, agents from the Treasury Department's Alcohol, Tobacco, and Firearms Bureau presented grand jury subpoenas to two banks in which a suspect maintained accounts. Without advising the depositor that subpoenas had been served, the banks supplied the government with microfilms of checks, deposit slips, and other records. The Supreme Court held that a Fourth Amendment interest could not be vindicated in court by challenging such a subpoena. The Court treated the materials as business records of a bank, not private papers of a person. *United States v. Miller*, 425 U.S. 435, 438 (1976).

Congress responded by passing the Right to Financial Privacy Act of 1978. 92 Stat. 3617 (1978). Congressman Charles Whalen explained that the primary purpose of the statute was to prevent warrantless government searches of bank and credit records that reveal the nature of one's private affairs. The Government should not have access "except with the knowledge of the subject individual or else with the supervision of the courts." 124 Cong. Rec. 33310 (1978). Congressman John Rousselot remarked about the responsibility of

Congress to redress the shortcomings of the Court's decision: "Another standing to challenge the release of information in a court of law is provided for in section 1110, which, as a practical matter, reverses the holding in the Miller case." *Id.* at 33836. In essence, certain safeguards to Fourth Amendment rights that were unavailable because of the Supreme Court's decision were now secured by congressional action.

Recess Appointments. Another example of independent legislative and executive analysis comes from the field of recess appointments. The President's constitutional authority to make recess appointments to the federal courts was upheld by the Second Circuit in 1962 and the Ninth Circuit in 1985.¹⁸ Although this practice was upheld in the courts, Congress had expressed opposition to these appointments. In 1960, the Senate adopted a resolution objecting to recess appointments to the courts, and the House Judiciary Committee conducted a study of this type of appointment. Both Houses pointed to serious constitutional issues: circumvention of the Senate's role in confirming regular appointments; judges serving in a recess capacity without the independence of a lifetime appointment; and litigants forced to argue their case before a part-time federal judge. Louis Fisher, *Constitutional Conflicts between Congress and the President* 43-45 (4th ed. 1997). Because of opposition to this practice, no President since Eisenhower has used the recess appointment power to place someone on the Supreme Court, and no President since Carter has used the power to place someone on the lower courts. Similar to the independent counsel issue, the courts have told the political branches that they may place recess appointees on the federal courts if they want to, but if the branches have constitutional doubts about the practice they can rely on the regular confirmation process for lifetime appointments. The political branches have chosen to do the latter.

Religious Freedom. In 1986, the Supreme Court decided a case involving Captain Simcha Goldman, who was told by the Air Force that he could not wear his yarmulke indoors while on duty. The Court upheld the constitutionality of the Air Force regulation, reasoning that the regulation was necessary for military discipline, unity, and order. *Goldman v. Weinberger*, 475 U.S. 503 (1986). In effect, Air Force needs outweighed Goldman's free exercise of religion. Within a year, Congress attached to a military authorization bill language permitting military personnel to wear conservative, unobtrusive religious apparel indoors, provided that it does not interfere with their military duties. 101 Stat. 1086-87, sec. 508 (1987). The debate in the House and the Senate demonstrated that Members of Congress were capable of analyzing constitutional rights and giving greater protection to individuals than was available from the Supreme Court.

¹⁸ *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985), cert. denied, 475 U.S. 1048 (1986).

B. When the Court Finds Unconstitutionality

If the Court decides that a governmental action is unconstitutional, it is usually more difficult for Congress and the President to contest the judiciary. Congress frequently rewrites legislation to redress deficiencies found by the courts. But even in this category there are examples of effective legislative and executive challenges to court rulings.

Slavery. In his inaugural address in 1857, President James Buchanan announced that the dispute over slavery in the territories "is a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be." Two days later Chief Justice Taney handed down the Court's decision, holding that Congress could not prohibit slavery in the territories and that blacks were not U.S. citizens. *Dred Scott v. Sandford*, 60 U.S. (9 How.) 393 (1857).

Several years earlier, in a dissenting opinion, Chief Justice Taney had cautioned that any judgment issued by the Court was subject to review by society and other political institutions. The Court's opinion "upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported. The Passenger Cases, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J., dissenting).

Far from settling the matter and providing the "final word" on the slavery issue, the Court's decision in 1857 split the country. During the debates of 1858, Senator Stephen A. Douglas supported *Dred Scott* while his opponent, Abraham Lincoln, accepted the decision only as it affected the particular litigants. However, he rejected the larger policy questions decided by the Court, including the issues of slavery in the territories and citizenship to blacks. He considered those parts of the decision a nullity, to be left to political resolution outside the courts. 2 *Collected Works of Abraham Lincoln* 516 (Roy Basler ed. 1953).

Lincoln regarded the Court as a coequal, not a superior, branch of government. In his inaugural address in 1861, he denied that constitutional questions could be settled solely by the Court. If government policy on "vital questions affecting the whole people is to be irrevocably fixed" by the 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."¹⁹

Dred Scott was overturned by the Thirteenth, Fourteenth, and Fifteenth Amendments, which were ratified from 1865 to 1870. Even before those

¹⁹ 7 *A Compilation of the Messages and Papers of the Presidents* 3210 (James D. Richardson ed. 1897).

amendments were considered and ratified, Congress and the executive branch had already taken action to repudiate the main tenets of the decision. Congress passed legislation in 1862 to prohibit slavery in the territories. 12 Stat. 432. If Supreme Court decisions on constitutional matters can be overturned only by constitutional amendments, it would seem that someone during the congressional debate would have objected to overturning *Dred Scott* by statute. However, the decision was not even mentioned. Members of Congress never doubted their constitutional power to prohibit slavery in the territories and proceeded to announce their independent interpretation, with or without the Court.

Also in 1862, Attorney General Bates released a long opinion in which he held that neither color nor race could deny American blacks the right of citizenship. He pointed out that "freemen of all colors" had voted in some of the states. The idea of denying citizenship on the ground of color was received by other nations "with incredulity, if not disgust." The Constitution was "silent about *race* as it is about *color*." With regard to *Dred Scott*, he said that the case, "as it stands of record, does not determine, nor purport to determine," the question of blacks to be citizens. What Chief Justice Taney said about citizenship was pure dicta and "of no authority as a judicial decision." Bates concluded: "[T]he *free man of color*, ... if born in the United States, is a citizen of the United States." 10 Op. Att'y Gen. 382, 413 (1862) (emphasis in original).

Child Labor Legislation. In passing the first child labor law in 1916, Congress relied on the commerce power. The Supreme Court held that statute to be unconstitutional. *Hammer v. Dagenhart*, 247 U.S. 251 (1918). The following year Congress passed legislation again to regulate child labor, this time relying on its power to tax. When the constitutionality of this legislation was challenged in court, Solicitor General Beck advised the Court that congressional statutes should be struck down only when "an *invincible, irreconcilable, and indubitable repugnancy* develops between a statute and the Constitution." 21 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 51 (emphasis in original). He further stated: "The impression is general—and I believe that it is a mischievous one—that the judiciary has an unlimited power to nullify a law if its incidental effect is in excess of the governmental sphere of the enacting body." *Id.* at 52. It was an "erroneous idea" that the Court is the "sole guardian and protector of our constitutional form of government," for that belief would lead to an impairment within Congress and the people of "what may be called the constitutional conscience." *Id.* at 59. Beck's importunings were ignored. The Court struck down the second child labor law as well. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

At that point Congress passed a constitutional amendment in 1924 to give it the power to regulate child labor. 65 Cong. Rec. 7295, 10142 (1924). By 1937, only 28 of the necessary 36 states had ratified the amendment, and there was little hope of securing the additional states. After a major collision between the Court and the political branches throughout the 1930s, Congress returned to the commerce power when it included a child labor provision in the Fair Labor Standards Act of 1938. 52 Stat. 1067. The issue was taken to the Supreme

Court, which unanimously upheld the child labor section. *United States v. Darby*, 312 U.S. 100 (1941).

This record—from 1916 to 1941—was an exceptionally lengthy dialogue between Congress and the Court, with the legislative branch eventually prevailing. The Court later admitted that "the history of judicial limitation of congressional power over commerce, when exercised affirmatively, has been more largely one of retreat than of ultimate victory." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 415 (1946). Justice Owen Roberts, who served on the Court from 1930 to 1945 and witnessed many of the confrontations between the judiciary and the political branches, commented on the expansion of national power over economic conditions: "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy." Owen J. Roberts, *The Court and the Constitution* 61 (1951).

Sedition. In 1956, the Supreme Court invalidated a state sedition law because the Smith Act, passed by Congress, regulated the same subject. The Court concluded that it had been the intent of Congress to occupy the whole field of sedition. *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956).

The author of the Smith Act, Congressman Howard W. Smith, immediately denied that he had ever intended the result reached by the Court. In fact, even before the Court decided the question, he criticized the holding of the Supreme Court of Pennsylvania that the Smith Act preempted state efforts to regulate sedition. 101 Cong. Rec. 143 (1955). He introduced a bill to prohibit the courts from construing a congressional statute "as indicating an intent on the part of Congress to occupy a field in which such act operates, to the exclusion of all State laws on the same subject matter, unless such act contains an express provision to that effect." *Id.* at 31 [H.R. 3], 142.

Congressional committees reported legislation to permit concurrent jurisdiction by the federal government and the states in the areas of sedition and subversion. The legislation would also have prohibited courts from using intent or implication to decide questions of federal preemption over state activities. These bills were never enacted.²⁰ However, Smith's bill was debated at length on the House floor in 1958. 104 Cong. Rec. 13844-65, 13993-4023, 14138-62 (1958). He explained that the purpose of his bill was to say to the Supreme Court: "Do not undertake to read the minds of the Congress; we, in the Congress, think ourselves more capable of knowing our minds than the Supreme Court.... We are telling you that when we get ready to repeal a State law or preempt a field, we will say so and we will not leave it to the Supreme Court to guess whether we are or not." *Id.* at 14139-40. His bill passed the House of Representatives by the vote of 241 to 155. *Id.* at 14162. The measure was never taken up on the Senate floor.

²⁰ H.Rept. 2576, 84th Cong., 2nd Sess. (1956); S.Rept. 2117, 84th Cong., 2nd Sess. (1956); S.Rept. 2230, 84th Cong., 2nd Sess. (1956); H.Rept. 1878, 85th Cong., 2nd Sess. (1958).

In 1959, these bills were again under consideration.²¹ Shortly before the legislation was debated by the House, the Court "distinguished" its 1956 decision and held that a state could investigate subversive activities against itself. To this extent state and federal sedition laws could coexist. *Uphaus v. Wyman*, 360 U.S. 72 (1959). See also *Uphaus v. Wyman*, 364 U.S. 388 (1960). The Court's modification in 1959 satisfied congressional critics, who thought the preemption doctrine announced in 1956 intruded upon state sovereignty, and put an end to the confrontation between the judicial and congressional branches.

Congressional Investigations. In 1970, the House Committee on Internal Security prepared a report on "Limited Survey of Honoraria Given Guest Speakers for Engagements at Colleges and Universities." The study included the names of leftist or antiwar speakers and the amounts they received. The ACLU obtained a copy of the galleys and asked for an injunction. District Judge Gesell ruled that the report served no legislative purpose and was issued solely for the sake of exposure or intimidation. He ordered the Public Printer and the Superintendent of Documents not to print the report "or any portion, restatement or facsimile thereof," with the possible exception of placing the report in the *Congressional Record*. *Hentoff v. Ichord*, 318 F.Supp. 1175, 1183 (D.D.C. 1970). Gesell claimed that "the authority of a congressional committee to publish and distribute a report at public expense is not unlimited but is subject to judicial review in the light of the circumstances presented." *Id.* at 1181.

On December 14, 1970, the House of Representatives passed a resolution that told the courts, in essence, to step back. During the course of the debate, Members of Congress explained that it was not the practice of the House to print committee reports in the *Congressional Record*. 116 Cong. Rec. 41358 (1970). Moreover, Judge Gesell's order "runs afoul not only of the speech and debate clause—article I, section 6—of the Constitution, but obstructs the execution of other constitutional commitments of the House as well, including article I, section 5, which authorizes each House to determine the rules of its proceedings, and requires each House to publish its proceedings." *Id.*

The resolution stated that the new committee report was a "restatement" of the previous one and ordered the Public Printer and the Superintendent of Documents to print and distribute it. With an eye toward Judge Gesell and others who might stand in the way, the resolution provided that all persons "are further advised, ordered, and enjoined to refrain from molesting, intimidating, damaging, arresting, imprisoning, or punishing any person because of his participation in" publishing the report. H. Res. 1306, 91st Cong., 2nd Sess. 18 (1970). The resolution passed by a large bipartisan margin of 302 to 54. 116 Cong. Rec. 41373 (1970). The report was printed without any further interference from the judiciary. H.Rept. 1732, 91st Cong., 2nd Sess. (1970).

²¹ H.Rept. 422, 86th Cong., 1st Sess. (1959); 105 Cong. Rec. 11486-508, 11625-67, 11729-309 (1959).

C. Judicial Invitations

During the 1930s and 1940s, after Congress and the Court had clashed on a tax issue, the Supreme Court invited Congress to pass legislation and challenge previous rulings: "There is no reason to doubt that this Court may fall into error as may other branches of the Government. Nothing in the history or attitude of this Court should give rise to legislative embarrassment if in the performance of its duty a legislative body feels impelled to enact laws which may require the Court to reexamine its previous judgment or doctrine." *Helvering v. Griffiths*, 318 U.S. 371, 400-01 (1943). The Court explained that it is less able than other branches "to extricate itself from error," because it can reconsider a matter "only when it is again properly brought before it as a case or controversy." *Id.* at 401. By overruling itself, the Court admits its ability on an earlier occasion to commit error. "Congress and the courts," said Justice Stone, "both unhappily may falter or be mistaken in the performance of their constitutional duty." *United States v. Butler*, 297 U.S. 1, 87 (1936) (Stone, J., dissenting).

Commerce Clause. In 1890, the Supreme Court ruled that a state's prohibition of intoxicating liquors could not be applied to "original packages" or kegs. Only after the original package was broken into smaller packages could the state exercise control. The Court qualified its opinion by saying that the states could not exclude incoming articles "without congressional permission." *Leisy v. Hardin*, 135 U.S. 100, 125 (1890). Within a matter of months, Congress considered legislation to overturn the decision. During debate, Senator George Edmunds said that the opinions of the Supreme Court regarding Congress "are of no more value to us than ours are to it. We are just as independent of the Supreme Court of the United States as it is of us, and every judge will admit it." If Members of Congress concluded that the Court had made an error "are we to stop and say that is the end of the law and the mission of civilization in the United States for that reason? I take it not." Further consideration by the Court might produce a different result: "as they have often done, it may be their mission next year to change their opinion and say that the rule ought to be the other way." 21 Cong. Rec. 4964 (1890).

Congress quickly overturned the Court's decision by passing legislation that made intoxicating liquors, upon their arrival in a state or territory, subject to the police powers "to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." 26 Stat. 313 (1890). A year later the Court upheld the constitutionality of this statute. *In re Rahrer*, 140 U.S. 545 (1891).

The give-and-take between Congress and the judiciary is illustrated by another commerce case. In 1869, the Supreme Court held that states, rather than Congress, could regulate insurance because it was not a "transaction of commerce." *Paul v. Virginia*, 8 Wall. 168 (1869). That holding, along with 150 years of precedents, was overturned in 1944 when the Court interpreted the transaction of insurance business across state lines as interstate commerce subject to congressional regulation. The Court said that Congress had not

intended to exempt the insurance business from the Sherman Antitrust Act. *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944).

The 1944 decision sent a mixed message as to whether the resolution of this dispute lay solely with the Court or whether Congress could intervene with new legislation. The Court said that the "real answer before us is to be found in the Commerce Clause itself and in some of the great cases which interpret it," implying that the matter was judicial in nature. *Id.* at 549. And yet the ruling was conditioned on the "absence of Congressional action" and was placed in the context of "the continued absence of conflicting Congressional action." *Id.* at 548, 549. Evidently, the "real answer" depended on what Congress decided to do. If exceptions were to be written into the Sherman Act, "they must come from the Congress, not this Court." *Id.* at 561. Congress quickly passed the McCarren Act, authorizing states to regulate insurance, and the Court unanimously upheld the statute. 59 Stat. 33 (1945); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

Criminal Procedures. A 1957 decision by the Supreme Court involved access by defendants to government files bearing on their trial. On the basis of statements by two informers for the FBI, the government prosecuted Clinton Jencks for failing to state that he was a member of the Communist party. He asked that the FBI reports be turned over to the trial judge for examination to determine whether they had value in impeaching the statements of the two informers. The Supreme Court went beyond Jencks' request by ordering the government to produce for *his* inspection all FBI reports "touching the events and activities" at issue in the trial. *Jencks v. United States*, 353 U.S. 657, 668 (1957). The Court specifically rejected the option of producing government documents to the trial judge for his determination of relevance and materiality. *Id.* at 669.

In their concurrence, Justices Burton and Harlan believed that Jencks was only entitled to have the records submitted to the trial judge. A dissent by Justice Clark, agreeing that the documents should be delivered only to the trial judge, encouraged Congress to act: "Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets."

The Court announced its decision on June 3, 1957. Both Houses of Congress quickly held hearings and reported remedial legislation. The Jencks Bill passed the Senate by voice vote on August 26 and passed the House on August 27 by a vote of 351 to 17. The conference report was adopted with huge majorities: 74 to 2 in the Senate and 315 to zero in the House. The bill became law on September 2, 1957. The statute provides that in any federal criminal prosecution, no statement or report in the possession of the government "which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection unless said witness has testified on direct examination in the trial of the case." If a witness testifies, statements may be

delivered to the defendant for examination and use unless the United States claims that the statement contains irrelevant matter, in which case the statement shall be inspected by the court *in camera*. The judge may excise irrelevant portions of the statement before submitting it to the defendant. 71 Stat. 595 (1957).

Title II of the Omnibus Crime Control and Safe Streets Act of 1968 responded to three controversial decisions by the Supreme Court on criminal procedures. The first held that suspects must be taken before a magistrate for arraignment as quickly as possible. *Mallory v. United States*, 354 U.S. 449, 454 (1957). Admissions obtained from suspects during illegal detainment could not be used against them. The Court made room for congressional involvement by basing its decision partly on the Federal Rules of Criminal Procedure enacted by Congress. The decision thus allowed Congress to enter the arena and modify the rules. Congress did so: Title II established six hours as a reasonable period before arraignment.

In the second case, the Court held that confessions by criminal suspects could not be used unless the suspects had been informed of their rights by law enforcement officers. *Miranda v. Arizona*, 384 U.S. 436 (1966). Whether the majority opinion was based on constitutional principles or statutory rules of evidence was unclear. The Court referred to a number of constitutional issues but also referred to the Federal Rules of Criminal Procedure and invited Congress to contribute its own handiwork. *Id.* at 463, 467. Congress did so again: Title II allowed for the admissibility of confessions if voluntarily given. Trial judges would determine the issue of voluntariness after taking into consideration all the circumstances surrounding the confession, including five elements identified by Congress. 18 U.S.C. 3501.

In the third case, the Court decided that if an accused was denied the right to counsel during a police lineup, the identification would be inadmissible unless the in-court identifications had an independent source or the introduction of the evidence would be harmless error. *United States v. Wade*, 388 U.S. 218 (1967). The Court said that "legislative or other regulations, such as those developed by the local police departments, [might] eliminate the risks of abuse and unintentional suggestion at lineup proceedings," but that "neither Congress nor the Federal authorities have seen fit to provide a solution." *Id.* at 239. Title II provided that eyewitness testimony would be admissible as evidence in any criminal prosecution, regardless of whether the accused had an attorney present at the lineup. 18 U.S.C. 3502.

Search and Seizure. In 1978, the Supreme Court ruled that law enforcement officials could obtain a warrant and enter the premises of a newspaper to conduct a search for evidence regarding another party. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). The Court's approval of third-party searches and the threat to a free press triggered nationwide protests and congressional hearings. The Court, in fact, had invited Congress to act if it considered the Court's decision too restrictive on free press rights. The Court stated that nothing in the Fourth Amendment prevented legislative or executive

efforts to establish "nonconstitutional protections against possible abuses of the search warrant procedure." *Id.* at 567.

Apparently the word "nonconstitutional" was an effort to permit the participation of Congress and the President without jeopardizing the Court's supposed monopoly on constitutional questions. Yet Congress had to do precisely what the Court had done: balance the interests of law enforcement against free press. Legislation in 1980 limited newsroom searches by requiring, with certain exceptions, a subpoena instead of the more intrusive warrant. 94 Stat. 1879 (1980). If a newspaper or anyone with a First Amendment interest is required by subpoena to respond, they surrender only the requested document. Law enforcement officials do not enter their space to begin a general search through files, wastepaper baskets, and other sources.

Religious Freedom. In 1990, the Supreme Court held that the Free Exercise Clause permits a state to prohibit sacramental peyote use by Native American Indians and to deny unemployment benefits to persons discharged for such use. State law could prohibit the possession and use of a drug even if it incidentally prohibits a religious practice, provided that the state law is neutral and generally applicable to all individuals. *Employment Division v. Smith*, 494 U.S. 872 (1990).

Under this test, there was no need for the state to show a compelling interest or to use the least restrictive means, standards that the Court had adopted in earlier cases. Could Congress enter the field and pass legislation that would give religions greater protection than the Court offered? In his opinion for the Court, Justice Scalia seemed to invite other branches to protect rights left unguarded by the courts:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. *Id.* at 890.

In 1993, the House Judiciary Committee, voting 35 to 0, reported a bill to create a "statutory right" to require the compelling governmental interest test in cases in which the free exercise of religion has been burdened by a law of general applicability. H.Rept. 103-88, 103rd Cong., 1st Sess. 1-2 (1993). The bill passed the House under suspension of the rules, which requires a two-thirds majority. 139 Cong. Rec. H2356-2363 (daily ed. May 11, 1993). The Senate Judiciary Committee, by a vote of 15 to 1, reported the bill for floor consideration. S.Rept. 103-11, 103rd Cong., 1st Sess. 2 (1993). On final passage, the bill passed 97 to 2. 139 Cong. Rec. S14351-14368 (daily ed. October 26, 1993); *id.* at S14461-14468 (daily ed. October 27, 1993). As enacted, the Religious Freedom Restoration Act (RFRA) provides that governments may substantially burden a person's religious exercise only if they demonstrate a compelling interest and use the least restrictive means of furthering that

interest. 107 Stat. 1488 (1993). A year later, Congress passed legislation to permit the use of peyote by Native Americans during religious ceremonies. 108 Stat. 3125 (1994).

In the years following enactment of RFRA, numerous courts have examined the constitutionality of the statute. Early in 1995, a district court in Texas held RFRA to be unconstitutional, relying on language from *Marbury* that it is "emphatically the province and duty of the judicial department to say what the law is." The district court concluded that Congress cannot enact legislation that has the effect of overturning a Supreme Court decision. *Flores v. City of Boerne*, 877 F.Supp. 355, 357 (W.D. Tex. 1995). This decision was overturned a year later by the Fifth Circuit, which said that the executive and legislative branches "also have both the right and duty to interpret the constitution." *Flores v. City of Boerne, Tex.*, 73 F.3d 1352, 1356 (5th Cir. 1996). The Fifth Circuit found nothing unusual about Congress protecting constitutional rights to a greater degree than the Supreme Court. For example, the Circuit noted that in 1959 the Supreme Court upheld literacy tests in voting elections; the Voting Rights Act of 1965 prohibited the tests. *Id.* at 1363 (citing *Lassiter v. Northhampton County Bd. of Elections*, 360 U.S. 45 (1959)). While it is the judiciary's duty to say what the law is, "that duty is not exclusive." *Id.* at 1363. Other branches participate in the debate over constitutional values. This case is now before the Supreme Court and a decision on the constitutionality of RFRA is expected by June.

D. Enforcement of Civil War Amendments

The Thirteenth, Fourteenth, and Fifteenth Amendments give Congress the power to enforce the amendments "by appropriate legislation." The creative and constructive task of giving meaning and life to these amendments thus lies largely with Congress.

In 1966, the Supreme Court reviewed the power of Congress to prohibit New York's requirement for literacy in English as a condition for voting. Section 4(e) of the Voting Rights Act of 1965 had provided that no person who had completed the sixth grade in Puerto Rico, with the language of instruction other than English, could be denied the right to vote in any election because of an inability to read or write in English. The Court regarded section 4(e) as a "proper exercise" of the powers granted to Congress to enforce the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 646 (1966). Factfinding was a legislative, not a judicial, responsibility: "It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations.... It is not for us to review the congressional resolution of these factors." *Id.* at 653.

In 1980 the Court commented on the competence of Congress to protect equal protection rights: "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Fullilove v. Klutznick*, 448 U.S. 448, 483 (1980). If there is a collision between the immunity accorded states under

the Eleventh Amendment and the power of Congress to enforce the Fourteenth Amendment, the congressional statute prevails: *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Congress has ample powers under the Fifteenth Amendment. The Supreme Court has deferred to congressional interpretations so long as Congress uses "any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). Congress is "chiefly responsible" for implementing the rights created in the Fifteenth Amendment. *Id.* at 327. Congress may prohibit practices that "in and of themselves" do not violate the Fifteenth Amendment "so long as the prohibitions attacking racial discrimination in voting are 'appropriate'" *Rome v. United States*, 446 U.S. 156, 177 (1980).

In 1980, a plurality of the Court held that states are prohibited only from *purposefully* discriminating against the voting rights of blacks. Abridgement of voting rights had to be intentional, not incidental. *Mobile v. Bolden*, 446 U.S. 55 (1980). Congress responded by amending the Voting Rights Act to allow plaintiffs to show discrimination solely on the *effects* of a voting plan. The Court applied this new test to invalidate districting plans in North Carolina that had the effect of diluting the black vote whether or not intended by the state. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

E. Statutory Reversals

It is the practice of courts not to pass on the constitutionality of a statute if it can be construed solely on statutory grounds. *United States v. Clark*, 445 U.S. 23, 27 (1980). Justice Brandeis described a series of rules under which the Supreme Court "has avoided passing upon a large part of the constitutional questions pressed upon it for decision." *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). "It is well settled that if a case may be decided on either statutory or constitutional grounds, [the] Court, for sound jurisprudential reasons, will inquire first into the statutory question." *Harris v. McRae*, 448 U.S. 297, 306-07 (1980). This judicial strategy allows the courts to dispose of issues on statutory grounds in the midst of obvious constitutional questions. Instead of attempting to fix constitutional doctrine, the judiciary enters into a dialogue with the other branches concerning the intent of prior statutes.

Sex Discrimination. Title IX of the Education Amendments of 1972 prohibited sex discrimination in any education program or activity that received federal financial assistance. After the Reagan administration issued statements indicating that its interpretation of Title IX was not as broad as previous administrations, the House of Representatives passed a resolution by a vote of 414 to 8, opposing the administration's position. The resolution stated the sense of the House that Title IX and regulations issued pursuant to the title "should not be amended or altered in any manner which will lessen the comprehensive coverage of such statute in eliminating gender discrimination throughout the American educational system." The resolution, of course, was not legally binding, but it was adopted because the Supreme Court was about

to hear oral argument on a case regarding Title IX. Congressman Paul Simon noted: "[By] passing this resolution the House can send the Court a signal that we believe that no institution should be allowed to discriminate on the basis of sex if it receives Federal funds." 129 Cong. Rec. 33105 (1983).

The issue before the Court was whether Title IX required federal funds to be terminated only for specific programs in which discrimination occurs or for the entire educational institution. The Court adopted the narrow interpretation. *Grove City College v. Bell*, 465 U.S. 444 (1984). Within four months the House of Representatives, by a vote of 375 to 32, passed legislation to amend not only Title IX but also three other statutes to adopt broad coverage of the antidiscrimination provisions. 130 Cong. Rec. 18880 (1984). The Senate resisted action that year, and subsequent efforts were complicated by questions of church-state and abortion. Finally, in 1988, Congress was able to forge a compromise. President Reagan vetoed the measure, but both Houses overrode the veto to enact the broader coverage for civil rights that had been rejected by the Court. 102 Stat. 28 (1988).

Also in 1988, Congress passed two other statutes to reverse the Supreme Court. In one decision, the Court ruled that federal employees could be sued for common law torts committed on the job. They were not entitled to absolute immunity from lawsuit. However, the Court remarked: "Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context." *Westfall v. Erwin*, 484 U.S. 292, 300 (1988). Congress passed legislation to overturn this decision by protecting federal employees from personal liability for common law torts committed within the scope of their employment. The statute provides the injured person with a remedy against the United States government. Thus, compensation would come from the U.S. Treasury, not the employee's pocketbook. 102 Stat. 4563 (1988).

The other statutory reversal in 1988 concerned a Supreme Court decision that accepted the definition of the Veterans Administration that alcoholism results from "willful misconduct" rather than from a disease. For those who regarded the decision as erroneous, the Court advised them that their arguments would be "better presented to Congress than to the courts." *Traynor v. Turnage*, 484 U.S. 535 (1988). Legislation enacted by Congress recognized that veterans seeking education or rehabilitation would not be denied those benefits under the willful-misconduct standard. 102 Stat. 4170, § 109 (1988).

Congress has resorted to statutory reversals with greater frequency in recent years.²² A single statute—the Civil Rights Act of 1991—overturned or modified nine Supreme Court decisions. 105 Stat. 1071 (1991).²³ In 1995, the Supreme Court held that a statute criminalizing false statements "in any matter

²² William N. Eskridge, Jr., "Overriding Supreme Court Statutory Interpretation Decisions," 101 Yale L. J. 331 (1991).

²³ For details on the statute and the Court decisions that were overruled or modified, see Louis Fisher, *American Constitutional Law* 1055-56 (1995).

within the jurisdiction of any department or agency of the United States" did not apply to false statements made in judicial proceedings. *Hubbard v. United States*, 115 S.Ct. 1754 (1995). In so holding, the Court overruled an earlier case that had applied the statute to a former Member of Congress who had made a false statement to the Disbursing Office of the House of Representatives. Congress responded to *Hubbard* by drafting legislation to reinstate criminal penalties for making false statement to Congress. The new law makes it a crime to make false statements to an official in any of the three branches of government. 110 Stat. 3459 (1996).

F. The Role of Custom

Congressional and executive practices over a number of years have been instrumental in fixing the meaning of the Constitution. In 1803, faced with a challenge to constitutionality of the Judiciary Act of 1789, the Supreme Court stated that "practice, and acquiescence under it, for a number of years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature." *Stuart v. Laird*, 5 U.S. (1 Cr.) 299, 309 (1803).

In upholding the President's power to remove executive officials, the Court in 1903 based its ruling largely on the "universal practice of the government for over a century." *Shurtleff v. United States*, 189 U.S. 311, 316 (1903). Presidential action in which Congress acquiesced can become a justification for the exercise of power. Presidential decisions in withdrawing public lands from private use can, over a period of years, "clearly indicate that the long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands." *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915). The cumulative force of these customs has helped to transform the Constitution over time.

In the Steel Seizure Case of 1952, challenging the seizure of steel mills by President Truman during the Korean War, several justices spoke about the force of custom in shaping constitutional law. Justice Jackson identified three scenarios for presidential power. The President was in the strongest position when he acted pursuant to an express or implied authorization of Congress, and in the weakest position when taking measures incompatible with the expressed or implied will of Congress. The President's legal position was especially interesting when Congress neither grants nor denies power:

When the President acts in absence of either a congressional grant or denial of authority, he can rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and

contemporary imponderables rather than on abstract theories of law. *Youngstown Co. v. S.* *r*, 343 U.S. 579, 635-37 (1952).

In other words, the constitutionality of an action is sometimes determined not by analyzing the words or intent of the Constitution but rather the political context in which a President acts. In this same case, Justice Frankfurter also explored the impact of custom and practice on presidential power. Legislative and executive power were not defined purely on the basis of textual grants. The behavior of each branch added meaning to constitutional power:

Deeply imbedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II. *Id.* at 610-11.

The thrust of these remarks has been tempered by other statements. Justice Frankfurter earlier noted: "Illegality cannot attain legitimacy through practice." *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524 (1940). Professor Gerhard Casper has written that "unconstitutional practices cannot become legitimate by the mere lapse of time."²⁴

²⁴ Gerhard Casper, "Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model," 43 U. Chi. L. Rev. 461, 479 (1976). See also Michael J. Glennon, "The Use of Custom in Resolving Separation of Power Disputes," 64 B.U.L. Rev. 109 (1984).

Mr. CANADY. Thank you. Professor Currie.

STATEMENT OF DAVID P. CURRIE, EDWARD H. LEVI DISTINGUISHED SERVICE PROFESSOR, UNIVERSITY OF CHICAGO SCHOOL OF LAW

Mr. CURRIE. Thank you very much, Mr. Chairman, and members of the committee. I welcome the opportunity to share with the committee my thoughts about this important subject. I've been thinking for a long time about constitutional interpretation, both in the courts and in other branches of the Federal Government.

My thesis is quite straightforward. I believe that each branch of the Federal Government, as well as each branch of the State Governments, has an equal and independent obligation to interpret and to obey the Constitution. The question of constitutional interpretation is also the question of constitutional enforcement, and the question of how these "paper barriers," as Madison once described them, that are found in the Constitution are to be enforced, and how we are to ensure that they are to be respected is a question that has agitated the framers and has agitated the rest of us down to the present day.

And James Madison, when he as a Member of Congress introduced the Bill of Rights in the House of Representatives in 1789, identified three checks that were designed to help enforce the Constitution. The first check was the conscience of the Members of Congress; that is to say, having sworn to uphold the Constitution, they would be expected to respect their oath and thus to respect the Constitution itself.

The second check was judicial review. The courts would view it as one of their special responsibilities to enforce the Constitution in case another branch of Government should ever exceed its power.

Third, the final check, and perhaps the most important of all, was the check of the voters. The people themselves would exercise a check on actions that exceeded the constitutional powers of one or another branch of Government by refusing to re-elect Members of Congress or Presidents or State officials who abused their authority.

The judicial check to which Madison alluded was, of course, confirmed by the Supreme Court in *Marbury v. Madison*. Judicial review, as Chief Justice Marshall said in that case, is an essential, an indispensable element in a system of checks and balances to help ensure that other branches of Government not exceed their constitutional authority. There's not a word in *Marbury v. Madison* suggesting that judicial review is the sole check on unconstitutional action, that the court is the only branch of Government with the power to interpret the Constitution.

President Jackson—and this has been mentioned already several times today—identified another check when he vetoed the bill to extend the charter of the Second National Bank because he found it to be unconstitutional, even though the Supreme Court had said Congress had the power to establish a national bank. Because the President, too, has sworn to uphold the Constitution, the President, too, has an independent obligation to enforce the Constitution, and therefore he cannot accept the Supreme Court's determination that

Congress has constitutional authority. If he believes a bill to be unconstitutional, the President has an independent obligation to veto the bill.

And the same is of course true of the Congress. Members of Congress have also sworn to support the Constitution, and whenever a bill is introduced in Congress, the first obligation of every Member is to ask the question, Do we have the power to pass this bill? And that, of course, is a question involving an interpretation of the Constitution. As Representative Theodore Sedgwick of Massachusetts said on the floor of the House in 1791, "The whole business of legislation is a practical construction of the powers of the legislature."

And thus each branch, independently, has an obligation to interpret and to obey the Constitution. No branch has the power to bind another branch in the interpretation of the Constitution, and thus we have a triple security for the enforcement of the Constitution.

I've gone so far in my study of the extrajudicial interpretation of the Constitution during the first 12 years of our history under the 1789 Constitution, as to suggest that the original understanding of our Constitution was forged not so much in the courts as in Congress and in the executive branch.

I come now to the issue of the Religious Freedom Restoration Act. I think that statute was wholly justified insofar as it operates as a congressional check on Federal action which in the view of Congress would violate the Constitution. That is to say, insofar as the statute is a refusal to authorize Federal agencies to do what Congress believes would violate the Constitution, I think Congress is wholly within its rights.

I think that the statute is also justified as an expression of Congress's disagreement with the Court's interpretation of the Free Exercise Clause insofar as it acts as a limitation on the powers of the States. But the next question is, What is the respect that is owed by the Court to Congress's interpretation of the Constitution as reflected in that statute? It seems to me that the answer has to be that the Court is no more bound by Congress's interpretation of the Free Exercise Clause than Congress is bound by the interpretation of the Court.

The same principle that says that Congress has to make up its own mind about the meaning of the Constitution says the same thing for the Court. And that's essentially what the Supreme Court said in the *Flores* case: We must interpret the Free Exercise Clause for ourselves, because we have the constitutional obligation to respect the Constitution and we cannot permit Congress to exceed its powers.

I see I'm out of time. I have more that I could say.

Mr. CANADY. If you could sum up in another minute or two.

Mr. CURRIE. Some scholars have suggested—thank you, Mr. Chairman—that the Court in the *Flores* case should have gone beyond simply saying Congress has no power to bind us as to the interpretation of the Constitution, that the Court should have re-examined its own precedent in light of Congress's contrary opinion, and therefore maybe taken a different view as to the meaning of the Free Exercise Clause.

I think the difficulty with that argument is that the Court was not asked to do that in *Flores*. The Court was not asked to overrule its precedent in the light of Congress's contrary interpretation; it was asked to accept the statute as having already overruled the prior decision, and that, I think, Congress had no power to do.

The final question is, when the Court is finally asked to reconsider its prior decisions—the *Smith* case in particular—interpreting the Free Exercise Clause, in the light of Congress's contrary interpretation as reflected in the Religious Freedom Restoration Act, what degree of deference should be paid by the Court to Congress's interpretation?

And that reminds me, of course, of the long debate between Justices Felix Frankfurter and Hugo Black during the 1940's, fifties, and early sixties over the degree of judicial restraint, the degree of deference to other branches. I'm sure there are members of the committee who recall Justice Frankfurter's dissent in the second *Flag Salute* case where he said it's really not for the Court to substitute its opinion for reasonable decisions by other branches.

Insofar as the interpretation of the First Amendment is concerned, I think it's fair to say that that extreme view of judicial deference to the views of other branches has been rejected, not only by the Court, but also by a large number of scholars. And in my view the Court is right not to take Justice Frankfurter's position because the enforcement of the Constitution requires that each branch take an independent view of the meaning of the Constitution.

Only if each branch does that can we ensure maximum security for the rights of the citizen and for the rights of the States, which are, of course, involved whenever Congress attempts to limit State authority as it did in the Religious Freedom Restoration Act. Thank you very much.

[The prepared statement of Mr. Currie follows:]

PREPARED STATEMENT OF DAVID P. CURRIE, EDWARD H. LEVI Distinguished
SERVICE PROFESSOR, UNIVERSITY OF CHICAGO SCHOOL OF LAW

The Supreme Court's recent decision in *City of Boerne v Flores*,¹ which struck down Congress's attempt to redefine the religious freedom guaranteed against the states by the fourteenth amendment, has called attention once more to the timeless question of the respective roles of Congress and of the courts as interpreters of the Constitution. As a longtime student of constitutional interpretation in all three branches of the Government, I welcome the opportunity to share with this Committee my thinking on this important subject.

I begin with the obligatory nod to *Marbury v Madison*.² I believe Chief Justice Marshall was right that courts have an obligation to determine the constitutionality of federal statutes they are asked to apply, and not simply because they are themselves required to obey the Constitution. As Marshall argued, I am convinced that judicial review is an essential element in the constitutional system of checks and balances—designed, as Hamilton said in *The Federalist*, to help keep the legislature within the limits of its authority.³

This does not mean that the courts have a monopoly on constitutional interpretation. Members of Congress, like all federal and state officers, are bound by their oaths to support the Constitution.⁴ Thus, whenever a bill is introduced, every member of the House or Senate must inquire whether or not Congress has power to

¹ 117 S.Ct. 2157 (1997).

² 5 US 137 (1803).

³ *The Federalist* No. 78. See also Madison's remarks in introducing the Bill of Rights in the House, 1 Annals of Congress 457 (1789).

⁴ US Const., Art. VI.

enact it; and thus Congress is continually engaged in interpreting the Constitution. So, of course, is the President. And thus a great deal of constitutional law is made outside the courts, by the legislative and executive branches of government.

Congressional debates and executive papers are replete with examples of legislative and executive interpretation of the Constitution. Few constitutional difficulties with proposed legislation escape the eyes of vigilant opponents, and the quality of argument is often extraordinarily high. In a great many instances congressional debates during the early years brought out all the constitutional arguments that anyone has been able to think of since. In many cases we continue to rely exclusively on legislative or executive precedents, for the issues have never been resolved by the courts. The original understanding of the Constitution, I recently concluded after an intensive study of the first twelve years of its operation, was forged not in the courts but in the legislative and executive branches.⁵

The interesting question is therefore not who has power to interpret the Constitution but whose view prevails in case of conflict. What happens when different branches of government, each acting within its proper sphere of authority, disagree as to what the Constitution means? I do not believe this question can be answered by a simple invocation of the shibboleth that the courts are the ultimate guardians of the Constitution.

There are times when other governmental actors are plainly obliged to accept judicial decisions. Judicial power to decide a case implies authority to render a judgment that binds the parties. Thus, when President Roosevelt contemplated disobeying an anticipated judicial decision requiring the government to pay bondholders in gold,⁶ he challenged the very essence of judicial power. Such a course could be defended, if at all, only as an exercise of the natural right of revolution; it was not consistent with the Constitution.

It does not follow that other branches are bound in all cases by judicial interpretations of the Constitution. The examples are familiar. President Jackson vetoed a new charter for the Bank of the United States after the Supreme Court had upheld congressional power to establish it;⁷ President Jefferson pardoned those convicted under the Sedition Act on constitutional grounds that had been rejected by the courts.⁸ Both Jackson and Jefferson were well within their rights. Neither did anything that interfered with the power of the courts to render binding judgments in particular cases; the pardon power is an express limitation on that principle, and it essentially allows the winning party to waive a judgment in its favor. Nor was either Jefferson's or Jackson's action inconsistent with *Marbury's* principle that the courts must have power to prevent other branches from exceeding their powers. On the contrary, Jefferson and Jackson's actions provided an additional check that furnished even greater security for the rights of the states and the people. Indeed what these two Presidents did illustrates the core of our constitutional separation of powers: No measure can be carried out to the detriment of the people or the states unless all three branches agree that it is constitutional.

These are the easy cases. More complex are the questions posed by Abraham Lincoln's attitude toward the *Dred Scott* case and by Governor Faubus's actions with respect to school segregation after *Brown v. Board of Education*. The poles of opinion on these issues are starkly delineated. Lincoln suggested that although he would not attempt to set Scott free in defiance of the Supreme Court's order he would vote for a new prohibition of slavery in the territories.⁹ The Court in *Cooper v. Aaron* said Faubus was bound by *Brown* because it was "the law of the land."¹⁰

At one level Lincoln seems to me to have been right and the Supreme Court wrong. The judgments in *Scott* and in *Brown* bound only the parties. Courts have no power to resolve general questions of constitutional interpretation; their only authority is to decide the concrete controversies before them. Faubus, of course, was defying not only the principles announced in *Brown* but also a decree entered against him by a lower federal court; that was enough, on the principle of the above discussion of the *Gold Clause* question, to justify condemning his action. But Lincoln disclaimed any intention of subverting the judgment in *Scott*; he merely denied that it restricted his freedom to decide for himself whether prospective legislation along the same lines would be constitutional.

⁵ David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801* 296 (Chicago, 1997).

⁶ 1 F.D.R.—His Personal Letters, 1928-1945 436-40 (Elliott Roosevelt ed. 1950).

⁷ 2 Richardson, *Messages and Papers of the Presidents* 576 (1896).

⁸ See Jefferson to Abigail Adams, Sep 11, 1804, in *Writings of Thomas Jefferson* 310 (Ford ed. 1897).

⁹ Lincoln-Douglas Debates, in 3 *Collected Works of Abraham Lincoln* 255 (Basler ed 1953).

¹⁰ 358 US 1, 18 (1958).

Professor Wechsler has shown the limits of this line of thinking. It is true that one does not undermine the Court's judgment—and therefore its power to definitively resolve the case—by refusing to follow its reasoning in enacting future laws. But if one believes (as I do, and as Hamilton and Marshall argued) that judicial review is an essential part of our system of checks and balances, this cannot be a complete answer. For that system cannot function if every school district in the United States insists on continuing to segregate its schools by race until the Supreme Court tells it not to. So long as (and as soon as) there is reason to think the Court might overrule its decision, a legislator or administrator who was not a party to the case may be justified in doing what the Court has ordered others not to do, for otherwise the Court could never correct its mistakes. Unlike *res judicata*, *stare decisis* is not an inflexible command. But once it is clear that the Court will not change its mind, I think Professor Wechsler is right that the Court's view must be accepted; for otherwise it cannot effectively perform its crucial task of helping to keep other branches of government within their legitimate authority.¹¹

This brings me to the current controversy over the *Smith* decision,¹² the Religious Freedom Restoration Act (RFRA),¹³ and the Supreme Court's response in *City of Boerne v. Flores*.¹⁴ Highly respected colleagues have written to criticize the *Flores* decision;¹⁵ I have written to praise it.¹⁶ Let me explain my position.

The Court's acceptance in *Smith* of Professor Kurland's view¹⁷ that the free exercise clause did not require that religious individuals be exempted from generally applicable laws was highly controversial. Though certainly not without support in earlier cases, it was (despite contrary arguments in the Court's opinion) squarely opposed to the Court's most recent pronouncement on the subject, in *Wisconsin v. Yoder*.¹⁸ Congress disagreed with the Court's new interpretation, and said so in RFRA: Henceforth the adverse impact of even a facially neutral law on religious exercise could be justified only by a compelling interest.¹⁹

That was a plausible interpretation of the Constitution, and Congress was entitled to make it. Congress was not a party to the *Smith* litigation, and it made no effort to set aside the judgment itself. It merely declared a rule to govern future cases. Moreover, one could not confidently say that the Court had said its last word on the subject. The decision was rendered by a bare majority; it effectively overruled recent precedent; it had been roundly though far from unanimously criticized ever since; it had been rendered without the benefit of Congress's views as to the meaning of the constitutional provision. In short, Congress was entitled to believe there was a reasonable chance the Court might reconsider its position in light of a well considered, reasonable, and nearly unanimous contrary legislative interpretation.

But of course the Court was no more bound by Congress's interpretation than Congress was by that of the Court in *Smith*. The same argument that proves that Congress is entitled to construe the Constitution for itself applies equally to the Court. And that was what the Court said in effect in *Flores*: Congress has authority to enforce the fourteenth amendment but not to amend it, and the Court is not bound by Congress's interpretation of its provisions.

Insofar as RFRA represented a self-denying interpretation of Congress's own power to enact laws impinging on religious freedom, it was squarely supported by Jefferson's and Jackson's actions in reading their own powers more narrowly than the courts had understood them. Whatever the Court says, Congress may not enact laws it believes to be unconstitutional. Nothing in the *Flores* opinion casts doubt on the legitimacy of RFRA as the exercise of a congressional check on congressional action. But it was something else again to expect the Court to accept Congress's interpretation of the free exercise clause in passing upon the validity of state law.

Should the Court in *Flores* be criticized for having rejected the congressional reading of religious freedom without reexamining the issue on the merits? Should it, in such a reexamination, have afforded some degree of deference to the views of a coordinate branch on which the framers of the fourteenth amendment expressly conferred the principal role in enforcing its provisions? One would not expect the Court to invalidate the clauses of the War Powers Resolution that purport to define the division between presidential and congressional authority simply because Congress's

¹¹ Herbert Wechsler, *The Courts and the Constitution*, 65 Colum L Rev 1001, 1008 (1965).

¹² *Employment Division v. Smith*, 494 US 872 (1990).

¹³ 107 Stat 1488 (1993), 42 USC §§ 2000bb et seq.

¹⁴ 117 S Ct 2157 (1997).

¹⁵ E.g., Michael McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 Harv L Rev 153 (1997).

¹⁶ David P. Currie, *RFRA* (forthcoming in *Wm & Mary L Rev* (1998)).

¹⁷ Philip B. Kurland, *Religion and the Law* (Chicago, 1978).

¹⁸ 406 US 205 (1972).

¹⁹ 42 USC § 2000bb-1.

interpretation does not bind the Court; one would expect Congress's understanding to be taken seriously in the Court's resolution of the dispute.

That the Court did not do this in *Flores* may have something to do with the way the issue was presented. The Court was not asked to overrule *Smith*; it was asked to accept the fact that Congress had already done so. Even Justice O'Connor, who wanted to use the case as a vehicle for reexamining *Smith*, urged only that that issue be briefed by the parties.²⁰ Congress and its defenders seemed to be arguing for something more than that the legislative interpretation should be considered; the case seemed to turn on whether the special authorization to enforce the amendment gave Congress rather than the Court the final say when the question arose in a judicial proceeding. The Court seems to me clearly right that it did not.²¹

If the issue is plainly phrased in some future case, I would expect the Court to take Congress's interpretation into account in determining whether or not to adhere to its *Smith* decision. If it does, it will have to address the question of what degree of deference to give to Congress's position. And that, it seems to me, boils down to the familiar dispute over judicial restraint that has raged since the Constitution was adopted, and which is best exemplified by the long duel between Justices Frankfurter and Black.²²

Frankfurter, as illustrated by his famous dissent in the second flag-salute case,²³ argued that to avoid excessive judicial interference the courts should generally defer to reasonable interpretations of the Constitution by other branches of government. The Court took this position in the fourteenth amendment context in an alternative holding in *Katzenbach v Morgan*, deferring to Congress's "reasonable" conclusion that requiring Puerto Rican voters to be literate in English offended the equal protection clause.²⁴ Justice Black's position, in contrast, was that true judicial restraint consisted in refusing to invent limitations on government that could not fairly be traced to the Constitution itself; what the Constitution required should be strictly enforced.²⁵

At least in the area of first amendment freedoms, Justice Frankfurter's approach has not stood the test of time; no Justice on the present Court takes such a restricted view of the Court's authority in such cases. Justice Black's position, I believe, is also more consistent with the purposes of judicial review. Congress's views are entitled to consideration and respect when the Court is called upon to construe the Constitution. Arguments made in Congress must be taken seriously on their merits, and the fact that Congress has accepted a given interpretation is additional evidence in its favor. But the Court must ultimately decide for itself what the Constitution requires, not accept someone else's view just because it is "reasonable." For only by exercising independent judgment in constitutional interpretation can the courts effectively help to ensure, as the Constitution contemplates, that other branches of government not exceed the limits of their authority. And that seems to have been the position taken in *Flores*. For the Court made clear that it thought there was no occasion to afford the congressional interpretation of the first amendment the degree of deference suggested by the alternative basis of decision in *Morgan*.²⁶

The Court in *Flores* similarly insisted on the right to make its own determination with regard to the unrelated question whether RFRA could be justified as a prophylactic measure to prevent undetectable evasions of the free exercise clause as the Court had construed it in *Smith*, by analogy to the flat ban on literacy tests for voters upheld in *Oregon v Mitchell*.²⁷ The Court found no such problem of evasion in *Flores* and so rejected this argument as well.²⁸ In construing Congress's authority to enforce the fourteenth amendment by "appropriate legislation" to require "a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end,"²⁹ the Court gave notice once again that it took its responsibility for judicial review seriously in the field of federalism as well as in that of individual rights, as the theory of the *Marbury* case seems to require.³⁰

²⁰ 117 S Ct at 2176 (O'Connor, J. dissenting).

²¹ Contrast US Const, Art I, § 8, cl 10, which gives Congress authority to "define" as well as to punish piracies and felonies on the high seas and offenses against the law of nations.

²² See David P. Currie, *The New Deal Court in the 1940's: Its Constitutional Legacy*, 1997 J Sup Ct Hist 87.

²³ *West Virginia Bd of Educ v Barnette*, 319 US 624, 648-49 (1943).

²⁴ 384 US 641, 656 (1966).

²⁵ See, e.g., *Adamson v California*, 332 US 46 (1947).

²⁶ 117 S Ct at 2168.

²⁷ 400 US 112 (1970). See also *South Carolina v Katzenbach*, 383 US 301 (1966).

²⁸ 117 S Ct at 2169.

²⁹ Id at 2164. See also id at 2169, 2170, 2171.

³⁰ Cf. *United States v Lopez*, 514 US 549 (1995); *Printz v United States*, 117 S Ct 2365 (1997).

In short, in my view the Constitution contemplates multiple checks to prevent anyone exercising public authority from infringing its provisions. Executive officers and Members of Congress have an independent obligation to obey the Constitution itself; they are not bound by a judicial conclusion that a particular action is within their authority. For the same reason, the courts are not bound by either executive or legislative interpretation of provisions whose construction is not committed to ultimate determination by the political branches.³¹ For the courts too were meant to serve as an indispensable element in our system of checks and balances. Respect for judicial authority requires not only that other governmental actors comply with judgments in cases to which they are parties. It also requires that, when it is clear that the Supreme Court will not recede from its position, other branches acquiesce in judicial opinions limiting their powers. Finally, the central importance of judicial review as a check on other branches requires that the courts exercise independent judgment in determining the constitutionality of legislative and executive action, giving respectful consideration but not undue deference to the views of the interested branch.

Mr. CANADY. Thank you, Professor. Professor Devins.

**STATEMENT OF NEAL DEVINS, GOODRICH PROFESSOR OF
LAW, COLLEGE OF WILLIAM AND MARY**

Mr. DEVINS. Thank you, Mr. Chairman, and I would like to thank the committee for inviting me to testify this morning.

My statement makes two points. One is that Congress has a long, proud history of countermanding the Supreme Court when it disagrees with the Court. That history has been alluded to by several of the witnesses. It includes Congress' rejection of *Dred Scott*, its rejection of *Hammer v. Dagenhardt*, which was a case saying that Congress was without authority under the Commerce Clause to regulate child labor.

It applies to the 1964 Civil Rights Act's public accommodation provision, which was legislation enacted after the Supreme Court had said almost a century before in a civil rights case that Congress could not enact a public accommodation provision. And it continues today with busing, abortion, religious freedom, flag burning, voting rights, legislative veto, and Federalism.

These are all instances where Congress has been willing to tell the Court that it thinks its interpretation of the Constitution is wrong, and I don't really think there's anything in *City of Boerne v. Flores* to fundamentally challenge Congress' power to disagree with the Court.

Flores is a very important case, of course, but it doesn't call into question Congress's power to use its spending authority, to condition the spending of Federal dollars. It doesn't speak to Congress's authority under the Commerce Clause. It doesn't speak to Congress's power over Federal programs—something that Professor Currie alluded to before. Even with respect to section 5 of the Fourteenth Amendment vis-a-vis the States, *Flores* doesn't challenge Congress's ability to remedy actions by the States that it considers unconstitutional. An example of this would be voting rights legislation passed in 1982 in response to *City of Mobile v. Bolden*.

So I don't really think there's much doubt that Congress has the power to disagree with the Court, and there's no doubt that the history of congressional action is one in which Congress often does disagree with the Court.

³¹ Contrast the Court's discussion of the impeachment provisions in *Nixon v. United States*, 506 US 224 (1993).

What I'd like to focus on in my testimony this morning is why it is that the Constitution is improved by Congress's disagreeing with the Court. Constitutional decisionmaking, in my view, is improved when all branches of Government engage in a dialogue which, of course, includes disagreements among the branches.

And to start with, I'd like to quote from the confirmation hearings of Justice Kennedy, the author of *Boerne*, and Justice Ginsburg. At his confirmation hearing, Justice Kennedy testified that lawmakers, quote, "would be fulfilling their duty by limiting the effects of Supreme Court decisions they consider wrong."—very interesting coming from the author of *Boerne v. Flores*.

Justice Ginsburg, at her confirmation hearings, states that "courts do not guard constitutional rights alone. Courts share that responsibility with Congress, the President, the States, and the people." I think Justices Kennedy and Ginsburg were aware of what I consider to be a fairly obvious truth, and that is that by challenging the Court, Congress often improves the quality of constitutional decisionmaking. By challenging the Court, Congress makes the Constitution more durable, more vital. Let me explain why I say this. Much of it has to do with how courts are different from policymakers, structurally different from policymakers.

First off, courts are reactive. Courts don't look for cases. Occasionally people accuse them of doing so, but courts have to have a case presented to them, and, as a result, if the Court makes a mistake in an earlier case, the only chance it can reconsider its decision is for there to be a new set of facts which calls into question the decision in the first case.

So for the Court to conclude that it made a mistake when saying that Congress was without authority under the Commerce Clause to prohibit child labor, Congress again needed to pass new child labor legislation, and that's precisely what happened. In *Hammer v. Dagenhardt*, the Court said it's unconstitutional for Congress to regulate child labor, but Congress again passed a child labor statute and eventually, in *United States v. Darby*, the Court concluded that Congress had that power.

Another example, a more controversial example, is abortion. In 1992, the *Casey* court overturned the trimester test in *Roe v. Wade*. The only way in which the Court could have that opportunity was for elected Government to express its disapproval of *Roe*. If everyone simply followed *Roe*, there would never be a chance for the Court to say, "Hold on, the trimester test is unsound, medically unsound," politically unsound, and so on and so forth. So, a court is reactive.

Another structural deficiency which limits what the Court can do is that the Court relies on presentations to it by specific parties at a specific moment in time. The Court can not hold a hearing bringing in all interested individuals. No, the Court is stuck, if you will, with the people who bring the case before it, and they don't necessarily present the Court with complete information. Also, the Court makes a decision at a particular moment in time; facts change, circumstances change. A decision that makes sense in 1988, say *Morrison v. Olson* and the independent counsel statute, may not make decision in 1998.

And because of these changed circumstances, it's important for elected Government again to express its disapproval of what the Court has done. It gives the Court the opportunity not just to reconsider what it has done, it also gives the Court additional information, information unavailable to it when it made its original decision.

I see my time is up. If I can just summarize, please?

Mr. CANADY. Please; please continue.

Mr. DEVINS. Okay; thank you, sir.

Well, one last substantive point before my conclusion and that is that when Congress disagrees with the Court, we tend to focus in on instances where, ultimately, the Court may overturn itself, rewrite its doctrine. In other words, as Professor Currie suggested, the RFRA was an attempt to get the Court to reconsider *Employment Division v. Smith*. Likewise child labor legislation in the 1930's was an attempt to get the Court to reconsider *Hammer v. Dagenhardt*.

But it's often the case that when Congress disagrees with the Court, it's on an issue that the Court will not revisit again, and it's particularly important for Congress to challenge Court decision-making in instances where the issue will not be revisited by the Court.

So, for example, it may be that the Court will not revisit *Morrison v. Olson*, the independent counsel decision, and it may be ultimately only for Congress to conclude that that decision was wrong by refusing to reauthorize the independent counsel. And it's very important that Congress perform that function, because if it does not, those bad decisions will remain on the books.

So, for all these reasons, I am very much convinced that the Constitution is more durable, more vital, more important to the Nation when Congress disagrees with it. It gives the Court a chance to update its thinking. It also gives Congress a chance to enact laws when the Court will not revisit the issue.

Thank you for the opportunity to testify.

[The prepared statement of Mr. Devins follows:]

PREPARED STATEMENT OF NEAL DEVINS, GOODRICH PROFESSOR OF LAW, COLLEGE OF WILLIAM AND MARY

Mr. Chairman, thank you for the opportunity to discuss Congress's role in interpreting the Constitution. My remarks will both call attention to the ways in which Congress can express its disapproval of Supreme Court interpretations of the Constitution and argue that such expressions of disagreement are necessary to "protect and defend" the Constitution.

The text and design of the Constitution as well as the historical record underscore the pervasive role that elected officials play in shaping constitutional values. Nevertheless, nearly two hundred years after *Marbury v. Madison*, the question of whether Supreme Court rulings bind elected officials remains controversial. In a *Washington Post* survey, for example, six out of ten respondents thought the Supreme Court the ultimate constitutional interpreter. In reporting this survey, the *Post* simply noted that those respondents were "correct."

This view, that constitutional truth derives solely from nine individuals (or a majority of them) sitting on the Supreme Court, has, on occasion, been embraced by the Court itself. Witness *City of Boerne v. Flores*, a 1997 decision which considered Congress's power to "overrule" a Supreme Court decision. Citing *Marbury*, the *Boerne* Court declared that "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary." Similarly, in its 1992 decision reaffirming abortion rights—*Planned Parenthood v. Casey*—the Court claimed authority to resolve the abortion dispute, calling on "the contending sides of a national controversy

to end their national division by accepting" "the Court's interpretation of the Constitution."

Decisions like *Casey* and *Boerne* are rare, however. Backed into a corner by elected government challenges to judicial decisionmaking, the Justices claimed authority to settle transcendent values.¹ For the most part, the Justices adhere to a philosophy that is much more modest, circumspect, and nuanced. Anthony Kennedy (the author of *Boerne*), for example, has testified before Congress that lawmakers "would be fulfilling [their] duty" by limiting the effects of Supreme Court decisions that they think are "wrong under the Constitution."²

The historical record provides overwhelming evidence that other parts of government challenge the Court's constitutional reasoning and that the Court is influenced by these challenges as well as the broader social currents which surround it. The Court may be the ultimate interpreter in a particular case, but not always the larger issue of what the case is a part. Congress, the White House, government agencies, interest groups, the general public and the states all play critical roles in shaping constitutional values. As noted by Ruth Bader Ginsburg a year before her appointment to the Supreme Court, judges "play an interdependent part in our democracy. They do not alone shape legal doctrine . . . they participate in a dialogue with other organs of government, and with the people as well."³

CONGRESS AND THE CONSTITUTION

Congress participates in constitutional decisionmaking at all phases of the law-making process, from the enactment of legislation and approval of constitutional amendments to the oversight of government departments and agencies. In recent decades, Congress also has participated in litigation both in its own name and through briefs filed by individual members. Through the Senate's power to confirm judicial nominees, moreover, Congress plays an integral role in defining the composition of the federal judiciary.

Elected government's most direct link to judicial decisionmaking is the overtly political process of selecting and approving federal judges. Accordingly, battles over Supreme Court nominations reveal that the president and Senate both recognize that the best way to shape outputs (Court rulings) is to control inputs (i.e., to control who sits on the Court). In particular, members of the Senate Judiciary Committee "have learned to shape the constitutional dialogue in the confirmation hearings to make clear to nominees that a willingness to profess belief in some threshold constitutional values is a prerequisite for the job."⁴ Beginning with the 1981 nomination of Sandra Day O'Connor, "these threshold values have included a commitment to the existence of . . . the right to privacy and respect for stare decisis."⁵

Congressional influence over constitutional interpretation through the confirmation of judges is only the tip of an iceberg. Before legislation is enacted, Congress often undertakes a constitutional review of the measure. This review may occur in a number of different ways. First, committee and subcommittee staff members as well as House or Senate members themselves may assess the bill's constitutionality. Second, a number of congressional offices may be called upon to assist in this review. The Congressional Research Service, the offices of legislative counsel to the House and to the Senate, and the General Accounting Office all can assist in reviewing constitutional questions. Third, through formalized legislative hearings and informal requests, constitutional scholars, Justice Department officials and other government officials, and interest groups share their views of a measure's constitutionality with members and their staffs.

Consider, for example, the pivotal role played by the House Judiciary Committee in the Supreme Court's approval of the 1964 Civil Rights Act's prohibition of discrimination by restaurants, hotels, and other public accommodations. In the wake of hearings raising grave doubts about whether Congress had the authority to ground this public accommodations provision in the Fourteenth Amendment's equal protection guarantee, Congress invoked its commerce power as an alternative basis for this provision. Because the statute was framed this way, the Supreme Court was

¹ For a detailing of the defensive nature of Court invocations of judicial supremacy, see Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 Va. L. Rev. (forthcoming, Feb 1998). I have attached a copy of this article to my testimony.

² Nomination of Anthony M. Kennedy to be Associate Justice of the United States Supreme Court of the United States: Hearings Before the Senate Judiciary Comm., 100th Cong., 1st Sess. 222-23 (1987).

³ Speaking in a Judicial Voice, 67 N.Y.U. L.Rev. 1185, 1198 (1992).

⁴ Stephen J. Wermeil, *Confirming the Constitution: The Role of the Senate Judiciary Committee*, 56 Law & Contemp. Probs. 121, 122 (Autumn 1993).

⁵ Id.

able to uphold the measure on commerce grounds without ever having to consider the Fourteenth Amendment issue. Had Congress relied exclusively on its authority to enforce the Fourteenth Amendment's equal protection guarantee, the case, of course, would not have been decided on commerce grounds and might well have come out the other way.

Aside from framing issues for judicial resolution, Congress and its members also participate in the litigation process. Sometimes the Supreme Court invites the House, the Senate, or individual members of Congress to present an *amicus curiae* (friend of the court) brief and participate in oral arguments. *Amicus curiae* briefs, most notably in abortion and separation-of-powers disputes, also have been filed at the initiative of the Senate, the House, and their individual members. For example, a coalition of more than two hundred members of Congress filed an *amicus* brief in *Harris v. McRae*, defending the right of Congress to fund or to refrain from funding abortions as it sees fit. Finally, Congress participates as a party to litigation when the Justice Department refuses to defend a statute's constitutionality. In cases involving the constitutionality of the bankruptcy court and the legislative veto, for example, Congress defended the constitutionality of its handiwork.

Once the Supreme Court decides a case, Congress may make use of a wide variety of powers to signal its approval or disapproval of the decision. When Congress agrees with the Court, it may affirmatively assist in the implementation of a Court decision. For example, in response to Southern resistance, Congress took bold steps to make *Brown v. Board of Education* a reality. In 1964 it prohibited segregated school systems from receiving federal aid (Title VI) and authorized the Department of Justice to file desegregation lawsuits. More significant, the implementation of the Elementary and Secondary Education Act of 1965, coupled with the issuance and enforcement of Title VI guidelines, marked a significant shift in federal powers over state education systems. These federal efforts proved critical in ending dual school systems. More actual desegregation took place the year after these legislative programs took effect than in the decade following *Brown*.

Congress, moreover, may also enact legislation at the Court's behest. In 1978 the Court, while upholding the constitutionality of third-party searches of newspapers in *Zurcher v. Stanford Daily*, invited legislative efforts to establish "nonconstitutional protections against possible abuses of the search warrant procedure." Congress accepted this invitation. Concluding that "the search warrant procedure in itself does not sufficiently protect the press and other innocent parties" and that the *Zurcher* decision had "thrown into doubt" "a longstanding principle of constitutional jurisprudence," Congress prohibited such newspaper searches in 1980.⁶

WHEN CONGRESS AND THE COURT DISAGREE

Starting with the First Congress, Congress has proven itself willing to act in the face of contradictory Supreme Court precedent. During the debate in 1789 on the President's removal power, for example, James Madison saw no reason to defer to the judiciary on the constitutionality of what Congress was about to do. While acknowledging that "the exposition of the laws and Constitution devolves upon the Judiciary," he begged to know on what ground "any one department draws from the Constitution greater powers than another in making out the limits of the powers of the several departments."⁷

In response to *Dred Scott*, Congress passed a bill prohibiting slavery in the territories.⁸ Disagreeing with the Court's 1918 ruling that the commerce power could not be used to regulate child labor, Congress two decades later again based child labor legislation on the Commerce Clause.⁹ Public accommodations protections contained in the 1964 Civil Rights Act similarly followed in the wake of a Supreme Court decision rejecting such protections.¹⁰ More recently, lawmakers have challenged Court rulings on abortion, busing, flag burning, religious freedom, voting rights, and the legislative veto.¹¹

Congressional disagreement with the Court takes many forms. At one extreme, Congress simply disregards a Court decision it finds unworkable. *Immigration and Naturalization Service v. Chadha*, invalidating the legislative veto, is such a case. In the twelve years after *Chadha*, 1983-1995, well over three hundred legislative veto provisions were enacted into law. The reason for such widespread disobedience

⁶ Staggers Rail Act of 1980, 94 Stat. 1895 (1980).

⁷ 1 Annals of Congress 500 (Joseph Gales ed., 1834).

⁸ Act of June 19, 1862, c.111, 12 Stat. 432.

⁹ Fair Labor Standard Act of 1938, 52 Stat. 1060.

¹⁰ Title II of the 1964 Civil Rights Act, 78 Stat. 241, 243.

¹¹ See generally Louis Fisher & Neal Devins, *Political Dynamics of Constitutional Law* (2d ed. 1996).

of *Chadha* is that "[n]either Congress nor the executive branch wants the static model of government offered by the Court."¹²

Congress may also seek to nullify Court rulings by amending the Constitution. While constitutional amendment proposals are almost always unsuccessful, these proposals nevertheless may drive judicial decisionmaking. For example, in response to the Court's failure to invalidate gender-based decisionmaking, Congress approved and sent to the states for ratification a proposed Equal Rights Amendment (ERA) prohibiting the abridgement of "equality of rights . . . on account of sex." These efforts prompted the Court to reconsider its approach to gender decision-making, and in the early 1970s Supreme Court decision-making became "fully compatible with arguments made by leading mainstream ERA proponents in such documents as congressional committee reports and hearings records on the ERA, and in testimony in the Congressional Record by leading ERA sponsors."¹³ Ironically, the ultimate defeat of the ERA is sometimes attributed to the Court's general adoption of the amendment's principles.

Another area where Congress has been successful is in countering Supreme Court decisionmaking that does not protect rights that Congress thinks should be protected. Two recent examples stand out. After the Supreme Court upheld, in *Goldman v. Weinberger*, an air force regulation forbidding an Orthodox Jew's wearing of a yarmulke indoors while on duty, Congress enacted legislation overturning this regulation.¹⁴ More strikingly, Congress significantly expanded voting rights protections through its 1982 amendments to the Voting Rights Act. The bill was a direct outgrowth of the Supreme Court's decision in *Mobile v. Bolden*, in which the Court required proof of discriminatory intent as a basis for voting rights litigation. Concluding that the "intent test focuses on the wrong question and places an unacceptable burden upon plaintiffs in voting discrimination cases,"¹⁵ Congress cleared the way for impact-based proofs of discrimination.

Congress, finally, has sought to limit the reach of Court decisions that protect rights in ways that Congress thinks are inappropriate. Following *Roe v. Wade*, Congress revealed its hostility to expansive abortion rights through funding restrictions. Congress likewise made effective use of its power of the purse in limiting school busing.

City of Boerne v. Flores, invalidating legislative efforts to define the content of First Amendment religious liberty protections, does not call into question Congress's broad authority to limit the effect of Supreme Court decisions.¹⁶ To begin with, *Boerne* says nothing about Congress's authority to control federal programs or its power to place conditions on the receipt of federal funds (including the denial of federal funding to disfavored activities). Moreover, while specifying that Congress's authority to enforce the Fourteenth Amendment is limited to "legislation which deters or remedies constitutional violations," the Court acknowledged that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern." Correspondingly, in recognizing that "Congress must have wide latitude in determining" whether corrective legislation is, in fact, remedial, *Boerne* acknowledged Congress's power to engage the Court in constitutional dialogues.

THE LAST WORD DEBATE REVISITED

Congressional practice as well as the design and text of the Constitution all suggest that the overriding value promoted by the framers was a system of checks and balances, with each branch asserting its own powers and protecting its own prerogatives. Furthermore, constitutional dialogues between the courts and elected government often result in more vibrant and durable constitutional interpretation. In particular, a final interpretive authority of the Constitution will make our most fundamental text stagnant and irrelevant, rather than preserve and honor it. Lou Fisher and I develop this point in a forthcoming article, *Judicial Exclusivity and Political Instability*, which I am attaching to this statement. In our view, the Constitution becomes more relevant and more stable when all branches and levels of government do battle with one another.

¹² Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 *Law & Contemp. Probs.* 273, 292 (Autumn 1993).

¹³ Leslie Goldstein, *The ERA and the U.S. Supreme Court*, 1 *Law and Political Studies* 145 (1987). See also Jane Mansbridge, *Why We Lost the ERA* 47 (1989).

¹⁴ National Defense Authorization Act for Fiscal Years 1988 and 1989, 101 Stat. 1019, 1087 (1987).

¹⁵ S. Rep. No. 97-417 at 13 (1982).

¹⁶ For an elaboration of why I think *Boerne* is of limited reach, see Neal Devins, *How Not to Challenge the Court*, 39 *Wm. & Mary L.Rev.* (forthcoming 1998).

Courts and elected officials should both be activists in shaping governmental policy, in large measure, because judges and politicians sometimes react differently to social and political forces. Congress, for example, focuses its "energy mostly on the claims of large populous interests, or on the claims of the wealthy and the powerful, since that tends to be the best route to re-election."¹⁷ Courts, in contrast, are less affected by these pressures, for judges possess life tenure. Accordingly, because special interest group pressures affect courts and elected officials in different ways, a government-wide decisionmaking process encourages a full-ranging consideration of the costs and benefits of different policy outcomes.

This politicization of constitutional discourse, while contributing to partisan value-laden constitutional interpretation, is better than the alternatives—legislative or judicial supremacy. Legislative supremacy, as *Marbury* recognized, would blur the line separating the Constitution from ordinary laws. Moreover, subject to the pressures of reelection, "legislatures are too likely to get caught up in the passions of the moment, be they flag burning, alleged communists in the State Department, to the need to really sock it to various types of criminal defendants."¹⁸ For progressives and conservatives alike, lawmakers' propensity to do that which is politically expedient makes legislative supremacy unpalatable.

Judicial exclusivity, like legislative supremacy, creates more problems than it solves. "When technologies are changing rapidly, when facts or values are unclear and when democracy is in a state of moral flux, courts [with limited factfinding capacity and inability to respond quickly to changing circumstances] should recognize that they may not have the best or final answers."¹⁹ Moreover, lacking the powers of purse and sword, as *Casey* recognized, the Court's authority is necessarily tied to "the people's acceptance for the Judiciary." The Court is well aware of this: for example, Justice Owen Roberts, whose alleged "switch in time" saved the *Lochner* Court from Roosevelt's Court-packing plan, acknowledged that "[l]ooking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country."²⁰

To be sure, those who believe that Congress is not "ideologically committed or institutionally suited to search for the meaning of constitutional values"²¹ may question the practicality of this dynamic decisionmaking model. Populist constitutional interpretation, however, serves as an important foil for the Court. In so doing, elected government interpretation makes the Constitution more relevant and more durable.

The saga of abortion rights underscores the appropriately interactive nature of constitutional decisionmaking.²² *Roe v. Wade* served as a critical trigger to judicial recognition of abortion rights, overcoming politically potent pro-life interests that have always stood in the way of populist abortion reform. *Roe* also prompted the elected branches of government into action. From 1973 to 1989, 306 abortion-restricting measures were passed by forty-eight states. In 1992, after two decades of elected government resistance as well as the appointment of new Supreme Court Justices, the Court responded to these pressures and returned much of the abortion issue to the states. Repudiating *Roe*'s stringent trimester test in favor of a more deferential "undue burden" standard, *Planned Parenthood v. Casey*, while reaffirming "the central holding of *Roe*," signalled the Court's increasing willingness to uphold state regulation of abortion.

Without question, to a pro-choice advocate, *Casey*'s balance sells out important interests of women, and, to a pro-lifer, it permits moral outrages to continue. But there is no realistic alternative to *Casey*'s balancing act. The political upheaval that followed (and still follows) *Roe* reveals the unworkability of a strident pro-choice jurisprudence. But a jurisprudence allowing the prohibition of abortion is equally unworkable. In the years before *Roe*, when nontherapeutic abortions were prohibited in nearly every state, abortions were both less safe and almost as common as they are today. Ultimately, abortion is too divisive for either pro-choice or pro-life absolutism to rule the day. Absent the constitutional dialogue that followed *Roe*, however, the politically unworkable trimester standard would have remained in place.

¹⁷ Steven G. Calabresi, Thayer's Clear Mistake, 88 Nw. U.L. Rev. 269, 273 (1993).

¹⁸ Id.

¹⁹ Cass Sunstein, Supreme Caution: Once Again the High Court Takes Only Small Steps, Wash. Post, July 6, 1997 at C-1.

²⁰ Owen J. Roberts, The Court and the Constitution 61 (1951).

²¹ Owen Fiss, The Forms of Justice, 93 Harv. L.Rev. 1, 10 (1979).

²² For a detailed treatment of this point, see Neal Devins, Shaping Constitutional Values: Elected Government, the Supreme Court, and the Abortion Debate (1996).

CONCLUSION

Congress must not shy away from its responsibility to interpret the Constitution and, when necessary, challenge the Court. Delegations of constitutional responsibility to the courts through expedited review provisions or suggestions that Court interpretations are definitive both weaken the Congress and the Constitution.²³ Our system of government, as Justice Ginsburg rightly observed at their confirmation hearing, is one where courts "do not guard constitutional rights alone. Courts share that responsibility with Congress, the President, the states, and the people."²⁴

This process of "ambition counteracting ambition" is central to our system of divided government. By empowering "we the people" through their elected representatives, it also makes the Constitution more vital, more durable, and more democratic.

Mr. CANADY. Okay; thank you, Professor Devins. Professor Kinkopf.

STATEMENT OF NEIL KINKOPF, VISITING ASSISTANT PROFESSOR OF LAW, CASE WESTERN RESERVE UNIVERSITY LAW SCHOOL

Mr. KINKOPF. Thank you, Mr. Chairman, members of the committee. It's a real honor to appear before you today and a particular privilege to appear on such a distinguished panel.

The relationship between Congress and the Court with respect to constitutional interpretation calls to mind Justice Jackson's observation that the Constitution "enjoins upon the branches of the Federal Government separateness but interdependence, autonomy but reciprocity." We've heard a lot of discussion this morning about the separateness and the independence of the roles of the branches in interpreting the Constitution.

I would like to focus on the interdependence and reciprocity. In particular, I would like to focus on the deference that the Court owes to Congress's constitutional interpretations contained in legislation and in the legislative record that supports that legislation.

There is no broadly-applicable rule to determine whether, or even to what extent, the Court owes deference to Congress. It depends on the context and content of particular legislation and the legislative record. For example, the Court will extend differing levels of deference depending on whether legislation draws classifications based on race, based on gender, or based on, say, age. I want to discuss the deference that the Court owes to congressional constitutional interpretation in the context of separation of powers and the structure of the Federal Government.

I think first it would be useful to recall the two fundamental purposes underlying the structure of the Federal Government. First, because the framers feared that large concentrations of unchecked power are subject almost inevitably to abuse, the Constitution separates the Government into three branches and makes each branch the primary guardian of its own constitutional role, arming it constitutionally with checking powers on the others.

Second, the Constitution sought to create a viable and effective national Government, particularly in light of its experience under

²³ For a critical examination of Congress's employment of an expedited judicial review provision in 1996 item veto legislation, see Neal Devins and Michael A. Fitts, *The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court's Attempt to Control Constitutional Conflicts*, 86 Geo. L.J. 351 (1997).

²⁴ Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 103d Cong., 1st Sess. 50 (1993).

the Articles of Confederation. The power to establish the procedures, structures, and mechanisms of that effective self-government is granted primarily to the Congress.

Now there's tension that arises between these two structural purposes, particularly when Congress legislates in a way that is perceived to undermine the separateness of the branches. The Court has resolved that tension largely by according great deference to Congress's constitutional judgment that a given measure will be effective and will not subvert the constitutional separation of powers.

In granting that deference, the Court places a great deal of emphasis on the initial judgment not to rely on parchment barriers between the branches, but rather to defer to each branch's ability to act as the primary guardian of its own role.

One might view the Court's precedents in this area as according slightly less preference when the branch affected by a given piece of legislation is the judiciary itself. I don't think that's cynical on the part of the Court, if in fact that's the case, but rather it's because the Court's check from the Constitution is judicial review. And so, it is in accord with its role as the primary guardian—its duty as the primary guardian of its own constitutional role—that the Court would perhaps grant slightly less deference where a given statute affects the judiciary.

The Supreme Court's recent decision in *Boerne* stands in contrast to this approach. The Religious Freedom Restoration Act was supported by an extensive legislative record in support of Congress's judgment that RFRA was constitutional. And the Supreme Court recognized that the *Boerne* case was one that fundamentally involved separation of powers. They were concerned about whether Congress had actually sought to exercise the judicial power.

I believe that in striking down RFRA, the Supreme Court may well have been insufficiently deferential to Congress's constitutional judgment. I think the *Boerne* court's failure to be sufficiently deferential can be traced to the fact that although the Court recognized the separation of powers setting for its decision, it didn't recognize the precedents that it could have looked to for guidance as to just how deferential it should have been.

But it also brings us to a second point—and I notice my time has expired—

Mr. CANADY. You may continue.

Mr. KINKOPF [continuing]. But if I can get to the second point, which is that Congress can help the Court be deferential. In particular, Congress can make findings that demonstrate that it recognizes the barriers and boundaries to its own powers, which is what particularly motivated the Court in *Boerne* and in a number of other recent cases, particularly I'm thinking of the *Lopez* decision striking down the Gun-Free School Zones Act.

The Court has been particularly concerned with making sure that Congress stays within its enumerated powers, and it views it as perhaps its most important function—to make sure that the Congress does that. If Congress establishes a legislative record that identifies the boundaries of its power and that makes findings that demonstrate that the legislation it has enacted is drawn with respect to those boundaries, keeping those boundaries on its power

in mind, then the Court has indicated that it will accord great deference to Congress's constitutional judgments.

And in both *Boerne* and *Lopez*, the Court expressed its concern that it couldn't find that in the legislative record. Now in the *Boerne* case that's understandable, because there was disagreement between the Congress and the Court about where the boundary on that power was, whether the power under section 5 was simply preventive and remedial, or whether it included some sort of substantive component.

But I think the more general point still holds, and that is that in the case where it's unclear that Congress has acted within the scope of its powers, the Court will look to the legislative record, and if Congress has established a legislative record that both identifies the barriers on its power and the ways in which the particular enactment stay within respect of those boundaries, the Court will, in fact, defer to Congress's constitutional judgments.

Thank you.

[The prepared statement of Mr. Kinkopf follows:]

PREPARED STATEMENT OF NEIL KINKOPF, VISITING ASSISTANT PROFESSOR OF LAW,
CASE WESTERN RESERVE UNIVERSITY LAW SCHOOL

It is an honor to be invited to give testimony before this subcommittee and to appear on such a distinguished panel. The topic of today's hearing, "Congress, the Court, and the Constitution" calls to mind Justice Jackson's observation on the relationship between the branches of the federal government. The Constitution, he said, "enjoins upon [the] branches separateness but interdependence, autonomy but reciprocity."¹ The Supreme Court's recent decision in *Boerne v. Flores*,² affords an excellent opportunity for examining both the separateness and the interdependence of constitutional interpretation by the courts and by Congress. I will have a few words to say about the separateness and independence of congressional constitutional interpretation, but I want to concentrate on the interdependence and reciprocity of judicial and congressional constitutional interpretation. In particular, I will examine the level of deference that the courts owe to Congress's constitutional judgments.

I will begin by discussing the level of deference due Congress's constitutional judgments in separation of powers cases generally. This discussion will set the stage for examining the level of deference that was due and that was actually accorded in *Boerne*. I will then draw from this examination observations about how Congress can help the Courts defer to Congress's constitutional judgments. I arrive at two conclusions. First, where it is unclear whether Congress has acted within the scope of one of its enumerated powers, the Court will be deferential to Congress's judgment that it has acted within that power, but the extent of the deference will be greater—and perhaps determinatively so—where Congress has made findings that indicate Congress is aware of the nature and limits of the enumerated power it is exercising and has drafted its legislation in recognition of and conformance to those limits. Second, where there is concern that Congress has actually exercised the power of another branch, the legislative history should specifically address this concern and explain how Congress has sought to avoid stepping beyond the legislative sphere and has indulged interbranch comity with respect to the executive or judiciary.

After this discussion of the interdependence between Congress and the Courts, I will turn to their independence and review some of the benefits that derive from congressional non-acquiescence in Supreme Court doctrine. This discussion draws on analogous executive branch approach to non-acquiescence. I conclude that there are important benefits to be derived from Congress exercising an independent interpretive role, even where its interpretation conflicts with the Supreme Court's.

¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

² 117 S. Ct. 2157 (1997).

1. INTERDEPENDENCE: JUDICIAL DEFERENCE TO CONGRESSIONAL CONSTITUTIONAL JUDGMENTS

A. The General Separation of Powers Context

There is in fact no single level of deference that the courts do or should accord Congress's constitutional judgments. Instead, the level of deference due a congressional constitutional judgment depends on the subject matter of the legislation under review and the specific power under which Congress is acting as well as the context and content of the specific legislation. So, for example, the courts will accord differing levels of deference to Congress's constitutional judgments in connection with legislation that draws racial classifications, gender-based classifications, and age-based classifications. Because many of the recent cases that have starkly posed the question of deference, including *Boerne*, have arisen in the context of separation of powers,³ I will confine my inquiry to the level of deference that the judiciary owes Congress's constitutional judgments regarding the allocation and exercise of the federal government's power.

Even under the heading "separation of powers," the level of judicial deference due Congress's constitutional determinations will vary. It is helpful to remember the purposes that the constitutional structure of the federal government is designed to serve. The Constitution structures the federal government to achieve two fundamental purposes. First, it safeguards the liberty of the governed by dividing the federal government into three branches and assigning each a distinct role in the exercise of federal power.⁴ The framers accepted the premise that large concentrations of unchecked power were peculiarly subject to abuse and so divided the constitutional powers of the federal government into three branches and subjected each branch in the exercise of its power to checking or limiting power vested in the others.⁵ The natural ambition of each branch would lead it to prevent the others from encroaching upon its constitutionally assigned sphere.⁶ Under this design, then, each branch is to be the primary guardian of its own constitutional role. Second, the Constitution's framers were determined to create a viable and effective national government to replace what they regarded as the embarrassing spectacle of ineffectual national government under the Articles of Confederation.⁷ The Constitution assigns Congress the function of establishing effective forms of national self-government and grants Congress broad powers to structure the federal government primarily through the Necessary and Proper Clause.⁸ Congress establishes the structure of the executive and judicial branches. Within that structure it orders and arranges the powers and duties of each by establishing departments and agencies⁹ and the subunits and bureaus of each, as well as by creating all offices and defining their duties and powers and the limits on those duties and powers. Congress also prescribes the procedures officials must follow in exercising federal power and the conditions on which that power may be exercised. In sum, while the Constitution creates the executive and judicial branches, Congress gives each its form and content, according to its judg-

³ The Supreme Court has invoked the doctrine of separation of powers to resolve a large number of recent controversies, see, e.g., *Printz v. United States*, 117 S. Ct. 2365 (1997); *Edmond v. United States*, 117 S. Ct. 1573 (1997); *Clinton v. Jones*, 117 S. Ct. 1636 (1997); *Loving v. United States*, 116 S. Ct. 1737 (1996); *Plaut v. Spendthrift Farm Co.*, 115 S. Ct. 1447 (1995), including at least one case where the litigants apparently did not realize the doctrine was implicated. See *Lebron v. National Passenger Railroad Corp.*, 115 S. Ct. 961 (1995).

⁴ See, e.g., *Loving v. United States*, 116 S. Ct. 1737, 1743 (1996); *Plaut v. Spendthrift Farm Co.*, 115 S. Ct. 1447, 1463 (1995) (Breyer, J., concurring); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 824 (1987); *Bowsher v. Synar*, 478 U.S. 714, 730 (1986); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring); *THE FEDERALIST* No. 47, at 302-03 (Madison) (Clinton Rossiter, ed. 1961).

⁵ See generally *THE FEDERALIST* NOS. 47-49, 51.

⁶ *THE FEDERALIST* No. 51, at 337 (Edward Mead Earle, ed. 1976).

⁷ See, e.g., *THE FEDERALIST* No. 15 (Hamilton) (Clinton Rossiter, ed. 1961); *THE FEDERALIST* No. 51, at 321 (Madison). The Court has repeatedly identified effective self-government as an important policy derived from, and to be applied in questions regarding, the constitutional structure of the federal government. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 381 (1989); *Buckley v. United States*, 424 U.S. 1, 121 (1976) (per curiam); *Panama Refg. Co. v. Ryan*, 293 U.S. 388, 421 (1935); *Union Bridge Co. v. United States*, 27 S. Ct. 367, 374 (1907) *Buttfield v. Stranahan*, 24 S. Ct. 349, 355 (1904); *Field v. Clark*, 12 S. Ct. 495, 505 (1892).

⁸ U.S. Const. Art. I, § 8 cl. 17. On Congress's broad authority under the Necessary and Proper Clause, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The Constitution specifically confers significant latitude in Congress to structure the federal judiciary in Article III. See U.S. Const. Art. III, § 1, 2.

⁹ In the case of the judiciary, it creates and structures the various article III courts and the agencies and offices that support those courts, such as the Administrative Office of United States Courts and magistrate judgeships.

ment as to which forms will be most effective within the constraints of the Constitution's text and structure.¹⁰

It is occasionally asserted that Congress has exercised its Necessary and Proper Clause power in a way that impermissibly encroaches upon one of the other branches by enacting legislation that interferes with the ability of one of the other branches to perform its functions.¹¹ The two fundamental purposes of the Constitution's structure thus often come into tension. Rather than establishing a system of specific, categorical rules to resolve this tension, the Supreme Court has interpreted this division to be "governed according to common sense and the inherent necessities of the governmental co-ordination."¹² Indeed, the Supreme Court has fashioned a standard that, in both formulation and application, is extremely deferential to the Congress's judgment that the resulting arrangement of federal power will comport with the constitutional system of separation of powers. Thus, the Court will find Congress impermissibly to have interfered with one of the other branches only if its enactment "prevents the [other b]ranch from accomplishing its constitutionally assigned functions."¹³ Even then, a statute that does so is unconstitutional only if its impact is not justified by an overriding need to promote objectives within the Congress's constitutional authority.¹⁴

The Court has used this same general separation of powers formulation whether Congress is asserted to have interfered with the executive branch or with on the judicial branch.¹⁵ The Court's application of this formulation has been only slightly less deferential where a statute is asserted to have interfered with the judiciary as compared with asserted interference with the executive.¹⁶ In *Commodity Futures Trading Comm'n v. Schor*,¹⁷ the Supreme Court held that Congress could authorize a non-Article III court to decide a state common law cause of action if raised as a counterclaim in a proceeding that is otherwise validly before the tribunal. Generally, such tribunals are authorized to hear regulatory or administrative claims but the Supreme Court has held that Article III prohibits Congress from assigning them authority to hear causes of action that are within the core of Article III jurisdiction. State common law causes of action are at the core of Article III's jurisdiction. In *Schor*, the Court allowed a non-Article III tribunal to exercise jurisdiction over a contract dispute, a classic state common law cause of action, that was raised as a counterclaim in a proceeding initiated to resolve an administrative claim. While the Court recognized that such claims implicate the core of the judicial power, it was extremely deferential to Congress's constitutional conclusion that allowing the CFTC to hear such disputes as counterclaims would not subvert the role of the judiciary or the constitutional balance of power. In particular, the Court deferred to Congress's judgment that counterclaim jurisdiction was important to the CFTC's effective operation, pronouncing that the legislation's "primary focus was on making effective a specific regulatory scheme."¹⁸

This approach allows Congress to fulfill its constitutional role of arranging and ordering the exercise of federal power through the forms it deems to be most effective and to maintain the constitutional balance of power, while preserving to each branch the role of primary guardian of its constitutional sphere. It is in view of this latter role that we find justification for the Court's somewhat less deferential appli-

¹⁰ On the importance of effective self-government as a constitutional value, see GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD* (1997); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596 (1989); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

¹¹ I mean to distinguish those cases where Congress has impermissibly aggrandized itself by assigning non-legislative power to itself, one of its committees, or an official subject to its control. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986). I discuss this anti-aggrandizement principle *infra*.

¹² *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928).

¹³ *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 443 (1977).

¹⁴ *Id.*

¹⁵ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 393 (1989); *CFTC v. Schor*, 478 U.S. 833, 851 (1986) (emphasizing minimal practical effect on the judiciary and importance of asserted encroachment to challenged legislative scheme).

¹⁶ While the Court has typically upheld statutes against the assertion that they impermissibly encroach upon the judiciary, see *Schor*; *Thomas v. Union Carbide*, 473 U.S. 568 (1985), the Court has occasionally struck down a statute on the grounds of encroachment on the judiciary, see *Schor*, 478 U.S. at 851-52 (characterizing *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), and *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792)). In contrast, the Court has never struck down a statute as an encroachment on the executive branch.

¹⁷ 478 U.S. 833 (1986).

¹⁸ 478 U.S. at 855; see also *Thomas v. Union Carbide*, 473 U.S. 568, 594 (1985). Compare *Morrison v. Olson*, 487 U.S. 654 (1988) (applying test in the context of asserted interference with the executive branch).

cation of the general separation of powers principle to cases involving possible encroachments on the judicial branch as compared with the executive branch. In the former, the Court acts as guardian of its own role, while in the latter the Court steps back and allows the executive branch to guard itself. It bears emphasizing, however, that the Court is only *slightly* less deferential to Congress's judgments in cases involving asserted encroachment on the judiciary. The Court's deference in these cases demonstrates the significance it places on Congress's function of establishing effective mechanisms of governance and its respect for Congress's constitutional judgment that the mechanisms it selects will not undermine the separation of powers.

A related question derives from the constitutional division of power: Congress may exercise only the legislative power. Any attempt by Congress to exercise judicial or executive power, whether itself or through one of its committees or agents, is unconstitutional.¹⁹ This much is uncontroversial. The difficult case arises when, in response to an assertion that a statute represents an exercise of a non-legislative power, Congress can plausibly point to an expressly enumerated power as authority for its statute. Put another way, how do we determine whether Congress, under the guise of an enumerated power, has actually exercised an executive or judicial power? At least one of the framers, James Madison, recognized this concern and wrote:

The legislative department[s] . . . constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments. It is not infrequently a matter of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere.²⁰

Recalling the constitutional commitment to effective self-government and recognizing that the Constitution impresses upon each branch the duty to act as primary guardian of its own constitutional role and grants each branch powers to fulfill that duty, Congress should expect great deference to its determination that a given piece of legislation represents a necessary and proper exercise of one of its constitutionally enumerated powers.²¹ Indeed, James Madison made the above-quoted observation in the context of arguing that the only effective means of keeping Congress within the legislative sphere would be through each branch acting to preserve its constitutional role rather than through rigid and formalistic "parchment barriers."

While Madison was prescient in foreseeing this controversy, it has only rarely materialized. The question whether legislation is within Congress's enumerated power, or whether it is properly seen as an exercise of a non-legislative power has most often involved concern that Congress has exercised an executive power, particularly the appointment power. The Constitution establishes a clear division of labor with respect to creating and filling federal offices. The Constitution assigns Congress the power to create offices and assigns the President primary responsibility for filling them.²² This clear line separating the power to create offices from the power to appoint officers is breached when Congress adds duties to an existing office. While Congress plainly has authority to define and redefine offices, there is concern that in adding duties to an existing office with a known occupant, Congress will have essentially created a new office and chosen the officer to fill the "new" office.²³ It was on this ground that the Financial Institutions Reform, Recovery and Enforcement Act was ruled unconstitutional.²⁴

¹⁹ See, e.g., *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991); *Bowsher*, 478 U.S. at 727; *Myers v. United States*, 272 U.S. 52 (1926).

²⁰ THE FEDERALIST NO. 48, at 323 (Madison) (Edward Mead Earle, ed. 1976).

²¹ See, e.g., *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

²² The Appointments Clause requires the President to obtain the Senate's advice and consent and allows Congress, in establishing inferior offices, to provide for appointment by the President, a court of law, or a department head without Senate confirmation. However one characterizes the President's role, what is clear is that the Constitution specifically and intentionally withheld the power to fill offices from Congress. The framers were concerned placing the power to create offices and the power to fill them in the same hands would lead to abuse.

²³ A closely related issue would arise if legislation were to abolish an office and recreate it. In this case, the issue would be whether Congress had exercised the executive removal power under the guise of its structural power under the Necessary and Proper Clause.

²⁴ Until 1989 the savings and loan, or thrift, industry was regulated by the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation. FIRREA abolished

As the framers anticipated, these controversies are typically resolved between the Congress and the executive branch without involving the judiciary. Nevertheless, the courts have had occasion to fashion a standard, known as the *Shoemaker* doctrine, to govern this controversy. As with the approach to separation of powers generally, the *Shoemaker* doctrine is, in both formulation and application, extremely deferential to Congress. It requires only that the new duties be germane to the office's pre-existing duties. In a recent decision, the Supreme Court held that any commissioned military officer could be detailed to act as a military judge without a formal constitutional appointment because the duties of a military judge are sufficiently germane to the duties of any commissioned officer of the armed forces.²⁵ A comparison of the duties of a Second Lieutenant on a naval supply ship, for example, with the duties of a military judge demonstrates just how deferential the Court's application of the germaneness requirement can be.

B. Deference in *Boerne*

Last term, the case of *Boerne v. Flores*²⁶ presented the question of how to address this controversy when legislation is attacked as an exercise of the judicial power, rather than the executive power. Specifically, the Court was asked to determine whether the Religious Freedom Restoration Act ("RFRA") was a valid exercise of Congress's broad authority under Section 5 of the Fourteenth Amendment, or instead represented congressional exercise of the judicial power.²⁷ Consistent with the Court's approach to separation of powers generally, as discussed above, and in recognition of the important constitutional values supporting that approach, the Court should have employed a deferential standard similar to the *Shoemaker* germaneness requirement and have applied that standard with slightly greater scrutiny, which is to say with slightly less deference, than the Court accords in the *Shoemaker* context. In fact, this is precisely what the Court purported to do.

In formulating the governing standard, the Court virtually paraphrased the *Shoemaker* germaneness requirement. It held that "[t]here must be a congruence and proportionality between" Congress's enumerated power and the "means adopted to that end."²⁸ In the same breath, the Court expressed its considerable deference for Congress's judgment, "the line between measures that" are within and without Congress's authority "is not easy to discern, and Congress must have wide latitude in determining where it lies. . . ."²⁹ Despite the articulated standard and expressed intention to accord substantial deference to Congress's constitutional judgment that the enactment of RFRA was within its enumerated powers, the Court ruled the Act unconstitutional on the ground that RFRA was not within Congress's authority under Section 5 of the Fourteenth Amendment.

Congress had compiled an impressive and extensive legislative record detailing the injuries that it sought to remedy through RFRA and the need for legislation to remedy those injuries.³⁰ I believe that the Court articulated an appropriately deferential standard by which to review whether RFRA was within Congress's enumerated power to enact but that, in light of the extensive legislative findings and conclusions, the Court was insufficiently deferential in applying that standard to Congress's constitutional judgment that RFRA was within its authority. Why, then, was the Court insufficiently deferential to Congress's determination? Part of the blame obviously rests with the Court. The Court failed to locate its analysis within the broader separation of powers context or even within the more specific context of cases, like *Shoemaker* and *Weiss*, that examine whether Congress has actually exercised the power of another branch or has remained within its enumerated powers. Had it explored this context, it would have found further support for the "con-

these entities and replaced them with the Office of Thrift Supervision and the Savings Association Insurance Fund. OTS differed from FHLBB primarily in that it would be headed by an individual director, rather than a three-member board. FIRREA provided that the chairman of the board of the FHLBB would serve as the initial director of OTS. See *Olympic Fed. Sav. & Loan v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183 (D.D.C. 1990).

²⁵ *Weiss v. United States*, 114 S. Ct. 752 (1994).

²⁶ 117 S. Ct. 2157 (1997).

²⁷ I do not mean to suggest that this determination turns on Congress's motive. In the *Shoemaker* context, for example, Congress may not add extraneous duties to an office, regardless of its motive for doing so. Compare *Weiss*, 114 S. Ct. at 759 (suggesting that where the legislation adds the new duties not to a specific office but to a large class of offices, germaneness may be required only if there is evidence that the legislation is motivated by a congressional attempt to exercise the appointment power). It is, in that sense, an objective standard. If Congress adds non-germane duties to an existing office, it has exercised the appointment power, whether it subjectively meant to or not.

²⁸ *Id.* at 2164.

²⁹ *Id.*

³⁰ See, for example, the extensive history cited by *Boerne* itself. *Id.* at 2169.

gruence and proportionality" standard it articulated, but would also have garnered concrete guidance on how to apply that standard.³¹ This would have indicated using Shoemaker and Weiss as a baseline against which to assess the level of deference due Congress's findings and conclusion, and should have alerted the Court that the level reflected in its decision was inadequate.

Nevertheless, Congress has the means to provide the Court a basis for appropriate deference to Congress's constitutional judgments. The Constitution embodies the fundamental judgment that the federal government is a limited government of expressly enumerated powers. Although the line between actions that fall within these powers and outside of them is not always clear, the line "exists and must be observed."³² The Court takes very seriously its role in ensuring that Congress does not either itself take action or authorize other federal action that is beyond these enumerated powers, and may in fact view this as its most important function.³³ One might ask why the Court should require Congress to make such findings expressly. Surely Congress's judgment that a given piece of legislation is within its constitutional power to enact is implicit in its enactment. In the vast majority of cases, the Court accepts Congress's implicit judgment. Where it is clear to the Court that the enactment is within Congress's authority, it requires no express corroboration. It is where the Court cannot perceive how the enactment respects the constitutional limits on Congress's authority that it looks to Congress for an explanation in the form of findings and a legislative record. First, this exercise ensures that Congress recognizes the same limits on its power that the Court perceives and that Congress has drawn its legislation to conform to those limits. Second, there is reason to doubt that Congress considers the constitutionality of each provision of each piece of legislation it enacts and therefore to question whether enactment carries an implicit congressional determination of constitutionality. For example, Congress has enacted hundreds of legislative vetoes since the Supreme Court ruled them unconstitutional in *INS v. Chadha*.³⁴ There is no indication that Congress pauses to consider the constitutionality of these provisions before enacting them. It is understandable, therefore, that the Court may have some doubt as to whether Congress actually considers the constitutionality of each provision it enacts. If Congress has not, to what is the Court to defer?

In *Boerne* the Court examined the legislative record for evidence that Congress recognized the extent and limits on its Section 5 power and had drafted RFRA with those limits in mind. The Court noted that the record lacked evidence of "animus or hostility to the burdened religious practices" and was not directed to the issue of the intent underlying generally applicable state laws and local ordinances. More important, the legislative record did not attempt, in the view of the Court, to demonstrate a congruence and proportion between the operative provisions of RFRA and the Congress's power under Section 5 to remedy or prevent violations of individual constitutional rights. In this connection, the Court emphasized RFRA's "universal coverage" and, at least by implication, the legislative record's failure to consider whether a different standard might be appropriate in different contexts, such as prison management as opposed to state employment as opposed to zoning regulation.³⁵ Finally, the legislative record included significant indication that RFRA was in fact designed to exercise the judicial power by overruling the Supreme Court's

³¹ An analogy may be illuminating. Merely articulating the strict scrutiny standard, which requires that legislative means be narrowly tailored to a compelling governmental interest, does not fully capture strictness with which that standard is applied. This can be seen most clearly by examining the practical application of the standard in the Court's precedents. Similarly, a full appreciation for the deference due Congress is most clearly seen from the deference actually accorded in separation of powers cases involving the judiciary, such as *Schor*, as compared with those involving the executive, such as *Morrison*, as well as those involving concern that Congress has exercised the power of another branch, such as Shoemaker and Weiss.

³² *Boerne*, 117 S. Ct. at 2164.

³³ See *id.* at 2162 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)); see also *United States v. Lopez*, 115 S. Ct. 1624 (1995).

³⁴ 462 U.S. 919 (1983). See Louis Fisher, *The Legislative Veto: Invalidated It Survives*, 56 L. & CONTEMP. PROBS. 273, 288 (1993).

³⁵ 117 S. Ct. at 2162.

decision in *Oregon v. Smith*.³⁶ It is, at least conceivably, within Congress's ability to remedy each of these shortcomings in the legislative record.³⁷

A second case is instructive, *United States v. Lopez*. This case raised the question whether Congress had acted within the scope of its power under the Commerce Clause.³⁸ Congress had enacted a statute making it a federal offense to possess a gun in a school zone. The question presented was, in shorthand, whether the possession of a gun in a school zone is an "activity . . . that substantially affect[s] interstate commerce." There, the Court did not perceive the substantial effect and so looked for legislative findings in order that it might defer to Congress, but found them lacking.³⁹

This review of *Boerne* and *Lopez* yields two observations. First, where it is unclear whether Congress has acted within the scope of one of its enumerated powers, the Court will be deferential to Congress's judgment that it has acted within that power, but the extent of the deference will be greater—and perhaps determinatively so—where Congress has made findings that indicate Congress is aware of the nature and limits of the enumerated power it is exercising and has drafted its legislation in recognition of and conformance to those limits.⁴⁰ Put another way, the courts will defer to Congress's interpretation of its own constitutional authority, such as under the Commerce Clause or Section 5 of the Fourteenth Amendment, when there is an interpretation to defer to. Second, where there is concern that Congress has actually exercised the power of another branch, the legislative history should specifically address this concern and explain how Congress has sought to avoid stepping beyond the legislative sphere and has indulged interbranch comity with respect to the executive or judiciary, as the case may be.

II. CONGRESS'S INDEPENDENT ROLE IN INTERPRETING THE CONSTITUTION

While *Boerne* demonstrates that the Court will extend broad deference to Congress's constitutional judgment, reflected in a well-developed legislative record, that it has drafted legislation that remains within the boundaries of enumerated congressional authority, *Boerne* also indicates that the Court will not defer to Congress's determination on the logically prior question: precisely where those boundaries are drawn. Nevertheless, there are important benefits to be derived from Congress expressing, including as the declared basis for legislation, its own constitutional interpretation. First, where Congress adheres to a constitutional interpretation that is at odds with the Court's precedents and legislates on that basis, it gives the Court an opportunity to reconsider and overrule its precedents. Once again, *Boerne* is instructive. Each of the three dissenting justices urged the Court to use RFRA as an occasion to revisit and overrule its decision in *Smith*.⁴¹ A less dramatic consequence than overruling a precedent or line of precedents, Congress's adherence to its own constitutional interpretation may give the Court an opportunity to develop its doctrine within the confines of existing precedent or to consider constitu-

³⁶ 494 U.S. 872 (1990). The *Boerne* Court began its analysis by observing that "Congress enacted RFRA in direct response to the Court's decision in . . . *Smith*." 117 S. Ct. at 2160. The findings and purposes set forth in RFRA support the Court's view. These findings include statements that may be taken to assert the meaning of religious liberty protected under the first amendment, criticize *Smith*, and articulate a different constitutional standard for assessing First Amendment claims than the Court had fashioned in *Smith*. See 42 U.S.C. § 2000bb(a) & (b). The Court appears to have adopted this understanding of RFRA. 117 S. Ct. at 2161 ("Many [members of Congress] criticized the Court's reasoning [in *Smith*], and this disagreement resulted in the passage of RFRA.").

³⁷ I do not mean to say Congress can necessarily, or easily, satisfy the Court. The legislative record that Congress compiled to support enactment of RFRA included an understandable deficiency; it did not recognize that Congress's authority under Section 5 of the Fourteenth Amendment was limited to remedial and preventive action. This deficiency is understandable because, until the Court decided *Boerne*, the Court had not articulated that limitation. It is now possible for Congress to revisit the question of how to remedy and prevent religious discrimination with these limitations in mind and to draft a bill supported by a legislative record that reflects Congress's constitutional judgment that the measure will remedy and prevent religious discrimination in ways that are proportional to and congruent with the limitations of Congress's authority under Section 5. The *Boerne* opinion demonstrates that the Court will regard such the constitutional judgment contained in such a legislative record with great deference.

³⁸ U.S. Const. Art. I, § 8, cl. 3.

³⁹ See 115 S. Ct. at 1632. But see *id.* at 1659–61 (Breyer, J., dissenting).

⁴⁰ See Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695 (1996) (reviewing the benefits of requiring legislative findings to determine whether Congress acted within its Commerce Clause power).

⁴¹ See *Boerne*, 117 S. Ct. at 2176 (O'Connor, J., dissenting); *id.* at 2185–86 (Souter, J., dissenting) (expressing desire to reconsider *Smith* and articulating grave doubts about its "precedential value and its entitlement to adherence").

tional theories that had not previously been argued. Thus, when Congress exercises its independent constitutional judgment, it can actually support and promote Court's ability to perform its "duty . . . to say what the law is"⁴² in a way that slavish adherence to precedent does not.⁴³

Mr. CANADY. Thank you. Professor Strossen.

STATEMENT OF NADINE STROSSEN, PRESIDENT, AMERICAN CIVIL LIBERTIES UNION

Ms. STROSSEN. Thank you very much, Chairman Hyde, Chairman Canady, Representative Scott, and other distinguished members of the committee and distinguished members of the panel. It's really a pleasure, I have to say, to be here, as well as an honor.

Chairman Canady introduced me as the president of the American Civil Liberties Union. That is my volunteer position. I also want to state on the record that I earn my living as a law professor. I teach constitutional law. Chairman Canady said to me when we spoke before these proceedings began that this would be like a seminar, and I have to agree; it certainly is an intellectual feast, to quote that notorious judicial activist, Antonin Scalia. [Laughter.]

But, of course, there are also enormous consequences in terms of individual rights for these discussions that we're holding, and I'd like to zero in on that issue wearing my ACLU hat. It seems to me—and I'm delighted—that every person who has testified so far, including the Members of Congress as well as the academic experts, have agreed that Congress has not only the right, but also the responsibility to reach its own independent judgments as to the constitutionality of particular measures.

I'm so happy that there is agreement and, apparently, enthusiasm about pursuing that role more vigorously, because I have to agree with Congressman Frank, when he said that too often his colleagues are not sufficiently concerned about constitutional issues. Too often we're in the position of trying to persuade Members of Congress to vote against something on the ground that it's unconstitutional, and we are told that that is not something that they feel it is appropriate for them to take into account. So, to the extent that there is a consensus that we should redouble our commitment in all branches of Government to enforce the Constitution, I think that's wonderful.

Now, where I see some possible breakdown in the unanimity goes to the second point I would like to address and that is what law professors and judges often call the one-way ratchet of interpreting constitutional rights or individual freedom independently of the courts. And the notion there is that, yes, Congress does have—and for that matter the executive branch of Government also has—independent power and authority to interpret the Constitution regarding individual rights, but only insofar as rights are more securely protected or there is a more expansive vision of individual liberty that results from that reinterpretation.

⁴²*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁴³I do not mean to endorse contumacious adherence to rejected interpretations. Such resistance can significantly undermine the ability of the judiciary to fulfill its constitutional role. The possibility of such a course of action does not alone eliminate the benefits that may follow on a responsible adherence to a constitutional interpretation in conflict with Supreme Court precedent. As is often the case, this is a question of balance.

Congress does not, under this theory, have the power to reject a Supreme Court decision that says, for example, a certain law violates the First Amendment, and go ahead and re-pass that law (although obviously, the Congress has the power to pass a constitutional amendment). One way that I like to summarize this for my constitutional law students is that the Supreme Court can put a floor under our constitutional rights, but it cannot impose a ceiling over them.

Conversely, though, that would mean that Congress could not sink beneath that floor that the Supreme Court has articulated. I wasn't sure whether Congressman Hostettler would agree with that one-way ratchet theory. I got a little uncomfortable when I heard him criticizing a decision of a Federal court that a certain law that had been passed by Congress violated the First Amendment. I don't think it would be within Congress's prerogative to second guess such a judicial interpretation if it were from the Supreme Court, and the example that he referred to was not from the Supreme Court, so perhaps I have no need to be concerned on that score.

The other possible breakdown in the unanimity here on this one-way ratchet theory of expanding individual rights is, of course, the Supreme Court's decision in the *Boerne* case, and I was happy to hear my distinguished colleagues on this panel agree that that decision is quite questionable.

As Congressman Hyde knows, I had the pleasure of testifying in favor of the Religious Freedom Restoration Act, both in the House and in the Senate. The ACLU spearheaded the coalition, called the Coalition for the Free Exercise of Religion, that lobbied very strongly for RFRA and argued for it in the Supreme Court, and, coincidentally, even as we are meeting here this morning, that coalition is still engaging in discussions about what's next, what steps can be taken, either by Congress or in other branches of Government, to secure the expanded vision of religious liberty that RFRA embodies, and that the Supreme Court rejected.

Now, I do agree though with colleagues who have said that the RFRA decision, the *Boerne* decision, does still leave some openings, and I think that's important. I didn't hear the Supreme Court there to be completely rejecting this one-way ratchet of constitutional law.

May I please beg the Chair's indulgence to continue?

Mr. CANADY. Please continue.

Ms. STROSSEN. I'll try to be very brief. So I agree that Congress has the power to expand constitutional rights. I am concerned, though, about a possible subtext when courts expansively interpret constitutional rights beyond what Members of Congress are willing to support, at least publicly. I'm going to give you an example.

When the ACLU lobbied against the Communications Decency Act, we were told by a number of Members of Congress that they understood that it was unconstitutional, or probably unconstitutional, but they didn't want to risk the ire of their constituency by voting against something that could result in their being labeled soft on porn or soft on crime. And, when the Supreme Court agreed with us and struck down that law, essentially unanimously, in a case that I'm happy is called *Reno v. ACLU*, a number of Members

of Congress who had voted for the law told us they were relieved that the Supreme Court had voted as it did.

I think it's very striking that the members of the Supreme Court, as well as the six lower court judges who ruled on the CDA were unanimous in finding it unconstitutional across a very broad ideological and political spectrum. These judges were appointed by five different presidents—three Republicans and two Democrats—and when this United States Supreme Court is unanimous that a law is constitutional, it is really unconstitutional.

Having said that, it's quite shocking when you consider how very, very few Members of Congress voted against the CDA, and, of course, the Administration enthusiastically supported it. So, I'm very concerned that we have too many elected officials who are not, in fact, seriously upholding their oath to defend the Constitution. Then, to add insult to injury, they turn around and attack those members of the Federal judiciary who do have the political courage and who do take those oaths seriously, even in striking down very politically popular measures.

I'm going to end by harking back to the underlying principles of separation of powers and checks and balances. I wanted to underscore one additional function to those that were laid out by Professor Kinkopf. It's the one that I have foremost in mind, and if I had more time I would cite evidence that the founders had foremost in mind, and that is to maximize individual liberty.

The Supreme Court reminded us of that essential function in the *Mistretta* case in 1989. The Court stressed that separation of powers is not an end in itself; rather, quote, "it is an essential means to the preservation of liberty."

Thank you very much.

[The prepared statement of Ms. Strossen follows:]

PREPARED STATEMENT OF NADINE STROSSEN, PRESIDENT, AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman, and members of the Subcommittee:

I am Nadine Strossen, President of the American Civil Liberties Union and Professor of Law at New York Law School, where I teach constitutional law.

I want to thank House Judiciary Committee Chair Henry Hyde as well as the Constitution Subcommittee Chair Charles Canady and Ranking Minority Member Bobby Scott for inviting me to testify on the vitally important—and perennially controversial—subject of "Congress, the Court, and the Constitution."

I appreciate the opportunity to testify before you today on behalf of the American Civil Liberties Union (ACLU). The ACLU is a nation-wide, non-partisan organization of more than 275,000 members devoted to protecting the principles of freedom set forth in the Bill of Rights and the Constitution.

I understand that these hearings have been called in response to charges by some members of Congress and by some citizens' groups that federal judges have engaged in inappropriate "activism" that, in their view, undermines democratic principles and the separation of powers. Proposed solutions to this alleged problem include calls for impeaching particular judges and amending the Constitution to constrain the power and independence of all federal judges through such means as imposing fixed, limited judicial terms of office and allowing Congress to override judicial decisions on constitutional issues.

While I welcome the Committee's discussion of these important issues, I disagree both with the diagnosis of the alleged problem and with the vaunted solutions. Not only is there no disease of unwarranted judicial activism, but even if there were, the proposed cures would be worse than the disease. And, in so stating, I speak in both of my capacities: as a scholar and teacher of constitutional law and as head

of the organization that has been hailed by supporters and critics alike as the most influential advocate of constitutional rights in our nation's courts.¹

Critics denounce as inappropriate activism judges enforcement of constitutional rights, especially when the consequence is to invalidate government measures that are supported by the majority of elected officials and the electorate, and especially when the most immediate beneficiaries are unpopular or controversial individuals or disempowered minority groups. But, far from deciding such judicial action as deviating from the judiciary's constitutionally designated role, as critics contend, I applaud it for faithfully fulfilling the Constitution's commands concerning individual rights and the judiciary's responsibility to protect them.

Although all elected and appointed government officials take the same oath to defend and uphold the Constitution, far too often, elected officials honor that pledge in the breach. When it would be politically unpopular to stand up for constitutional principles rather than follow the latest public opinion poll, too many politicians ignore our nation's original "Contract with America," our Constitution and Bill of Rights. To add insult to injury, they then attack the federal judges who do have the political courage to abide by their oath to enforce constitutional limits on governmental power and to uphold constitutional guarantees of individual liberty.

Regardless of whether I agree or disagree with a particular judge's ruling in a specific case—and, certainly, my ACLU colleagues and I have criticized many court decisions over the years—I respect the independence of the judicial branch of our federal government, and the special role it holds in the carefully structured system of limited and divided governmental powers that our constitutional framers devised.

The remedy for particular decisions with which one disagrees is to seek relief within the judicial system itself. A number of rulings that have provoked denunciations have in fact been overturned—to cite one recent example, Judge Thelton Henderson's preliminary injunction against the implementation of California's anti-affirmative action voter initiative, Proposition 209.² The ACLU led the constitutional challenge to Proposition 209, advancing strong arguments—consistent with Supreme Court precedents and constitutional principles—that it violated both the Equal Protection Clause and the Supremacy Clause of the U.S. Constitution. Accordingly, I disagreed with the ruling of the federal appellate court that rejected these arguments and overturned Judge Henderson's order.³ However, in contrast to some Congressional and other critics of Judge Henderson's ruling, neither I nor any of the ACLU's broad-based coalition partners in the Proposition 209 case have called for the impeachment of the appellate judges who denied our claims.

In addition to seeking to overturn particular rulings by appealing those rulings themselves, anyone who has a certain vision of constitutional rights—or of limits on those rights—can also seek to influence constitutional law through longer-term strategies aimed at remolding the Supreme Court's interpretations of the Constitution. The most famous example of this longer-range approach is the NAACP's carefully orchestrated series of cases that culminated in *Brown v. Board of Education*,⁴ in which the Supreme Court unanimously overturned an earlier decision, *Plessy v. Ferguson*,⁵ and held that racially segregated public schools violate the Constitution's equality guarantee, repudiating the "separate-but-equal" doctrine.

More recently, we have witnessed a campaign using a similar strategy to advance a different constitutional vision: the efforts by "pro-life" forces to overturn *Roe v. Wade*,⁶ with its recognition of constitutional protection for women's reproductive freedom. While these efforts have not achieved the outright and complete reversal of *Roe*, they have resulted in a substantial cutting-back on the scope of the right that *Roe* had upheld, and a concomitant expansion in governmental power to restrict women's access to abortions.⁷ I certainly disagree with the Supreme Court's

¹ See, for example, the article by Ken Chowder in the current issue of the *Smithsonian Magazine* (January, 1998), "The ACLU Defends Everybody" (p. 86). He writes, "No matter what you think of the ACLU, it is probably the most potent legal organization in America. . . . Its story is virtually a highlight reel of 20th-century legal history. . . . [O]ur modern definition of liberty has been greatly influenced by the ACLU." *Id.* at 88, 97. For a comparable assessment from an ardent critic of the ACLU—and of "judicial activism"—see Robert Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (1996) at 97 ("[T]he American Civil Liberties Union . . . has had, through litigation and lobbying, a very considerable effect upon American law and culture."); *id.* at 98 ("The ACLU is the premier litigating and lobbying arm of modern liberalism, and it has been extremely successful.").

² *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996).

³ *Coalition for Economic Equity v. Wilson*, 107 F. 3d 704, rehearing denied, 122 F. 3d 692 (9th Cir.), cert. denied, 118 S. Ct. 17 (1997).

⁴ 349 U.S. 294 (1954).

⁵ 163 U.S. 537 (1896).

⁶ 410 U.S. 113 (1973).

⁷ See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

post-*Roe* decisions that have curtailed women's reproductive rights. Again, though, my belief that specific judges or courts are mistaken in particular rulings does not undermine either my support for the independent federal judiciary as an institution, or for the judicial review power, as essential pillars in our constitutional structure.

The evolution of the Supreme Court's jurisprudence in abortion cases, in the past quarter-century since *Roe*, illustrates another important avenue of redress for those who disagree with particular rulings, which - in contrast with radical proposals to impeach judges or curtail their constitutional powers—is wholly consistent with the Constitution. Specifically, the Constitution affords the President and the Senate an opportunity to influence the composition of the federal courts by confirming or refusing to confirm individuals based on their character, qualifications, and the judicial philosophies they espouse.

In this respect, as in so many others, I celebrate the genius of our Constitution, which struck a delicate balance between—on the one hand—making federal judges too beholden to majoritarian pressures, and thus not sufficiently protective of individual and minority group rights, and—on the other hand—shielding judges too much from majoritarian concerns, hence making them insufficiently accountable to democratic processes. Avoiding both of these extremes, our Constitution affords federal judges some independence from majoritarian forces by guaranteeing them tenure “during good behavior,” subject to removal only through the extraordinary process of impeachment; but the Constitution also imposes some degree of democratic accountability on federal judges by requiring them to be nominated by the President and confirmed by two-thirds of the Senate.

In recent history, the nomination and confirmation process concerning federal judges has received much political, media, and judicial appointments. Indeed, many scholars and jurists have charged that this process has become too politicized, tilting our Constitution's delicate balance too far away from judicial independence and too far toward popular accountability. Putting aside the merits of those charges, it suffices for the present discussion to note that critics of *Roe* and other “activist” rulings have had an enormous influence in remaking the federal courts, from the Supreme Court on down, by electing Presidents who would nominate, and Senators who would confirm, judges who shared their constitutional and judicial philosophy.

In short, critics of judicial “activism” have already had a significant influence on the composition and philosophy of our federal courts, by acting through existing constitutional and legal channels. Therefore, I cannot understand either why they continue to complain of activism or why they still seek to alter our established constitutional and legal processes.

The recently stepped-up attack on the perennial bogeymen of many (but, significantly, far from all⁸) political conservatives, “activist” federal judges, is as ironically ill-timed as it is dangerously destructive of fundamental constitutional values. While the courts' critics decry “tyranny of the judiciary,” the alternative they advocate is the far more dangerous “tyranny of the majority.”

The irony of the timing is that this attack comes while our federal courts continue to be dominated by judges appointed during the twelve years of appointments by the Reagan and Bush Administrations. Both Administrations systematically selected judges who as a group have a relatively narrow view of judicially enforceable constitutional rights. To compound the irony, as Attorney General, Ed Meese played an instrumental role in this selection process; yet he is now railing against the federal bench that still bears his stamp.

Nor has that stamp been significantly muted by President Clinton's subsequent judicial appointments. He has moved slowly and cautiously in filling federal judicial vacancies. He has avoided nominating individuals who would be ideological counterweights to the many extreme exponents of “judicial restraint” who had been appointed during the preceding dozen years. Moreover, as was recently noted by no less staunch a conservative than Chief Justice Rehnquist, the Senate has been slow to act on the judicial candidates that President Clinton has nominated.⁹

⁸ Many prominent conservatives have expressed grave concerns about the campaign against “judicial activism,” voicing many of the same misgivings set out in this testimony, including that this campaign threatens the independence of the judiciary and the security of constitutional guarantees of individual liberty. See, e.g., Statement of Roger Pilon, Senior Fellow and Director, Center for Constitutional Studies, Cato Institute, before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, United States House of Representatives, May 15, 1997; Bruce Fein (Associate Deputy Attorney General in the Reagan Administration), *Judge Not*, N.Y. TIMES, May 8, 1997 at A31.

⁹ See Bruce Fein, *The Chief Justice vs. Hatch*, THE WASHINGTON TIMES, Jan. 6, 1998, at A12 (quoting Chief Justice Rehnquist as stating: “The Senate confirmed only 17 judges in 1996 and 36 in 1997, well under the 101 judges it confirmed during 1994. . . . The Senate is surely

The ideological tilt of the U.S. Supreme Court typifies the cast of all our federal courts. On the one hand, the current Chief Justice and two of his brethren—Antonin Scalia and Clarence Thomas—are among the most conservative jurists to sit on the Court in recent history, voting to overturn many core tenets of post-New Deal jurisprudence.¹⁰ In contrast, the present Supreme Court includes not a single member who espouses the energetic enforcement of constitutional rights that was its hallmark during the Warren Court era.

During the Warren Court era, the battle cry against “judicial activism” was at least understandable, insofar as it responded to that Court’s active protection of individual liberties and civil rights. Now, more than a generation and two conservative Chief Justices later, the Court has stepped back from that role. It has significantly reduced both the substantive scope of rights it deems constitutionally protected and the remedies it affords to victims of rights violations.

Nowhere is this rollback more severe than in the criminal justice arena. The Court has overturned many longstanding precedents to curb constitutional rights of suspected criminals. Moreover, it has cut off numerous avenues for asserting even those truncated rights that it continues to recognize in theory. For example, the Court (together with Congress) has hamstrung the hallowed remedy of habeas corpus, or federal court review of state convictions’ which Alexander Hamilton hailed as “the greatest liberty of all”—so severely that, for all practical purposes, it is unavailable to many prisoners, even if they are on Death Row, their constitutional rights were violated, and they have evidence that they did not commit the crimes for which they face execution.

In the area of racial justice—another area where the Warren Court vigorously protected constitutional rights—the subsequent cutbacks parallel the pattern in the criminal justice area. In a series of decisions over the last several years, the Supreme Court has consistently prevented lower federal courts and other government officials from implementing meaningful remedies for school segregation, discrimination in voting, and discrimination in government contracting. Of particular note, the Court has dramatically restricted the availability of race-conscious affirmative action remedies. The repeated attacks on federal courts for upholding racial “quotas,” therefore, illustrates the misguided nature of the current assault on the judiciary.

In short, the current Supreme Court and other federal courts already exercise the very judicial restraint concerning constitutional rights claims for which their critics clamor. Apparently, though, these critics are not content for their views to prevail on most courts and in most cases. Nor are they satisfied with a series of recent congressional measures that already sharply limits the power of federal courts to hear important categories of cases involving basic rights on behalf of relatively unpopular, powerless groups, including poor people, prisoners, and immigrants—the very kind of claims and clients for which the Constitution and its independent federal judiciary are designed to serve as the ultimate protector.

Nonetheless, these critics call for even more extreme “court-stripping” measures, including the elimination of the lifetime tenure that the Constitution guarantees to federal judges, and the power of judicial review that has been enshrined since Chief Justice John Marshall’s historic ruling in *Marbury v. Madison*.¹¹ They thus endanger the federal judiciary’s constitutionally mandated independence from the elected branches of government, and prevent it from fulfilling its designated role in the Constitution’s scheme of checks and balances: to curb overreaching and abuses by the other branches of the federal government and by state governments, and to protect even the politically powerless individuals and minority groups whose rights are the least likely to be secured by the political branches of government.

Our founders wisely structured a government that was not a pure democracy. Although most government policies are determined by elected representatives who are responsive to the majority will, our Constitution’s framers recognized that there are some rights that are so fundamental that no majority—no matter how large—could deny them to any minority, no matter how small or unpopular. In order to prevent what James Madison termed “tyranny of the majority,” the Constitution provided for federal courts whose members were insulated from majoritarian pressures through lifetime tenure, subject to removal only by impeachment.

under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down. In the latter case, the President can then send up another nominee.”); *id.* (quoting the Chief Justice as stating that “Vacancies [on our nation’s federal court benches] cannot remain at such high levels without eroding the quality of justice”).

¹⁰See generally Nadine Strossen, *Religion and Politics: A Reply to Justice Antonin Scalia*, 24 *Fordham Urban Law Journal* 427 (1997).

¹¹5 U.S. (1 Cranch) 137 (1803).

Modern history provides many examples of federal court judges withstanding popular pressure to stand up for the rights of embattled racial, religious, political, and other minorities. With twenty-twenty hindsight, the contemporary consensus now recognizes recurrent past instances in which the elected branches of government acted in an unconstitutional and unjust manner. Correspondingly, while the federal judges who resisted those political tides were at the time harshly denounced and threatened with impeachment or even physical harm, they are now widely respected, even by current critics of judicial autonomy.

A prime illustration is the "massive resistance" that Southern officials mounted to *Brown v. Board of Education*¹² and other Warren Court rulings outlawing racial segregation, and to the remedial orders issued by such "activist" Southern federal judges as Elbert Tuttle, John Minor Wisdom and Frank Johnson. Where would we now be, in our national struggle for racial Justice, were it not for the leadership of these courageous federal judges, who actually honored the oath that all government officials take to uphold the Constitution? As their inspiring example underscores, the fact that federal judges are unelected and life-tenured is not a problem—as current critics contend—but rather a solution to some of our nation's most intractable problems, such as racial discrimination.

The special responsibility of federal judges to enforce constitutional rights even—indeed, especially—when they are unpopular with elected officials and the majority of their constituents was most eloquently explained by former Supreme Court Justice Robert Jackson, who could hardly be accused of being a "judicial activist." Nevertheless, in 1943, he and seven of his fellow Justices struck down a very popular measure that had been adopted throughout the country in response to World-War-II-heightened nationalistic fervor: mandatory flag salutes in the public schools. In *West Virginia Board of Education v. Barnette*, the Court recognized that the Constitution protects even such a tiny, unpopular minority as Jehovah's Witnesses schoolchildren from having to participate in even such a deeply revered ritual.

While the Jehovah's Witnesses objected to the flag salute specifically because it violated their religious beliefs, Justice Jackson explained why all constitutional rights deserve protection from majoritarian pressures, and hence illustrated the uniquely important role of federal courts in general:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹³

While we now recognize *Barnette* and *Brown* as landmarks of liberty, at the time they were decided, they and the judges who issued them were denounced in precisely the same terms that critics are now using to attack more recent judicial rulings upholding other human rights claims. Perhaps, in due course, these more recent rulings will also be vindicated in the court of public opinion.

In any event, the fact that federal judges overturn initiatives supported by the majority of citizens or politicians does not cast any doubt on the legitimacy of the federal courts. To the contrary, it vindicates the special, essential function of these courts as a check against abuses of power by elected officials and intolerant majorities. The independence of the federal courts must be preserved not *despite* their power to overturn majoritarian decisions, but rather *precisely because of* that power.¹⁴

Mr. CANADY. Thank you. Professor Franck.

STATEMENT OF MATTHEW J. FRANCK, CHAIRMAN AND ASSOCIATE PROFESSOR OF POLITICAL SCIENCE, RADFORD UNIVERSITY

Mr. FRANCK. Good morning, Mr. Chairman, members of the subcommittee. Thank you for inviting me to come here today to discuss

¹² 349 U.S. 294 (1954).

¹³ 319 U.S. 624, 638 (1943).

¹⁴ A Biographical Statement is attached. Pursuant to House Rule XI, clause 2(g)(4), I affirm that neither I nor the American Civil Liberties Union receives any federal funds—as a matter of organizational policy.

the roles of Congress and the Court in interpreting the Constitution.

If I may, I think I could correct one mis-statement by Professor Strossen. I think it was that even more notorious judicial activist, Judge Robert Bork, who referred to his love of intellectual feasts.

Ms. STROSSEN. I'm sorry; you're right. How could I get them mixed up? [Laughter.]

Mr. FRANCK. Well, for a while there Judge Scalia had a beard.

On June 25, 26, and 27 of last year, the Supreme Court held three acts of Congress in 3 days to be unconstitutional. I don't know when was the last time the Court was quite that busy. I do know that there are good arguments to be made about all three cases, that the Court got them wrong. I'd like to focus, however, on one of those three cases, the one that's come under the most scrutiny this morning, the *City of Boerne v. Flores*, because it involved the most explicit confrontation between Congress and the Court. The *Boerne* ruling overturned the Religious Freedom Restoration Act passed in 1993 as an attempt to legislate a reversal of the 1990 Smith decision of the Court on the meaning of the free exercise of religion clause in the First Amendment.

RFRA, for short, failed, I argue, because it was not a thorough-going challenge to the regime of judicial supremacy, and, thus, citing the very notion that the Court is the final authority on the meaning of the Constitution, the Justices struck down the act. The act, I argue, assumed three things that are at best questionable, and at worst, simply mistaken.

First, it was assumed by RFRA that the Court is properly the enforcer of the First Amendment, a view we cannot find espoused by the father of the Bill of Rights, James Madison. Second, the act assumed the propriety of the First Amendment's application to the actions of State and local governments, a legal fiction of the 20th Century based on a misreading of the Fourteenth Amendment. Finally, RFRA attempted to resurrect the view that the free exercise of religion requires Government to make exemptions on religious grounds to otherwise valid general laws, a doctrine barely 35 years old, which was itself a breach with the original view of this matter.

Only on this last point did the Court disagree with Congress. The Court in *Boerne* refused to take instruction from Congress on that last point but it got away with it—the Court did, that is—because the first two assumptions mentioned gave it a firm ground to stand on.

I would just very briefly suggest some different approaches for the Congress in asserting its own vital role in interpreting the Constitution. First, and this actually falls within the Senate's purview, nominees to the Federal bench should be challenged to acknowledge, and to state plainly their understanding of, the difference between judicial review and judicial supremacy.

Second, Congress should take a serious new look at the rules of civil procedure and the way they currently facilitate dubious constitutional rulings, thanks to excessively loose standards on standing to sue, declaratory judgments, class actions, and remedial decrees, for instance.

Third, the Congress's power to make exceptions to Federal Court jurisdiction should be considered a potent weapon for reversing ju-

dicial error. For instance, a great restoration of federalism could be effected if Congress were to rule out-of-bounds certain kinds of challenges made to state law under the Bill of Rights.

Fourth, it should not be forgotten that the Framers regarded the congressional impeachment power as a significant potential restraint on judicial usurpation of power. Impeachment is not a criminal proceeding, but a political one, and may be used to redress "injuries to the society itself," in the words of Alexander Hamilton.

The Constitution we have, without any need of amendments attacking the Court's independence, provides Congress with all the tools it requires to begin the rescue of the Constitution from the Supreme Court. The Congress must take its own role under the Constitution seriously before it can induce the Court to do likewise. Thank you.

[The prepared statement of Mr. Franck follows:]

PREPARED STATEMENT OF MATTHEW J. FRANCK, CHAIRMAN AND ASSOCIATE
PROFESSOR OF POLITICAL SCIENCE, RADFORD UNIVERSITY

When Congress made its most recent attempt to influence the Supreme Court, the result was an unmitigated failure. I refer to the fate of the Religious Freedom Restoration Act of 1993 (RFRA), overturned on June 25 of last year in the case of *City of Boerne v. Flores*. In response to a perceived threat to the free exercise of religion in the Court's 1990 *Smith* decision,¹ Congress in RFRA sought, through the use of its power to enforce the terms of the Fourteenth Amendment, to overturn that ruling and restore, as against every agency of government in the land, the "compelling interest" test for judging the validity of incidental burdens on free exercise resulting from generally applicable laws. RFRA had overwhelming support from all points on the political spectrum, and passed in the Congress nearly unanimously. But to veteran Court-watchers, the *Boerne* decision was entirely predictable, inasmuch as the justices of the Court do not take kindly to legislative instruction in how to decide constitutional cases.

But the Act's failure went far deeper: it was in fact not a serious enough challenge to the Court's authority, for it conceded too much to the current regime of judicial supremacy. The following are the multiple ironies of the clash between Congress and the Court that culminated in *Boerne*.

1. Congress assumed that the Court is properly the enforcer of the First Amendment.

This is by now a very old error, and one so venerable that to speak in correction of it is to raise questions about one's sanity in most circles. So deep runs the popular myth that the Supreme Court is properly the final authority in enforcing virtually every provision of the Constitution that a digression is necessary here into the more general question of judicial review. As Professor Robert Clinton has shown, the judicial power to invalidate the actions of other branches of the national government was widely understood at the founding to be "departmental" or "coordinate"—a power he calls "functional review" enabling the judiciary to pronounce authoritatively on the constitutionality of laws touching on the integrity of the courts' own functions, for instance where a case concerns jurisdictional issues, standards of evidence, or the provision of simple due process. This limited version of judicial review was all that was either exercised or claimed for the Court by John Marshall in the 1803 case of *Marbury v. Madison*.² On the other hand, the legislative and executive branches have a like authority to have the "last word" on those constitutional questions bearing on the exercise of their own powers, arising from the provisions of the Constitution addressed to themselves. Thus, that same John Marshall, for instance, held that the reach of Congress's power over commerce among the states was to be controlled authoritatively not by the judiciary, but by the people through democratic

¹ *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).

² 1 Cranch (5 U.S.) 137 (1803). See Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (Lawrence: Univ. Press of Kansas, 1989), *passim*. See also Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: Univ. Press of Kansas, 1996), 47–71; Matthew J. Franck, *Against the Imperial Judiciary: The Supreme Court vs. the Sovereignty of the People* (Lawrence: Univ. Press of Kansas, 1996), 65–105; and James Burnham, *Congress and the American Tradition* (Washington, D.C.: Regnery, 1959, 1996), 129–36.

processes: such are "the restraints on which the people must often rely solely, in all representative governments."³

Now obviously, the terms of the First Amendment address themselves to the Congress and not to the judiciary, and in no way would an infringement of one of the rights therein have an adverse effect on the proper functioning of judicial processes. Moreover, if the First Amendment had been expected to be the subject of routine judicial enforcement, we would expect the subject to have come up frequently in the First Congress that debated and drafted the Bill of Rights. Yet, in his brilliant account of how the Bill of Rights came to be added to the Constitution, Professor Robert Goldwin manages to tell the whole story in complete detail without ever once mentioning that the subject of judicial enforcement of the Bill arose at all. The point of the Bill of Rights was not to trigger judicial review, but to weave a love of liberty into the American political culture. Here "is how it works," Goldwin tells us in his recent book:

[T]o the extent that these principles of free government [in the Bill of Rights] have become a part of our "national sentiment," they do, indeed, often enable us, the majority, to restrain ourselves, the majority, from oppressive actions. That is the import of the first five words of the Bill of Rights: "Congress shall make no law" that attempts to accomplish certain prohibited things. It means that even if a majority in Congress, representing a majority of us, the people, wants to make a law that the Constitution forbids it to make, we, all of us, superior to any majority, say it must not be done, because the Constitution is the will of all of us, not just a majority of us.⁴

So as not to be misunderstood, I should add that certain provisions in the Bill of Rights do address themselves to the courts, and so are fit subjects for judicial review—obviously amendments five through seven, arguably four through eight—but the First Amendment is not one of them. It is only in this century, with the expansion of judicial authority in every direction, that we have come to think otherwise. And RFRA played right into that modern myth, insisting that a clause of the First Amendment be enforced by courts in a certain way when, at the very least, clear doubt exists that it was meant to be judicially enforced at all.

2. Congress assumed the validity of the "incorporation" doctrine.

Whatever uncertainty there might be about whether the First Amendment is gathered into the scope of judicial review, there is none whatever about the proposition that, along with the rest of the Bill of Rights, it was intended to restrain only the national government and not the states or their subdivisions. And, among scholars who do not hold a prior commitment to judicial activism, a second proposition is virtually settled as well: that the Fourteenth Amendment changed nothing about that fact.⁵

Of course, on the Court the debate has gone all the other way, so that Justices Scalia and Thomas no less than their more liberal brethren act unquestioningly on the basis of twentieth-century precedents that declared that much of the Bill of Rights is selectively "absorbed" or "incorporated" into the terms of the due process clause of the Fourteenth Amendment. But these precedents are worse than doubtful: they represent a plain usurpation of power by the Court, and they ought not to be respected, on or off the Court, by anyone who regards the Constitution as superior to "constitutional law."

Yet the Congress, in passing RFRA, paid its respects to this judicial usurpation. The Act prescribed a judicial test of constitutionality to be applied to the laws and policies of all levels of government, including acts of Congress,⁶ but clearly the legislation was motivated chiefly by fears for religious liberty's fate at the state and local level. Thus the Senate report on the Act cited, as part of the authority for its passage, the "incorporation" precedent of *Cantwell v. Connecticut*, a 1940 case in which

³ *Gibbons v. Ogden*, 9 Wheaton (22 U.S.) 1 (1824), at 197.

⁴ Robert A. Goldwin, *From Parchment to Power: How James Madison Used the Bill of Rights to Save the Constitution* (Washington, D.C.: AEI Press, 1997), 100. See also Franck, *Against the Imperial Judiciary*, 83-87.

⁵ See Richard G. Stevens, "Due Process of Law," in Stevens, *The American Constitution and Its Provenance* (Lanham, Md.: Rowman & Littlefield, 1997), 123-42; Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment*, 2nd ed. (Indianapolis: Liberty Fund, 1997), 155-89; and Berger, *The Fourteenth Amendment and the Bill of Rights* (Norman: Univ. of Oklahoma Press, 1989).

⁶ How the Court could have applied RFRA to nullify any subsequent act of Congress is a mystery, since any such contradictory act would naturally be considered an implicit repeal of RFRA's terms, at least in part.

the free exercise clause of the First Amendment was applied to the actions of states in a casual four sentences carrying no historical analysis whatsoever.⁷

Whatever one's worries about the fate of religious liberty after the *Smith* case—and Archbishop Flores of San Antonio was hardly being ground beneath the heel of oppression—whatever one's politics in these matters, the proper position of a constitutional conservative is to wonder what on earth the Supreme Court is doing enforcing the terms of the First Amendment against state and local governments. Wisely or unwisely—and I think the former—the framers of the Bill of Rights and the framers of the Fourteenth Amendment left the subject of religious liberty in relation to state and local policy to be sorted out by state constitutions, state legislatures, and state courts. How members of Congress ostensibly committed to federalism could overlook this is a source of some wonder. Why Congress does not wish to restore that federalism from the ashes in which the Court has left it is cause for amazement.

3. Congress assumed the soundness of the “compelling interest” test.

Even if we assume both that the Supreme Court is the proper enforcer of the First Amendment and that it may act against the states under that banner, there remains the fact that the *Smith* ruling was no innovation, but a return to a previous generation of decisions under the free exercise clause. The “compelling interest” test, having originated in other areas of constitutional law, was carried over to the adjudication of free exercise cases only as recently as 1963 (in *Sherbert v. Verner*), with its full import being discernible only in 1972 (in *Wisconsin v. Yoder*).⁸ The effect of the test is to carve out exemptions to generally applicable laws, otherwise held valid, for those with religious scruples about obeying them. From the date of the very first religion case under the First Amendment until 1963, it was not thought that such exemptions are affirmatively required of government by the provision against “prohibiting the free exercise” of religion. As Chief Justice Morrison Waite put it in 1879, “[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.” To hold otherwise, he continued, “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”⁹ Precisely so did the Court begin to hold in the 1960s and 1970s.

In the 1990 *Smith* case, the Court did not overrule the

Sherbert and *Yoder* precedents, but distinguished them away so that they would have practically no value for the guidance of future decisions. In RFRA, Congress explicitly identified *Sherbert* and *Yoder* as the precedents it wished the Court to follow instead of *Smith*. Much disagreement persists on and off the Court about just how the free exercise clause ought to be applied. But I would offer one fairly mild judgment about this matter: that *Sherbert* and *Yoder* are the progeny of judicial activism, and *Smith* a return to judicial restraint. One may like *Sherbert* and *Yoder* and dislike *Smith*, but it seems clear that if that is one's preference, one is (here at least) on the side of judicial activism.

Thus the Religious Freedom Restoration Act presented the ironic spectacle of the Congress complaining that the Supreme Court was *not being activist enough* in its interpretation of the Constitution. “Stop us all before we legislate again!” was the rallying cry of the Act's partisans as it swept virtually unhindered through both houses of Congress. In the final irony, the Court in the *Boerne* case rebuffed the demand, standing on its dignity and defending its newfound judicial restraint respecting the free exercise clause of the First Amendment.

In a way, *Boerne* presented a case in which judicial activism was at war with itself. Congress, as I have said, demanded of the Court more activism than the Court was prepared to provide. But the Court could only refuse the demand by turning to its own well-worn precepts of judicial supremacy in the interpretation of the Constitution. Mistakenly citing *Marbury v. Madison* for support of judicial authority to have the last word,¹⁰ Justice Kennedy's opinion for the Court concluded that Congress overreached with its power to enforce the Fourteenth Amendment:

⁷Senate Report 103–111, at 14 n. 40. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940), at 303.

⁸*Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁹*Reynolds v. United States*, 98 U.S. 145 (1879), at 166, 167. Justice Scalia partially quoted these words in *Smith*, 494 U.S. at 885. See also Walter Berns, *The First Amendment and the Future of American Democracy* (New York: Basic Books, 1976; reprint, Chicago: Regnery Gateway, 1985), 35–55.

¹⁰See *City of Boerne v. Flores*, ___ U.S. ___ (1997), slip op. at 6 (Kennedy, J., for the Court).

Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.¹¹

What everyone (except perhaps Justice Kennedy himself) must surely notice is that he is, in effect, saying that *only the Supreme Court* enforces constitutional rights by changing what they are (and sometimes by making them up out of whole cloth), and that it will not tolerate the Congress interfering as it goes about its business.

The *Boerne* case, in the end, presents the friend of the Constitution's original meaning and of judicial restraint with one of those rare instances when he does not know which side to choose, and must instead say "a pox on both your houses." On the one hand, the Court continued on its accustomed course of asserting its supreme position in the decision of all questions of constitutional politics, even where a clause of the Constitution (§5 of the Fourteenth Amendment) arguably gives Congress a legitimate role to play in such questions. On the other hand, Congress, rather than truly challenge judicial supremacy, had written legislation that embraced it: accepting the Court's role as final enforcer of the First Amendment, accepting the application of that amendment to the states, and unfortunately demanding that the Court return to its activist habits in the interpretation of the free exercise clause. Little wonder that the Court had the better of the confrontation.

The "judicial usurpation of politics," as *First Things* magazine referred to our present straits a little over a year ago, remains the most pressing problem confronting the American experiment in republicanism. If RFRA is a failed model for congressional challenges to that usurpation, what is to be done instead?

1. Challenge judicial supremacy directly.

Over eleven years ago, then-Attorney General Meese got a lot of attention for saying, in an address at Tulane University, that "the Constitution cannot be reduced to constitutional law," and that in its notorious dicta in *Cooper v. Aaron* in 1958,¹² the Supreme Court had misread both the Constitution and *Marbury v. Madison* in describing its own authority to determine the content of the supreme law of the land.¹³ He was much excoriated on op-ed pages and by many legal scholars, but he was absolutely right.

It is time to translate words into action, to move from rhetoric to a more concrete approach. If we are serious about the proposition that all the branches of the national government share a coordinate authority to interpret the Constitution, with none of them commanding the obedience of the others as to every sort of constitutional question, then it is past time the Congress began to assert its co-equal authority in practical ways. This reassertion of congressional responsibility can begin with the breaking of some comfortable habits.

First, during Senate confirmation hearings on nominations to the federal bench at all levels, senators should cease requiring nominees to declare their allegiance to the "*Marbury* myth" that the Supreme Court has the last word on constitutional questions. The Senate should instead demand just the opposite—a clear statement from every nominee that he or she recognizes the difference between judicial review (properly understood) and judicial supremacy. Other matters of what is infelicitously called "judicial philosophy" should also be central to confirmation hearings, but this is a good place to start.

Secondly, the Congress should stop bowing in the direction of the Court's presumed final authority when it legislates, and should instead consider repealing, or at least exempting some legislation from, the standard mechanisms by which it currently does so—such as the remedial-power and class-action provisions of the 1938 Rules of Civil Procedure (as amended in 1966).

Consider the recent fate of the Communications Decency Act (CDA) of 1996. No one was ever prosecuted under the Act's provisions. Instead, under federal rules of procedure that are within the power of Congress to change, politically interested parties led by the ACLU brought suit against the government, secured a hearing before a three-judge panel of a district court *as required by the CDA itself*, and won a preliminary injunction from that panel against the government's enforcement of the law's indecency provisions *against anyone whatsoever*. Then, under a "special review provision" of the CDA itself, a rapid appeal was taken directly to the Supreme Court. The resulting affirmance of the district court's injunction means that a writ that cannot be gainsaid runs against every U.S. attorney barring enforcement of the

¹¹ *Ibid.*, at 9.

¹² 358 U.S. 1 (1958).

¹³ The speech was later printed as Edwin Meese III, "The Law of the Constitution," *Tulane Law Review* 61 (1987): 979–90.

Act, presumably on pain of contempt proceedings if any federal prosecutor seeks to enforce it anywhere. Major provisions of the CDA were thus rendered a dead letter before they ever really lived.¹⁴

This method of broadly striking down laws by injunction short-circuits the kind of response to judicial error that Lincoln exemplified. In criticizing the *Dred Scott* ruling, Lincoln insisted that the Missouri Compromise was not to be considered unconstitutional just because the Court had held it so in one case concerning individual parties. The statute had already been repealed three years earlier by the Kansas-Nebraska Act of 1854—but if the other branches of the government did not agree with the *Dred Scott* ruling, the law could, in Lincoln's view, be revived by the Congress and enforced by the executive. (This is exactly what happened in 1862, when Congress forbade slavery in all federal territories.) And had the Missouri Compromise not already been repealed, it is more than likely that Lincoln would have argued for its continued enforcement after *Dred Scott*, bolstered by supplementary legislation if need be. It would have been a different matter for Lincoln and for the fate of self-government if an injunction extending to the whole of the government had accompanied the Court's pronouncement on the law's constitutionality.

It must be said that the CDA was *designed* to be struck down; it was passed with an engraved invitation to the courts to do so. Had Congress, in passing the CDA, been confident of its own position as a true equal of the Court in interpreting the Constitution, it not only would have refrained from the timidity of the special review provisions in the Act. It would have included instead a provision shielding the Act from the injunctive procedure by which the courts declared it unconstitutional. Then we would have seen some criminal trials under the Act's provisions, and if on appeal of any convictions the Supreme Court had held the Act unconstitutional, it would still be open to Congress to legislate support for the Act's continued enforcement against others, and for the executive to prosecute under it. What would happen next could get very interesting indeed.

The fate of the CDA should, more generally, prompt rethinking of some of the procedural aspects of modern-day judicial power. As Professor Gary McDowell pointed out ten years ago, it is within the power of Congress to undo some of the damage that has been done to the traditional "case or controversy" requirement of Article III by the loosening of standards in the judicial process concerning standing to sue, class actions, intervention, consent decrees, declaratory judgments, and the merging of actions in law and equity.¹⁵ By traditional procedural criteria, the lawsuit that resulted in the invalidation of the CDA's indecency provisions would never have gotten off the ground.

2. Start defending the states instead of undermining them.

In recent cases such as *U.S. v. Lopez* and *Printz v. U.S.*,¹⁶ some see a trend toward the defense of federalism on the Supreme Court. One may see this trend at work in the *Boerne* case as well; certainly RFRA, whatever one thinks of its solicitude toward religious liberty, was an assault on the authority of states and localities.¹⁷ Even if we do not agree with all of these decisions—and I do not—we can be happy with the *results* in them if we care for local self-government. But the question remains: why must the Court rather than the Congress be the states' defender? The Court is a fickle defender in any event, as recent cases on abortion, gay rights, and single-sex public higher education clearly show.

And has the Congress mended its ways since the Republicans became the majority party? It doesn't seem so. Last October the House passed H.R. 1534, the "Private Property Rights Implementation Act of 1997," which would permit property owners to hurry straight into federal court with claims that a local or state regulation has resulted in a "taking" under the Fifth Amendment. Senator Hatch introduced similar legislation in the Senate (S. 1256, the "Citizens Access to Justice Act of 1997"). These bills are merely RFRA all over again, albeit on a smaller scale—and as the least of their sins, would merely add to the workload of our strained federal courts, a problem recently noted by Chief Justice Rehnquist.¹⁸ Such efforts should be abandoned by members of Congress who value the Constitution and reject the "incorporation" doctrine. It is not really a matter of having to make a hard choice between

¹⁴ See *Reno v. ACLU*, ___ U.S. ___ (decided June 26, 1997).

¹⁵ Gary L. McDowell, *Curbing the Courts: The Constitution and the Limits of Judicial Power* (Baton Rouge: Louisiana State University Press, 1988), 168–96.

¹⁶ *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, ___ U.S. ___ (decided June 27, 1997).

¹⁷ See Steven G. Calabresi, "A Constitutional Revolution," *Wall Street Journal*, 10 July 1997, A14.

¹⁸ See William H. Rehnquist, "The 1997 Year-End Report on the Federal Judiciary," 1 January 1998, section I.A.

federalism and property rights; in this case the Constitution has already chosen for us.

Instead of such measures that add to their miseries, the Congress should take steps to shield state and local governments from the depredations of the Court. Where the danger comes from judicial interpretation of federal statutes, Congress can (and sometimes does) easily forestall the danger by including language about non-preemption of state laws, or declaratory clauses on the rules by which a statute is to be construed. But the greatest blows to federalism in this century have come from the Supreme Court working quite on its own with no other weapon than what it purports to be the Constitution. To begin to reverse that damage, more imaginative approaches are needed. One scholar, for instance, has recently suggested that the enforcement power given to Congress in section 5 of the Fourteenth Amendment can be turned to good use here, to limit rather than expand the reach of judicial power over the states.¹⁹

The Fourteenth Amendment is certainly the major "culprit" if we are concerned about reining in the Court. By "incorporation" of the Bill of Rights, and by creating under the doctrine of "substantive due process" rights which are contained nowhere in the Constitution at all, the Court has used the Fourteenth Amendment to nationalize some of the most important policy questions that the Constitution properly leaves to the states.

A broad approach to this problem would be for Congress to avail itself of its seldom-used power under Article III to regulate and make exceptions to the appellate jurisdiction—as well as its complete authority over the jurisdiction of the lower federal courts. It would take careful draftsmanship to close all the loopholes to judicial creativity, but Congress ought to take up legislation declaring all questions regarding the application of the Bill of Rights to states and local governments off limits for the federal courts at every level. Where the "extra-constitutional" rights currently packed into the due process clause are concerned—such as the "right of privacy" at the heart of the abortion decisions—even more care would need to be taken in drafting appropriate jurisdictional legislation. For how does one describe a protean legal fiction with sufficient precision so as to exorcise it from the law of the land? The problem is rather like legislating that the courts shall no longer hear cases concerning dragons only to learn that they are hearing cases concerning unicorns instead. But I am convinced it is worth the effort.

For some, the option of "jurisdiction-stripping" by statute poses a potential difficulty, inasmuch as the legislation could itself be subject to judicial review, and the Court could conceivably declare it unconstitutional.²⁰ But the leading precedents suggest otherwise: if Congress cleanly removes certain types of cases from the Court's jurisdiction, the justices will not dare to act on such cases. Only if the Congress attempts to interfere in how the Court decides the cases it *does* hear, by predetermining their outcome or by fixing the probative value of evidence in a constitutional case, will the justices strike down purported efforts to regulate their jurisdiction—and rightly so.²¹ Avoid that sort of problem, and this congressional power can be a potent check on the Court.

3. *Keep examining the impeachment option.*

The good news on Capitol Hill in the last session was that members of Congress (such as Reps. Tom DeLay and Charles Canady) began to talk of impeaching federal judges for their usurpations of political power. Rep. Howard Coble (chairman of the House Judiciary subcommittee on Courts and Intellectual Property) conducted hearings on judicial activism last spring that raised this possibility. This exploration should be encouraged. At the same time, however, hasty calls for impeachment on the basis of a single wrongheaded ruling by a judge somewhere should be discouraged. For impeachment talk to be taken seriously and not dismissed as simply red meat for one's partisans, the exploration must proceed with restraint and prudence, and a proper marshaling of arguments.

The basic question is this: can the decisions of a federal judge, arrived at without criminal corruption as that is ordinarily understood, be considered among those

¹⁹See Dennis Teti, "The Ten Commandments and the Constitution," *The Weekly Standard* (July 21, 1997), 21–24.

²⁰See Richard John Neuhaus, "The Anatomy of a Controversy," in Mitchell S. Muncy, ed., *The End of Democracy? The Judicial Usurpation of Politics: The Celebrated First Things Debate with Arguments Pro and Con* (Dallas: Spence Publishing, 1997), 254–55.

²¹Compare *Ex parte McCordle*, 74 U.S. 506 (1869), and *United States v. Klein*, 80 U.S. 128 (1872).

"high Crimes and Misdemeanors" for which he may be impeached, tried, convicted, and removed from office? The answer from the founding is a very clear "yes."²²

In the *Federalist*, Hamilton describes the impeachment process as "a method of NATIONAL INQUEST" into "the abuse or violation of some public trust," aimed at discovering political offenses that result in "injuries done immediately to the society itself." And he explicitly extends this interpretation of Congress's power to the judiciary, writing that the threat of impeachment is "a complete security" against "a series of deliberate usurpations on the authority of the legislature."²³ Almost half a century later, Justice Joseph Story agreed with Hamilton's reasoning on impeachment's political character, and its application to judges, in his *Commentaries on the Constitution*.²⁴

What seems to stand in the way of this method of controlling the judiciary is not the Constitution or the framers' intent but history. A handful of lower federal judges have been removed who were not found guilty of any criminal offense in the narrow sense, but only one Supreme Court justice has ever been impeached, and he was acquitted: Justice Samuel Chase in 1805. A common misconception, however, is that the Chase trial settled the issue whether "political" impeachments may be pursued against judges with a firm "no." Our present chief justice has so concluded, in a book and in a well-publicized 1996 speech. But more careful scholars than Chief Justice Rehnquist (who can hardly be considered disinterested in this question) have concluded that the Chase trial was inconclusive on the constitutional issues—that it settled nothing regarding the breadth of Congress's power to impeach judges.²⁵

Should impeachment proceedings be launched regarding any federal judge, most particularly against any Supreme Court justice, the greatest care must be taken to pitch the issues at the highest possible level. Beginning in the House Judiciary Committee, and continuing on the floor of the House and in the Senate, members of Congress must reeducate themselves about the separation of powers and judicial review—about their own role and that of the judges under the Constitution. The focus must be, not one or two unpopular rulings, but (in Hamilton's words again) a "series of deliberate usurpations" of authority not belonging properly to the judiciary. The cause being defended by congressional removal efforts must be, and be seen to be, not a narrowly partisan one, but the integrity of the Constitution. It will be impossible to convince everyone of this. But with adequate preparation of the public mind to receive the idea that self-government itself is at stake, and with the freest possible opportunity for open and fair-minded colloquy with any judge placed on trial in the Senate, an impeachment proceeding can become a great seminar for the whole nation regarding the political arrangements under which we choose to live. It is possible that even a trial resulting in acquittal could be instructive for the polity and chastening for the judiciary. But prosecutors do not like to take cases to trial that they think they will lose; hence the first defendant judge in particular must be one against whom an impeachment case can be made absolutely compelling. And remember that a two-thirds majority is necessary to convict in the Senate. The framers set the bar high with good reason, and under present circumstances in the Senate, the politics of impeachment will have to be clearly distinguished from the politics of partisan ideology and scorekeeping.

4. Leave the Constitution alone.

By no means have we exhausted the possibilities for controlling the judiciary under the terms of the Constitution, but I should like to mention one other that is generally a bad idea: succumbing to the urge to amend the Constitution. In the last session alone, several amendments were introduced, for example, to limit the judicial term of office to eight years in the lower courts (H.J.Res. 74), or to ten years at all levels including the Supreme Court (S.J.Res. 26 and H.J.Res. 77), or to twelve years for all (H.J.Res. 63). The amendments that absolutely limit judicial terms would do little to address our difficulties, as judges would be free to act as they please during their term of office. And those that provide for reappointment for successive terms might endanger the independence of the judiciary that Hamilton and his fellow framers were intent on securing.

For all the branches of government, the courts included, it was the aspiration of the framers to create a balance of strength and limitation—with officeholders power-

²² See Franck, *Against the Imperial Judiciary*, 45–51; and "The Supreme Court and the Politics of Impeachment," *On Principle* (Ashbrook Center), vol. IV, no. 4 (August 1996): 3–5. See also McDowell, *Curbing the Courts*, 121.

²³ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961), no. 65, pp. 396–97; no. 81, p. 485.

²⁴ Joseph Story, *Commentaries on the Constitution of the United States*, 1st ed. (Boston: Hilliard, Gray, 1833), §§ 686–87, 740–801, 1629.

²⁵ See Franck, *Against the Imperial Judiciary*, 223–24 n. 90.

ful in their own right and free to act on their convictions, yet restrainable by the others when power becomes tyranny and the freedom to act becomes mere license. I have argued that the Constitution as it already stands provides us with the principles that reveal judicial usurpation for what it is, and with the tools necessary to fashion remedies for that usurpation. The abuses of the judiciary run deep in the body of twentieth-century caselaw, and it will not be the work of a moment to undo the damage. But patient toil, and a renewed attention in Congress to the high politics of constitutionalism, can begin to move us away from government by judges and back to genuine republican government.

My opposition to amending the Constitution to deal with our difficulties is not rooted in mere reverence for the framers' handiwork if evidence shows its insufficiency in some respect. No institutions crafted by human beings can be truly permanent, never requiring any alterations. Yet the Constitution, as Joseph Story said, was "reared for immortality, if the work of man may justly aspire to such a title." Before we take risks with a structure whose "foundations are solid" and whose "compartments are beautiful, as well as useful" (again Story's words),²⁶ we should explore the building thoroughly and be certain we have not overlooked any of the useful features it already contains.

Conclusion.

All the suggestions I have made will come to nought until members of both houses of Congress recover for themselves what the framers had in mind when creating truly co-equal branches of government under the Constitution. Only in this century did it begin to become commonplace to regard the justices of the Supreme Court as the "guardians" of the Constitution, as though only they, and no one else, had this charge by virtue of their oath of office. The framers knew better. For them, the fate of republicanism, and of constitutionalism itself, rested with "the extent and proper structure of the Union," and with institutions that "divide and arrange the several offices in such a manner as that each may be a check on the other." They knew that men are not angels, nor are they governed by angels—that we have a government "administered by men over men," and that judges are no more angelic than legislators.²⁷ Thus they charged *all* public officials, indeed *all citizens*, with the duty to preserve the Constitution, fully expecting us to persuade, to argue, to clash over what that preservation means. To forget that, to believe complacently that that highest task of our shared political existence is somebody else's business in which we will not interfere, is to let the cause of republican self-government slip through our fingers, and to dishonor the memory of the men from whom we inherited that cause.

Mr. CANADY. Thank you, Professor Franck. You get the award for giving your testimony within the allotted time. [Laughter.]

Mr. CANADY. Professor Clinton.

STATEMENT OF ROBERT L. CLINTON, ASSOCIATE PROFESSOR OF POLITICAL SCIENCE, SOUTHERN ILLINOIS UNIVERSITY

Mr. CLINTON. Thank you, Mr. Chairman and members of the committee, for giving me the opportunity to state my views on this very important question of the proper relationship between Congress, the Supreme Court, and the Constitution.

Despite what so many of the members of the committee and panel have said, on my way to the airport yesterday, I shared a limo ride with an anthropologist from my university. When I told her that I was going to a hearing about Congress's role in constitutional interpretation, she looked absolutely stunned and said, "What role?" [Laughter.]

And this is a woman with a Ph.D. in anthropology who is, in fact, one of the most noted anthropologists in the country. So, in spite of the fact that we seem all here to agree that Congress has a very important role in constitutional interpretation, apparently that view has not gotten out into the general public.

²⁶ *Story's Commentaries*, quoted in Franck, *Against the Imperial Judiciary*, 213.

²⁷ *Federalist* No. 10, p. 84; No. 51, p. 322.

We have witnessed during the last 40 years the rise to prominence of a constitutional theory that gives the U.S. Supreme Court a virtual monopoly in American constitutional law. This theory grants to the Court final, ultimate, exclusive authority to determine the meaning of constitutional provisions with conclusive effect on Congress, the President, the States and private citizens. The power extends even to the determination of the constitutional powers of the co-equal branches of the National Government.

Judicial supremacy rests on a number of foundations, one of which is the historical claim that the Court's hegemony is firmly grounded in American Constitutional history, especially in the landmark case of *Marbury v. Madison*, which has been cited by almost everyone here today. It is to this argument that I will address my remarks today.

Before the Civil War, constitutional interpretation was performed by Congress and the President as much as by the Court. This is most apparent when one looks at the great Congressional debates over the establishment of the National Executive in the 1790's. Congressional determinations of constitutional meaning were then regarded as highly as those of the Court. After the Civil War, the Courts became more aggressive in challenging laws believed to be defective, but it is not until 1958 that the Court first staked its claim to be the exclusive interpreter of the Constitution. The claim was made in *Cooper v. Aaron* where the Court declared its own constitutional rulings to be part of the supreme law of the land, on a par with the Constitution itself. Since 1958, the Court has asserted this authority several times, most recently in the *City of Boerne v. Flores* in 1997.

In that case, the Court went even farther than it had in *Cooper*, ruling that Congress has no power to determine the meaning of the Free Exercise Clause when passing laws designed to enforce the Fourteenth Amendment. In *Cooper*, *Boerne*, and the other cases in which the Court has exerted its conclusive authority, it relied on *Marbury v. Madison* for support. But *Marbury* does not support such authority. *Marbury* involved Article III's jurisdictional distribution, which is a provision directly addressed to the Court. *Boerne* involved the Fourteenth Amendment, whose enforcement provision is directly addressed to Congress. *Marbury* contains no assertion of an exclusive authority in the Court to bind other parts of the Government. Chief Justice Marshall claims only that the Court must obey explicit commands of the Constitution in preference to conflicting laws, when such commands are directed at the Court itself, and not to another branch of Government.

The Court's own treatment of *Marbury* as a precedent throughout most of its history shows that this narrow reading of the case is accurate. Between 1803 and 1983, the Court cited *Marbury* 181 times. From the beginning to 1865, *Marbury* was cited only to support narrow rulings on jurisdiction or mandamus. In *Dred Scott*, the other case of the era in which the Court voided a national law, *Marbury* is not even mentioned. During the 30-year period following the Civil War, the Court invalidated at least 20 provisions of Federal law; yet *Marbury* is mentioned in none of these cases. Not until 1895, in the Income Tax Case, did the Court first cite *Marbury* to support judicial review of national laws. Between 1895

and 1957, the Court cited *Marbury* only eight times to support judicial power to invalidate laws, and all eight describe the power in a very restrictive way. So, all totalled, there were 92 uses of *Marbury* between 1803 and 1957, and only 10 of these concern judicial power to invalidate laws; all 10 advancing restrictive notions of the power. Nowhere can be found any claim that the Court is the final arbiter of constitutional questions. If *Marbury* really means what *Cooper* and *Boerne* says it means, wouldn't the Court have said so during its first 168 years?

But all this changes in 1958. Over the next quarter century after the decision of *Cooper*, *Marbury* is employed 50 times to support judicial review; 18 times to support sweeping assertions of judicial power; and 9 times to support the idea that the Court is ultimate interpreter of the Constitution. So if we take the Court's own law seriously, we must conclude that judicial supremacy originated neither in *Marbury*, nor in the Constitution, but was established by the Warren court and developed subsequently by the Burger and Rehnquist courts. Thus judicial supremacy is not the correct understanding of the judicial power established in the Constitution. So what is?

The answer to this question is found by consulting Article III of the Constitution, *Marbury v. Madison*, and the thoughts of the Framers. In the first Congress, *Madison* flatly denied the power of any branch of the national Government, including the judicial, "to determine the limits of the constitutional division of power." The separation of powers was a central concern of the Founders who extended Federal judicial powers to cases arising under the Constitution, laws and treaties, only after they had generally agreed that the power was limited to cases of a judiciary nature. *Marbury* is the prototypical case of a judiciary nature because it involved a constitutional provision aimed directly at the Court that also embodies 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. Cases of the *Marbury* type, in which the Constitution implicates judicial functions directly, may be expected to arise most often under Article III, Amendments Four through Eight, and perhaps portions of Article I, Section 9. Limiting final constitutional review to the Court only in these cases, leaving to co-ordinate branches the final authority to determine the reach of their own constitutional powers, will preserve the co-equality accorded to each division of Government by the Founders, strengthens the Separation of Powers by emphasizing the constitutional responsibilities of Congress and the President, and recovers an important strand of our republican heritage that is nowhere more apparent than in the Supreme Court's own rich constitutional legacy. Thank you.

[The prepared statement of Mr. Clinton follows:]

PREPARED STATEMENT OF ROBERT L. CLINTON, ASSOCIATE PROFESSOR OF POLITICAL SCIENCE, SOUTHERN ILLINOIS UNIVERSITY

JUDICIAL CONSTITUTIONALISM IN THE UNITED STATES

Discussion of the United States Constitution cannot avoid confronting the obvious fact that the Supreme Court is now widely regarded to be the primary guardian of our fundamental law. The Court's monopoly in constitutional law rests largely upon two kinds of argument. The first argument, political, says that judicial control of

the Constitution is required in order to protect individuals and minority groups from the majority tyranny which would be implemented by legislatures in the absence of the judicial monopoly. The second argument is historical, asserting that judicial supremacy in constitutional matters is grounded in American constitutional history, especially in the landmark case of *Marbury v. Madison* (1803). My expertise is in the history of judicial review, so I shall confine my remarks mainly to the second argument.

In *Marbury v. Madison and Judicial Review*,¹ I described the historical process by which legal commentators in late-nineteenth and early-twentieth century America employed the *Marbury* case to lay a precedential foundation for modern judicial supremacy. Some of the present-day practical effects of the resulting judicialized constitutionalism are summarized by Robert F. Nagel in the following passage:

Today federal courts control more important public decisions and institutions in more detail and for more extended periods than at any time in our history . . . This unprecedented use of judicial power is not a response to specific and limited necessity or emergency. The power is exercised in every state and on a wide variety of social issues . . . Even a relatively "conservative" Supreme Court seems transfixed; recent decisions, such as those dealing with the legislative veto and political gerrymandering, illustrate the Court's continuing insistence that almost no public issue should be excluded from judicial oversight . . . Heavy 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.²

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, in many of the most vital aspects of life in the American polity, governed primarily by judges. Nagel's metaphor is that of "addiction:" American society has grown "dependent" on the omnipresent, omniscient federal judge, who appears to have supplanted the priest of earlier times.³ Nagel concludes that "excessive reliance on judicial review" undermines long-term support for basic constitutional principles, impairs the "general health of the political culture," and works against "both the preservation and the healthy growth of our constitutional traditions."⁴ I concur with these conclusions.

One of the most important results of judicialization has been to turn virtually all discussions about the Constitution into discussions about the role of judges in its interpretation. Here are two prominent examples. Soterios Barber, one of the few contemporary constitutional theorists who has tried to establish that the Constitution and constitutional law are two different things,⁵ nonetheless suggests that the most important job of "mainstream scholars" is to justify "a strong and unapologetic exercise of judicial power in constitutional cases."⁶ The second illustration is provided by Michael Perry:

In a society, like American society, in which it is axiomatic that the judiciary should enforce the Constitution, the choice among competing conceptions of the Constitution is (in part) precisely a choice among competing conceptions of judicial role. In resolving the question how to conceive of the Constitution, we are resolving the question what role the judiciary should play. In that sense, the two questions are really one question: What conception of "Constitution/judicial role" ought we to choose?⁷

This equation of Court with Constitution is pervasive in contemporary constitutional theory. It has led to a form of constitutional nihilism, expressed by Mark Tushnet, that judicial review is an "all or nothing" proposition: "Either one allows judges to do whatever they want or one allows majorities to do whatever they want.

¹ Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (Lawrence, Kansas: University Press of Kansas, 1989).

² Robert Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (Berkeley, California: University of California Press, 1989), pp. 1-2. See also Robert Lowry Clinton, *God and Man in the Law: The Foundations of Anglo-American Constitutionalism* (Lawrence, Kansas: University Press of Kansas, 1997), pp. 13-14.

³ *Ibid.*, p. 2; Clinton, *God and Man in Law*, p. 14.

⁴ *Ibid.*, p. 3; Clinton, *God and Man in Law*, p. 14.

⁵ Soterios A. Barber, "Michael Perry and the Future of Constitutional Theory," *Tulane Law Review* 63 (1989): 1289-1303, at 1298; Clinton, *God and Man in Law*, p. 14.

⁶ *Ibid.*, at 1290; Clinton, *God and Man in Law*, p. 14.

⁷ Michael Perry, "Review," *Ethics*, October 1985 (1985): 202-203, at 203; Clinton, *God and Man in Law*, pp. 14-15.

Either choice is deeply anticonstitutional—which means, I suppose, that constitutionalism is self-contradictory.”⁸

Let's think about this for a moment. Here are three of our nation's leading constitutional theorists unflinchingly declaring: (1) that the main job of constitutional scholars today is to *justify judicial activism* (not to understand the Constitution); (2) that in our system, the word “Constitution” really means “judicial role”; and (3) that constitutionalism is “anticonstitutional,” or “self-contradictory!” This is astounding. Constitutionalism may be a contradiction under any regime in which judicial review is “all or nothing,” but judicial review is “all or nothing” only under a theory of judicial supremacy. So if judicial supremacy is incompatible with constitutionalism, shouldn't we just get rid of judicial supremacy, and keep the Constitution? My answer is an unequivocal affirmative; and I would add that American constitutional history supports this answer. Let's consider this history now.

CONSTITUTIONAL INTERPRETATION IN AMERICAN HISTORY

During the antebellum period, constitutional interpretation was performed continuously by all three branches of the federal government. The great debates in Congress during this period were arguments over the meaning of constitutional provisions. The record is literally permeated by assertions of legislative duty to interpret the Constitution both rightly and in accordance with accepted canons of construction.⁹ 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.¹⁰ 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.¹¹

Note also that the indeterminacy of certain portions of the constitutional text has frequently required provision of constitutional meaning via the interplay of non-judicial political forces (for instance, in the establishment of a national executive administration in the 1790s, in the interposition, nullification, and secession controversies of the antebellum period, in some famous impeachment controversies, or in more recent conflicts over the reach of executive power in foreign and military affairs). The result here has been an extralegal constitutional construction which, though principled, is nonetheless primarily a political activity necessarily involving non-judicial actors and agencies and is largely unsuitable for courts. When judges go beyond the activity of applying determinate legal texts, where all the resources of traditional legal practice are available both to circumscribe their efforts and to justify their results, they enter an area in which they have neither special claim nor special competence. Attention to the importance of constitutional constructions throughout American constitutional history makes it clear that constitutional development in the United States has been very much a “departmental” affair, involving not only the political branches and the administration of the national government, but the states as well.¹²

Finally, and perhaps most tellingly, the Supreme Court itself did not claim “finality” or conclusiveness for its own constitutional interpretations until 1958;¹³ nor did constitutional commentators until the early twentieth century.¹⁴ Nor did the Court assert any power to control the boundaries of constitutional authority assigned to other agencies of government until the late nineteenth century, except in “cases of a judiciary nature.”¹⁵ The last-mentioned point 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.¹⁶

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

⁸ Mark Tushnet, “Judicial Review,” *Harvard Journal of Law and Public Policy* 7 (1984): 77–79, at 77; Clinton, *God and Man in Law*, p. 15.

⁹ See Clinton, *Marbury and Review*, pp. 72–77; Clinton, *God and Man in Law*, p. 15.

¹⁰ *Ibid.*; Clinton, *God and Man in Law*, p. 27.

¹¹ *Ibid.*, p. 113; Clinton, *God and Man in Law*, p. 15.

¹² See Keith E. Whittington, *Constitutional Constructions: Divided Powers and Constitutional Meaning* (typescript, Department of Politics, Catholic University of America, Washington, D.C., 1996), esp. chap. 1; Clinton, *God and Man in Law*, p. 24.

¹³ See *Cooper v. Aaron*, 358 U.S. 1, at 18 (1958); see also Clinton, *Marbury and Review*, pp. 14–15; Clinton, *God and Man in Law*, p. 15.

¹⁴ See Clinton, *Marbury and Review*, pp. 190–191; Clinton, *God and Man in Law*, p. 15.

¹⁵ *Ibid.*, p. 121, notes 46–48 and accompanying text; Clinton, *God and Man in Law*, p. 15.

¹⁶ *Ibid.*, chap. 5; Clinton, *God and Man in Law*, p. 27.

academicians and commentators in the late nineteenth and early twentieth centuries.¹⁷ It emerged in full flower only in the 1950s.¹⁸ During earlier periods, questions about constitutional meaning were not generally regarded as solely, or even primarily, judicial. Tocqueville's famous aphorism according to which all political questions sooner or later developed into judicial ones described a feared tendency rather than a reality. So had the earlier arguments of the antifederalist Brutus.¹⁹ 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.²⁰

During the last forty years, 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* (the Little Rock school desegregation case); claiming, for the first time in American constitutional history, judicial "finality" for its readings of the Constitution. This ruling effectively equated the Court's own constitutional interpretations with the Constitution itself.²¹ The legal peg 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, and federal treaties.²² In another "first," the *Cooper* Court cited *Marbury v. Madison* as precedent for its newly-discovered "ultimate" interpretive authority.

Since the *Cooper* decision, many have come to believe that, in *Marbury*,²³ the Supreme Court declared itself to be the primary organ of constitutional interpretation. The theory that appears to be most widely accepted currently is that the primacy of judicial review was established in *Marbury* on the basis of a comparatively weak or "inconclusive" historical foundation in the Founding and immediate post-Founding eras.²⁴ According to this theory, modern (broad-gauged) judicial review is explained and justified as an original "creative" fashioning by the Marshall Court that was later expanded by subsequent Courts in response to the demands of individuals and groups for judicial supervision of states, executives, and Congress in accord with the growing "needs" of American society.

As the Court's own record of precedents demonstrates, this conception of American constitutional history is fundamentally wrong. A limited form of judicial review was already established by 1800, but only as to relatively "clear cases."²⁵ *Marbury v. Madison* did not alter this, but rather established a clear precedent for the Court's power to disregard congressional laws in cases "of a judiciary nature"—i.e., cases in which judicial functions were threatened by application of a questionable statutory provision.²⁶ *Marbury* thus established only that the judiciary would play an important role in constitutional interpretation, not that it would be the sole, ultimate, or final constitutional interpreter. The idea that a single organ of government must possess such authority is a product of later times. After *Marbury* the Court would not invalidate another act of Congress until the 1850s.²⁷ Nor would it cite

¹⁷ Clinton, *Marbury and Review*, chapter 10–11; Clinton, *God and Man in Law*, p. 15.

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

¹⁹ 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 a century 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; Clinton, *God and Man in Law*, p. 27.

²⁰ See Clinton, *Marbury and Review*, chapter 6; Clinton, *God and Man in Law*, p. 27.

²¹ *Cooper v. Aaron*, 358 U.S. 1 (1958); see also Clinton, *Marbury and Review*, pp. 14–15, 207–211; Clinton, *God and Man in Law*, p. 27.

²² *Ibid.*, at p. 18. The Court there declared that "the federal judiciary is supreme in the exposition of the law of the Constitution." See also Clinton, *God and Man in Law*, p. 27.

²³ 1 Cranch (5 U.S.) 137 (1803); Clinton, *God and Man in Law*, p. 36.

²⁴ See, e.g., Leonard Levy, ed., *Judicial Review and the Supreme Court* (New York: Harper and Row, 1967); Clinton, *God and Man in Law*, p. 36.

²⁵ Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven, Conn.: Yale University Press, 1990), esp. chapter 3; Clinton, *God and Man in Law*, p. 38.

²⁶ Clinton, *Marbury and Review*, esp. chapter 5; Clinton, *God and Man in Law*, p. 38.

²⁷ *Dred Scott v. Sanford*, 19 Howard 393 (1857); Clinton, *God and Man in Law*, p. 38.

Marbury in support of any kind of constitutional judicial review until the 1880s; and not in support of broad-gauged review until the 1950s.²⁸

After its decision in *Cooper v. Aaron*, the Court has used *Marbury* to support its constitutional hegemony at least ten times, most recently in *City of Boerne v. Flores* (1997).²⁹ There, the Court invalidated a provision of the Religious Freedom Restoration Act of 1993 (RFRA) that attempted to restore the "compelling interest" standard in free exercise cases that the Court declined to apply in *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990).³⁰ In promulgating RFRA, Congress relied upon 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 *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."³¹

Though it is indeed difficult to see how Congress can "enforce" the Constitution without being able to "determine what constitutes a constitutional violation," for purposes of our historical survey, the crucial point that must be understood here is this: the reason why RFRA can be held to have altered the meaning of the Free Exercise Clause is that, in *Cooper v. Aaron*, the Court has put its own understandings of constitutional meaning (its "interpretations") on a par with the Constitution itself. In other words, according to the logic of *Cooper*, the Court's decision in *Oregon 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 *Boerne*, the Court explicitly denies the authority of Congress to interpret the Constitution conclusively or to define its own powers in accordance with it.³²

Thus it appears that the development of judicial supremacy in constitutional law is now virtually complete. 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. Co-ordinate agencies of government, the policies of which are defeated by the Court, are then expected to goose-step to the Court-imposed drumbeat, even to the point of conforming future policy choices to judicial preferences.

As I have said, it has not always been so. Nowhere is this shown more clearly than in the Court's historical treatment of the *Marbury* case—the very case misrepresented in *Cooper* and *Boerne* to support constitutional judicial supremacy. Given the importance of *stare decisis* in our legal system, it is worthwhile to examine the Court's treatment of *Marbury* during previous historical periods, because this treatment indicates how the Court conceived its own power during those periods.

MARBURY IN THE SUPREME COURT

In *Marbury v. Madison and Judicial Review*, I surveyed and catalogued all of the Court's citations of *Marbury* from 1803 through 1983.³³ Here's what I found. During the remainder of John Marshall's tenure as chief justice (through 1835), ten separate opinions contain references to *Marbury*. Nine are purely jurisdictional in nature, supporting the distribution of jurisdiction contained in Article III. The remaining reference is made to support the ruling that writs of mandamus may issue to executive officials only when engaged in the performance of purely ministerial duties. The Court's power to invalidate laws is not mentioned in any of these cases.

Between 1835 and 1865, *Marbury* is cited in 15 separate opinions in the U.S. Reports. As before, the largest number of cites is in the jurisdictional area (eight references). Six concern nuances in the mandamus remedy. One clarifies some dicta in *Marbury* that were unnecessary to the decision of that case. Judicial review is not mentioned at all. Even in *Dred Scott v. Sanford* (1857), the only other case before the Civil War in which the Court invalidated an act of Congress, *Marbury* is not mentioned! This pattern continues during the 30-year period following the Civil War, a period in which the Court invalidated national laws in no fewer than 20 cases—yet *Marbury* is mentioned in none of them! As in earlier periods, the in-

²⁸ Clinton, *Marbury and Review*, chapter 7; Clinton, *God and Man in Law*, p. 38.

²⁹ 117 S.Ct. 2157.

³⁰ 494 U.S. 872.

³¹ 117 S.Ct. 2157, at 2164.

³² 117 S.Ct. 2157, at 2168.

³³ Clinton, *Marbury and Review*, chap. 7. Full citations for all the cases may be found in the notes accompanying chapter 7, at pp. 266-274.

stances in which *Marbury* is cited pertain primarily to jurisdiction or mandamus. It is during this period, however, that *Marbury* is first cited in support of any kind of judicial review—but not over Congress. The citation is found in *Mugler v. Kansas* (1887), and is offered in support of judicial authority to overturn state laws via use of the doctrine of substantive due process!

At the beginning of the next period, in the famous *Income Tax Case* (1895), the Court, for the first time in its history, cites *Marbury* in support of its power to determine the constitutionality of national laws. Between 1895 and 1957, the Court cites *Marbury* in 38 additional instances, hardly more often than during the 30-year period preceding 1895. As before, most of the citations have nothing to do with judicial review. Five refer to the right/remedy maxim. Four support the holding that writs of mandamus may be issued only as an exercise of appellate jurisdiction. Four refer to the distinction between “ministerial” and “discretionary” executive acts. Four confirm that acts in violation of the Constitution are not law, but say nothing about the Court’s power to deny their enforcement. Three pertain to questions about the removal power of the president. Two refer to sections of the *Marbury* opinion which imply that courts may resolve only “cases or controversies” according to the regular course of judicial procedure. Two concern the idea that general expressions in judicial opinions are to be taken “in connection with the case in which they are used.” Two involve the relation between executive appointments and commissions. Two use *Marbury* to support the principle that no words in the Constitution should be presumed to be without effect. One maintains that constitutional language should receive a liberal construction whenever individual rights are at stake. Another supports the idea that the national government is supreme within its lawful sphere.

Eight of the *Marbury* citations during this period pertain to the judicial power to invalidate laws, and all reflect a narrow or restrictive conception of the power. Two are offered in support of the idea that judicial review should be confined to “clear cases.” A third is offered to show that courts have no “general veto power” over legislation, but may invalidate laws only in “proper cases.” A fourth is used to confine judicial review to “cases or controversies.” A fifth restricts court review to cases in which literal interpretations of the Constitution are possible. A sixth imposes on the Court the obligation to “interpret the law,” but only in “proper cases.” A seventh merely notes the petitioner’s argument that *Marbury* forbids executive invasions of “the Judicial sphere.” The eighth citation mentions *Marbury* as one of a long line of cases in which legislation was declared unconstitutional “because it imposed on the Court powers or functions that were regarded as outside the scope of the ‘judicial power’ lodged in the Court by the Constitution.”

Thus it may be fairly concluded that, although the Court began to notice *Marbury*’s judicial review aspect during the first half of the present century, it recognized fully its restrictive nature. Nowhere is there anything approaching a declaration that the Court is the final arbiter of constitutional questions. All told, of the 92 citations of *Marbury* by justices of the Supreme Court between 1803 and 1957, only ten refer to that portion of the Marshall opinion that is currently thought to have “established judicial review.”

All this changed in 1958. During the 25-year period between 1958 and 1983, there are 89 separate citations of *Marbury*, a number that almost equals the total of the previous 154 years. Of these 89, fifty utilize *Marbury* in support of judicial review. Of these 50, at least eighteen employ *Marbury* to justify sweeping assertions of judicial authority. Of these 18, nine apply *Marbury* to support the idea that the Court is the “final” or “ultimate” interpreter of the Constitution, with power to issue “binding” proclamations to any other agency or department of government respecting any constitutional issue whatsoever. As I have noted above, *Cooper v. Aaron* is the first of the cases in this last-mentioned category. If we take the Court’s own statements seriously, then it must again be concluded that judicial supremacy could not have originated in *Marbury*, but rather is a doctrine firmly established by the Warren Court and subsequently developed by the Burger Court. And if we take seriously the Court’s use of *Marbury* in the *Boerne* case, we must also conclude that the Rehnquist Court is presently doing its part to perpetuate the doctrine.

But if the doctrine of judicial supremacy in constitutional law is not the correct understanding of the judicial function established in the Constitution, then what is the correct understanding? The best way to answer this question is to contrast the modern doctrine with its traditional counterpart. I shall first sketch out the judicial function as it was understood at the time of the Founding. I will then try to show how the modern practice of review in cases involving the constitutional powers of co-ordinate agencies of government like Congress deviates from traditional practice. Finally, I shall attempt briefly to make out a case for a return to tradition.

Judicial review of national law in the U.S. is usually thought to be constitutionally grounded in the Article III extension of federal judicial power to cases "arising under" the Constitution, laws and treaties.³⁴ 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."³⁵ 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."³⁶ 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'."³⁷

Supporting the statements of Wright and Rossum are Madison's own remarks during the 1789 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 states the following:

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.³⁸

It can be argued that Madison's "mode to be provided by the constitution" is formal amendment and that the modes "dictated by the necessity of the case" may be elections, impeachments, or even revolutions.³⁹ It is more plausible, however, to assume that "necessity of the case" refers to the three branches of government working out in the daily routine of constitutional government the functional differentiations inherent in the separation of powers. It was Madison who just two years previously had recorded approvingly the Philadelphia Convention's restriction of the "arising under" jurisdiction of federal courts to cases "of a Judiciary nature," and in the passage just quoted, Madison straightforwardly denies the power of the courts to issue final constitutional pronouncements in cases which involve interpretations of the constitutional powers of co-ordinate agencies. Cases *not* of a judiciary nature that *also* arise under the Constitution are pre-eminently those that require determination of the constitutional authority of the legislative or executive branch. *Appropriate cases for judicial review must be those which do not require such a determination.*

³⁴ 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."

³⁵ Max Farrand, *Records of the Federal Convention*, 4 vols. (New Haven, Connecticut: Yale University Press, 1911), vol. 2, p. 430.

³⁶ Benjamin F. Wright, *The Growth of American Constitutional Law* (Boston: Houghton Mifflin, 1942; Chicago: University of Chicago Press, Phoenix Books, 1967 (reprint)), p. 18.

³⁷ Ralph A. Rossum, "The Courts and the Judicial Power," in Leonard Levy and Dennis Mahoney, eds., *The Framing and Ratification of the Constitution* (New York: Macmillan, 1987), p. 236.

³⁸ James Madison, "Comments on the Removal Power of the President," June 17 1789, in Charles F. Hobson and Robert A. Rutland, eds., *The Papers of James Madison*, 15 vols. (Charlottesville, Virginia: University Press of Virginia, 1979), vol. 12, p. 234.

³⁹ Wolfe, *The Rise of Modern Judicial Review*, p. 95.

It is likely that the 1787 cases "of a judiciary nature" are exactly those 1789 cases in which, "in the ordinary course of government," the exposition of the "constitution devolves upon the judicial." Under this view, it is only in cases which involve constitutional provisions directly addressed to the courts that the Supreme Court's refusal to apply relevant law is necessarily final. In cases involving constitutional provisions addressed to other branches of government (e.g., the Article I, Section 8 "necessary and proper" clause), the Court may surely refuse to apply the law, but it may not do so with finality in the strict sense. Even though the Court's decision may bind the parties in a particular case, Congress may nonetheless choose to disregard the Court's constitutional ruling and provide for executive enforcement of the statute. 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. 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 group includes those instances in which judicial review is appropriate, because final authority for nonapplication of the unconstitutional law rests in the courts by virtue of the nature of the judicial function. The most obvious example is an act which operates "unconstitutionally" on a court's performance of its own duties. In the other category, constitutional judicial review is inappropriate, because the performance of judicial duty in those instances is unaffected by the constitutional infirmity of the law.

MARBURY AND THE EARLY CASES

The case which best illustrates Madison's theory is also the one which has been most often used to support the modern theory of review, and which (nominally) involved Madison himself 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's jurisdictional distribution (which restricted the Court's original jurisdiction to cases involving "ambassadors, public ministers, consuls, and states").⁴⁰ *Marbury* is a case of judiciary nature in the pure 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. The Court's refusal to apply the law thus left the coordinate 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, one should be reminded that virtually all exercises of 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 to usurp judicial functions outright. In the first category, one may point to the *Invalid Pensioner Cases* of the 1790s,⁴¹ to the famous *Correspondence of the Judges*,⁴² and to *Marbury* itself. In the second category, one can refer to the many early cases involving statu-

⁴⁰ *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803).

⁴¹ See, e.g., *Hayburn's Case*, 2 Dallas 409 (1792); *United States v. Yale Todd* (unreported at the time), summarized by Chief Justice Taney in *United States v. Ferreira*, 13 Howard (54 U.S.) 40, at 52-53 (1851). 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." 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; *Kemper v. Hawkins*, 1 Va Cases 21 (1793).

⁴² 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 violative of the separation of powers. See David P. Currie, "The Constitution in the Supreme Court: 1789-1801," *University of Chicago Law Review* 48 (1981): 819-885, p. 829.

tory suspension of jury trials.⁴³ In the third, we have frequent instances of legislative usurpation via passage of attainders and retrospective criminal laws.⁴⁴

If one has trouble imagining judicial review so confined in its scope, it is probably because the modern American mind, conditioned by at least a half-century of judicial supremacy, can hardly help but regard the judicial branch as a co-equal partner in the public policy making process. But it was doubtless to prevent such participation by judges in policy-making that the Founders circumscribed the jurisdiction and power of courts so narrowly in the first place. And just as surely was it to prevent being dragged into such processes that early American judges strongly utilized the power of review to safeguard their independence; both by resisting legislative encroachment on legitimate judicial functions, and by refusing to intrude themselves upon domains they regarded as better left to others.

Marshall implicitly recognized this in *Marbury*, by drawing a clear distinction between the issue of constitutionality and that of judicial review; that is, between (a) a law being a *nullity* due to its incompatibility 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, bind the courts, and oblige them to give it effect?"⁴⁵ In answering this rhetorical question, Marshall articulated the theory of judicial function for which *Marbury* is justly celebrated:

It is emphatically the province the 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.⁴⁶

Since these lines recently have been so frequently cited as precedent for a notion of judicial power which renders the Supreme Court ultimate arbiter of *all* constitutional questions, it is important to assess what is *not* said in them. No exclusive power to interpret the fundamental law is claimed for the Court, here or anywhere else in *Marbury*. To be sure, it is "the province and duty of the judicial department to say what the law is," but only "of necessity," whenever those "who apply the rule to particular cases" *must* determine which of two "conflicting rules governs the case." In other words, the power of review claimed by the Court in *Marbury* is merely a power of discretion to disregard existing laws in the decision of particular controversies, *provided that the constitutional and statutory provisions involved are, like those in Article III and the Judiciary Act, addressed to the Court itself*. If the provisions are not addressed to the Court, then the Court will not be compelled, *as a matter of logic*, to choose between them in order to decide the case. Since precedents are created by holdings on points of law *necessarily* decided in particular cases, the Court's choice between constitutional and statutory provisions, one or both of which are not addressed to the Court, should not control the decision of subsequent cases. *Marbury* thus affords no basis for inferring that the Court is bound to disregard a statutory provision in conflict with the Constitution, except in that relatively small number of instances in which the Constitution furnishes a direct rule for the courts.

Where does the Constitution furnish direct rules for the courts? Most of the provisions of this type may be found in two places: Article III and Amendments 4-8 of the Bill of Rights. The classic example is one that Marshall himself used in *Marbury*: the treason clause, which requires either a confession or the testimony of two witnesses in open court to the same overt treasonable act.⁴⁷ For an obvious ex-

⁴³ 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* 76 (May 1978): 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).

⁴⁴ See, e.g., *Commonwealth v. Caton*, 4 Call (Va.) 5 (1782); *Kemper v. Hawkins*, 1 Va. Cases 21 (1793); *Caldwell v. The Commonwealth*, 2 Sneed (Ky.) 129 (1802).

⁴⁵ *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, at 177 (1803).

⁴⁶ *Ibid.*, at 177-178.

⁴⁷ United States Constitution, Article III, Section 3.

ample from the Bill of Rights, one only need add the requirement of the Fifth Amendment that such a confession be uncoerced. Now suppose that Congress, in a zealous attempt to suppress subversion, amends the federal rules of criminal procedure so as to make it possible for the government to obtain a conviction on a charge of treason on the basis of a coerced confession. 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 Constitution.*

Reformulating the emphasized portion above as a question allows formulation of a rule which will help one to determine whether any particular case is one of a judiciary nature. In each case, one may ask: "Can the Court apply the law in question without itself violating the Constitution?" If the answer to this question is negative, 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 nonjudiciary in nature, and the Court must apply the law, *whether or not the law itself violates the Constitution.*

Applying this method, one may read down the list of provisions in Article III and Amendments 4-8, and be quickly satisfied that most of the cases which have arisen (and may yet arise) under them fall into the former category (cases of a judiciary nature). At the same time, one may look almost anywhere else in the Constitution and be satisfied, though perhaps not so quickly, that most of the cases which have arisen (and may yet arise) under provisions other than Article III and Amendments 4-8 fall into the latter category (cases of a nonjudiciary nature).

FUNCTIONAL CO-ORDINATE REVIEW

What would be the effect of the Supreme Court's adoption of an approach which confines the scope of judicial review in cases involving the constitutional power of co-ordinate agencies of government to those "of a judiciary nature," leaving to other branches the right to construe constitutional provisions addressed to them? Such an approach would authorize judicial invalidation of laws only when to do otherwise (i.e., to uphold the law) would cause the Court to violate a constitutional restriction on judicial power. It would not allow the Court to defeat legislative or executive policies merely on the ground that such policies were unauthorized by the Constitution. It would not allow judicial nullification of policies forbidden by the Constitution, except when the participation of courts is required to effectuate them. Would not adoption of this approach, which I call "functional co-ordinate review," put an end to constitutional law as we presently understand it, leaving us in the grip of tyrannous popular majorities?

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. Of the 130-odd cases in which federal laws were invalidated between 1800 and 1985, only 38 were "of a judiciary nature."⁴⁸

However, when the cases are examined more closely, a different picture emerges. First, leaving aside *Marbury* and *Dred Scott*⁴⁹ (the earliest instance of judicial invalidation of congressional policy in a case not of a judiciary nature), the Court invalidated national laws in 75 cases between the end of the Civil War and 1936—on the eve of the Roosevelt Court-packing scheme.⁵⁰ Only 14 of these occurred in cases "of a judiciary nature," leaving 61 having occurred in cases inappropriate for judicial review, under Madison's theory. The bulk of these latter cases were decided on the ground either of: (a) Fifth Amendment substantive "economic" due process, (b) Tenth Amendment "dual federalism," or the Court's mere opinion that Congress had overstepped its constitutional authority. The crucial point is this: virtually *all* the last-mentioned decisions (the "inappropriate" ones) have since been either overruled or so thoroughly emasculated as to have effectively disappeared from our constitutional law.

During the period following the Court-fight to 1985, the Court overturned some 53 acts of Congress.⁵¹ The Roosevelt and Warren Courts together performed 26 of these, all but five in cases "of a judiciary nature."⁵² Conversely, the Burger Court performed 27 nullifications, only two of which clearly were in cases of a judiciary nature.⁵³ The obvious conclusion to be drawn from this brief survey is that, unless one happens to be a staunch devotee of the Burger Court, adoption of Madison's the-

⁴⁸ Clinton, *Marbury v. Madison and Judicial Review*, pp. 117-121, 207-211.

⁴⁹ *Dred Scott v. Sanford*, 19 Howard (60 U.S.) 393 (1857).

⁵⁰ Clinton, *Marbury v. Madison and Judicial Review*, p. 121, pp. 207-208.

⁵¹ *Ibid.*, pp. 208-210.

⁵² *Ibid.*, pp. 208-209.

⁵³ *Ibid.*, pp. 209-210.

ory of review would hardly reduce our constitutional law to a shambles. Instead, it would only serve to eliminate the more questionable portion of the Court's historical interferences with national legislative policy. Indeed, of the 90-odd cases comprising this portion, *the Court has itself already eliminated roughly two-thirds!*

I believe that this record is a testament to the good sense of Madison and the Founders. They knew what we have apparently forgotten, that courts are fragile institutions, with little political capital to squander, and which must be jealously guarded if they are to perform well their most vital function: that of resolving disputes peacefully, 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." When that branch attempts self-aggrandizement via constitutional struggles with the more explicitly "political" (and ultimately stronger) organs of government, it will not, in the long run, become the "most dangerous branch;" rather, it will put the entire machinery of peaceful dispute-resolution at risk, and thereby undermine the real source of its own authority.

The Founders also knew something else that we seem to have forgotten. Three decades ago, constitutional historian Donald G. Morgan, warning of the danger of the 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."⁵⁴ Jefferson believed that "congressional involvement with constitutional inquiries" was "essential to an informed electorate," the "safest depository of ultimate power."⁵⁵ Madison viewed such constitutional involvement as "essential to the integrity of the Legislature 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.⁵⁶

Commenting on Morgan's book, the late Senator Sam J. Ervin, Jr. issued a call which, in the wake of the *Boerne* decision, seems especially appropriate:

The thesis of this book is that it is the responsibility of every Senator and Representative in the national Congress to study the constitutionality as well as the wisdom of the legislative proposals pending before the Congress . . . As a member of the Senate, I accept the validity of this thesis, which was evidently in the minds of the men who drafted and ratified the Constitution.⁵⁷

Mr. CANADY. Thank you, Professor Clinton. Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I was delighted with the testimony, and one of the things that we kept hearing was whether the Court had the last word. One of the things that is interesting, the nature of passing legislation; passed by Congress, then the President. Just in the order of things, the Supreme Court would be the last one to speak; there's no way to get the Court speaking first.

Let me ask a couple of questions; since this is a political discussion, whether or not the witnesses see any ideological bent in the cases where the acts of Congress are invalidated?

Ms. STROSSEN. I have to say, Congressman Scott, looking at the cases that I follow most closely, which are those dealing with civil liberties, to a surprising extent on some issues there is a lack of ideological bent, and I say surprising because it is quite different from what we encounter in elected branches of Government.

The Communications Decency Act, struck down in the *Reno* case, is a perfect case in point. Essentially, that decision was joined by

⁵⁴Donald G. Morgan, *Congress and the Constitution: A Study of Responsibility* (Cambridge, Massachusetts: Harvard University Press, 1966), p. vii.

⁵⁵*Ibid.*, p. 362.

⁵⁶*Ibid.*

⁵⁷*Ibid.* (Jacket).

all nine Justices, with just small dissents on very small portions of the law—by Justice O'Connor and Chief Justice Rehnquist. But, essentially, they all agreed that the CDA was unconstitutional, regardless of their own personal ideologies or the ideologies of those who appointed them.

The counter-example that I can think of in the area of the First Amendment, is—and I'm sure Congressman Hyde, in particular, is familiar with this—some critics have charged that the Court is engaging in an "abortion distortion," and have argued that the Court's decisions concerning free speech, or alleged free speech and free association rights of anti-abortion demonstrators are less protective than they would have been of the free speech rights of, let's say, pro-civil rights demonstrators. And I think it's interesting that in those cases you have Antonin Scalia standing more strongly, for a more solid version and a more absolutist version of the First Amendment than held by Justices who would be considered liberal.

Mr. SCOTT. I think Professor Clinton kind of alluded to this, and I wanted to ask if the invalidation of acts of Congress seems to be more common today than it has been historically.

Mr. CLINTON. Well, I don't think there's any doubt about that. Of course, during earlier periods, prior to the Civil War, there were only two acts of Congress invalidated, and in one of those, which was the *Marbury* case it's not clear that the Court even knew, at least until the 1880's or 1890's, that the Court had invalidated any law there; because if you look at the citations of *Marbury* during that entire period, you get virtually nothing, except very narrow references to jurisdiction or mandamus.

The first time I know of that *Marbury* was ever even cited in support of judicial review was 1887 in the *Mugler* case; and there the Court mistakenly cited the case as an example of substantive due process, in effect. In other words, they used *Marbury* as a precedent for the Court striking down state laws on Fourteenth Amendment grounds; and so it's not clear why they even dredged it up, and it's not clear that they knew what they were citing either. Now that all changed in the late 19th and early 20th centuries, which happens to be the same era in which the Court started striking down more acts of Congress.

And, I think, if you look—there's an interesting thing that goes on here. If you look at the modern period, after the Warren court, you find that the Warren court struck down more state laws than anything else, but very few Federal laws. The Burger court, on the other hand, struck down a whole lot of Federal laws. And the Rehnquist court seems to have followed suit, although I haven't done those numbers. But there's no question that the exercise of judicial power over Congress has increased steadily since the late 19th century. I think that would be a fair enough statement. Some of the other panelists may have something to add to that.

Mr. CURRIE. Yes, I'd just like to say that it certainly is true that there have been more Federal statutes struck down in this century than the preceding century; but this is not the first period of judicial activism in that regard. One thinks, of course, of the famous invalidation of many New Deal measures during the 1930's. And I think that this—

Mr. CANADY. The gentleman has two additional minutes.

Mr. CURRIE. Thank you, Mr. Chairman.

This suggests that the degree of invalidation of congressional action is proportional, in part, to the degree of congressional action. That is, one of the reasons why there were very few congressional statutes struck down in the early 19th century was that the Congress was much more restrained in the exercise of its powers during those years than it has been since. It is when Congress begins breaking new ground and reaching out into new areas where there are questions about its constitutional power that the Court is naturally given more opportunities to pass on the extent of its powers.

Mr. SCOTT. No one—there's one other aspect of this that I think is significant, and I haven't heard much on it, and that is the fact that Congress is elected one way, the President is elected independent of Congress, but the Judicial Branch is dependent on the other two branches, so that if there is a disagreement between the legislative and administrative branches, there's a solution. It takes a little time to get there, but there is a solution. Is that any restraint on historical, traditional activism, and disagreeing with Congress and the President?

Mr. DEVINS. Well, the ballot box also applies to the Courts because the selection of judges and Justices is an overtly political process. So, to return to the example of the Court striking down New Deal legislation that Professor Currie mentioned before, it was inevitable that with the death of Justices on the Court, that the view of the Court to the New Deal would change over time because of political events, the reelection of Roosevelt, and the substitution, with it, of old Justices with new Justices. So, I don't quite know if the demarcation you suggest is really a true demarcation.

Mr. FISHER. I am reminded by your question of what happened in the early 1940's, and, Nadine said, which is true, that if the Court is unanimous, that means something is really unconstitutional. But at times, the Court is nearly unanimous, and the public, in this case, reacts in the newspapers and editorials, and so forth. I'm thinking about the 1940 case that upheld a compulsory flag salute. It was an eight-to-one vote by the Court, and the reaction in the public was fierce against the Court's ruling. Very strong determination by the general public and experts that the Court didn't understand the Constitution, didn't understand religious freedom, and didn't understand individual rights. Two years later, three Justices recanted; said they had regretted their being part of the eight. Two new Justices came on, and in 1943, the Court reversed itself.

Now, the Court's opinion in 1943 was a beautiful description of the Bill of Rights, and what it means, but I think the credit goes to the country weighing in and saying this is just unacceptable to force school children to take a flag salute that's in violation of their religious rights. So, sometimes Congress is the restraint, sometimes it is the President, sometimes the general public.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. CANADY. Thank you. Mr. Hyde.

Chairman HYDE. Thank you very much, Mr. Chairman, and I want to congratulate you on holding this hearing. This is a fascinating subject and I just wish we had two or 3 days on a mountaintop retreat where we could not be stymied by the limitations of time, and really have some exchanges. Nadine Strossen is a pal

of mine, and I admire and respect her, and I don't think there's anything we agree on. [Laughter.]

And that's what makes it such fun, because she brings a level of learning, and intelligence, and analysis to these subjects, but I'm just going to go through some of the things that trouble me in this field.

Court-stripping as a remedy. Sure, it's in the Constitution, and we can limit jurisdiction of the Courts, but just try it. I remember some years ago—I won't mention his name, a Senator from a southern State, introduced legislation to remove abortion cases from the Court, and it produced an explosive reaction from the academic world. And I remember Arthur Fleming testifying with great indignation that this would shred the Constitution, and I asked him if he would send me his paper in opposition to the Norris-LaGuardia Act, and he just smiled and made no response. Judicial activism, yes, there is, there really is. Someone, Kissinger, I guess, said that power is the ultimate aphrodisiac, and it is, and there are judges who exercise this.

But what I did not hear is who gets the last word. *Roe v. Wade* created a constitutional right out of the air, and it's there, and every court and every State in the land had their abortion laws wiped out with one fell swoop, and the Court has danced around it now with Casey, but reinforced it for the marvelous reason that, by God, it's here, and we're used to it. So, who gets the last word? We're bound and we're chained by that. State courts, state legislatures are chained by that, and so the court has got the last word, and that's really what counts.

Is the Constitution a living, breathing document ala Justice Brennan, or does original intent count for something? "You pays your money and you takes your choice;" good question.

Defining deviancy down—so true, so true, Senator Moynihan—because obscenity 20 years ago—and Nadine has written a book on this—but, twenty years ago, the stuff you can see now in some of the movies, see on your nightly television, and listen to, would be criminalized. The Court has been defining deviancy down, but there you are. Flag burning; is burning a flag symbolic speech? The Court refuses to recognize that many of us, the majority of Americans, don't think it's symbolic speech, but that's where we are. The Second Amendment; I don't care what you say, it's there—and the right to keep and bear arms is there. Internet porn, which Nadine was so concerned about. The consent of the governed is out there somewhere as a basis for this whole Government. And parents and people are worried about the poison that's on the internet, and it may be delightful to say what you want to say no matter how obscene it is, but there's a real problem and I hope we can somehow work it out.

There are noble exceptions to principle. Tort reform, we hear the argument from State's Rightists, saying we have 50 states and we ought to keep our nose out of their tort laws but in the real world today, you have 50 different sets of laws that insurance companies and exporters have to comply with and it just won't work.

So, I remember arguing with a Justice or judge of the Fifth Circuit one time over lunch about judicial activism, and I said—I was trying to be critical of judicial activism and he pointed out an ex-

ample where they have to do something they shouldn't do. And I said, what's that? And he said, reapportion. He said, your state legislatures won't do it, many times, and, so, it's left to the Courts to do. For years, we didn't do it and nothing happened, but the political process was distorted because the legislatures abandoned their responsibility; we did it and we do it. He's quite right. And I would call that a——

Mr. CANADY. The gentleman has two additional minutes.

Chairman HYDE. That's all right, I've trespassed on everybody's time, but——

Mr. CANADY. We've all trespassed. [Laughter.]

Chairman HYDE. But this is really a fascinating subject: judicial review versus legislative review. It's nice to say we have the same responsibility, but we don't really have the power because the Court has the last word and it's really a conflict of laws problem. But, thank you, Mr. Chairman, thank you all for giving your time to us.

Mr. CANADY. Thank you, Mr. Hyde. Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I seldom take the opportunity to praise the chairman of this subcommittee, and I——

Mr. CANADY. Let's get this on tape. [Laughter.]

Mr. WATT. I will do that publicly and I want to make sure that our reporter is recording this. I think this has been an outstanding exercise. It may just be an exercise, unfortunately. I suspect that most of us will go back to our various ways of dealing with these issues when the hearing is over, and it'll be a nice academic backdrop for us. But, it's at least nice for us to have the opportunity to have these kinds of exchanges as part of our legislative process. I think it's important for the Judiciary Committee, in particular, to take up some of these kind of discussions that appear to be academic but have some very, very important and powerful legal and political implications.

I should say that I resemble the chairman's remarks about neo-State Righters. I had the sense that he might have been pointing that at me, but I'm sure he wasn't.

Chairman HYDE. No, sir, I think you're a genuine States Righter. [Laughter.]

Mr. WATT. I haven't heard anything today that I'm surprised by. The thing that I have not heard much about, that I'm extremely concerned about is impeachment of judges. I mean, there are a number of issues, that like the chairman I could go down and differ with the Court on going back historically, differ with the Court on currently, and call them judicial activism or say that they ought to be doing something different. I'm kind of satisfied with that equalizing itself over time and coming out in a reasonable way; the political process will take care of that.

The one issue that is very troubling to me though is one that only Professor Franck addressed in a tangential way. And that when we, on our side, start talking about impeaching judges for activism, and because we disagree with their opinions on issues. There are several issues I would vigorously disagree with members of the Supreme Court, and members of other courts, about, but I think that it's another matter to start talking about impeaching a judge. I heard what Professor Franck said about it. He thinks it's

apparently a legitimate, primary tool that one might consider. I'm just wondering how the others on the panel may feel about how this whole threat of impeachment plays into the process, and when and under what circumstances it might be appropriately threatened and or applied.

Ms. STROSSEN. May I address that, Congressman Watt? I did address that in my written testimony and certainly the ACLU, as a staunch defender of free speech, would absolutely defend the right of everybody, including you and Congressman Hyde and all of us, to criticize particular decisions, and most of us have criticized the *Boerne* decision, as an example. That is protected free speech. But when you start not only the impeachment process itself, but even threatening to invoke the impeachment process, and when those attacks are voiced by Government officials who are in a position to actually initiate the impeachment process, our concern is that starts crossing over a very important line between your protected right to criticize Government officials, including judges, versus dangerous threats and intimidation. Even if they don't result in impeachment, they can have a chilling effect on judicial independence, which, by the way, no less staunch a conservative than Chief Justice Rehnquist called the crown jewel of our system of Government.

And Chief Justice Rehnquist also wrote a book about the impeachment process in which he, going back to the first incident in history in 1804, talked about the extremely important precedent that, was set in the case of the impeachment of Justice Chase. It was not a legitimate basis for impeachment that somebody disagreed with the judge's constitutional interpretation. That is the basis for criticism, certainly, but that is not a basis for removal.

One can cite not only history for that proposition, and not only the text of the impeachment clause of the Constitution, but also, I think, even more importantly, the whole structure of checks and balances and of the very special role that is carved out for our judiciary to be a check on the majoritarian branches of Government, to help them resist political tides that may well—and, unfortunately, throughout our history, have—run roughshod over the rights, especially, of unpopular individuals and dis-empowered minority groups.

Mr. CANADY. The gentleman may have two additional minutes.

Chairman HYDE. Would the gentleman yield?

Mr. WATT. I'll certainly yield.

Chairman HYDE. I just want to say on this subject, I think the gentleman is absolutely right. The word is thrown around promiscuously and wrongfully, and it should never be, and it's usually non-lawyers who do it. I don't mean to be critical of non-lawyers, but their visceral reaction to a judge they don't like is impeach. Thank God it takes a two-thirds vote and requires bipartisan support to impeach anybody. But I don't think that's a real threat. I think very few people have reacted to a local situation; however, it gets a little dicey when you have a Federal judge who waits 8 years to rule on a case, a serious criminal case that involves the freedom of the person, and of having to try it again, and find the witnesses after 8 years—to have the decision in your bosom for 8

years, it gets close to egregious misconduct. And those are tough cases; we don't have one before us, although I know of such a case.

And just one last thing, you mentioned internet pornography and that we have a duty to look at the Constitution and say, hey, this isn't constitutional. Many times, Members of Congress want to—it isn't a question of sending a message, but they know the Courts change their mind, and you want to give them a chance to get it right next time, and they can't unless they get legislation up before them. That is sometimes a motive, rather than a blatant disregard for doing something that is unconstitutional, but let the Court worry about it. Sometimes you want to keep sending it up to them, hoping. *Roe v. Wade*, I'd like to send one every week up there, hoping they'll get it right sometime.

Thank you. Thanks.

Mr. WATT. Can I just—I don't have any more questions, but I would like to hear from as many of the panelists as you will give time to respond to it—

Mr. CANADY. Sure.

Mr. WATT. The impeachment issue.

Mr. CANDAY. The gentleman has two additional minutes.

Mr. CURRIE. I certainly agree with what has been suggested about the inadvisability of killing the umpire because you don't like his decisions. Impeachment is one form of killing the umpire, and the Senate of the United States in a very admirable bipartisan decision back in 1805 in refusing to remove Justice Chase for political reasons gave, I think, the definitive answer to the use of impeachment as a means of controlling the exercise of judicial power. The use of impeachment for that purpose is squarely contrary to the whole idea of judicial review.

And, so, I think, is any attempt by other branches to destroy the effectiveness of the Court. For example, you go back to the 1930's again, when the Supreme Court was frustrating the New Deal, the President's reaction was, let us neutralize the Court by packing it with a bunch of new Justices who will be sympathetic to my program. That is totally inconsistent with the role of the Court as an enforcer of the Constitution. That is to say, kill the umpire.

I have similar problems if the Congress undertakes to kill the umpire by removing the jurisdiction of the Court—by stripping the Court of jurisdiction to determine the constitutionality of acts of Congress or the state legislatures. It was not just people like Marshall and Hamilton who believed in judicial review as an essential check on the unconstitutional actions of other branches of government. Madison, as I said in my testimony, was also of that view; so was Thomas Jefferson. Congress has a role, the President has a role, everybody in a sense, Congressman Hyde, has the last word, in that if the Congress thinks that a bill is unconstitutional, it won't pass it. If the Court thinks that the bill is unconstitutional, it will hold it unconstitutional. And I think that's the best way to enforce the Constitution. Don't kill the umpire; let every branch of Government exercise its independent responsibility to protect us against constitutional violations. This is not to say that there are no checks on the Court; of course there are checks on the Court. The appointment process has been mentioned. The amendment

process has been mentioned. But let's not kill the umpire just because we don't like his decisions.

Mr. FRANCK. May I respond since I——

Mr. WATT. I wanted—I may have misstated what your intention was.

Mr. CANADY. The gentleman has two additional minutes.

Mr. WATT. I didn't intend to do that. I'm sorry.

Mr. CANADY. The gentleman has two additional minutes.

Mr. FRANCK. I don't believe you did misstate my intentions, Congressman Watt. Professor Currie refers to the Supreme Court as the umpire, and wishes us to not kill the umpire. I would object to that noun being applied to the Supreme Court, actually. Professor Currie and Professor Strossen are in agreement with our esteemed Chief Justice on the question of impeachment, but the Chief Justice is in disagreement with Alexander Hamilton, with Joseph Story, and with Henry Adams who wrote the most significant history of the Jefferson and Madison Administrations back about a century ago. Hamilton, you'll recall, of course, is the man who puts forward the argument for judicial review in Federalist 78, but then three essays later in Federalist 81, says that the impeachment power is our complete security against the deliberate usurpations of the legislative authority by the Justices of the Court.

Joseph Story agreed with that in his *Commentaries on the Constitution* in 1833 and when Henry Adams, late in the 19th century, took a look at the Chase trial of 1805, he concluded that nothing was concluded. That is, nothing was settled conclusively by the Chase trial because neither side really came out clearly victorious as a theoretical matter. On the side of those seeking to remove Justice Chase was the argument that the Congress could impeach and remove for any reason it chose. Chase's defense team argued to the contrary, that something had to be clearly within the ambit of criminal law to be an impeachable offense. And Adams' conclusion was that neither side really won that argument. The truth has to be somewhere in between.

A similar conclusion was reached about 5 years ago by the woman who wrote what I think is the definitive work on this, Eleanor Bushnell, whose book, *Crimes, Follies and Misfortunes*, was published by University of Illinois Press. She concludes likewise about the impeachment trial, in fact, reviews all the judicial impeachments in our history. And, I think her scholarship, frankly, is superior to Chief Justice Rehnquist's.

All that being said, I believe too that impeachment is inadvisable almost all the time. I mentioned it today because I did not want to leave out what I think is a powerful potential check on the Court.

Mr. WATT. What about on substantive disagreements? Is that a permissive basis?

Mr. FRANCK. If the Congress concludes, if the House by majority sends a prosecution team up to the Senate chamber and succeeds in persuading two-thirds of the Senators that a particular judge or Justice has committed a deliberate series of usurpations on the authority of the legislature, I believe that that is sufficient grounds for impeachment.

And, of course, the Court itself ruled in *Nixon v. United States* in 1993 that Senate determination of someone's guilt is really a procedural issue, but by extension they could be said to have concluded that impeachment proceedings are unreviewable by the Courts themselves. They called it a political question.

Mr. WATT. Thank you, Mr. Chairman, I'm sorry, I didn't mean to—

Mr. CANADY. Oh, no, I think that was a productive line to pursue. Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I also want to thank you for holding these hearings. I think it's a very important subject that we have neglected for too long. Let me also say that I agree with Chairman Hyde that we need to avoid trying to change the Court's jurisdiction as a solution to this. But I would never say never to that.

And I agree with the gentleman from North Carolina that impeachment is not a suitable alternative, but I would never say never to that either, because that's a constitutional power that we have and we should preserve and protect it.

And I would say that the gentleman, Professor Franck, that his point's well-taken; that it's only going to be used in the rather extreme circumstance that the body would refer to the Senate for trial and action that would require two-thirds majority of the Senate. Rarely is it even going to be undertaken, and even more rarely would it succeed. But, I can envision circumstances where a Justice was totally and flagrantly ignoring the provisions of the United States Constitution, and under those circumstances, without any high crime or misdemeanor, but rather simply the misdemeanor of the opinion of the public and of the Congress that they are ignoring the dictates of law, would be a basis for their removal, and I would not ever foreclose that as a possibility.

But, it is certainly not an adequate solution to the steady, case-by-case erosion of the power of the other two branches of Government and, in my opinion, of the Constitution itself, that takes place when the Court deals with issues in a manner that I think flagrantly disregard the Constitution.

So my question to you then is, what do we do as an alternative? And let me take the *Smith* case and the *Boerne* case as an example. I think most people in this country were stunned at the *Smith* decision. It was an easy decision, perhaps, in that particular factual scenario. Nobody wants to be upholding the right of people to smoke drugs, and that's what they founded that decision on, but it was a dramatic erosion of our First Amendment free exercise rights, in hindsight. But we read into that decision the inference that Congress hadn't spoken on this issue and that if we did speak on this issue, the Court would recognize that and honor it, and so by overwhelming majorities we passed through the Congress—almost no dissent—the Religious Freedom Restoration Act, making it clear that the higher standard of protection of free exercise of religion would be the law of the land, and the Court then simply came back and said, no, you don't have the authority to do that.

There are other alternatives. A constitutional amendment is one, and, I, frankly, in this particular instance, think a constitutional amendment is called for, and I think it would have a great chance

as you might like, but nonetheless, I think, a quite significant difference, and that's on the abortion issue. I think things, in terms of Supreme Court doctrine, are very different 25 years after the *Roe v. Wade*.

And I understand that the *Casey* case is one that employs *stare decisis*, but in so doing nonetheless overturns the trimester standard of *Roe*. The *Casey* court undoubtedly is responding to its recognition that *Roe* may have gone too far. There are new Justices on the Court who perhaps think that *Roe* was not a good decision when first decided. But beyond *Casey*, you have, through the Hyde amendments, an opportunity to place further limitations on abortion rights. You have through the initiatives of President Reagan and Bush the gag orders—

Mr. GOODLATTE. But none of those overturn the underlying decision that many of think was incorrect in the first place, and 32 million abortions later—to me, I don't think that our ability to chisel around the edge of that really is a chilling of strength. All it is, is being able to operate in areas the Court have not acted and, therefore, given us a little more room to operate. But, that's simply like saying, well, here are the crumbs that we've left for you to operate around the edge of this issue, but the core of the issue, we said, stay out of it because of what many people believe is a misinterpretation of the Constitution.

Mr. CANADY. The gentleman has two additional minutes.

Mr. GOODLATTE. Anyone else want to respond to that?

Ms. STROSSEN. I would love to. Specifically, in the area of religious freedom and RFRA. As I mentioned, the ACLU had testified in favor of it. We're very disappointed by the Supreme Court's decision. By the way, with all due respect, Congressman, the drug involved—peyote—is not smoked, so I'm told. One has to ingest it. But, seriously, what was at issue there, of course, was the right not to ingest a drug in general, but in a particular religious ceremony. As it happened—

Mr. GOODLATTE. But I'm not trying to go over that. I think—my opinion is that the Court picked a case where it would not stir great public controversy—

Ms. STROSSEN. I completely agree with that.

Mr. GOODLATTE [continuing]. People's religious freedoms were infringed by that particular decision, yet—

Ms. STROSSEN. And, yet, it had sweeping consequences, absolutely. And in that particular case, the follow-up, I think, points the way toward other action that can be taken. Namely, the state legislature in Oregon, where that case came from, immediately passed a law making an exemption from the drug laws for those who were ingesting peyote in religious ceremonies. And, short of a constitutional amendment—which not only is difficult to enact, but may have some very strong downsides as well—I'm heartened that there are a lot of other possible strategies for securing the religious freedom that Congress tried to secure through RFRA.

One potential vehicle is another Federal statute, and I think a couple of the witnesses on this panel testified about a legislative record that could perhaps be responsive to the concerns the Supreme Court raised. And another possible approach that Congress could follow would be not to have a law that is written in such

sweeping terms that it sounds like an interpretation of the Constitution, which is what, I think, got the Supreme Court's back up, but one could isolate the particular violations of religious liberty that are being conducted under Federal laws.

One example was already given: the regulation that prohibited the wearing of religious headgear by members of the military. One could find out what all the existing violations are and correct them by passing statutes. In addition, the states are very strong avenues of potential support for religious freedom. Not only through laws, such as the one that was passed in Oregon, but also through state courts' interpretations of their religious freedom provisions in their constitutions. Since the Supreme Court's *Smith* decision—

Mr. GOODLATTE. Can I interrupt since I'm going to have to leave and I'm sure the chairman doesn't want to go on indefinitely, but I don't disagree with what you're saying, that there are other alternatives to seek legislative remedies. What I am concerned about is the lack of ability to change an overlying Supreme Court decision that the majority of the people in this country find offensive and your solutions don't address that. Professor Franck, do you want to say something?

Mr. FRANCK. Professor Clinton—

Mr. CANADY. The gentleman will have one additional minute.

Mr. CLINTON. Yes, I think what's frustrating here is that you're looking for something a little more definite and a little more forceful, and I think that I can give that to you. And it seems to me that you should go back to the Founders, and reread all that history and then reclaim your authority to interpret the boundaries of your own power from the Court, which I think the Congress has given away.

Mr. GOODLATTE. How do we take it back?

Mr. CLINTON. Essentially, take it back. You're simply taking it back. You're going back to the original understanding of the Constitution.

Mr. GOODLATTE. Is that in defiance of Mr. Hyde's concerns about the Congress changing the jurisdictional authority of the Court?

Mr. CLINTON. Well, I don't mean to do it that way. I mean, simply, I think the understanding was, in the beginning, that each of the branches of Government would be the judge of their own constitutional powers. Madison said it; he said it flatly in debates in the first Congress. And I think that would be the most—I suppose that would be the most direct and the most forceful approach. It would answer Mr. Hyde's suggestion—he raised a question—I think it was the first or second that he noted—was, who has the last word. I think that's the issue, seems to me. Seems to me, the problem is, we have, in the last 40 or 50 years, come to expect that the Court has the last word, but I think that's a-historical and it's not in accordance with the original design of the Constitution, and so, there may be some tension.

Now, it creates a problem. The problem is, if there's no finality, then it looks as like there's going to be a form of anarchy in constitutional interpretation. Well, yes. I think that's precisely what was intended.

Mr. CANADY. The gentleman's time has expired.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. CANADY. One more time? Without objection, the gentleman from Virginia, Mr. Scott, will be recognized for three additional minutes for an additional question.

Mr. SCOTT. Thank you, Mr. Chairman. We've heard a lot about the will of the people—and I don't know if this is a question or an observation, it just occurred to me that when the Supreme Court steps in with a ruling invalidating a statute, that it is always going to be in violation of the will of the majority of the people. And that's just the way it is, and that's how we like it because we have a minimum standard of rights that aren't going to be violated, and if something passes 97-to-2 in the Senate, if it's unconstitutional, it doesn't matter how popular it is.

Mr. FISHER. I have a comment. Chairman Hyde had said that on *Roe v. Wade* it's still the last word even though the Court backed up a little bit in *Casey* to give up on the trimester standard. I don't think that's a statement on the power of the Supreme Court. I think that's a statement of reality of politics in the United States. I think that if *Roe v. Wade* had been resisted by 90 percent of the people, it wouldn't be around today. But the country is fairly closely divided on this issue, and it gives the Court enough political room to hold on to some of *Roe* and give up on the rest.

I think on the other cases that we have been talking about—on *Boerne* and on *Lopez*, on guns in the schoolyard—it may not be a case of the Court being the last word, but Congress not putting enough attention into building a record to show why it would have that authority to enact the legislation. You probably know—I think it was last year, within the last year—Congress passed legislation again on guns in the schoolyard and the dialogue continues. So, I think the burden is on Congress. Particularly on *Boerne*, where what you were doing was probably fatal. To tell the Court, when you gave up on the *Sherbert* standard in *Smith*, we are reimposing it in RFRA, I think that's probably a red flag for the Court. But, you could have stated that although the Court held that religious freedom is at this level, we're going to go above it with some other language and not to confront the Court by telling it to adopt a standard that it itself had rejected. So a lot of the power is left to you to build a record and show why the legislation is necessary.

Ms. STROSSEN. Congressmen Scott, if I could comment just briefly. I think what you said is partly correct, but I would like to add an important caveat. It's partly correct that, of course, it's inevitable that in striking down a popularly enacted law, whether by referendum or through the legislative process, the Court is violating or thwarting the will of the people that is at that moment in the time the majority of the people. So we are talking about temporary, shifting majorities. But in doing so, the Court is honoring the will of the people in the larger, more durable sense, as reflected in that great document that begins, "We, the people of the United States."

And, it also honors that larger concept of popular will, insofar as we the people retain the right to amend the Constitution to overturn a Supreme Court decision. That is a power that has been exercised recurrently throughout our history. I agree with the remarks that were just made. The fact that such a constitutional amendment has not been adopted with respect to abortion, and we cer-

at passage because the underlying statutory legislation was almost unanimously approved by Congress, but that's not often going to be the case.

And we also have the alternative proposed by President Jackson, which is—I don't recall if it was Justice Marshall or Justice Taney who was Chief Justice at the time—but, he said, the Justice has issued his opinion, now let him enforce it. Certainly a dangerous precedent to follow, but there's certainly a temptation by the executive branch and the legislative branch to ignore Supreme Court decisions since they obviously ignore our opinions in some of these cases.

I wonder if you all would comment on that.

Mr. DEVINS. Yes. Congress has an enormous range of tools available to it to express disagreement with the Court to affect the constitutional value at play in a decision that go well beyond impeachment, restrictions of jurisdiction or even constitutional amendment.

Mr. GOODLATTE. Let me interrupt you on that point.

Mr. DEVINS. Sure.

Mr. GOODLATTE. A number of us cheered when some California Supreme Court justices were removed from office a number of years ago; they did not have a lifetime appointment, and they were clearly making decisions contrary to the will of the general public in California, as evidenced by their removal from office. But, we don't have that with the Federal judiciary. They have lifetime appointments. Are you advocating a change?

Mr. DEVINS. No, I'm not. As we have seen over the past decade, the composition of the Courts changes roughly one-half, I think, every decade. It's a quite significant change over a decade. But let's get beyond—

Mr. GOODLATTE. Well, I don't want to get beyond that. I think you raise a good point, but then we have well-established within the Court the document of stare decisis. They are very, very reluctant to go back and overturn previous decisions by the Court. They do it, certainly, in some instances, but the progress seems to me to be a steady march away from what many would view as the original intent in our Constitution.

Mr. CANADY. The gentleman has two additional minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

I wonder if you would address that point. Yes, we do get new Justices; we work very hard to pick them and to make sure they are of the—I don't want to take a liberal or conservative approach here—but, of the correct interpretation of the Constitution, that they will continue what we think is the established intent, and then they refuse to do it because previous Courts have said otherwise and they're not willing to overturn the precedents of the Court.

Mr. DEVINS. I think, Congressman, you may be a little pessimistic, very pessimistic of your authority, and let me suggest by way—

Mr. GOODLATTE. Well, you haven't given me much authority to hang my hat on—

Mr. DEVINS. Let me give you a concrete example where I think Congress and the states, in resisting a Supreme Court decision have made a huge difference. Perhaps not as much of a difference

tainly know it's been tried, suggests that the court is in fact honoring the will of the people in that larger and, I think, more important sense.

Mr. CANADAY. The gentleman has one additional minute.

Mr. WATT. Let me make a quick comment, and that is that if you're talking about freedom of speech, the only time you have standing to rely on freedom of speech is when the Government is probably doing something to you like throwing you in jail. What you have said, or what you have expressed, has made democratically-elected officials so mad that they want to throw you in jail, and then you resort to the Constitution. I don't see how you can ever rely on the First Amendment and be in the majority. That's just a comment.

Ms. STROSSEN. That's why the ACLU's First Amendment clients are such unpopular people. [Laughter.]

Mr. WATT. Thank you, Mr. Chairman.

Mr. CANADAY. Thank you. I'll now recognize myself.

I want to get back to Professor Clinton's testimony about *Marbury v. Madison*, and his historical analysis of what that case meant when it was decided, and how the Supreme Court dealt with that case over the following 100 years. Is there anyone who disagrees, who would express disagreement with what Professor Clinton adds, and then I'll give him a chance to respond. Professor Currie?

Mr. CURRIE. Indeed, I do disagree and I'm happy to have the opportunity to say so. The Supreme Court itself has never suggested that *Marbury v. Madison* should be limited so narrowly, and the Supreme Court has always understood that it has the power to test the validity of any act of Congress or any state legislation that comes before it in case controversy. If one goes back to the intentions of the Framers, which have been invoked here and which I do think have an important role to play in the interpretation of the Constitution it's perfectly clear from the record of the Constitutional Convention that the Framers of the Constitution intended judicial review as a part of the system of checks and balances. Not just to prevent the powers of the courts from being unconstitutionally infringed by acts of Congress, but to prevent Congress from unwittingly or deliberately exceeding the limits on its own powers. That's the way it was described by Hamilton in the Federalist Papers. That's the way it was understood by innumerable Members of the early Congress.

The question often came up, do we have the constitutional power to pass a particular bill? Every once in a while somebody would say, let's leave it to the Supreme Court. A number of people here today have rightly criticized that approach. Members of Congress have an independent obligation to construe the Constitution for themselves and to obey it. But everyone on both sides of that debate during the first 12 years in Congress said, of course the Courts have an additional check on the constitutionality of legislation passed by Congress. And that means that Congress will not always have the final word. That's inherent in a system of checks and balances.

Sometimes the Court may make a mistake, but again, if the Court makes a mistake, it's dangerous to destroy the Court. I said

the court was an umpire; I didn't say it was the only umpire. In baseball, you've got umpires now. The Court is the third base umpire, the Congress is the first base umpire, and the home plate umpire is the people of the United States, who will ultimately see to it that wrong decisions by the Court get corrected one way or the other. The *Dred Scott* case, the *Child Labor* case, *Plessy v. Ferguson*, a whole lot of wrong decisions of the Supreme Court have not stood the test of time; they have not withstood the opposition of the people, for in the long run and here I certainly agree with Professor Strossen, in the long run the people's good sense will prevail. That's why we have a Constitution, that's why we have the Supreme Court as one of the umpires, that's why obligation of Members of Congress are also obliged to interpret and respect the Constitution.

Mr. CANADY. Would anyone else like to comment on the historical issue before I give Professor Clinton a chance to respond? Professor Devins?

Mr. DEVINS. This is an extension of what Professor Currie was just saying. I think that no branch speaks the last word, even on a particular case. It's a circular process and if you have four umpires, they must all be in play all the time. Along those lines, it's important we look at *Marbury* as a precedent to recognize what *Marbury* speaks to is only the power of the Court to interpret the Constitution and not to the power of the Court to speak the last word about the Constitution.

Mr. KINKOPF. I'd like to, if I might—

Mr. CANADY. Yes, Professor Kinkopf.

Mr. KINKOPF. That is, again, just to amplify on Professor Currie's remarks, but it, I think, would profit us to bear in mind what it would mean if each branch would be the ultimate arbiter of its own power. I think that would effectively, or potentially, would effectively eviscerate Congress in that. Chairman Canady, you mentioned in your opening remarks the President's authority to interpret the Constitution pursuant to the Take-care Clause. Congress could enact laws, but the President could decide himself not to enforce those laws so that it wouldn't leave to Congress—it would end up undermining Congress's authority in that way, to allow the President simply to determine that he's not going to enforce any statute of Congress with which he disagrees as to Congress's basis of authority.

Mr. FRANCK. I would just like to go on record as saying that I absolutely agree with Professor Clinton's view of the history of these matters. I've looked into much of the same history myself. I find, as Professor Clinton does, Madison saying quite the opposite of what Professor Currie asserts he says in the First Congress. I also find it interesting that in the question of the Court's role as the enforcer of the boundaries on Congress's power, you have this statement on the interstate commerce power from John Marshall in *Gibbons v. Ogden* in 1824. He says that the reach of Congress's power over commerce among the states must be controlled authoritatively not by the judiciary, but by the people through democratic processes—those are my words, so far—then Marshall says, such are, “the restraints on which people must often rely solely in all

representative governments." Where Professor Currie and I emphatically agree is that the home plate umpire is the people.

Mr. CANADY. Mr. Fisher?

Mr. FISHER. I want to comment on something that Neil Kinkopf said about the Take-care Clause. Maybe he can explain it again because, to me, if Congress passes legislation, the President is to see that the laws are faithfully executed. He doesn't have authority to pick and choose, and say, I'm not going to enforce this.

There was a case in the Reagan years where the Justice Department decided that it wasn't going to implement all of the Competition in Contracting Act, and the Circuit Court, the Appellate Court, said that the President doesn't have such authority; that would be like a line-item veto. Well, we have one, live with one now, but at that time, that was considered a forbidden act. You enforce all the laws; you don't pick and choose.

Mr. KINKOPF. Right, I agree with you, Professor Fisher, and I appreciate the opportunity perhaps to clarify what I said. I agree that that is not for the President to do, and my concern would be that if we were to adopt the position that each branch is the ultimate arbiter of its own authority we would end up very quickly in a very significant constitutional crisis. And I think the Court's approach which accommodates and is greatly deferential to each branch's view of its own power, but which is not finally deferential allows us to avoid those constitutional conflicts and I think properly enforces the Constitution's structure.

Mr. CANADY. Professor Clinton?

Mr. CLINTON. Well, I'd first like to ask Professor Currie; something he said confused me. I agree with you that Congress does not have the last word on all constitutional questions, but are you saying that the Court does?

Mr. CURRIE. No. As I tried to say a few moments ago, I think each branch has a negative. Each branch, if it says something is unconstitutional, can prohibit it from going into effect. I think that's what the Framers intended and I think that gives us maximum protection for constitutional rights.

Mr. CLINTON. Well, I'm unclear as to why you think I disagree with that.

Mr. CURRIE. Well, if you don't disagree with it, fine.

Mr. CLINTON. I think all I really said was that it seems to me, according to the original understanding, that each branch of government was to be the final judge of its own powers. I think that's way the constitutional history of the country went for at least a 100 years and then things started changing in the late 19th century.

Mr. CURRIE. What I took you to say—Mr. Chairman, if I may—I took you to be taking a narrow view of *Marbury v. Madison*, saying that it only upholds the power of the Court to strike down those acts of Congress which interfere with its own functions, and I'm saying I do not agree with that. *Gibbons v. Ogden* was just cited as an example of a narrow view of judicial review, but actually what the Court did there was to review the constitutionality of a substantive act of Congress.

Mr. CLINTON. Well, isn't it true that a Court's holding is generally confined to the situation of the case.

Mr. CURRIE. I hope so.

Mr. CLINTON. It seems like if you interpret *Marbury* that way, that's all that could be drawn out of the case in terms of judicial review.

Mr. CURRIE. *Marbury* doesn't stand alone. We have 200 years of other decisions of the Supreme Court, reviewing the validity of substantive decisions of Congress, and I think that history supports that authority.

Mr. CLINTON. But it seems to me that history doesn't really start until about the 1890's and that's where the historical problem comes in. Sure, if the Court had decided other cases right away and continued to do that throughout the 1800's, and the 1820's, 1830's, and the 1840's, and on, at an increasing rate, that would be one thing; but the fact seems to me to be that the Court did not do that. It waited, in effect, almost 100 years before it ever invalidated an act of Congress, other than the *Dred Scott* case—we have to admit that was an exception. But that was the only exception until 1895, it seems to me, where the Court actually invalidated a Federal law on grounds other than those stated in *Marbury*.

Mr. CURRIE. The Court had practiced substantive judicial review ever since *Hylton v. United States* in 1796 in which it was asked to invalidate an act of Congress imposing a tax on the ground it violated the direct tax apportionment provisions of Article I. The Court recognizes and exercises the power of judicial review not only when it in fact strikes down a statute, but whenever it asks the question, as it asked innumerable times throughout the 19th century, is this act constitutional. The historical record supports the Supreme Court's power to do that, and I don't think today anybody is going to cause us to retreat from judicial review of acts of Congress on substantive grounds that do not affect the jurisdiction of the Court. That's a very established and very essential part of our checks and balances.

Ms. STROSSEN. I'd just like to echo that and to say I think it would be very dangerous if we inferred from the fact that it took the Supreme Court a long time to exercise its power of constitutional review with respect to particular acts of Congress that, therefore, that means the Supreme Court doesn't have that power.

Take the area where I have continued to voice concern, in the acts of Congress that violate the First Amendment. We've had them for a long time; earlier on in today's session, somebody mentioned the Alien and Sedition Acts. The Supreme Court did not have occasion to find those unconstitutional. Interestingly enough, it was Congress that stepped into the breach by failing to re-enact the law. But it was not until 1965 that the Supreme Court for the first time struck down an act of Congress as violating the Free Speech guarantee in the First Amendment, and I would be loathe to infer from that historical record that, therefore, the Supreme Court does not have the power to strike down acts of Congress that do violate the First Amendment.

Mr. CANADY. Mr. Fisher?

Mr. FISHER. The point that David Currie just made about the affirmative role of the Supreme Court I think should be underscored. That gives you the creative, constructive power. You're the ones who are deciding what national legislation should be, and, on the

whole, the Supreme Court comes along and says, you're right, you're right, you're right, and occasionally they say, you're wrong, and you're back on the dialog again. But the affirmative part of judicial review just emphasizes how large a role the Congress plays and the Court is generally instrumental in supporting you.

Mr. CANADY. Well, thank you for your comments. All of you have made a very important contribution to our hearing today and I want to extend my gratitude to you.

I want to thank the members of the subcommittee—we actually had pretty good attendance today for a day that Congress is not in session, and I'm grateful to the members who were able to be here. I wish we could continue, but time is racing on. I do thank you, and this is a discussion that will go on, and I think the issues that we've raised today are important issues, not just for the subcommittee, but for all Members of Congress to reflect on and hopefully some of the things that have been discussed today will be discussed more widely in the Congress as we go about our constitutional responsibilities.

Thank you very much. The subcommittee is adjourned.

[Whereupon, at 12:08 p.m., the subcommittee adjourned subject to the call of the Chair.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

ESSAY

JUDICIAL EXCLUSIVITY AND POLITICAL INSTABILITY

Neal Devins and Louis Fisher***

JUDICIAL supremacy is down but hardly out. Notwithstanding calls by interest groups that Congress "is now the court of last resort,"¹ the myth of judicial exclusivity nonetheless persists. The popular press treats Court rulings as definitive,² law school casebooks typically identify constitutional law as the work of the Supreme Court,³ and when a government official, make that Reagan Administration Attorney General Edwin Meese, argues that Supreme Court decisions are not "binding on all persons and parts of government,"⁴ editorialists and representatives of the *Washington Post*, *New York Times*, and American Bar Association are sent into a state of apoplexy.⁵ Among legal academics, however, it is

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¹ W. John Moore, *In Whose Court?*, 23 *Nat'l J.* 2396, 2400 (1991).

² In a 1987 survey conducted by the Hearst Corporation and reported in the *Washington Post*, six out of ten respondents identified the Supreme Court as the "final authority on constitutional change." For the *Post*, those six were "correct[]." Ruth Marcus, *Constitution Confuses Most Americans: Public Ill-Informed on U.S. Blueprint*, *Wash. Post*, Feb. 15, 1987, at A13. See also Joan Biskupic, *The Shrinking Docket*, *Wash. Post*, Mar. 18, 1996, at A15 (discussing the Supreme Court's shrinking docket and noting: "The importance of the Court, of course, is not in its numbers. It is in the Court having the last word. The justices are the final arbiter of what is in the Constitution.")

³ See Neal E. Devins, *Correspondence: The Stuff of Constitutional Law*, 77 *Iowa L. Rev.* 1795 (1992).

⁴ Edwin Meese III, *The Law of the Constitution*, 61 *Tul. L. Rev.* 979, 983 (1987).

⁵ Michael Kinsley, *Meese's Stink Bomb*, *Wash. Post*, Oct. 29, 1986, at A19; Anthony Lewis, *Law or Power?*, *N.Y. Times*, Oct. 27, 1986, at A23; Stuart Taylor Jr., *Liberties Union Denounces Meese*, *N.Y. Times*, Oct. 24, 1986, at A17 (quoting then-ABA

now commonplace to discuss constitutional law as something larger and more complex than merely court rulings.⁹ The degree to which some scholars now dismiss the Supreme Court as the exclusive source of constitutional law prompted Mike Paulsen recently to ask, somewhat plaintively: "Will nobody defend judicial supremacy anymore?"⁷

Fear not Mike. Larry Alexander and Fred Schauer have heard your cry.⁸ In an analysis that is "neither empirical nor historical" (it cannot be), they derive judicial supremacy from "preconstitutional" norms.⁹ In particular, Alexander and Schauer believe that vesting in the Court the authority to interpret, with finality, the meaning of the Constitution contributes to political stability.¹⁰ Correspondingly, they claim that "an important—perhaps *the* important—function of law is its ability to settle authoritatively what is to be done."¹¹

Alexander and Schauer's argument is important, provocative, and unconvincing. To their credit, by grounding judicial supremacy on law's settlement function, they have reinvigorated the academic debate over democratic government's duty to obey Court edicts. Nevertheless, if stability is the problem, judicial exclusivity is not the answer. Their ahistorical analysis collides with everything we know about the Court as a political institution. In par-

president Eugene C. Thomas as saying that this disregard would "shake the foundations of our system").

⁹ See, e.g., Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (1988); Louis Fisher & Neal Devins, *Political Dynamics of Constitutional Law* (2d ed. 1996); Robert F. Nagel, *Judicial Power and American Character: Censoring Ourselves in an Anxious Age* (1994); Neal Devins, ed., *Elected Branch Influences in Constitutional Decisionmaking*, *Law & Contemp. Probs.*, Autumn 1993, at 1, 3-4; Barry Friedman, *Dialogue and Judicial Review*, 91 *Mich. L. Rev.* 577 (1993); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 *Va. L. Rev.* 1 (1996); Sanford Levinson, *Could Meese Be Right This Time?*, 61 *Tul. L. Rev.* 1071 (1987); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Geo. L.J.* 217 (1994); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 *Cardozo L. Rev.* 113 (1993); Robin West, *The Aspirational Constitution*, 88 *Nw. U. L. Rev.* 241 (1993).

⁷ Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 *Geo. L.J.* 385, 385 (1994).

⁸ Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *Harv. L. Rev.* 1359 (1997).

⁹ *Id.* at 1369.

¹⁰ *Id.* at 1375-77.

¹¹ *Id.* at 1377.

ticular, Alexander and Schauer do not take into account how concentrating complete interpretive authority in the Court would create political instability and undermine the fragile foundation that supports and sustains judicial power. Instead of suggesting that the judiciary can settle in any decisive way such contentious issues as abortion, affirmative action, federalism, privacy, race districting, and religious freedom, the record of the last two centuries points to a more modest and circumscribed role for the courts.¹² No doubt at various times in our history the Supreme Court has attempted a more ambitious agenda, but it has done so at great cost to itself and the nation.¹³

Perhaps we are being unfair. Alexander and Schauer "engage in direct normative inquiry,"¹⁴ considering democratic acceptance of what judicial supremacy "should" be.¹⁵ Yet, even if it was understood that the Court should have the last word on the Constitution's meaning, judicial exclusivity would marginalize the Constitution by overwhelming the obligation to follow the Court's constitutional judgments with the competing policy-driven "obligations" of government officials.¹⁶ In other words, absent the constraints imposed by social and political forces, the Court's constitutional judgments will be less relevant and hence less stable. The tugs and pulls of politics therefore make the Constitution more relevant and more durable.

I. PRESERVING THE CONSTITUTION

Can the Constitution be preserved and honored without "a final interpretive authority for choosing among competing [constitutional] interpretations?"¹⁷ For modern day defenders of judicial supremacy, like Alexander and Schauer, this question is little more than rhetorical. Suggesting that the "settlement and coordination functions of law"¹⁸ are the Constitution's "chief raison d'être,"¹⁹ judicial

¹² See *infra* Part II.A; notes 111-120 and accompanying text.

¹³ See *infra* notes 76-86, 101-104 and accompanying text.

¹⁴ *Id.* at 1370.

¹⁵ *Id.* at 1369.

¹⁶ See *infra* Part II.B. Making matters worse, the Court might well attempt to demonstrate its last word status by purposefully distancing itself from populist sentiment through its decisions.

¹⁷ Alexander & Schauer, *supra* note 8, at 1381.

¹⁸ *Id.* at 1376.

supremacy is heralded as the only way to protect "a single written constitution" from "shifting political fortunes."²¹ This conclusion, however, is not suggested in the text or structure of the Constitution, the framers' intent, historical development, or even Supreme Court declarations of its own status as the ultimate and final interpreter of the Constitution.²² Instead, the overriding value promoted by the framers was a system of checks and balances, with each branch asserting its own powers and protecting its own prerogatives.

Alexander and Schauer dodge this historical bullet by reminding us that their inquiry is "normative" and suggesting that, in any event, "[t]he present, and not the past, decides whether the past is relevant."²³ For an essay on whether a Constitution ought to have an authoritative interpreter, this bit of trickery might suffice. For an essay on "The Constitution of the United States," however, it is self-contradictory to argue that judicial supremacy is needed to defend the Constitution. Claiming a power for the Court that was never intended hardly preserves and defends the Constitution. Instead, this claim debases and threatens constitutional government.

The Constitution's text, its original intent, and intervening practice support a form of judicial review far more limited than that offered by Alexander and Schauer. Indeed, no specific language in the Constitution gives the Supreme Court the power to declare certain governmental conduct unconstitutional, let alone the exclusive authority to do so. Judicial review can be derived from some sections of the Constitution, but in almost every instance it is the power of federal courts to strike down state actions or to void congressional statutes that threaten judicial independence.²⁴ The de-

²¹ *Id.* at 1381.

²² *Id.* at 1376.

²³ On Court declarations of its last word status, see text accompanying notes 58-75; see also Louis Fisher, *The Curious Belief in Judicial Supremacy*, 25 *Suffolk U. L. Rev.* 85 (1991) (discussing various Justices' interpretations of the Court's role).

²⁴ Alexander & Schauer, *supra* note 8, at 1370.

²⁵ The specification that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby," U.S. Const. art. VI, makes clear that federal courts must review the actions of state governments. One might argue that congressional statutes not "in [p]ursuance" of the Constitution are subject to judicial nullification, but judicial review over the coequal branches represents a major aggrandizement and requires convincing evidence. Furthermore, in extending the judi-

bates that occurred during state ratification conventions suggest that the framers believed judicial review of Congress was limited and the President had the power to independently interpret the Constitution.²⁴ Although there was some support for a broad conception of judicial review,²⁵ no one argued for judicial supremacy.²⁶

Early Court rulings confirm this understanding. From 1789 to 1803, several Justices wondered whether the power of judicial review would reach to congressional and presidential actions. They could not decide whether the power existed, whether it was vested in the Court, or under what conditions it might be invoked.²⁷

Certainly judicial supremacy would have been alien to the members of the First Congress. During the debate in 1789 on the President's removal power, Madison saw no reason to defer to the judi-

cial power to all cases "arising Under the Constitution," it was "generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature." 2 The Records of the Federal Convention of 1787, at 430 (Max Farrand ed., rev. ed. 1937) [hereinafter Records]. For example, cases of a "judiciary nature" would include congressional statutes that reduce the salaries of federal judges. However defined, the idea of cases of a "judiciary nature" is something far short of giving the Supreme Court ultimate control over the meaning of the Constitution. At the Virginia ratifying convention, for example, Madison interpreted "arising under" to justify judicial review only against the states. 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 532 (Jonathan Elliot ed., 1968). Alexander Hamilton made the same point in Federalist No. 80. The Federalist No. 80, at 503 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). In addition, several delegates at the Philadelphia convention spoke in favor of judicial review when invoked against unconstitutional *state* laws. 2 Records, *supra*, at 92-93 (remarks by Gouverneur Morris and James Madison).

²⁴ See Paulsen, *supra* note 7, at 219-92; Frank H. Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 921-22 (1990).

²⁵ See William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. Pa. L. Rev. 491 (1994).

²⁶ Sylvia Snowiss, *Judicial Review and the Law of the Constitution* 195-97 (1990).

²⁷ See *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (Chase, J.) (emphasizing that if the Supreme Court had such a power it should never be exercised "*but in a very clear case*"); see also comments in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J.) (the authority of the court to declare a statute void is of a "delicate" nature and the Court will not use such power except in a "clear and urgent case") and *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (Chase, J.) (while some Circuits have decided the Supreme Court could declare an act unconstitutional, the Supreme Court itself has not so held). Moreover, when John Marshall provided the rationale for judicial review in *Marbury*, it was through a chain of reasoning that presupposed presidential authority to interpret the Constitution. See Easterbrook, *supra* note 24, at 919-20.

ciary on the constitutionality of what Congress was about to do.²⁹ While acknowledging that "the exposition of the laws and Constitution devolves upon the Judiciary," he begged to know on what ground "any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments?"²⁹

Early presidents also believed that each branch of government should act as an independent interpreter of the Constitution. George Washington's first veto was on constitutional grounds.³⁰ Thomas Jefferson, viewing the Alien and Sedition Acts (which criminalized speech critical of the government) as patently unconstitutional, used his pardon power to discharge "every person under punishment or prosecution under the sedition law."³¹ Andrew Jackson announced his own theory of coordinate construction in a message vetoing legislation to recharter the Bank of the United States.³² Since the Court had previously upheld the constitutionality of the Bank,³³ Jackson was under pressure to consider the matter as settled by precedent and judicial decision.³⁴ He disagreed: The Supreme Court's authority over Congress and the President would extend only to "such influence as the force of their reasoning may deserve."³⁵

Jackson's position has been followed by every other President. Abraham Lincoln, in repudiating *Dred Scott v. Sandford*,³⁶ argued that if government policy on "vital questions affecting the whole

²⁹ 1 Annals of Congress 500 (Joseph Gales ed., 1834). Yet in introducing the Bill of Rights in the House of Representatives, Madison predicted that once they were incorporated into the Constitution, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive." *Id.* at 439.

³⁰ *Id.* at 500.

³¹ See Easterbrook, *supra* note 24, at 907.

³² Letter from Thomas Jefferson to Mrs. John Adams (July 22, 1804), in 11 The Writings of Thomas Jefferson 42, 43 (Andrew A. Lipscomb ed., 1905). See also Easterbrook, *supra* note 24, at 907 (noting that the effect of Jefferson's pardon was to nullify the statutes "as much as if the Supreme Court had held them unconstitutional").

³³ 3 A Compilation of the Messages and Papers of the Presidents 1144-45 (James D. Richardson ed., 1897) [hereinafter *Compilation*].

³⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

³⁵ 3 *Compilation*, *supra* note 32, at 1144.

³⁶ *Id.* at 1145.

³⁷ 60 U.S. (19 How.) 393 (1857).

people is to be irrevocably fixed" by the Supreme Court, "the people will have ceased to be their own rulers."³⁷ Franklin Delano Roosevelt lashed out at the *Lochner* Court for taking the country back to the "horse and buggy" days.³⁸ Richard Nixon's campaign to undo Warren Court liberalism,³⁹ Ronald Reagan's attack on *Roe v. Wade*,⁴⁰ and Bill Clinton's embrace of efforts to "reverse" Court standards governing religious liberty⁴¹ also follow this pattern.

For its part, Congress has launched numerous challenges to the Court. In response to *Dred Scott*, Congress passed a bill prohibiting slavery in the territories.⁴² Disagreeing with the Court's 1918 ruling that the commerce power could not be used to regulate child labor,⁴³ Congress two decades later again based child labor legislation on the commerce clause.⁴⁴ Public accommodations protections contained in the 1964 Civil Rights Act similarly followed in the wake of a Supreme Court decision rejecting such protections.⁴⁵ More recently, lawmakers have challenged Court rulings on abortion, busing, flag burning, religious freedom, voting rights, and the legislative veto.⁴⁶

Judicial exclusivity, then, finds no support in Congressional and White House practices, in the debates surrounding the drafting and ratification of the Constitution, or in the Constitution itself. To the extent that language and tradition matter,⁴⁷ the argument for judicial supremacy is a nosterter.

³⁷ 7 Compilation, *supra* note 32, at 3210.

³⁸ 4 The Public Papers and Addresses of Franklin D. Roosevelt: The Court Disapproves, 1935, at 209-10 (Samuel I. Rosenman ed., 1938) [hereinafter *Public Papers of Roosevelt*].

³⁹ See Fisher & Devins, *supra* note 6, at 94-95, 247-48.

⁴⁰ 410 U.S. 113 (1973). See Fisher & Devins, *supra* note 6, at 184-94.

⁴¹ See Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 Pub. Papers 2000 (Nov. 16, 1993).

⁴² Act of June 19, 1862, c. 111, 12 Stat. 432 ("An Act to secure freedom to all Persons within the Territories of the United States").

⁴³ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

⁴⁴ This episode is recounted in Fisher & Devins, *supra* note 6, at 70-76.

⁴⁵ See *id.* at 87-94.

⁴⁶ See generally *id.* (discussing recent constitutional challenges before the Court).

⁴⁷ For an argument that language matters, see Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399 (1985). For the classic argument that tradition matters, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593-97 (1952) (Frankfurter, J., concurring); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 323-24 (1819).

Alexander and Schauer, as well as others before them, have navigated this terrain, discounting the relevance of notoriously ambiguous texts and indications of intention which presuppose that the "intentions of long-dead people from a different social world should influence us."⁴⁰ When it comes to judicial exclusivity, however, the problem with "tak[ing] neither original intent nor intervening practice as authoritative"⁴¹ is that there is not a scintilla of evidence supporting the Court's ultimate interpreter status.⁴² Alexander and Schauer, for example, never explain how judicial exclusivity, a principle derived from "the nature of law" can trump, well, the supreme LAW of the land. Suggesting that "preconstitutional" norms and "meta-rules" are more important than the Constitution itself⁴³ is, in the end, not enough to pull off the impossible feat of demonstrating fidelity to the Constitution by disregarding its basic command about the separation of powers.

II. PROMOTING POLITICAL STABILITY

There may be an element of unfairness in our efforts to link the Constitution's design with interpretive theories intended to make the Constitution the "supreme law of the land." We do not, for example, consider the central question which animates Alexander and Schauer's admittedly "normative inquiry," that is, "[w]hat . . . is law for?"⁴⁴ Yet, even assuming—as they do—that law's principal function is to "settle [matters] authoritatively" and promote

(contending that historical practices are relevant in determining the division of powers among the branches).

⁴⁰ Sanford Levinson, *Law as Literature*, 60 *Tex. L. Rev.* 373, 379 (1982). See also Alexander & Schauer, *supra* note 8, at 1370 (explaining "what in fact has the status of law, and what should have the status of law—can only be decided non-historically"). Moreover, as a matter of *realpolitik*, "non-deference is often good political strategy," and lawmakers and the President suffer "neither legally nor politically" for making "politically popular or otherwise attractive policy decisions . . . flatly inconsistent with established precedent." *Id.* at 1365-66.

⁴¹ Alexander & Schauer, *supra* note 8, at 1370.

⁴² Occasional claims by Supreme Court Justices that they speak the last word, prove just the opposite, that is, the Court is extremely sensitive to social and political forces. See *infra* Part II.A.

⁴³ Alexander & Schauer, *supra* note 8, at 1369, 1370.

⁴⁴ *Id.* at 1370-71.

"stability,"³³ the argument for judicial supremacy falls short. Without the powers of purse and sword, "[t]he Court must take care to speak and act in ways that allow people to accept its decisions."³⁴ As such, rather than advance its institutional self-interest through claims of judicial supremacy, the Court understands its role in government as limited. Correspondingly, even if Court decisions were viewed as final, elected officials would sublimate their "duty to obey the law" to allegedly overriding duties more consistent with their policy preferences. This marginalization of the Constitution is directly at odds with the settlement function of law. For the Constitution to truly operate as a stabilizing force, it must be relevant to the lives of democratic government and the American people. Judicial exclusivity cannot accomplish this task; rather, stability can only be achieved through a give-and-take process involving all of government as well as the people.

A. Settling Transcendent Values

The history of the Supreme Court has been a search for various techniques and methods that will permit the judiciary to limit and constrain its own power. Justices understand, either by instinct or experience, that the hazards are great when the Court attempts to settle political, social, and economic matters best left to the political process.³⁵ Despite occasional utterances from the Court that it is the "ultimate interpreter"³⁶ of the Constitution, Justices by necessity adhere to a philosophy that is much more modest, circumspect, and nuanced. Rather than settle transcendent values, Court decisions, at best, momentarily resolve the dispute immediately before the Court.

The strongest support for this proposition, ironically, comes from those cases in which the Court has defended its authority to bind government officials through its interpretation of the Constitution. *Marbury v. Madison*,³⁷ the supposed foundation of judicial

³³ *Id.* at 1371, 1376. Law actually has many different natures including flexibility, utility, and the service of human needs.

³⁴ *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992).

³⁵ See *infra* notes 62, 78, 86, 94 and accompanying text.

³⁶ See *infra* notes 63-71.

³⁷ 5 U.S. (1 Cranch) 137 (1803).

supremacy," nicely illustrates how political challenges to the Court's interpretive authority and claims of judicial supremacy are inextricably linked to each other. When *Marbury* was decided, the Supreme Court and its Chief Justice, John Marshall, were under attack. Court foe Thomas Jefferson had just been elected President and, at his urging, Secretary of State James Madison openly challenged the Court's authority to subject executive officers to judicial orders.⁵⁹ Further complicating matters, were the Court to rule against the Jeffersonians, Marshall believed that his political enemies would push for his impeachment.⁶⁰ Unwilling to engage in a head-to-head confrontation with the Jeffersonians, the Court's supposed war cry in *Marbury*, that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"⁶¹ is window dressing for the Court's reasoning in ultimately ducking the *Marbury* dispute on jurisdictional grounds.⁶² As such, other than to assure that William Marbury did not get his job and to usher in a claim of judicial review debated ever since, *Marbury* settled very little, if anything.

On those few occasions when the Court does insist that it is the "last word" in interpreting the Constitution, such announcements

⁵⁹ See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). *Marbury*, of course, did not rule that the Court's constitutional interpretations were final and definitive; instead, the Court simply declared that it had the power to invalidate unconstitutional Congressional action. 5 U.S. (1 Cranch) at 177-80.

⁶⁰ Specifically, when William Marbury challenged Madison's failure to deliver him a judicial commission, Madison refused to present a defense, thereby forcing the Court to decide the case without the benefit of the executive's arguments. See Fisher & Devins, *supra* note 6, at 25-35.

⁶¹ Marshall took the impeachment threat seriously, contending that it would be better for the elected branches to reverse a Court opinion by statute than to impeach Supreme Court Justices. See 3 Albert J. Beveridge, *The Life of John Marshall: Conflict and Construction, 1800-1815*, at 177 (1929) (citing letter from John Marshall, Chief Justice, to Samuel Chase, Associate Justice (Jan. 23, 1804)). Along these same lines, a modern day Court which regularly and unabashedly frustrated majoritarian preferences might find its members subject to the threat of impeachment.

⁶² 5 U.S. (1 Cranch) at 177.

⁶³ As Chief Justice Warren Burger noted: "The [C]ourt could stand hard blows, but not ridicule, and the ale houses would rock with hilarious laughter" had Marshall issued a mandamus ignored by the Jefferson administration. Warren E. Burger, *The Doctrine of Judicial Review: Mr. Marshall, Mr. Jefferson, and Mr. Marbury*, in *Views from the Bench: The Judiciary and Constitutional Politics* 7, 14 (Mark W. Cannon and David M. O'Brien eds., 1985).

must be understood within their political context. *Cooper v. Aaron*,⁶³ the decision that Alexander and Schauer embrace, exemplifies this practice. The Court's claim that federal court constitutional interpretations are "supreme"⁶⁴ was made in the face of massive Southern resistance to *Brown v. Board of Education*,⁶⁵ including Arkansas' enlistment of the National Guard to deny African-American schoolchildren access to Little Rock's Central High School.⁶⁶ *Planned Parenthood v. Casey*, which reaffirmed the "central holding" of *Roe v. Wade*, similarly underscores the Court's belief that "a surrender to political pressure" would result in "profound and unnecessary damage" to the Court.⁶⁷ The threat of resistance to its orders likewise animated invocations of judicial supremacy in *Baker v. Carr*,⁶⁸ *Powell v. McCormack*,⁶⁹ *United States v. Nixon*,⁷⁰ and *City of Boerne v. Flores*.⁷¹

⁶³ 358 U.S. 1 (1958).

⁶⁴ 358 U.S. at 18. The best academic treatment of *Cooper* is Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. Ill. L. Rev. 387 (1982).

⁶⁵ 347 U.S. 483 (1954).

⁶⁶ See Fisher & Devins, *supra* note 6, at 242-56. Moreover, recognizing inherent limits on its power to compel Southern schools to comply with *Brown*, *Cooper* was the Court's only statement on school desegregation from 1955-64 (when Congress encouraged the Court to reenter the school desegregation fray through its enactment of the 1964 Civil Rights Act).

⁶⁷ 505 U.S. 833, 853, 867, 869 (1992). Refusing to bend to the stated desires of the presidents who appointed them and overrule *Roe* "under fire," Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter "call[ed] the contending sides of a national controversy to end their national division by accepting" . . . "the Court's interpretation of the Constitution." *Id.* at 857. The *Casey* plurality, however, validated political challenges to *Roe*'s rigid trimester standard by replacing it with a more deferential "undue burden" test. *Id.* at 873-79.

⁶⁸ 369 U.S. 186, 211 (1962). At oral arguments, counsel for Tennessee suggested that they might resist court-ordered reapportionment. Jack Wilson, Assistant Attorney General of Tennessee, advised the Court about the sovereign rights of his state. 56 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 656, 658-59, 666 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter *Landmark Briefs*].

⁶⁹ 395 U.S. 486, 549 (1969). In *Powell*, the House of Representatives signaled that it might resist a court order requiring it to seat Adam Clayton Powell. See Robert B. McKay, *Comments on Powell v. McCormack*, 17 UCLA L. Rev. 117, 125-29 nn.42-44 (1969).

⁷⁰ 418 U.S. 683, 705 (1974). During oral arguments, Nixon's attorney James St. Clair equivocated on Nixon's willingness to accept the Court's judgment on executive

The Supreme Court's practice of declaring itself the final word on the Constitution's meaning when it feels especially challenged by the other branches is anything but surprising. Invariably, the Court takes a bold stand because it fears that the political order will ignore its command. These sweeping declarations of power cloak institutional self-doubts, much as a gorilla pounds his chest and makes threatening noises to avoid a fight. Invocations of judicial supremacy, for example, often place few demands on the government (as in *Marbury*) or are linked with popular outcomes, as in *Cooper*, *Baker v. Carr*, *Nixon*, and *Casey*.⁷²

Lacking the power to appropriate funds or command the military,⁷³ the Court understands that it must act in a way that garners public acceptance.⁷⁴ In other words, as psychologists Tom Tyler and Gregory Mitchell observed, the Court seems to believe "that public acceptance of the Court's role as interpreter of the Constitution—that is, the public belief in the Court's institutional legitimacy—enhances public acceptance of controversial Court decisions."⁷⁵

privilege as binding on the President. See 79 Landmark Briefs, *supra* note 68, at 861, 871-72, 879; Alexander & Schauer, *supra* note 8, at 1364 & nn.21-22.

⁷² 117 S. Ct. 2157 (1997). Invalidating congressional efforts to "overrule" *Employment Division v. Smith*, 494 U.S. 872 (1990), the *Boerne* Court told Congress that it "will treat its precedents with the respect due them" and that "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary." 117 S. Ct. at 2172, 2166.

⁷³ With respect to *Cooper*, although Arkansas' Governor Orval Faubus' repudiation of *Brown* scored points with in-state voters, national public opinion favored President Eisenhower's decision to make *Cooper* a reality by sending federal troops into Little Rock. See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 78 (1991). Like *Cooper*, *Baker v. Carr* risked ill will with state officials in order to reach an outcome popular in the national political arena. "Of sixty-three leading metropolitan daily newspapers, thirty-eight favored the Court's disposition of the [*Baker*] case, ten opposed it, and the remainder expressed neutral or confused opinions." Richard C. Cortner, *The Apportionment Cases 144-47* (1970). With respect to *Nixon*, public opinion strongly supported the Court's authority to order the President to release the tapes. See Louis Harris, *President Should Obey Order to Give Up Tapes*, *The Harris Survey*, July 29, 1974. *Casey*, in upholding *Roe*, relied on an "undue burden" standard that matched public opinion. See Neal Devins, *Shaping Constitutional Values: Elected Government, the Supreme Court, and the Abortion Debate 73-74* (1996).

⁷⁴ Alexander & Schauer, *supra* note 8, at 1366 & n.34.

⁷⁵ See *Casey*, 505 U.S. at 965-66 (recognizing the connection between the Court's "legitimacy" and "people's acceptance").

⁷⁶ Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 *Duke L.J.* 703, 715 (1994).

This emphasis on public acceptance of the judiciary seems to be conclusive proof that Court decisionmaking cannot be divorced from a case's (sometimes explosive) social and political setting.

A more telling manifestation of how public opinion affects Court decisionmaking is evident when the Court reverses itself to conform its decisionmaking to social and political forces beating against it.⁷⁶ Witness, for example, the collapse of the *Lochner* era under the weight of changing social conditions. Following Roosevelt's 1936 election victory in all but two states, the Court, embarrassed by populist attacks against the Justices, announced several decisions upholding New Deal programs.⁷⁷ In explaining this transformation, Justice Owen Roberts recognized the extraordinary importance of public opinion in undoing the *Lochner* era: "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy."⁷⁸

Social and political forces also played a defining role in the Court's reconsideration of decisions on sterilization and the eugenics movement,⁷⁹ state-mandated flag salutes,⁸⁰ the *Roe v. Wade* trimester standard,⁸¹ the death penalty,⁸² states' rights,⁸³ and much more.⁸⁴

⁷⁶ Recognizing the nexus between its authority and public acceptance, the Court is rarely out of step with prevailing mores. See, e.g., David Adamany, *Legitimacy, Realignment Elections, and the Supreme Court*, 1973 Wis. L. Rev. 790 (1973); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279, 285 (1957); Richard Funston, *The Supreme Court and Critical Elections*, 69 Am. Pol. Sci. Rev. 795 (1975); Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 Nw. U. L. Rev. 985, 1023 (1990).

⁷⁷ On the role of the 1936 elections, see Michael Nelson, *The President and the Court: Reinterpreting the Court-packing Episode of 1937*, 103 Pol. Sci. Q. 267 (1988). On populist attacks, see Fisher, *supra* note 6, at 211. For an alternative explanation, see Barry Cushman, *Rethinking the New Deal Court*, 80 Va. L. Rev. 201 (1994).

⁷⁸ Owen J. Roberts, *The Court and the Constitution: The Oliver Wendell Holmes Lectures*, 1951, at 61 (1951).

⁷⁹ See Louis Fisher, *Social Influences on Constitutional Law*, 15 J. Pol. Sci. 7, 11-15 (1987).

⁸⁰ See David R. Manwaring, *Render Unto Caesar: The Flag-Salute Controversy* 154-60 (1962); H.N. Hirsch, *The Enigma of Felix Frankfurter* 152-53 (1981).

⁸¹ See Devins, *supra* note 72, at 56-77, 139-48.

⁸² See Fisher, *supra* note 6, at 75-76.

⁸³ See Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 Case W. Res. L. Rev. 845 (1996).

It did not matter that some of these earlier decisions commanded an impressive majority of eight to one.³⁵ Without popular support, these decisions settled nothing. Justice Robert Jackson instructed us that "[t]he practical play of the forces of politics is such that judicial power has often delayed but never permanently defeated the persistent will of a substantial majority."³⁶ As such, for a Court that wants to maximize its power and legitimacy, taking social and political forces into account is an act of necessity, not cowardice. Correspondingly, when the Court gives short shrift to populist values or concerns, its decisionmaking is unworkable and destabilizing.³⁷

The Supreme Court may be the ultimate interpreter in a particular case, but not in the larger social issues of which that case is a reflection. Indeed, it is difficult to locate in the more than two centuries of rulings from the Supreme Court a single decision that ever finally settled a transcendent question of constitutional law. When a decision fails to persuade or otherwise proves unworkable,³⁸ elected officials, interest groups, academic commentators, and the press will speak their minds and the Court, ultimately, will listen.³⁹

Even in decisions that are generally praised, such as *Brown*, the Court must calibrate its decisionmaking against the sentiments of the implementing community and the nation. In an effort to temper Southern hostility to its decision, the Court did not issue a

³⁵ For a useful summary of instances where the Court overturned earlier precedent, see Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo. Wash. L. Rev. 68, app. (1991).

³⁶ See, e.g., *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (upholding mandatory flag salute), overruled by *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

³⁷ Robert H. Jackson, *Maintaining Our Freedoms: The Role of the Judiciary*, 19 Vital Speeches of the Day 759, 761 (1953).

³⁸ This is not to say that Court decisions at odds with popular will are always destabilizing. Our point, instead, is that the Justices must be somewhat sensitive to social and political forces to avoid a destabilizing populist backlash or repudiation of the Court.

³⁹ The Court, for example, abandoned its decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), because it produced doctrinal confusion rather than create an intelligible principle for federalism. See Fisher & Devins, *supra* note 6, at 94-104.

⁴⁰ On the power of the press and academic commentators, see Lawrence C. Marshall, *Intellectual Feasts and Intellectual Responsibilities*, 84 Nw. U. L. Rev. 832, 842-50 (1990); Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 Yale L.J. 1537 (1996).

remedy in the first *Brown* decision."¹¹ A similar tale is told by the Court's invocation of the so-called "passive virtues," that is, procedural and jurisdictional mechanisms that allow the Court to steer clear of politically explosive issues.¹² For example, the Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it," "formulate a rule of constitutional law broader than is required," or "pass upon a constitutional question . . . if there is . . . some other ground," such as statutory construction, upon which to dispose of the case.¹³ This deliberate withholding of judicial power reflects the fact that courts lack ballot-box legitimacy and need to avoid costly collisions with the general public and other branches of government.¹⁴

It is sometimes argued that courts operate on principle while the rest of government is satisfied with compromises.¹⁵ This argument

¹¹ See *Brown v. Board of Educ.*, 347 U.S. 483 (1954). More than a decade after *Brown*, a federal appellate court noted: "A national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. *The courts acting alone have failed.*" *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 847 (5th Cir. 1966), cert. denied, *East Baton Rouge Parish Sch. Bd. v. Davis*, 389 U.S. 840 (1967). For further discussion, see *infra* notes 124-129 and accompanying text.

¹² See Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961).

¹³ *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (citations omitted).

¹⁴ Correspondingly, the threshold tests of jurisdiction, justiciability, standing, mootness, ripeness, political questions, and prudential considerations are invoked regularly and deliberately to protect an unelected and unrepresentative judiciary. See Don B. Kates, Jr. & William T. Barker, *Mootness in Judicial Proceedings: Toward a Coherent Theory*, 62 Cal. L. Rev. 1385 (1974); David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 Wis. L. Rev. 37 (1984); Gene R. Nichol, Jr., *Rethinking Standing*, 72 Cal. L. Rev. 68 (1984). A typical example of this strategy is the use of ripeness in 1955 to avoid deciding the constitutionality of a Virginia miscegenation statute. Coming on the heels of the desegregation case of 1954, the Court was concerned that striking down a law banning interracial marriages would confirm the imagined fears of critics of desegregation who warned that integrated schools would lead to "mongrelization" of the white race. Years later, after the principle of desegregation had been safely established and Congress and the President had forged strong bipartisan majorities to pass the Civil Rights Act of 1964, the Court was then politically positioned to strike down the Virginia statute. See *Loving v. Virginia*, 388 U.S. 1 (1967); *Naim v. Naim*, 350 U.S. 391 (1955).

¹⁵ The classic statement of this position is Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 14-15 (1959). See also Earl Warren, *The Memoirs of Earl Warren* 6 (1977) (explaining that progress in politics "could be made and most often was made by compromising and taking half a loaf where a

is sheer folly. A multimember Court, like government, gropes incrementally towards consensus and decision through compromise, expediency, and ad hoc actions. "No good society," as Alexander Bickel observed, "can be unprincipled; and no viable society can be principle-ridden."⁹⁴

Courts, like elected officials, cannot escape "[t]he great tides and currents which engulf" the rest of us.⁹⁵ Rather than definitively settle transcendent questions, courts must take account of social movements and public opinion.⁹⁶ When the judiciary strays outside and opposes the policy of elected leaders, it does so at substantial risk. The Court maintains its strength by steering a course that fits within the permissible limits of public opinion. Correspondingly, "the Court's legitimacy—indeed, the Constitution's—must ultimately spring from public acceptance," for ours is a "political system ostensibly based on consent."⁹⁷

B. How Not to Marginalize the Constitution

"In urging officials to subjugate their constitutional judgments to those of the Supreme Court,"⁹⁸ Alexander and Schauer condemn the possible repudiation—by elected officials and the public—of Court decisions that operate outside of the societal mainstream. Under this account, courts should not bend to such lawless behavior; instead, elected officials ought to face up to their "obligation" to treat Supreme Court decisions as law. Accordingly, the current system, where courts take social and political forces into account, is seen as backwards.

To say that the current system is, well, the current system does not answer Alexander and Schauer's admittedly normative inquiry. What if democratic government saw Supreme Court decisions as

whole loaf could not be obtained. The opposite is true so far as the judicial process was concerned.").

⁹⁴ Bickel, *supra* note 91, at 49.

⁹⁵ Benjamin N. Cardozo, *The Nature of the Judicial Process* 168 (1921).

⁹⁶ A number of studies explain how courts generally stay within the political boundaries of their times. See *supra* notes 72, 76.

⁹⁷ Murphy & Tanenhaus, *supra* note 76, at 992. See also Tyler & Mitchell, *supra* note 75 (explaining that the public's acceptance of the Court's role as interpreter of the Constitution improves the chances of the public accepting the Court's controversial decisions).

⁹⁸ Alexander & Schauer, *supra* note 8, at 1382.

definitive statements of the Constitution's meaning? Would such a system, as Alexander and Schauer contend, "achieve a degree of settlement and stability" and "remove a series of transcendent questions from short-term majoritarian control?"¹⁰⁰

Of course not. A strict bifurcation—centering constitutional interpretation in the courts while allocating other policy decisions to nonjudicial actors—would put both sectors on widely divergent paths. Policymakers would believe the Constitution to be irrelevant, something to treat with indifference. Lawmakers would debate policy divorced from constitutional concerns. As a consequence, the Constitution would diminish in value and stature. If the Court viewed the Constitution as its exclusive domain, it would not moderate its opinions to take account of social and political forces. The two sectors would come to speak different languages, with courts increasingly out of step with the political institutions. Judicial exclusivity creates disincentives for the courts to function within the governmental orbit and, as such, is destabilizing.

The failings of judicial exclusivity, we think, are best illustrated by *Dred Scott*,¹⁰¹ a heinous decision that demands disobedience. At the time the case was to be decided, the Court was sufficiently confident in its "high and independent character" that Justice John Catron advised President-elect James Buchanan that, in the matter of *Dred Scott*, the Court would "decide & settle a controversy which has so long and seriously agitated the country."¹⁰² Buchanan took the Court at its word: In his inaugural address, he assured the nation that the issue of slavery was before the Court and would be "speedily and finally settled."¹⁰³ The judicial settlement was certainly speedy but not final. Two days later, the Court issued *Dred Scott*, propelling the nation into a bloody civil war that left, out of a population of approximately 30 million, more than 500,000 dead and another 300,000 wounded.¹⁰⁴

¹⁰⁰ *Id.* at 1380.

¹⁰¹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

¹⁰² Letter from John Catron to James Buchanan (Feb. 19, 1857), in 10 *The Works of James Buchanan* 106 n.1 (John B. Moore ed., Antiquarian Press Ltd. 1960) (1908-11).

¹⁰³ 6 *Compilation*, *supra* note 32, at 2962.

¹⁰⁴ *The World Almanac and Book of Facts* 184, 380 (Robert Famighetti ed., 1997).

Abraham Lincoln, through words and deeds, sought to countermand *Dred Scott*.¹⁰⁵ What if Lincoln, applying Alexander and Schauer's logic, treated the decision as definitive vis-à-vis the Constitution? The answer comes as a surprise: Lincoln, while having an "obligation to follow *Dred Scott* because of [the Supreme Court as] its source,"¹⁰⁶ could have repudiated the decision through actions directly at odds with it, say, his issuance of the Emancipation Proclamation. Court decisions, under Alexander and Schauer's view, are "overridable obligations"—legally binding but appropriately subject to civil disobedience in times of crisis.¹⁰⁷

Alexander and Schauer do not blink when making this argument. In language critical to their analysis, they answer "the challenge of *Dred Scott*":¹⁰⁸ "Given the inadvisability of designing a decision procedure around one case that might never be repeated, it is better to treat *Dred Scott* as aberrational, recognizing that officials can always override judicial interpretations if necessary, especially if they are willing to suffer the political consequences."¹⁰⁹

Try as they might, it will not do to treat *Dred Scott* as aberrational. The Supreme Court regularly confronts divisive, emotional issues, issues where lawmakers and the public may well find "overriding values" that warrant civil disobedience.¹¹⁰ Moreover, if policymakers treat Supreme Court rulings as final, some outlet will have to be found for expressing discontent with the consequences of disfavored Court rulings. In particular, knowing that they cannot engage in constitutional dialogues which challenge the underlying correctness of Court decisionmaking, policymakers may well engage in civil disobedience, especially when the voting public disapproves of

¹⁰⁵ For Lincoln, Court decisions were necessarily binding on the parties (*Dred Scott* and his "owner") but could not bind the elected government to judicially-imposed policymaking. 7 *Compilation*, *supra* note 32, at 3210.

¹⁰⁶ Alexander & Schauer, *supra* note 8, at 1382.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1383. In a provocative response to Alexander & Schauer, Emily Sherwin suggests that the Court ought to have the last word on all questions of constitutional interpretation, including slavery. See Emily Sherwin, *Ducking Dred Scott: A Response to Alexander and Schauer*, *Const. Comm.* (forthcoming [NEED DATE]) (manuscript at ___, on file with author).

¹¹⁰ See *supra* note 46 and accompanying text; *infra* notes 111-115 and accompanying text.

the Court. Rather than "aberrations," such challenges may become an important part of public life.

Consider, for example, the willingness of democratic institutions to resist Court rulings on abortion, affirmative action, busing, child labor, the death penalty, flag burning, gay marriage, the legislative veto, school prayer, voting rights, and religious liberty.¹¹¹ Today, these challenges take place in the framework of give-and-take dialogues between the Court, elected officials, and the public. Were judicial supremacy to rule the day, however, some or all of these challenges might become "occasions for disobedience."¹¹² Indeed, when Supreme Court decisions on the minimum wage,¹¹³ abortion,¹¹⁴ and religious liberty¹¹⁵ already have been analogized to *Dred Scott*, there is good reason to think that such challenges will, in fact, take place. Whether or not they succeed, it is difficult to see how judicial exclusivity would either promote stability or nullify majoritarian control of transcendent questions.

Even if *Dred Scott* is truly aberrational, judicial exclusivity is likely to marginalize the Court and, with it, the Constitution. Democratic institutions will only take the Constitution seriously if they have some sense of stake in it. Alexander and Schauer do not disagree; for them, a virtue of judicial exclusivity is that political discussion "might be richer precisely for its lack of reliance on ritualistic incantations of constitutional provisions."¹¹⁶ Yet, by fencing out politicized constitutional discourse, the Court's educative function will be severely limited as will the enduring values of the Constitution itself.¹¹⁷

¹¹¹ Several of these episodes are discussed in Fisher & Devins, *supra* note 6.

¹¹² Alexander & Schauer, *supra* note 8, at 1382.

¹¹³ See 4 Public Papers of Roosevelt, *supra* note 38, at 205.

¹¹⁴ See Ronald Reagan, Abortion and the Conscience of the Nation 15, 19-21 (1984); see also Justice Scalia's dissent in *Casey*, 505 U.S. at 984 (Scalia, J. dissenting) (equating the Supreme Court's reaffirmation of abortion rights with *Dred Scott*).

¹¹⁵ See The Religious Freedom Restoration Act: Hearings on S. 2969 Before the Senate Comm. on the Judiciary, 102d Cong. 42 (1993) (statement of Oliver S. Thomas, General Counsel, Baptist Joint Committee on Public Affairs).

¹¹⁶ Alexander & Schauer, *supra* note 8, at 1385.

¹¹⁷ "At its best," the Supreme Court produces "reasoned opinions that justify its claim to be the resident philosopher of the American constitutional system." Richard Funston, A Vital National Seminar: The Supreme Court in American Political Life 217 (1978). See also Christopher L. Eisgruber, Is the Supreme Court an Educative Institution?, 67 N.Y.U. L. Rev. 961 (1992) (asserting that the Supreme Court ~~is~~

Alexander and Schauer are hardly troubled by this state of affairs. If anything, they think policymakers ought to steer clear of all matters touched upon in Supreme Court rulings. In order to "generate[] a single conception of what the Constitution require[s],"¹¹⁸ for example, they would encourage lawmakers *not* to expand constitutional protections beyond the floor set by the Supreme Court.¹¹⁹ By this interpretation, Alexander and Schauer would then disapprove of legislation authorizing disparate impact proofs in voting rights and employment discrimination legislation; legislation and regulation authorizing the assignment of women to combat aircrafts; legislation and regulation allowing federal employees, including members of the armed services, to wear an item of religious apparel on their clothing; and other initiatives launched by democratic government in the face of Supreme Court decisions limiting individual rights.¹²⁰

By stifling public discourse in this way, the Constitution becomes less relevant. Constitutional arguments will no longer be used as a roadblock to stymie progressive reforms or, alternatively, to expand constitutional protections beyond the "floor" set by the Supreme Court. While Alexander and Schauer do not foreclose policymaking on matters that implicate constitutional values, elected officials are discouraged from doing so and, when they do, they are forbidden from discussing those fundamental values that underlie the Constitution and, with it, the United States itself. The virtues of "settlement for settlement's sake"¹²¹ pale in relation to these costs.

These costs are particularly acute in two categories of cases that are outside the radar of judicial supremacy proponents. One involves underenforced constitutional norms, that is, matters that for

times uses its educative function to offer "lessons" to inspire citizens); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 Harv. L. Rev. 193, 208 (1952) (describing Court's role in the discussion of problems, declaration of principles, and as an educational body).

¹¹⁸ Alexander & Schauer, *supra* note 8, at 1385.

¹¹⁹ See *id.*

¹²⁰ See Fisher & Devins, *supra* note 6, at 256-88 (discussing employment and voting), 305-16 (discussing women in the military); see also 10 U.S.C. § 774 (1994) (addressing religious apparel in military); Peter Baker, *Workplace Religion Policy Due*, Wash. Post, Aug. 14, 1997, at A1 (describing executive guidelines protecting religious expression in the federal workplace).

¹²¹ Alexander & Schauer, *supra* note 8, at 1385.

one reason or another are not likely to make their way into court.¹²² Here, it is left to democratic government to define the Constitution's meaning. Yet, if elected government is discouraged from thinking about the Constitution, it is unlikely that these matters will receive serious treatment, if any at all.¹²³

The second category involves instances in which the Court sees itself as a partner with government in shaping constitutional values. As a way of minimizing error, miscalculation, and needless conflicts with society and coequal branches, the Court sometimes enlists the help of elected government.¹²⁴ School desegregation is a particularly telling example of this practice. More than a decade after *Brown*, the percentage of African-American children in all-black schools in the South stood at ninety-eight percent.¹²⁵ Through the 1964 Civil Rights Act and other federal initiatives,

¹²² The best treatment of this topic is Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978). Examples of underenforced constitutional norms include the veto, the pocket veto, recess appointments, the incompatibility clause, war powers, and covert operations, discussed in Louis Fisher, *Separation of Powers: Interpretation Outside the Courts*, 18 Pepp. L. Rev. 57 (1990) (arguing that many separation of powers disputes are settled not in the courts, but through trade-offs and compromises between the President and Congress). See also William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 722, 885 (1995) (describing the property rights movement as illustrative of how political branches give serious treatment to underenforced constitutional norms).

¹²³ Alexander and Schauer are wrong in presuming that the political branches never give serious treatment to these matters. See Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 Minn. L. Rev. 1 (1996) (discussing legislative consideration of the "emoluments clause," a constitutional provision unlikely to be considered by the federal courts).

¹²⁴ The Court and Congress have acted jointly on many constitutional issues. See Fisher, *supra* note 6, at 247-51. An early example is Congress' response to the 1890 Supreme Court ruling *Leisy v. Hardin*, 135 U.S. 100 (1890). In *Leisy*, the Supreme Court ruled that a state's prohibition of intoxicating liquors could not be applied to "original packages" or kegs, but qualified its opinion by saying that states could not exclude incoming articles "without congressional permission." *Id.* at 124-25. Congress quickly overturned the decision by allowing states, through their police powers, to regulate incoming liquor "in original packages or otherwise." *Original Packages Act*, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (1994)). A more recent example is Congress's prohibition of newspaper searches, 42 U.S.C. § 2000aa, in the wake of *Zurcher v. Stanford Daily*, a decision upholding such searches but inviting legislative efforts to protect "against possible abuses." 436 U.S. 547, 567 (1978). For further discussion, see Fisher & Devins, *supra* note 6, at 3.

¹²⁵ Gary Orfield, *Public School Desegregation in the United States, 1968-1980*, at 5 (1983).

however, this figure had dropped to twenty-five percent in 1968.¹²⁶ More significant, with the President, congressional leadership, and the public committed to undoing Jim Crow laws, the Court was emboldened to attack discrimination and segregation "root and branch."¹²⁷

Herein lies the real danger of judicial exclusivity. In rejecting such constitutional decisionmaking by other branches, judicial exclusivity does little to promote stability. It encourages acrimony, not cooperation. Democratic government, rather than engage the Court in a constitutional dialogue, will give short shrift to the Court and the Constitution. For its part, the Court will neither enlist democratic government's help nor look to public opinion as a measure of its legitimacy. No longer constrained by its responsibilities as educator (Why educate if populist constitutional discourse is not a public good?) and certain of its status as final constitutional arbiter, the Court will see little value in calibrating its decisions against social and political forces.¹²⁸ Indeed, any such calibration would implicitly reject a decisionmaking model that equates stability with supremacy.

Pragmatism and statesmanship must temper abstract legal analysis. De Toqueville recognized in the 1830s that the judicial power "is enormous, but it is the power of public opinion. [Judges] are all-powerful as long as the people respect the law; but they would be impotent against popular neglect or contempt of the law."¹²⁹ Arguments to the contrary, that judicial exclusivity will have a stabilizing effect, won't do. To be stabilizing, court decisions must command respect and be generally acceptable and understandable.

C. Continuing Colloquies

Law, as Morris Raphael Cohen wrote in 1933, is anything but a "closed, independent system having nothing to do with economic, political, social, or philosophical science."¹³⁰ As this study reveals,

¹²⁶ *Id.*

¹²⁷ *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968).

¹²⁸ On this point, see Eisgruber, *supra* note 117, at 1014-21.

¹²⁹ 1 Alexis de Tocqueville, *Democracy in America* 151 (Phillips Bradley ed., 1945).

¹³⁰ Morris R. Cohen, *Law and the Social Order: Essays in Legal Philosophy* 380-81 n.86 (1933).

courts cannot be separated from the social and political influences that permeate all aspects of constitutional decisionmaking. The question of whether three branch interpretation is qualitatively better than judicial supremacy, however, remains. Alexander and Schauer consider this question irrelevant to their analysis. Focusing on the stabilizing and coordinating functions of law, they embrace judicial finality as the best and only means available to save the Constitution from "interpretive anarchy."¹³¹ We, of course, disagree with this claim. Perhaps more fundamentally, we think that the dialogue that takes place between the Court, elected government, and the American people is as constructive as it is inevitable and therefore more stable.

Constitutional decisionmaking is not well served by making challenges to Supreme Court decisions "more difficult," if not "futile."¹³² Complex social policy issues, especially those that implicate constitutional values, are best resolved through "the sweaty intimacy of creatures locked in combat."¹³³ Judges and politicians sometimes react differently to social and political forces. Congress, for example, focuses its "energy mostly on the claims of large populous interests, or on the claims of the wealthy and the powerful, since that tends to be the best route to re-election."¹³⁴ Courts, in contrast, are less affected by these pressures, for judges possess life tenure.¹³⁵ Accordingly, because special interest group pressures affect courts and elected officials in different ways, a full-ranging consideration of the costs and benefits of different policy outcomes is best accomplished by a government-wide decisionmaking process. For this reason, courts and elected officials should both be activists in shaping constitutional values.

¹³¹ Alexander & Schauer, *supra* note 8, at 1379.

¹³² *Id.* at 1386.

¹³³ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 261 (1962).

¹³⁴ Steven G. Calabresi, *Thayer's Clear Mistake*, 88 Nw. U. L. Rev. 269, 273 (1993).

¹³⁵ See *id.* As to what judges maximize, see Richard A. Posner, *What Do Judges and Justices Maximize?: (The Same Thing Everybody Else Does)*, 3 Sup. Ct. Econ. Rev. 1 (1993).

No doubt, this politicization of constitutional discourse will contribute to partisan, value-laden constitutional analysis.¹³⁶ Nevertheless, complex social policy issues are ill-suited to the winner-take-all nature of litigation. Emotionally charged and highly divisive issues are best resolved through political compromises that yield middle-ground solutions, rather than through an absolutist, and often rigid, judicial pronouncement.

Judicial supremacy yields unworkable solutions, not a more equitable world. "[G]overnment by lawsuit," as Justice Robert Jackson warned, "leads to a final decision guided by the learning and limited by the understanding of a single profession—the law."¹³⁷ Alexander Bickel puts the matter more directly—"doubt[ing] . . . the Court's capacity to develop 'durable principles'" and therefore doubting "that judicial supremacy can work and is tolerable."¹³⁸

Political realities and constitutional values require the judiciary to share with other political institutions and society at large the complex task of interpreting the Constitution. Constitutions do not govern by text alone or solely by judicial interpretation. They draw their life from forces outside the courts: from ideas, customs, society, and statutes. Through this rich and dynamic political process, the Constitution is regularly adapted to seek a harmony between legal principles and the needs of a changing society. Bickel described the courts as engaged in a "continuing colloquy with the political institutions and with society at large," a process through which constitutional principle has "evolved conversationally not perfected unilaterally."¹³⁹

III. CONCLUSION

The chief alternative to judicial exclusivity is not "interpretive anarchy,"¹⁴⁰ with each public official at every level of government making independent judgments of the Constitution. Nor is there

¹³⁶ See generally Louis Michael Seidman & Mark V. Tushnet, *Remnants of Belief: Contemporary Constitutional Issues* (1996) (discussing the effect of political influences on constitutional debates).

¹³⁷ Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics* 291 (1941).

¹³⁸ Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 99 (1970).

¹³⁹ Bickel, *supra* note 133, at 240, 244.

¹⁴⁰ Alexander & Schauer, *supra* note 8, at 1379.

any evidence that the main purpose of the Constitution was to vest a final interpretive authority in a single branch. The overriding value of the framers was a system of checks and balances that is antithetical to vesting in any branch a monopoly on constitutional values. The result, from the start, was "coordinate construction,"¹⁴¹ with each branch capable of and willing to make independent constitutional interpretations. That system has endured for more than two centuries without deteriorating into interpretive anarchy.

No single institution, including the judiciary, has the final word on constitutional questions. It is this process of give and take and mutual respect that permits the unelected Court to function in a democratic society. By agreeing to an open exchange among the branches, all three institutions are able to expose weaknesses, hold excesses in check, and gradually forge a consensus on constitutional values. By participating in this process, the public has an opportunity to add legitimacy, vitality, and meaning to what might otherwise be an alien and short-lived document. Therein lies true stability.

¹⁴¹ See Fisher, *supra* note 6, at 231.