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## In Defense of Judicial Supremacy

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## IN DEFENSE OF JUDICIAL SUPREMACY

ERWIN CHEMERINSKY\*

### ABSTRACT

*“Judicial supremacy” is the idea that the Supreme Court should be viewed as the authoritative interpreter of the Constitution and that we should deem its decisions as binding on the other branches and levels of government, until and unless constitutional amendment or subsequent decision overrules them. This is desirable because we want to have an authoritative interpreter of the Constitution and the Court is best suited to play this role. Under this view, doctrines which keep federal courts from enforcing constitutional provisions—such as denying standing for generalized grievances, the political question doctrine, and the state secrets doctrine—are misguided and should be abandoned.*

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## INTRODUCTION

*Marbury v. Madison* got it right. Chief Justice John Marshall explained that the Constitution exists to impose limits on government powers, and these limits are meaningless unless subject to judicial enforcement.<sup>1</sup> Borrowing from Alexander Hamilton's *Federalist No. 78*, Chief Justice Marshall wrote: "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."<sup>2</sup> And, he went on in perhaps the most frequently quoted words of the opinion: "It is emphatically the province and duty of the judicial department to say what the law is."<sup>3</sup> In other words, the Constitution depends on having judges with the power to enforce it.

Marshall got it exactly right, and that is why *Marbury v. Madison* has been a cornerstone of American government for almost its entire history. The Constitution exists to limit government, and the limits are meaningful only if someone or something enforces them. Enforcement often will not happen without the judiciary.

My thesis is that the Supreme Court should be viewed as the authoritative interpreter of the Constitution and that we should deem its decisions as binding on the other branches and levels of government, until and unless constitutional amendment or subsequent decision overrules them. This is what I define as "judicial supremacy."<sup>4</sup> In this paper, I defend this role for the judiciary and then sketch some implications from it.<sup>5</sup> In Part I, I explain why the

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-78 (1803).

2. *Id.* at 176; see THE FEDERALIST NO. 78, at 426-27 (Alexander Hamilton) (E.H. Scott ed., 1898).

3. *Marbury*, 5 U.S. at 177.

4. See Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045, 1046 (2004) ("Although such a conception is not without merit, it must compete with an alternative and arguably superior understanding of the *raison d'être* of a written document called a 'constitution.' ... Under this alternative view of constitutionalism, judicial supremacy emerges not because of any nostalgic or unduly idealistic view about the capacities of the judiciary. Nor does it flow from contempt for the decision-making capacities of ordinary people. Rather, external constraint on those who are to be constrained from effectuating even their rational, well-meaning, and good-faith policies and preferences is the natural concomitant of the external nature of the constitutional norms themselves.")

5. The label "judicial supremacy" comes from the editors of the *William & Mary Law Review* and the title for this symposium. I fear that it conveys a misleading impression. My

judiciary should be the authoritative interpreter of the Constitution. In Part II, I draw implications from this and argue that doctrines that keep the Court from enforcing the Constitution are misguided and should be abolished. In Part III, I respond to likely criticisms of my defense of judicial supremacy.

### I. WHY THE JUDICIARY?

Of course, federal courts are not the only judicial institution that enforces the Constitution. State courts also can and do enforce the Constitution.<sup>6</sup> But this in no way diminishes the importance of the federal courts doing so. State courts often have no authority over federal officers or the federal government. For example, the law firmly establishes that state courts cannot grant habeas corpus to federal prisoners.<sup>7</sup> Nor would it make sense to have state courts resolve issues of federal separation of powers, such as when a dispute arises between Congress and the President. To pick a recent example, it would have been unrealistic to expect a state court to decide the constitutionality of a federal law requiring that the State Department allow the parents of children born in Jerusalem to have their passports indicate “Israel” as their birthplaces.<sup>8</sup> In situations like this, when there is a constitutional impasse between the other branches of the federal government, the federal courts must act as the umpire. Also, many of the doctrines that keep federal courts from enforcing the Constitution—such as the limits on suing government entities and government officers—apply just the same way in the state courts.<sup>9</sup>

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thesis is not that the judiciary is supreme in all matters; rather, my argument is that the judiciary is authoritative in matters of constitutional interpretation.

6. *See, e.g.*, U.S. CONST. art. VI, cl. 2 (“Judges in every State shall be bound [by the Constitution].”); *Robb v. Connolly*, 111 U.S. 624, 637 (1884) (“Upon the State courts, equally with the courts of the Union, rests the obligation to guard, *enforce*, and protect every right granted or secured by the Constitution of the United States.” (emphasis added)).

7. *See Tarble’s Case*, 80 U.S. (13 Wall.) 397, 411 (1871).

8. *See Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090, 2096 (2015) (holding that, because the power to recognize foreign states resides in the President alone, § 214(d) of the Foreign Relations Authorization Act of 2003—which directs the Secretary of State, upon request, to designate “Israel” as the place of birth on the passport of a United States citizen who was born in Jerusalem—infringes on the President’s consistent decision to withhold recognition with respect to Jerusalem).

9. *See, e.g., Alden v. Maine*, 527 U.S. 706, 732 (1999) (holding that state governments

Nor can we rely on voluntary compliance from the other branches and levels of government.<sup>10</sup> Far too often, legislators and officials have a strong incentive not to comply with the Constitution.<sup>11</sup> These situations, which often involve the most vulnerable in society, are where the federal judiciary is needed most.<sup>12</sup>

Most dramatically, those without political power have nowhere to turn except the judiciary for the protection of their constitutional rights.<sup>13</sup> The reality is that participants in the political process have little incentive to be responsive to the constitutional rights of prisoners, criminal defendants, or those who are not citizens.<sup>14</sup> These individuals lack political power—they do not give money to political candidates; they are generally prohibited from voting; and they are unpopular and often unsympathetic.<sup>15</sup> When is the last time a legislature acted to expand the rights of prisoners or criminal defendants? In the competition for scarce dollars, legislatures have every political incentive to spend as little as possible on prisoners. Politicians compete to sound tough on crime, not to expand defendants' rights.<sup>16</sup> Yet how much worse might it be if politicians and

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have sovereign immunity and cannot be sued in state court, including on federal claims).

10. There are those who argue that this is sufficient and that judicial review should be eliminated. *See, e.g.*, JAMES MACGREGOR BURNS, *PACKING THE COURT* 254-55 (2009); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 127-28 (1999).

11. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1365 n.24 (1997). For example, unconstitutional acts might be politically popular or economically advantageous.

12. *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 135-36 (1980); WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 100-01 (2000) (“Democratically elected legislators and elected executive officials, who are responsible to popular majorities, cannot be trusted to protect minorities from those majorities. Judges with life tenure can be.”).

13. NELSON, *supra* note 12, at 100-01.

14. *See* Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482, 527 n.209 (1984) (“Since prisoners as a class are a despised and politically powerless minority, few political checks exist on legislative manipulation of their freedom, and few legal checks as well.”); *see also* Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 459 (1999).

15. *See* Chemerinsky, *supra* note 14, at 459-60; Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1191 (2006) (“Ex-offenders are not just marginalized, they are also a clear example of repeat losers in pluralist politics. Ex-offenders are often legally disenfranchised.”).

16. *But see* Trevor Timm, *Is the Political Imperative to Be ‘Tough on Crime’ Finally Over?*, GUARDIAN (July 18, 2015, 8:15 AM), <https://www.theguardian.com/commentisfree/2015/jul/18/political-imperative-tough-on-crime> [<https://perma.cc/U28U-JJUG>] (“[P]residential

prison officials knew that no court would review the constitutionality of their actions? Admittedly, the Supreme Court has a less than stellar record of protecting these individuals' rights, but there is no doubt that judicial review has provided protections for criminal defendants and dramatically improved conditions for countless prison inmates whom the political process abandoned.<sup>17</sup> Although these are obvious examples, the nature of democracy is that the elected branches of government are often insensitive to the rights of those who lack political influence.<sup>18</sup>

More generally, if not for the federal courts, what is to stop Congress or the President from enacting a law that is unconstitutional but politically expedient? What, other than the drastic remedy of impeachment, is to stop the President from pursuing unconstitutional policies when they are politically popular? Often there is no one—other than the courts—to deter wrongdoing and compensate those injured by constitutional violations.<sup>19</sup>

This view of the federal judiciary inevitably derives from the purpose of the Constitution itself. My agreement with *Marbury v. Madison* is ultimately based on my belief that the written Constitution exists to be the supreme law of the land and to limit what everyone in government, at all levels, can do.<sup>20</sup>

Harvard Law Professor Laurence Tribe powerfully asked “why a nation that rests legality on the consent of the governed would choose to constitute its political life in terms of commitments to an

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candidates—who once competed with one another over who was ‘tougher on crime’—are falling all over themselves to praise reform efforts meant to reduce the number of prisoners in the US.”).

17. See Eugene N. Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669, 669-70 (1966) (“Cases involving the rights of prisoners, probationers and parolees—a short time ago judicially ignored because the matters complained of were regarded as being solely within the purview of the administrators and not within the jurisdiction of the courts—are now being heard on the merits.”); see, e.g., *Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding that the imposition of a life without parole sentence on a juvenile offender who did not commit homicide is unconstitutional); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders who were under the age of eighteen when they committed their crimes). See generally Julia M. Glencer, Comment, *An ‘Atypical and Significant’ Barrier to Prisoners’ Procedural Due Process Claims Based on State-Created Liberty Interests*, 100 DICK. L. REV. 861 (1996).

18. ELY, *supra* note 12, at 135-36.

19. NELSON, *supra* note 12, at 100-01.

20. Cf. U.S. CONST. art. IV.

original agreement—made by the people, binding on their children, and deliberately structured so as to be difficult to change.”<sup>21</sup> It is hardly original or profound to answer this question by observing that the Framers deliberately made the Constitution very difficult to change as a way of preventing tyranny of the majority and protecting the rights of the minority from oppression by social majorities.<sup>22</sup> If the structure of government had been placed in a statute, then the urge to create dictatorial powers in times of crisis might be irresistible. If only statutes protected individual liberties, then a tyrannical government could overrule them. If terms of office were specified in a statute rather than in the Constitution, then those in power could alter the rules to remain in office.<sup>23</sup>

Thus, the Constitution represents society’s attempt to tie its own hands—to limit its ability to fall prey to weaknesses that might harm or undermine its most cherished values. History teaches that under the passions of the moment, people may sacrifice even the most basic principles of liberty and justice.<sup>24</sup> The Constitution is society’s attempt to protect itself from itself. It enumerates basic values—regular elections, separation of powers, individual rights, equality—and makes departure very difficult. In large part, the decision to be governed by the Constitution was animated by fear that a political majority could gain control of government and disenfranchise and perhaps persecute the minority.<sup>25</sup> Compared to all other laws, the Constitution is uniquely difficult to amend or alter, precisely to ensure that the limits it sets are not easily changed.<sup>26</sup>

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21. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 10 (2d ed. 1988).

22. See Norman R. Williams II, Note, *Rising Above Factionalism: A Madisonian Theory of Judicial Review*, 69 N.Y.U. L. REV. 963, 963 (1994); see also THE FEDERALIST NO. 10, *supra* note 2, at 53-54 (James Madison).

23. Cf. U.S. CONST. amend. XXII, § 1 (“No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once.”).

24. Cf. *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (holding that the wartime internment of American citizens of Japanese descent, pursuant to an executive order, was constitutional).

25. See generally THE FEDERALIST NO. 10, *supra* note 2 (James Madison).

26. Cf. U.S. CONST. art. V.



Accordingly, in deciding who should be the authoritative interpreter of the Constitution, the answer is the branch of government that can best enforce the Constitution's limits against the desires of political majorities. By this criterion, the federal judiciary is the obvious choice. It is the institution most insulated from political pressures.<sup>27</sup> Article III of the Constitution provides that federal court judges have life tenure unless impeached and that their salary may not be decreased during their terms of office.<sup>28</sup> Unlike legislators or the President, they never face reelection.<sup>29</sup>

Furthermore, the method of federal judicial selection reinforces its antimajoritarian character. Unlike the House of Representatives, whose members are elected at the same time, or the Senate, where one-third of the members are chosen in each election, the President appoints the Court's members one at a time, as vacancies arise.<sup>30</sup> Generally, no single administration is able to appoint a majority of the Court or the federal judiciary. The result is that the Court reflects many political views, not just the one that dominates at a particular time.

Other reasons exist, too, why the judiciary is the branch of government that is best suited to enforce the Constitution and should be deemed its authoritative interpreter. First, the judiciary is the only institution obligated to hear the complaints of a single person. For the most part, the federal judiciary's jurisdiction is mandatory. Although the Supreme Court can choose which cases to hear, a lower federal court must (with relatively rare exceptions)<sup>31</sup> rule on every case properly filed with it.<sup>32</sup> Long ago, Chief Justice Marshall wrote, "It is most true that this Court will not take jurisdiction if it should not[] but it is equally true[] that it must take jurisdiction if it should.... We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."<sup>33</sup>

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27. William F. Shughart II & Robert D. Tollison, *Interest Groups and the Courts*, 6 GEO. MASON L. REV. 953, 958-59 (1998).

28. U.S. CONST. art. III, § 1.

29. *Id.* art. I, §§ 2-3; *id.* art. III, § 1.

30. *Id.* art. I, § 2, cl. 1; *id.* art. I, § 3, cl. 2; *id.* art. II, § 2.

31. *See infra* Part II.

32. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

33. *Id.*

The legislature and the executive branch, on the other hand, are under no duty to hear any single person's complaints. A legislator or the President could easily ignore an individual or small group complaining of an injustice. If only a few constituents care about something, and if acting to help them would consume too much time for the number of votes it would yield, then politicians often will ignore them. Moreover, if helping the few will hurt more constituents, the legislator or the President is likely to disregard the few, no matter how just their cause. To use the example mentioned previously, prisoners are a constituency with little political power. In many states, felons are permanently disenfranchised from voting, meaning that elected officials need not worry about meeting their demands.<sup>34</sup> Providing adequate resources for prisoners—for their shelter, food, medical care, and training—requires expenditures unlikely to be popular with taxpayers, and certainly less popular than if the government spends the money on almost anything else.<sup>35</sup> With no constituency to pressure for prisoners' humane treatment, politicians are likely to ignore their rights and needs.<sup>36</sup>

However, the law requires the courts to rule on any properly filed complaint, no matter whether the litigant is rich or poor, powerful or powerless, incarcerated or not.<sup>37</sup> The judiciary is much more likely than the legislature to listen to criminal defendants' claims that their rights were violated or to poor individuals' objections that they were denied equal justice, because the courts must at least give such claims a hearing. The Constitution's purpose of protecting the minority from the tyranny of the majority is best fulfilled by an institution obligated to listen to the minority.

Second, the judiciary is not only the branch most likely to listen to complaints; it is also most likely to respond to them. The judiciary is supposed to decide each case on its own merits, subject to the accepted norm that it should treat like cases alike.<sup>38</sup> In every case in which an individual alleges a constitutional violation, the judiciary is obligated, if it has jurisdiction and if there is no way to

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34. See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974).

35. See *supra* notes 14-17 and accompanying text.

36. See *supra* notes 14-17 and accompanying text.

37. See generally U.S. CONST. art. III, § 2, cl. 1.

38. See William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 735-36 (1949).

decide the case on nonconstitutional grounds, to issue a constitutional ruling. In contrast, the legislature need not decide each matter before it on its merits—or at all. Logrolling, vote trading, and the tabling of bills are accepted parts of the legislative process.<sup>39</sup> Procedural devices—like the filibuster and holds—often let a minority prevent legislative action; for decades, Southerners in the Senate used them to block civil rights legislation.<sup>40</sup> Although their oath of office forbids legislators to enact laws they believe are unconstitutional, no law requires legislators to provide a remedy every time someone complains that the government is violating the Constitution.<sup>41</sup> Only the judiciary is obligated to respond to such complaints—and this makes the courts an ideal forum for ensuring that the Constitution is upheld.

Third, as the branch most insulated from day-to-day politics, the judiciary is the branch most willing to enforce the Constitution in the face of strong pressures from political majorities.<sup>42</sup> Even if the legislature and executive were to listen to all claims and respond on the merits, they are still less likely to uphold the Constitution against the intense opposition of their constituents. This insulation is what moved Alexis de Tocqueville to remark that “the power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies.”<sup>43</sup>

The argument is not that legislators act in bad faith and disregard their oath to uphold the Constitution, although this sometimes happens. Rather, it is that constitutional interpretation inherently

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39. See Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323, 1338-39 (2000).

40. See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 182-83 (1997).

41. See *Oath of Office*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/common/briefing/Oath\\_Office.htm#1](https://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm#1) [<https://perma.cc/4ZU8-3QMG>] (“I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic.”).

42. See Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 698 (1999) (“[T]he judicial branch is itself insulated from the majoritarian pressures which Congress is structured to reflect.”).

43. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 103 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1945) (1835).

requires choices as to what the Constitution should mean—how its abstract values should be applied in specific situations. These choices are best made by an institution whose primary commitment is to the Constitution, not to gaining reelection. Professor Owen Fiss observed that “[l]egislatures ... are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preferences of the people.”<sup>44</sup> The people can trust the judiciary much more to decide, for instance, whether the Constitution should protect the speech activities of a politically unpopular group like the Nazi Party.<sup>45</sup> Because the Court is committed to upholding the First Amendment and is not faced with intense pressure from constituents, it is also in a better position to decide whether the right of privacy includes the right of a woman to decide whether to have an abortion or whether school prayer violates the Constitution.<sup>46</sup>

The best institution for interpreting the Constitution is thus not the one that most reflects the majority’s current preferences. Constitutional interpretation is best done by a relatively politically insulated body. Professor Harry Wellington explained:

If a society were to design an institution which had the job of finding the society’s set of moral principles and determining how they bear in concrete situations, that institution would be sharply different from one charged with proposing policies. The latter institution would be constructed with the understanding that it was to respond to the people’s exercise of political power .... The former would be insulated from such pressure. It would provide an environment conducive to rumination, reflection, and analysis.<sup>47</sup>

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44. Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 10 (1979).

45. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (holding a statute prohibiting the placement of a Nazi swastika on public or private property to reasonably incite distress in others to be unconstitutional).

46. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that a Texas statute allowing abortions only to save the life of the mother unconstitutionally violates the Fourteenth Amendment’s Equal Protection Clause); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963) (holding that state requirements for prayer in schools unconstitutionally violate the Establishment Clause).

47. Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some*

Constitutional interpretation is a process of deciding what values are so fundamental that they should be safeguarded from political majorities.<sup>48</sup> It makes little sense to entrust these decisions to those same political majorities. The judiciary's insulation and commitment to decisions based on the merits make it far better suited for this task.<sup>49</sup> Professor Alexander Bickel remarked:

[C]ourts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society.<sup>50</sup>

Constitutional interpretation requires an institution to serve as the nation's moral conscience—an institution responsible for identifying values so important that they should not be sacrificed and reminding the country when its own most cherished values are being violated. At times, the Supreme Court has functioned in exactly this way: as a moral conscience holding the nation to its highest values.<sup>51</sup>

We should trust the legislature least when the question is the constitutionality of a statute it has enacted. Allowing the same body to both enact laws and determine their constitutionality is no way to protect constitutional values. Review by another branch of government creates a necessary check on the majority.<sup>52</sup> The executive veto provides something of a check, but Congress can override a veto.<sup>53</sup> Moreover, the President is electorally accountable, at least in his first term, and may feel the same pressures as Congress.<sup>54</sup> The judiciary is most detached from both the enactment of laws and the implementation of policies.

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*Notes on Adjudication*, 83 YALE L.J. 221, 246-47 (1973).

48. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 25-26 (1962).

49. See *id.*

50. *Id.*

51. See *id.*

52. See THE FEDERALIST NO. 51, *supra* note 2, at 285-87 (Alexander Hamilton).

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

54. See *id.* art II, § 1, cl. 1.

The Court's self-interest is in enhancing its long-term powers.<sup>55</sup> Certainly, the judiciary's institutional self-interest justifies fear of its deciding cases to aggrandize its own powers. I argue, however, that in resolving specific controversies, it is better to trust an institution with only long-term interests than one with immediate interests in the outcome of the matter. In sum, once we decide that a constitution should govern society in order to make certain matters less amenable to majoritarian control, judicial review is an essential mechanism for interpreting and enforcing the document's limits on majority action.

The methods of judicial decision-making also make it the best institution for constitutional interpretation. The judiciary is the only institution committed to arriving at decisions based entirely on arguments and reasoning.<sup>56</sup> Executive and legislative officials frequently offer no formal explanations for their decisions, and the statements they provide usually do not purport to be comprehensive.<sup>57</sup> The judicial method is a process of hearing arguments from the parties, reaching decisions based on those arguments, and justifying the results with a written opinion.<sup>58</sup> Although neither the Constitution nor any statute compels a court to write and publish opinions, publicly stated reasons for these decisions are embedded in the American legal system.<sup>59</sup> This country has long recognized that the "traditional means of protecting the public from judicial fiat ... [require] that judges give reasons for their results."<sup>60</sup>

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55. See, e.g., Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 585 (2001) ("When they are attentive to external actors, Justices find that the best way to have a long-term effect on the nature and content of the law is to adapt their decisions to the preferences of these [other branches].").

56. See Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 486 (2015) ("More than other branches of government, judges are expected to be model reason-givers.").

57. See Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1118-19 (2010) (describing how the law permits the President and other administrative agencies to keep the reasons for their actions secret); *id.* at 1093, 1104 (describing how legislators are usually not required to give reasons for their actions).

58. See G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 299 (1973).

59. See *id.*

60. *Id.*

For each ruling it hands down, the Supreme Court must write an opinion demonstrating that its decision was not arbitrary.<sup>61</sup> It must explain why the values it is protecting are worthy of constitutional status, how those values are embodied in legal principles, and how a court should apply them in a specific case.<sup>62</sup> The Supreme Court must also explain why its decision is consistent with prior holdings, is legitimately distinguishable from precedents, or justifies overruling conflicting cases.<sup>63</sup>

In contrast, the legislature and the executive need not follow any particular decision-making process. Neither law nor tradition requires Congress or the President to state reasons for their decisions.<sup>64</sup> Although Congress produces legislative histories and the President issues executive proclamations, only the judiciary commits to reaching its decisions through logical reasoning from principles rather than via political considerations.<sup>65</sup> The law permits a legislature to make arbitrary choices unsupported by a guiding principle.<sup>66</sup> Even though inevitably the Supreme Court's constitutional decisions are a product of the Justices' ideology and values, the Court still must justify them in legally acceptable terms.<sup>67</sup> Moreover, only the judiciary commits to following precedent.<sup>68</sup>

For all of these reasons, I believe the judiciary's essential role is to enforce the Constitution, and legal doctrines must facilitate its performance of this task. Alternative conceptions of the judicial role exist, but I reject them.

One such alternative is that the federal courts' primary role should be to resolve disputes between litigants and that resolving constitutional issues is a secondary function that comes into play only when parties present these issues in litigation.<sup>69</sup> The so-called

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61. *See id.* at 299 n.71.

62. *See id.* at 299.

63. *See Douglas, supra* note 38, at 735-36.

64. *See supra* notes 56-57 and accompanying text.

65. *See supra* note 58 and accompanying text.

66. *See William H. Riker & Barry R. Weingast, Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 374 (1988).

67. *See White, supra* note 58, at 299.

68. *See Douglas, supra* note 38, at 736.

69. *See Abram Chayes, The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-85 (1976).

“traditional” model describes adjudication as “a vehicle for settling disputes between private parties about private rights.”<sup>70</sup>

This is not an accurate depiction of the role of the federal courts; nor should it be. Almost thirty years ago, Professor Abram Chayes wrote in a famous article:

Whatever its historical validity, the traditional model is clearly invalid as a description of much current civil litigation in the federal district courts. Perhaps the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies. The shift in the legal basis of the lawsuit explains many, but not all, facets of what is going on “in fact” in federal trial courts.<sup>71</sup>

The traditional model focuses only on private civil litigation and does not account for all of the criminal prosecutions in federal court that the federal government brings, or the civil cases in which a government entity or officer is a party.<sup>72</sup>

Moreover, the distinction between “private” and “public” adjudication is largely false.<sup>73</sup> The people who bring most cases have suffered a harm. If any of these people have a desire to vindicate the Constitution, it is secondary to their personal interests. But the public’s interest in these cases is different; the public interest has to do with the rights we all should have.<sup>74</sup> Every decision is a precedent that controls lower courts in subsequent cases and even, more or less, the Supreme Court. Every Supreme Court decision makes law that affects all of us; it does not simply resolve individual disputes.

Finally, if we must make a choice between the “private rights” and the “public law” models of adjudication, we should follow the latter to the extent that it better facilitates enforcement of the Constitution. The choice of a model for adjudication, if we must make one, should follow from the reasons for having federal courts.

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70. *See id.* at 1282.

71. *Id.* at 1283-84 (footnote omitted).

72. *See id.*

73. *See id.*

74. *See id.* at 1308.



The most important role of the federal courts should be to enforce the Constitution and thus legal doctrines should facilitate that role.

A second alternative vision says that the role of the federal courts needs to be constrained by the separation of powers. In a dissenting opinion urging a narrow view of who has standing to bring a case to federal court, Justice Scalia recently wrote:

That doctrine of standing, that jurisdictional limitation upon our powers, does not have as its purpose (as the majority assumes) merely to assure that we will decide disputes in concrete factual contexts that enable “realistic appreciation of the consequences of judicial action.” To the contrary. “[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers.” It keeps us minding our own business.<sup>75</sup>

But such an argument begs the question of the appropriate role of the federal courts. Courts, of course, should “mind[] [their] own business.”<sup>76</sup> But that requires defining what their business is. The proper role of the federal courts has to be determined based on the purposes the federal judiciary should serve. If the business of the federal courts is enforcing the Constitution, that is what the doctrines defining federal court jurisdiction should facilitate. We cannot assume, as Justice Scalia does, that restricting the courts’ role best serves the separation of powers. Less judicial review is not inherently better. Doctrines that facilitate the courts’ function of enforcing the Constitution advance the courts’ proper role in the system of separation of powers; doctrines that limit its authority undermine separation of powers.

Finally, some scholars argue for a more limited role for the federal judiciary based on their concern that the courts must conserve their scarce institutional capital. This position is most frequently associated with Justice Frankfurter and Professor Bickel.<sup>77</sup> Their view rests on several assumptions: that the judiciary’s credibility is

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75. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2695 (2015) (Scalia, J., dissenting) (alteration in original) (citations omitted) (first quoting *Ariz. State Legislature*, 135 S. Ct. at 2665 (majority opinion); and then quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

76. *Id.*

77. See *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting); BICKEL, *supra* note 48, at 35.

fragile; that unpopular, controversial decisions will undermine the Court's legitimacy; that if the Court comes to lack legitimacy it will be disobeyed and rendered less powerful; and that the risk of these outweighs the costs of not enforcing particular constitutional provisions.<sup>78</sup>

All of these assumptions are highly questionable. History shows that judicial credibility and legitimacy are not fragile. Some of the Court's most controversial rulings—such as those reapportioning state legislatures and desegregating schools—ultimately enhanced the judiciary's stature.<sup>79</sup> As Professor John Hart Ely wrote:

“[T]he possibility of judicial emasculation by way of popular reaction against constitutional review by the courts has not in fact materialized in more than a century and a half of American experience.” The warnings probably reached their peak during the Warren years; they were not notably heeded; yet nothing resembling destruction materialized. In fact the Court's power continued to grow, and probably has never been greater than it has been over the past two decades.<sup>80</sup>

There is no reason to believe that greater enforcement of the Constitution by the federal courts will undermine their credibility, lead to disobedience of judicial orders, or decrease the judiciary's power. Quite the contrary; additional enforcement of the Constitution could well enhance the Court's public esteem and credibility. At the very least, it is entirely speculative whether greater enforcement of the Constitution would have any ill effects.

Most importantly, even if such a risk existed, it is worth bearing in order to ensure constitutional enforcement. The Court's very reason for accumulating institutional capital is to enforce the Constitution.<sup>81</sup> As Professor Tribe remarked, “the highest mission of the Supreme Court, in my view, is not to conserve judicial

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78. See *Baker*, 369 U.S. at 267; BICKEL, *supra* note 48, at 35.

79. Cf. *Baker*, 369 U.S. at 237 (majority opinion) (reapportioning state legislatures); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (desegregating schools).

80. ELY, *supra* note 12, at 47-48 (footnotes omitted) (quoting EUGENE ROSTOW, *THE SOVEREIGN PREROGATIVE* 165 (1962)).

81. See TRIBE, *supra* note 21, at viii.

credibility, but in the Constitution's own phrase, 'to form a more perfect Union' between right and rights."<sup>82</sup>

## II. IMPLICATIONS

My argument implicates that the Supreme Court is the final arbiter of the Constitution's meaning and that its interpretation is controlling until another decision or a constitutional amendment overrules it. The Court expressed this view perhaps most forcefully in *Cooper v. Aaron*, in an opinion each Justice signed:

*Marbury v. Madison* ... declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land ....

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery."<sup>83</sup>

I also believe that this view of judicial supremacy means that doctrines that prevent the Supreme Court from being the authoritative interpreter of the Constitution are undesirable and wrong. Here, in particular, I would object to justiciability doctrines that assign responsibility for interpreting the Constitution to other branches of government.<sup>84</sup>

The "generalized grievance" prong of the standing doctrine and the political question doctrine are key examples of doctrines that

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82. *Id.*

83. 358 U.S. 1, 18 (1958) (quoting *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809)).

84. In *CLOSING THE COURTHOUSE DOORS: HOW THE SUPREME COURT HAS MADE YOUR RIGHTS UNENFORCEABLE* (2017), I consider other doctrines that wrongly keep the federal courts from enforcing the Constitution, including sovereign immunity, individual immunities, restrictions on habeas corpus, and abstention doctrines.

prevent federal courts from enforcing the Constitution. I believe we should abolish both of these doctrines because they prevent the Court from being the authoritative interpreter of the Constitution.

The Supreme Court is not troubled by these situations in which no one can seek judicial review because that means the matter is left to the political process.<sup>85</sup> But enforcement of the Constitution should never be left to the political process. The Constitution exists to limit the government; those limits have meaning only if they are enforceable, and to think that the political process will address such issues is usually to indulge a fiction.<sup>86</sup> The kinds of complaints that courts dismiss for lack of standing or for being political questions rarely draw the level of public attention needed to make them political issues.

#### A. *The Standing Doctrine*

The Court's generalized grievance standing doctrine has meant that some claims of constitutional violations cannot be adjudicated at all. The courts will deem a case as presenting a generalized grievance if the plaintiff sues solely as a citizen or as a taxpayer interested in having the government follow the law.<sup>87</sup> For example, in *Ex parte Lévit*, the Supreme Court ruled that a person could not gain standing as a citizen claiming a right to have the government follow the law.<sup>88</sup> Albert Lévit sued to have Justice Black's appointment to the United States Supreme Court declared unconstitutional, contending that Justice Black could not be appointed to the Court because, as a senator, he voted to increase Supreme Court Justices' retirement benefits.<sup>89</sup> Lévit alleged that this violated Article I, Section 6, of the Constitution,<sup>90</sup> which states that "[n]o Senator ... shall, during the Time for which he was elected, be appointed to any civil Office ... the Emoluments whereof shall have

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85. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974).

86. See *supra* Part I.

87. See *United States v. Richardson*, 418 U.S. 166, 173-77 (1974).

88. 302 U.S. 633, 633-34 (1937) (per curiam).

89. *Id.*; see also Daniel H. Pollitt, *Senator/Attorney-General Saxbe and the "Ineligibility Clause" of the Constitution: An Encroachment upon Separation of Powers*, 53 N.C. L. REV. 111, 123-24 (1974).

90. *Lévit*, 302 U.S. at 633.

been increased during such time.”<sup>91</sup> The Court held that Lévitte lacked standing because “it is not sufficient [for standing] that he has merely a general interest common to all members of the public.”<sup>92</sup>

Similarly, in *United States v. Richardson*, the plaintiff, William B. Richardson, claimed that the statutes keeping the Central Intelligence Agency budget classified violated the Constitution’s requirement for a regular statement and accounting of all expenditures.<sup>93</sup> The Court ruled that he lacked standing because he did not allege a violation of a personal constitutional right but instead claimed injury only as a citizen and taxpayer.<sup>94</sup> The Court held that Richardson was “seeking ‘to employ a federal court as a forum in which to air his generalized grievances about the conduct of government.’”<sup>95</sup> The Court ruled irrelevant Richardson’s claim that if he could not sue, no one could. Chief Justice Burger wrote:

It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.<sup>96</sup>

In a decision handed down the same day, the Court denied citizen and taxpayer standing in *Schlesinger v. Reservists Committee to Stop the War*.<sup>97</sup> The plaintiffs had sued to enjoin members of Congress from serving in the military reserves, arguing that the Incompatibility Clause prevents a senator or representative from holding civil office.<sup>98</sup> This case arose in the context of the Vietnam War when some members of Congress also served in the Armed Forces Reserve.<sup>99</sup> Again, the Court refused to rule on the claim of

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91. U.S. CONST. art. I, § 6, cl. 2.

92. *Lévitte*, 302 U.S. at 634.

93. 418 U.S. 166, 168 (1974).

94. *Id.* at 175.

95. *Id.* (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

96. *Id.* at 179.

97. 418 U.S. 208, 209 (1974).

98. *Id.*; see also U.S. CONST. art. I, § 6, cl. 2.

99. See *Schlesinger*, 418 U.S. at 210-11.

unconstitutionality, holding that the matter posed a generalized grievance.<sup>100</sup> The plaintiffs had not alleged any specific violation of their constitutional rights, only an interest as citizens or taxpayers in having the government follow the law.<sup>101</sup> The Court stated:

Respondents seek to have the Judicial Branch compel the Executive Branch to act in conformity with the Incompatibility Clause, an interest shared by all citizens....

....

Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.<sup>102</sup>

These decisions mean that no one has standing to challenge certain government practices that violate the Constitution. Contrary to what the Court says, the fact that no one would have standing is exactly the reason for finding standing. Otherwise, the federal courts cannot enforce the Constitution.

### *B. The Political Question Doctrine*

Similarly, according to the Supreme Court, certain allegations of unconstitutional government conduct are “political questions” that the federal courts should not rule on, even when the case meets all of the jurisdictional and other justiciability requirements.<sup>103</sup> The Court has said that constitutional interpretation in these areas should be left to the politically accountable branches of government—the President and Congress.<sup>104</sup> In other words, the political question doctrine refers to matters that the Court deems inappropriate for judicial review.<sup>105</sup> So, despite an allegation that the Constitution has been violated, the federal court refuses to rule and instead

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100. *Id.* at 227-28.

101. *Id.*

102. *Id.* at 217, 227.

103. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

104. *See id.*

105. *See id.*; *see also* *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1275 (11th Cir. 2009) (referring specifically to the “political question doctrine”).

dismisses the case.<sup>106</sup> In essence, the political question doctrine says that the federal judiciary cannot enforce some parts of the Constitution.

I believe that this doctrine is inconsistent with the federal courts' primary mission of enforcing the Constitution. No allegation of constitutional violation should exist that federal courts cannot adjudicate. Professor Martin Redish contended that "the political question doctrine should play no role whatsoever in the exercise of the judicial review power."<sup>107</sup> I agree. As I explained above, matters are placed in a Constitution to insulate them from majoritarian control, and therefore, it is inappropriate to entrust constitutional issues to the majoritarian branches of government; we cannot rely on politically accountable bodies to enforce a document that is meant to restrain them.<sup>108</sup> The federal courts certainly can and should give deference to the choices of the other branches of government, but they should do so in rulings on the merits of individual cases, not through dismissals on justiciability grounds.

### 1. *The Guarantee Clause*

The Supreme Court has applied the political question doctrine in several major areas to rule that federal courts cannot adjudicate constitutional claims. The most notable examples are cases brought under Article IV, Section 4, of the Constitution, which states that "[t]he United States shall *guarantee* to every State in this Union a Republican Form of Government."<sup>109</sup> The Court has consistently held that cases alleging a violation of this clause—also known as the Guarantee Clause—present nonjusticiable political questions.<sup>110</sup> Several scholars have urged the Court to reconsider this rule.<sup>111</sup> It

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106. See, e.g., *Carmichael*, 572 F.3d at 1275.

107. Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1033 (1985).

108. See *supra* Part I.

109. U.S. CONST. art. IV, § 4 (emphasis added).

110. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849).

111. See, e.g., Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 851 (1994); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 2 (1988) (arguing that the Guarantee Clause should be seen as a basis for protecting federalism and states' rights from congressional interference). *But see* Ann Althouse, *Time for Federal Courts to Enforce the Guarantee Clause?—A Response to Professor Chemerinsky*, 65 U. COLO. L. REV.

has not done so yet, but Justice O'Connor once remarked that “the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions” and that “[c]ontemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances.”<sup>112</sup>

In fact, the first Supreme Court case to proclaim that a matter was a political question involved the Guarantee Clause. In *Luther v. Borden*, in 1849, the Court held that a challenge to the validity of the Rhode Island state government—which had no state constitution and still operated under a 1663 charter from King Charles II—was a political question.<sup>113</sup> A dispute arose when the existing government refused to allow a new government to take office under a new state constitution that the voters had approved.<sup>114</sup> The Supreme Court held that a federal court could not decide the case:

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not.<sup>115</sup>

In the Court's view, the case posed a political question because if a court declared the state's government unconstitutional, then this would invalidate all of the government's actions and create chaos in Rhode Island.<sup>116</sup> Additionally, the Court, in siding with the existing Rhode Island government, spoke of a lack of criteria for deciding what constitutes republican government.<sup>117</sup>

Since *Luther v. Borden*, the Supreme Court has never deemed a state government or state action to violate the Guarantee Clause.<sup>118</sup>

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881, 884-85 (1994); Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887, 924-28 (1994).

112. See *New York v. United States*, 505 U.S. 144, 185 (1992).

113. See 48 U.S. (7 How.) at 35-36, 42.

114. See *id.* at 36.

115. *Id.* at 42.

116. See *id.* at 41-44.

117. See *id.* at 42.

118. However, the Supreme Court has decided cases on the merits under the Guarantee Clause, upholding the challenged government action. See, e.g., *Forsyth v. City of Hammond*,



In *Taylor v. Beckham*, the Court refused to decide whether a state legislature's resolution of a disputed gubernatorial race violated this clause.<sup>119</sup> In *Pacific States Telephone & Telegraph Co. v. Oregon*, it again held that cases under this clause are not justiciable.<sup>120</sup> *Pacific States* involved a challenge to a state law, passed through a voter initiative, that taxed certain corporations.<sup>121</sup> The defendant, a corporation the state of Oregon sued for failure to pay taxes under this law, argued that the statute was unconstitutional because the initiative process, as a form of direct democracy, violated the Guarantee Clause.<sup>122</sup> The Supreme Court held that the matter was not justiciable, calling the issue "political and governmental, and embraced within the scope of the powers conferred upon Congress, and not, therefore, within the reach of judicial power."<sup>123</sup>

The effect of the Supreme Court's decisions since *Luther v. Borden* is that the Guarantee Clause is essentially read out of the Constitution; the Court has never enforced this provision.

## 2. Gerrymandering

Challenges to partisan gerrymandering is another type of claim that the Court has ruled nonjusticiable. Gerrymandering occurs when the political party that controls the legislature draws election districts to maximize its own safe seats.<sup>124</sup> In a 1986 case, *Davis v. Bandemer*, the Court had previously held that challenges to gerrymandering were justiciable.<sup>125</sup>

But in *Vieth v. Jubelirer*, a plurality of Justices dismissed an equal protection challenge to partisan gerrymandering, stating that such suits are inherently nonjusticiable political questions.<sup>126</sup> Republicans controlled the Pennsylvania legislature and drew

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166 U.S. 506, 519 (1897); *Foster v. Kansas ex rel. Johnston*, 112 U.S. 201, 206 (1884); *Kennard v. Louisiana ex rel. Morgan*, 92 U.S. 480, 482-83 (1875).

119. 178 U.S. 548, 578-80 (1900).

120. 223 U.S. 118, 150-51 (1912).

121. *See id.* at 119.

122. *See id.* at 137.

123. *Id.* at 151.

124. *See* Robert S. Erikson, *Malapportionment, Gerrymandering, and Party Fortunes in Congressional Elections*, 66 AM. POL. SCI. REV. 1234, 1234 (1972).

125. 478 U.S. 109, 124 (1986).

126. 541 U.S. 267, 277-81 (2004) (plurality opinion).

election districts to maximize Republican seats.<sup>127</sup> This action, of course, is unique neither to Republicans nor to Pennsylvania.<sup>128</sup> Except in places with independent district commissions, election districts for all levels of government often are drawn to maximize seats for the party drawing the districts.<sup>129</sup>

The plurality concluded that *Davis* had proved impossible to implement.<sup>130</sup> The plurality opinion, written by Justice Scalia and joined by Chief Justice Rehnquist and Justices O'Connor and Thomas, argued that challenges to partisan gerrymandering are political questions with no judicially discoverable or manageable standards.<sup>131</sup> There is, Justice Scalia wrote, no basis for courts to decide when partisan gerrymandering offends the Constitution.<sup>132</sup>

Justice Kennedy provided the fifth vote for the majority.<sup>133</sup> He agreed to dismiss the case because of the lack of judicially discoverable or manageable standards, but he did not believe such standards could never be developed in the future.<sup>134</sup> Thus, he disagreed with the plurality opinion that challenges to partisan gerrymandering are always political questions: such cases could be heard when standards were developed.<sup>135</sup> Justices Stevens, Souter, and Breyer each wrote dissenting opinions arguing that the standards already existed.<sup>136</sup>

Two years later, in *League of United Latin American Citizens v. Perry*, the Court did not offer any more clarity.<sup>137</sup> Again the Court dismissed a challenge to partisan gerrymandering.<sup>138</sup> After Republicans gained control of the Texas legislature in 2002, they replaced

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127. *Id.* at 272.

128. *See, e.g.*, *King v. State Bd. of Elections*, 979 F. Supp. 582, 586-87 (N.D. Ill.) (describing the odd shape of Illinois's Fourth Congressional District, the first Hispanic-majority congressional district in the Midwest), *vacated*, 519 U.S. 978 (1996).

129. *See* Angelo N. Ancheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 HARV. L. & POL'Y REV. 109, 109-10 (2014).

130. *See Vieth*, 541 U.S. at 278-81 (plurality opinion).

131. *Id.* at 305-06.

132. *Id.*

133. *Id.* at 270 (syllabus).

134. *Id.* at 306 (Kennedy, J., concurring in the judgment).

135. *See id.*

136. *See id.* at 339 (Stevens, J., dissenting); *id.* at 347-51 (Souter, J., dissenting); *id.* at 365-67 (Breyer, J., dissenting). Justice Ginsburg joined Justice Souter's dissent.

137. *See* 548 U.S. 399 (2006).

138. *Id.* at 410 (plurality opinion).

the congressional district map drawn by a federal district court in 2001 with one designed to maximize Republican seats.<sup>139</sup> The new map was very successful; the Texas congressional delegation went from seventeen Democrats and fifteen Republicans in the 2002 election to eleven Democrats and twenty-one Republicans in 2004.<sup>140</sup>

Many lawsuits challenged the Texas gerrymandering, and once more the Court did not hand down a majority opinion. Justice Kennedy wrote for the plurality: “We do not revisit the justiciability holding but do proceed to examine whether appellants’ claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.”<sup>141</sup> The challengers claimed that mid-decade redistricting for openly partisan reasons provided a “reliable standard” by which the Court could invalidate the Texas plan, but Justice Kennedy rejected this argument.<sup>142</sup>

Justices Scalia and Thomas reiterated their view, expressed in *Vieth*, that challenges to partisan gerrymandering are *always* nonjusticiable political questions.<sup>143</sup> Chief Justice Roberts and Justice Alito agreed with the dismissal of the suit but did not specify whether they found the issue nonjusticiable or whether they thought partisan gerrymandering violated equal protection.<sup>144</sup> Chief Justice Roberts wrote:

I agree with the determination that appellants have not provided “a reliable standard for identifying unconstitutional political gerrymanders.” The question whether any such standard exists—that is, whether a challenge to a political gerrymander presents a justiciable case or controversy—has not been argued in these cases. I therefore take no position on that question, which has divided the Court and I join the Court’s disposition in Part II without specifying whether appellants

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139. *Id.* at 411-13.

140. *See id.* at 412-13.

141. *Id.* at 414.

142. *See id.* at 423.

143. *Id.* at 511-12 (Scalia, J., concurring in the judgment in part and dissenting in part).

144. *Id.* at 492-93, 511 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

have failed to state a claim on which relief can be granted, or have failed to present a justiciable controversy.<sup>145</sup>

Justices Stevens, Souter, Ginsburg, and Breyer again dissented from the finding that partisan gerrymandering was nonjusticiable.<sup>146</sup> They would have ruled on the merits of the equal protection claim.<sup>147</sup>

Although there still has not been a majority opinion holding that challenges to partisan gerrymandering are always political questions, after *Vieth* and *Perry* it is hard to imagine such a case succeeding, at least under the current Court. Chief Justice Roberts and Justices Kennedy, Thomas, and Alito are likely to rule against such a claim and a Trump appointee will mean that five Justices probably would rule against any such challenge. The result is that an individual may raise an allegation of a politically very significant constitutional violation, but no court can rule on its constitutionality.

The Court should have reaffirmed its holding in *Davis v. Bandemer* that partisan gerrymandering is unconstitutional. The law should require states to draw their election districts on the basis of population, geography, or community interests, not to maximize the political control of those in power in the legislature. We all were taught that voters should choose their elected officials; partisan gerrymandering means that elected officials get to choose their voters.<sup>148</sup>

### C. *The State Secrets Doctrine*

Consider one other example involving a different legal doctrine, but one that is similar to the political question doctrine. Border Patrol stopped Khaled el-Masri, a car salesman from Ulm, Germany,

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145. *Id.* at 492-93 (citations omitted).

146. *Id.* at 406-07 (syllabus).

147. *See id.* at 447-48 (Stevens, J., concurring in part and dissenting in part); *id.* at 483-84 (Souter, J., concurring in part and dissenting in part).

148. This issue is likely to soon be before the Supreme Court again. In *Whitford v. Gill*, a three-judge federal district court declared unconstitutional the gerrymandering of the Wisconsin state legislature. No. 15-cv-421-bbc, 2016 WL 6837229 (W.D. Wis. Nov. 21, 2016). Because it is a decision of a three-judge federal district court, the Supreme Court is required to take the case. *See* 28 U.S.C. § 1253 (2012).

at a border crossing between Serbia and Macedonia.<sup>149</sup> The Central Intelligence Agency (CIA), which had confused him with someone else of a similar name, took him into custody.<sup>150</sup> A CIA official in Langley, Virginia, believed el-Masri had ties to al-Queda.<sup>151</sup> On this hunch, the CIA held him for 149 days, without informing his family or anyone else.<sup>152</sup> El-Masri described how unseen assailants beat him, stripped him, subjected him to a body cavity exam, clothed him in a diaper and tracksuit, hooded him, shackled him to the floor of a plane, and finally knocked him out using a pair of injections.<sup>153</sup> When he regained consciousness, el-Masri was in Afghanistan.<sup>154</sup> During his captivity, the CIA fed el-Masri putrid food; el-Masri lost sixty pounds and was regularly “roughed up” during his interrogations.<sup>155</sup> Eventually, the CIA officials realized they had the wrong man and decided to release him.<sup>156</sup> As Jane Mayer described it: “The CIA, meanwhile, had flown Masri to Tirana, Albania, driven him blindfolded down a long, winding, potholed road, handed him back his possessions, and dropped him near the border with Serbia and Macedonia, where he was told to start walking and not look back.”<sup>157</sup>

El-Masri sued the former Director of the CIA and others in federal district court arguing that his capture and treatment violated countless requirements of international law.<sup>158</sup> The United States moved to dismiss the case on the grounds that if a court even considered el-Masri’s case, it could reveal “state secrets” about the United States’ rendition program.<sup>159</sup> The government’s position was that the entire matter had to be thrown out of court at the outset.<sup>160</sup> At no time did the United States dispute the facts given in el-Masri’s complaint, nor did it dispute his allegations that the U.S.

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149. For the facts of this case, see JANE MAYER, *THE DARK SIDE* 282-87 (2008).

150. *Id.* at 282-84.

151. *Id.* at 282-83.

152. *See id.* at 283.

153. *See id.* at 283-84.

154. *Id.*; *see also* Complaint at 1, 10, *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05cv1417), *aff’d sub nom.* *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

155. MAYER, *supra* note 149, at 284-85.

156. *See id.*

157. *Id.* at 287.

158. *See El-Masri*, 437 F. Supp. 2d at 535.

159. *Id.*

160. *See id.*

government was responsible for his apprehension and treatment.<sup>161</sup> The government's sole argument was that allowing the case to go forward risked revealing state secrets.<sup>162</sup>

El-Masri opposed the motion to dismiss on the ground that the facts of his case were already public, in Mayer's book and elsewhere.<sup>163</sup> El-Masri argued that as a result they could try the entire case on publicly available information, eliminating the risk of disclosing any state secrets.<sup>164</sup>

The federal courts sided with the U.S. government and dismissed without hearing el-Masri's case.<sup>165</sup> The U.S. Court of Appeals for the Fourth Circuit affirmed the dismissal, writing that "those central facts—the CIA means and methods that form the subject matter of El-Masri's claim—remain state secrets. Consequently, pursuant to the standards that El-Masri has acknowledged as controlling, the district court did not err in dismissing his Complaint at the pleading stage."<sup>166</sup>

The Fourth Circuit stressed what it saw as the limited role of the federal courts:

El-Masri's position ... fundamentally misunderstands the nature of our relationship to the executive branch. El-Masri envisions a judiciary that possesses a roving writ to ferret out and strike down executive excess. Article III, however, assigns the courts a more modest role: we simply decide cases and controversies .... [W]e would be guilty of excess in our own right if we were to disregard settled legal principles ... especially when the challenged action pertains to military or foreign policy. We decline to follow such a course, and thus reject El-Masri's invitation to rule that the state secrets doctrine can be brushed aside on the ground that the President's foreign policy has gotten out of line.<sup>167</sup>

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161. *See id.* at 538.

162. *See id.* at 535.

163. *See* Memorandum of Points and Authorities in Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment at 16-20, *El-Masri*, 437 F. Supp. 2d 530 (No. 1:05cv1417).

164. *Id.* at 16-22.

165. *El-Masri*, 437 F. Supp. 2d at 541.

166. *El-Masri v. United States*, 479 F.3d 296, 311 (4th Cir. 2007).

167. *Id.* at 312-13.

Thus, these courts refused to even hear el-Masri's claim that the government violated his rights under the Constitution and international law because there was a chance that doing so might reveal secrets.

Other courts have also dismissed lawsuits against those who participated in torture on the ground that it might reveal state secrets. In *Mohamed v. Jeppesen Dataplan, Inc.*, the U.S. Court of Appeals for the Ninth Circuit dismissed a lawsuit brought by five individuals who claimed, like el-Masri, that the government subjected them to rendition and torture.<sup>168</sup> They sued Jeppesen Dataplan, Inc., a U.S. corporation that the plaintiffs said provided flight planning and logistical support services for all of the flights transporting them among the various locations where the government detained and allegedly tortured them.<sup>169</sup> The complaint asserted that "Jeppesen played an integral role" in the abductions and detentions and "provided direct and substantial services to the United States for its so-called 'extraordinary rendition' program," thereby "enabling the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities."<sup>170</sup> The complaint also alleged that "Jeppesen provided this assistance with ... 'knowledge of the objectives of the rendition program,' including knowledge that the plaintiffs 'would be subjected to forced disappearance, detention, and torture' by U.S. and foreign government officials."<sup>171</sup> The plaintiffs sued Jeppesen because the U.S. government has sovereign immunity and cannot be sued, whereas Jeppesen was a private company.

The plaintiffs' complaint details egregious violations of the U.S. Constitution and international law. Binyam Mohamed, the named plaintiff in the lawsuit, was a twenty-eight-year-old Ethiopian citizen and legal resident of the United Kingdom.<sup>172</sup> He was flown to Morocco where he was subjected to "severe physical and psychological torture," including routine beatings that resulted in broken

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168. 614 F.3d 1070, 1073-75 (9th Cir. 2010).

169. *See id.* at 1075.

170. Complaint at 1, 14, *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. C07-02798 JW), *aff'd*, *Mohamed*, 614 F.3d 1070.

171. *Mohamed*, 614 F.3d at 1075 (quoting Complaint, *supra* note 170, at 5-6).

172. *Mohamed*, 614 F.3d at 1074.

bones.<sup>173</sup> He said that his captors cut him with a “scalpel all over his body, including on his penis, and poured ‘hot stinging liquid’ into the open wounds.”<sup>174</sup> After eighteen months in a Moroccan prison, Mohamed was transferred back to American custody and flown to Afghanistan.<sup>175</sup> He claimed, “he was detained there in a CIA ‘dark prison’ where he was kept in ‘near permanent darkness’ and subjected to loud noise, such as the recorded screams of women and children, 24 hours a day.”<sup>176</sup> He was fed sparingly and irregularly, and in four months he lost between forty and sixty pounds.<sup>177</sup> “Eventually, Mohamed was transferred to the U.S. military prison at Guantanamo Bay, Cuba, where he remained for nearly five years.”<sup>178</sup> He was then released and returned to the United Kingdom.<sup>179</sup>

Plaintiff Ahmed Agiza, an Egyptian national who had been seeking asylum in Sweden, alleged similar facts:

[He] was captured by Swedish authorities, transferred to American custody, and flown to Egypt ... [H]e claims he was held for five weeks “in a squalid, windowless, and frigid cell,” where he was “severely and repeatedly beaten” and subjected to electric shock through electrodes attached to his ear lobes, nipples and genitals. Agiza was held in detention for two and a half years, after which he was given a six-hour trial before a military court, convicted and sentenced to 15 years in Egyptian prison.<sup>180</sup>

The other plaintiffs, Abou Elkassim Britel, a forty-year-old Italian citizen of Moroccan origin, and Bisher al-Rawi, a thirty-nine-year-old Iraqi citizen and legal resident of the United Kingdom, were subjected to similar treatment.<sup>181</sup> All claimed that Jeppesen was liable for its knowing participation in the violations of their rights.<sup>182</sup>

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173. *Id.* (quoting Complaint, *supra* note 170, at 21).

174. *Id.* (quoting Complaint, *supra* note 170, at 21).

175. *Id.*

176. *Id.* (quoting Complaint, *supra* note 170, at 23).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *See id.* at 1074-75.

182. *See id.* at 1075.



As in *el-Masri's* case, the U.S. government moved to dismiss their lawsuit based on the state secrets doctrine.<sup>183</sup> The Director of the CIA at the time, General Michael Hayden, filed one classified and one redacted and unclassified declaration in support of the motion to dismiss. The public declaration stated that “[d]isclosure of the information covered by this privilege assertion reasonably could be expected to cause serious—and in some instances, exceptionally grave—damage to the national security of the United States and, therefore, the information should be excluded from any use in this case.”<sup>184</sup> Further, the declaration asserted that “because highly classified information is central to the allegations and issues in this case, the risk is great that further litigation will lead to disclosures harmful to U.S. national security and, accordingly, this case should be dismissed.”<sup>185</sup>

The federal district court dismissed the case based on the state secrets doctrine.<sup>186</sup> The Ninth Circuit reversed and held that the case should go forward.<sup>187</sup> But then the Ninth Circuit, in a 6-5 en banc decision, reversed and ordered the case dismissed, concluding that “the government’s valid assertion of the state secrets privilege warrant[ed] dismissal of the litigation.”<sup>188</sup> As in *el-Masri's* case, the court did not question the complaint’s allegations, including that the U.S. government was responsible for torture.<sup>189</sup> The court accepted all of that as true and said that nonetheless, the case had to be dismissed because it risked revealing state secrets.<sup>190</sup>

The dissenting judges objected that the plaintiffs’ complaint was based on publicly available information and that the government had not shown that litigating the case would require revealing state secrets.<sup>191</sup> The dissent, expressing great concern that the judiciary was abdicating its most important role, declared that

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183. *See id.* at 1077.

184. *Id.* at 1076.

185. *Id.*

186. *See id.* at 1076-77.

187. *See id.* at 1077.

188. *Id.* at 1093.

189. *See id.* at 1087.

190. *See id.*

191. *See id.* at 1094-96 (Hawkins, J., dissenting).

the [state secrets] doctrine is so dangerous as a means of hiding governmental misbehavior under the guise of national security, and so violative of common rights to due process, that courts should confine its application to the narrowest circumstances that still protect the government's essential secrets. When, as here, the doctrine is successfully invoked at the threshold of litigation, the claims of secret are necessarily broad and hypothetical. The result is a maximum interference with the due processes of the courts, on the most general claims of state secret privilege.<sup>192</sup>

Judge Hawkins, the author of the dissent, wrote that the majority opinion “disregard[ed] the concept of checks and balances. Permitting the executive to police its own errors and determine the remedy dispensed would not only deprive the judiciary of its role, but also deprive Plaintiffs of a fair assessment of their claims by a neutral arbiter.”<sup>193</sup>

Torture by agents of the United States in these and other cases has been documented, including in a report released by the Senate Select Committee on Intelligence in 2014.<sup>194</sup> Yet those who suffered from these acts could not even have their complaints heard in federal courts. The courts dismissed their claims at the earliest stage of litigation, reasoning that the plaintiffs failed to state a claim upon which relief could be granted based on the state secrets doctrine.

This reasoning is deeply flawed. The government made no showing that the litigation would reveal state secrets. As the plaintiffs alleged, and as the dissent pointed out in *Jeppesen*, they sought to rely on information about their abduction, detention, and treatment that was already widely available.<sup>195</sup> At the very least, the courts could have allowed the cases to go forward and given the plaintiffs the opportunity to prove their cases with publicly available documents. Moreover, the courts saw only two choices: allow disclosure of national security information or dismiss the lawsuits.

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192. *Id.* at 1094 (footnote omitted).

193. *Id.* at 1101.

194. SENATE SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288, at 19, 53-55, 59-60, 70, 77, 85-86, 88, 119, 128-29, 160, 238-39 (2014).

195. *See supra* notes 164, 192 and accompanying text.

But there was a middle course: try the cases, but do so with safeguards to protect secrecy.

Most importantly, the federal courts failed at their most basic mission: upholding the Constitution. We must reject any doctrine, like the state secrets doctrine, that renders the federal courts powerless to hear and remedy constitutional violations. The plaintiffs in these cases were left with no recourse. They could not sue in federal court, and they could not sue in state court. No international tribunal likely exists to adjudicate their claims or to provide a remedy. No judicial forum was available to them, despite the injuries they suffered. The federal courts had no ability to enforce the Constitution, federal statutes, or international law. All legal rules that keep federal courts from enforcing the Constitution, such as the state secrets doctrine, should be eliminated.

If the government, through the CIA or any other agency, can pluck a person off the street and detain, interrogate, and torture him or her without charges or due process in the name of war, then all of us are at risk. The idea of a constitutional democracy is that the government must act within the limits set forth in the Constitution. History teaches that in order to preserve a constitutional order, an institutional mechanism must exist to keep the government from exceeding the limits on its power.<sup>196</sup> Official self-restraint has never been enough. No government—especially a hugely powerful government—has ever been restrained only by voluntary, unenforced limits. My central thesis is that the federal courts must enforce, and must be able to enforce, the limits on government power found in the United States Constitution.

### III. TOO MUCH POWER IN THE FEDERAL COURTS?

Federal judges are unelected, and many have argued that there is a tension between judicial review and democracy. Over a half century ago, Professor Bickel called judicial review a “deviant institution” in American society that raised a “counter-majoritarian difficulty.”<sup>197</sup>

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196. *Cf.* THE FEDERALIST NO. 47, *supra* note 2, at 266-67 (James Madison).

197. BICKEL, *supra* note 48, at 16-18.

The Supreme Court often has invoked the need to limit the judicial role. Lower courts have followed this lead. For example, the Fourth Circuit did this in justifying the dismissal of el-Masri's case.<sup>198</sup> One of the more famous declarations was the Court's statement in *United Public Workers v. Mitchell*: "Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches."<sup>199</sup>

Of course, I agree that the federal courts should not expand their power to hear "ill-defined controversies over constitutional issues."<sup>200</sup> The matters that I have described, which federal courts cannot hear, however, do not fit that description. They all involve people whose rights were violated and who had nowhere else to turn for a remedy. These cases presented constitutional claims that should have been heard.

The Supreme Court has repeatedly declared that limiting the federal courts' role serves the goal of separation of powers.<sup>201</sup> But the assumption behind such statements is that less judicial review means better separation of powers. Such a conclusion begs the question of what the proper role of the federal judiciary is.

The appropriate, and indeed the most important, role of the federal courts is to enforce the Constitution. When jurisdictional doctrines facilitate that role, they give the federal judiciary its proper degree of authority. Doctrines that do more than this would unduly expand the role of the federal courts. But the doctrines I have described in Part II undermine the courts' authority to enforce the Constitution. Therefore, they should be changed.

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198. See *El-Masri v. United States*, 479 F.3d 296, 303-04, 312 (4th Cir. 2007).

199. 330 U.S. 75, 90-91 (1947).

200. *Id.*

201. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2695 (2015) (Scalia, J., dissenting) ("That doctrine of standing, that jurisdictional limitation upon our powers, does not have as its purpose (as the majority assumes) merely to assure that we will decide disputes in concrete factual contexts that enable 'realistic appreciation of the consequences of judicial action.' *To the contrary. [T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers. It keeps us minding our own business.*" (alteration in original) (emphasis added) (citations omitted) (first quoting *Ariz. State Legislature*, 135 S. Ct. at 2665 (majority opinion); and then quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

Phrased slightly differently, doctrines that facilitate the federal courts hearing of constitutional cases, by definition, should never be regarded as giving the courts too much power. The content of the constitutional principles, and not jurisdictional doctrines, should determine when courts defer to the government and when they invalidate its actions. Although there are areas in which courts should defer to the choices of elected government officials, that deference can be reflected in the constitutional doctrines and the merits of the decisions; it should not be the basis for dismissals on jurisdictional grounds that keep the federal courts from hearing the cases at all.

#### CONCLUSION

The phrase “judicial supremacy” is an uncomfortable one. It is difficult to want to defend “supremacy” of any institution. But the idea that the Supreme Court’s interpretations of the Constitution are controlling is not new. This has been the generally accepted understanding at least since *Marbury v. Madison*, and perhaps even since the ratification of the Constitution. Relatively rarely has this idea of judicial supremacy been challenged. Recent questioning of judicial supremacy by politicians and by scholars challenging the Supreme Court’s marriage equality decision make it important to explain once more why it is “emphatically the province and duty of the judicial department to say what the law is.”<sup>202</sup>

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