

# JUDICIAL SUPREMACY AND ITS DISCONTENTS

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[T]he federal judiciary is supreme in the exposition of the law of the Constitution. . . .<sup>1</sup>

The decision [Brown v. Board of Education] tortured the Constitution—the South will torture the decision.<sup>2</sup>

Will nobody defend judicial supremacy anymore?<sup>3</sup>

The Supreme Court has made its grab for power. The question is: will we let them get away with it?<sup>4</sup>

This is a remarkably quiet period in the public life of the Constitution. It is not a quiet time for constitutional law professors, of course, for whom there is always a crisis around the bend, a radical departure from fundamental values afoot, a usurpation of rights lurking. And there is certainly a lot of activity related to constitutional law, from the recent impeachment of President Clinton to judicial intervention in the election of 2000 to the creation of military tribunals to try suspected terrorists and enemy combatants.

It is a quiet period, however, in the sense that there is remarkably little public agitation about either the meaning of the Constitution or about the federal judiciary. Two hundred years after John Marshall set afloat the *U.S.S. Judicial Review*—over

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1. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

2. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 159 (1955) (quoting John Temple Graves).

3. Michael Stokes Paulsen, *Protestantism and Comparative Competence*, 83 *GEO. L.J.* 385, 385 (1994).

4. Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 *HARV. L. REV.* 4, 169 (2001).

time slowly refitted and finally re-commissioned as the *U.S.S. Judicial Supremacy*—the sea is calm and the ship sails on.

Nearly every aspect of *Marbury v. Madison*<sup>5</sup> has been examined, praised, and criticized: the charged political and factual background of the decision, John Marshall's own participation in the events that led to it, the opinion's consideration of the merits before jurisdiction, its claim that for every right there must be a remedy, the assertion that the judiciary may issue orders to an executive official, Marshall's strained interpretation of Section 13 of the Judiciary Act of 1789,<sup>6</sup> his controversial reading of Article III, the conclusion that the federal judiciary may declare an act of a coordinate branch unconstitutional, the various arguments given for that power of judicial review, and many other aspects of the case. The spectrum of scholarly opinion ranges from those who have treated *Marbury* as a holy writ of American law, giving it pride of place as the first case reprinted in constitutional law textbooks,<sup>7</sup> to one scholar who views it as a relatively trivial pronouncement unworthy of the time necessary to explain it adequately in an introductory constitutional law course.<sup>8</sup>

But one modern legacy of *Marbury* has come recently to dominate scholarly debate above all others. In *Cooper v. Aaron*, one of the many cases involving defiance of the Supreme Court's declaration that public-school segregation is unconstitutional, the Court interpreted *Marbury* to establish not just judicial review but judicial supremacy, the doctrine that the Supreme Court has not just *a* word, but the *final* word, on the meaning of the Constitution.<sup>9</sup> Now a growing number of respected constitu-

5. 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

6. Edward A. Harnett, *Not the King's Bench*, 20 CONST. COMMENT. 283 (2003).

7. GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 3 (1997).

8. Sanford Levinson & Jack M. Balkin, *What are the Facts of Marbury v. Madison*, 20 CONST. COMMENT. 255 (2003).

9. The judicial-supremacy interpretation has been criticized as an over-reading of *Marbury*. Cite. Marshall's opinion famously claims "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 1 Cranch (5 U.S.) at 177. The insistent tone of this line ("emphatically," "province," and "duty") hints at a paramount role for the courts. That interpretation is aided by Marshall's conclusions that (1) the Court may declare an act of Congress void as beyond its constitutional powers, and that (2) the Court may issue orders to the Executive branch to comply with its legal obligations. *Id.* Both of these suggest some degree of superiority over the other two branches when it comes to legal obligations imposed by the Constitution. Moreover, Marshall's discussion of the value of a written constitution as a limit on legislative power, combined with the judiciary's role in interpreting it, would be rendered almost purposeless if Congress or the President were free to ignore the Court's interpretation and thus

tional theorists, coming from a broad range of political and jurisprudential perspectives, have begun to question the legitimacy of judicial supremacy in constitutional interpretation.<sup>10</sup>

This essay examines judicial supremacy and some of its discontents, old and new. Part I surveys the curiously quiet posture of the public and their representatives today on the issue of judicial supremacy. Part II contrasts this quiet with other eras when neither the people nor their representatives willingly accepted judicial supremacy. Part III considers the views of two important contemporary critics of judicial supremacy who write from very different constitutional and political perspectives. My friend and colleague Michael Paulsen argues that the President, as head of the coordinate and equal executive branch of the national government, has the power to interpret the Constitution for himself, is not obliged to adopt the Court's interpretation of the Constitution, and may even refuse to execute orders from the Court.<sup>11</sup> Professor Larry Kramer argues that the Rehnquist Court has transformed judicial supremacy into "judicial sovereignty," threatening to erase the idea of "popular constitutionalism" under which the people themselves are ultimately responsible for interpreting and implementing their Constitution.<sup>12</sup>

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exceed the limits of their powers. Marshall nowhere mentions a role for Congress or the executive in constitutional interpretation. Thus, though judicial supremacy is not explicitly demanded by *Marbury*, it is suggested and is certainly not *inconsistent* with *Marbury*. An opposite reading, that Marshall meant only to establish a power of the Court to issue declarations of unconstitutionality in particular cases that the other branches were then free to contravene, seems less plausible to me.

10. There is a large literature on this subject, which I do not pretend to review here. The most radical critique of judicial supremacy has come from Michael Paulsen, who argues that state and federal officials (including the President) are not required to follow judicial interpretations of the Constitution and may even disobey (in the case of a president, refuse to execute) the order of a federal court they believe is wrong as a matter of constitutional law as they independently interpret the Constitution. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What The Law Is*, 83 GEO. L.J. 217 (1994). See Section III. Others have offered a milder critique of judicial supremacy, maintaining that while other constitutional interpreters may act on their own independent interpretations, they must nevertheless abide by a court order even if they think it constitutionally erroneous. Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421 (1999). The milder critique of judicial supremacy is practically a surrender to it, since the combination of adherence to judgments and *stare decisis* means the courts will effectively have the last word on constitutional disputes. Kramer, *supra* note 4, at 7. Judicial supremacy, in its strong *Cooper* formulation, has also been powerfully defended. Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997). And, wouldn't you know it, there have been responses to the defense, see, for example, Hartnett *supra* note 6, and a reply to some of the responses. Larry Alexander and Frederick Schauer, *Defending Judicial Supremacy*, 17 CONST. COMMENT. 455 (2000).

11. Paulsen, *supra* note 10.

12. Kramer, *supra* note 4.

I will make the negative case that these critiques of judicial supremacy miss the mark. What I will *not* do here is make an affirmative case for judicial supremacy. Such an affirmative case could be made from the text, structure, and history of the Constitution, as well as from the repeated acquiescence of the coordinate branches to it and from simple prudence. My argument, especially as it relates to Paulsen's thesis, rests on the admittedly contestable premise that advocates for changing longstanding practices bear the burden of persuasion for changing them.

### I. ALL QUIET ON THE POPULAR FRONT

At the outset of this essay, I said there is "remarkably" little public agitation just now about the Constitution and the role of the federal courts in its interpretation because, when you think about it, there have been plausible grounds for public provocation. There has certainly been enough to rile citizens of a conservative political bent. The list of such incitements is very long but a short catalogue of the highlights will suffice. In just the past forty years, the federal courts, in the name of the Constitution and under the guise of interpreting it, have stricken teacher-led prayer from public schools,<sup>13</sup> required that children be bussed from neighborhood schools to schools across town,<sup>14</sup> allowed the proliferation of pornography in the public square,<sup>15</sup> shielded flag-burning,<sup>16</sup> and—most galling of all—sharply limited the power of the government to regulate abortion,<sup>17</sup> even to the point of striking down a statute that forbade the practice of late-term abortion.<sup>18</sup>

There's also been plenty, especially in the past two decades of conservative judicial ascendancy, to anger citizens with a more politically liberal bent. So, the federal courts, again in the name of the Constitution and under the guise of interpreting it, struck down a state anti-discrimination law that sought to force the Boy Scouts to admit openly gay scoutmasters,<sup>19</sup> invalidated congress-

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13. *Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203 (1963).

14. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971).

15. *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973).

16. *Texas v. Johnson*, 491 U.S. 397 (1989).

17. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

18. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

19. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

sional attempts to deal with the problem of gun possession near schools<sup>20</sup> and violence against women,<sup>21</sup> have upheld many of the domestic-security measures taken in the aftermath of September 11,<sup>22</sup> and—most galling of all—halted the counting of votes in the 2000 election, ensuring that George W. Bush would be the next President of the United States.<sup>23</sup>

Yet where are the mass protests? Why haven't elections over the past four decades been a series of referenda on federal judicial appointments? Where are the calls for impeaching Supreme Court justices? Why aren't the people—whether conservative or liberal or neither—as upset about all this objectionable judicial activity as are the academic participants in this and other symposia questioning the very basis for judicial supremacy?

The people have not always been so quiet about the Constitution or about the Court's role in interpreting it. In fact, there has been at least some protest of many of the decisions listed above, especially the abortion decisions and the 2000 election decision. The abortion decisions continue to draw annual protests marches in Washington. But anti-*Roe* activists are no closer to having the decision reversed today than they were when Ronald Reagan took office and may be even further from their goal, thanks to the votes of several Republican appointees. The 2000 election decision is largely forgotten, except by the most partisan political critics and frustrated academics, for whom it will always be 10 p.m. on December 12, 2000. But, as a Gallup poll determined on the eve of the decision, seventy-three percent of Americans were prepared to accept the Supreme Court's decision as a "legitimate outcome no matter which candidate it favors."<sup>24</sup>

The limited eruptions of late against the federal judiciary are nothing compared to the widespread public agitation of some earlier times, when Supreme Court decisions engendered open defiance, by elected officials, legislatures, and state judges, and led to mass protests and riots in the streets.<sup>25</sup> Despite *Roe*,

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20. *United States v. Lopez*, 514 U.S. 549 (1995).

21. *United States v. Morrison*, 529 U.S. 598 (2000).

22. *Hamidi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003); Center for Nat'l Sec. Studies v. Dept. of Justice, 331 F.3d 918 (D.C. Cir. 2003); *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003); *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2003).

23. *Bush v. Gore*, 531 U.S. 98 (2000).

24. The Gallup Organization, "Public Willing to Accept Supreme Court as Final Arbiter of Election Dispute," at [http://www.gallup.com/subscription/?m=f&c\\_id=9940](http://www.gallup.com/subscription/?m=f&c_id=9940).

25. See Part II, *infra*.

and *Bush v. Gore*, and all the other decisions of late that one or another constitutional theorist regards as a travesty, America is not in a state of constitutional crisis or even close to one. The public consistently holds the Supreme Court in high esteem. The Court is usually the most trusted of the three branches of the federal government—except when the country is at war or very close to one, at which point the President’s stock temporarily rises above that of the other branches.<sup>26</sup>

Also significant is the relative silence of the two politically accountable branches of the federal government. Members of Congress frequently criticize the Court’s decisions and question the suspected political agendas of the Justices, but these criticisms almost never go to the legitimacy of judicial supremacy in constitutional interpretation. Congress is not passing flag-burning statutes in defiance of the Supreme Court, though such acts would have popular support.<sup>27</sup> It has not even acted recently to limit the Court’s jurisdiction to hear certain matters, as it has in the past. Similarly, presidents—whether Democrat or Republican, whether or not serving with a Court favorable to them—have obeyed orders from the Court. Even Richard Nixon, perhaps the most zealous claimant to (and abuser of) executive authority in the country’s history, backed down when faced with a direct order from the Court to produce audiotapes that incriminated him and led to his resignation.<sup>28</sup> There has been no plan to pack the Court by enlarging its membership; if one were offered, it would be seen as a dangerous and destabilizing power grab, just as Franklin Roosevelt’s was.

Then there is the relative silence of the states, whose loud opposition to and even open defiance of mandates from the federal courts have been a recurrent fact of our national political life.<sup>29</sup> This is not because states have consistently won before the court. (Admittedly, part of this may be explained by the fact that, as compared to past Courts, the present Court has acted to

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26. Polls routinely show the Supreme Court’s favorability rating as very high, while those for the President and Congress are usually lower. William H. Rehnquist, *1999 Year-End Report on the Federal Judiciary*, at <http://www.uscourts.gov/ttb/jan00ttb/jan2000.html>.

27. The one attempt to do so, after *Texas v. Johnson*, 491 U.S. 397 (1989), was struck down in *United States v. Eichman*, 496 U.S. 310 (1990). While Congress has repeatedly attempted to amend the Constitution to allow the government to protect the flag from physical destruction, it has not passed another flag-burning *statute*. This suggests, again, that it thoroughly accepts judicial supremacy in constitutional interpretation.

28. *United States v. Nixon*, 418 U.S. 683 (1974).

29. See Part II, *infra*.

limit congressional authority over the states and thus preserve the power of the states. But its limitations on congressional power have been, well, limited.<sup>30</sup>) The greatest constraints on the states are Court-created doctrines—implied preemption and the Dormant Commerce Clause—and there has been no retreat from these in the Court's recent precedents. Finally, even the Rehnquist Court has not shied from invalidating state laws thought to tread on individual liberties.<sup>31</sup>

Despite dire predictions and pronouncements that the Court has squandered its political capital or eroded its legitimacy by one or another ruling, it never has done so for long, even in its darkest moments.<sup>32</sup>

Why have the public and its elected representatives been so quiet? Perhaps the country is preoccupied just now with foreign affairs. But that hardly seems a satisfactory explanation for public tranquility about the Constitution; there was no great constitutional clamor before September 11. Even waving the bloody flag of *Bush v. Gore* had begun to lose its power to rouse people by then.

Of course, the relative constitutional quietude in which we now live is no argument that any single decision of the Court has been correct, or even that the general direction of the Court has been the best one for the country. But, to the extent critics of judicial supremacy claim to be speaking for a people whose role has been diminished by an arrogant judiciary, we ought at least pause to wonder why the people and their formal political organs seem so unconcerned.

There are, I think, at least two possible explanations for the popular calm. One, an unhappy explanation, is that this placidity about the Court is just another manifestation of the public's general apathy about politics. Why the public is so apathetic is itself a puzzle with many possible answers. An anti-supremacist might argue that the Court has already so stripped the people of authority to govern themselves that they no longer feel they can have any meaningful influence on their government. They have given up, not because they welcome being governed by elitist, distant, and unaccountable lawyers in black robes, but because they have concluded there is very little in practice they can do

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30. See Part III, *infra*.

31. *Lawrence v. Texas*, 123 S.Ct. 2472 (2003) (striking down the sodomy laws of 13 states).

32. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

about it. Their political energy has been sapped. But this explanation seems implausible because of the second explanation.

A second, more benign, and more plausible explanation for the people's calm about judicial supremacy contravenes the first. It argues that, in fact, the people have not been stripped to any significant degree of their ability to govern themselves. They are quite capable of dramatically changing or soundly reaffirming the direction of their government when they want to, as they did in the national elections of 1964, 1968, 1974, 1980, 1992, 1994, and 2002. The Court may nibble at the edges of popular rule, striking a particular law here and there, but the people themselves set the general direction for the country, including controlling at least indirectly the philosophy of the federal courts through the appointments process administered by their elected representatives.

The courts have rarely bucked for long a strong national consensus.<sup>33</sup> They have tended to reflect, not to resist, the dominant national political alliance. If the people still feel themselves to be the masters of their fate when they want to be, they are not much disturbed by an opinion from the Supreme Court requiring, say, the insertion of a "jurisdictional hook" into a federal law banning gun possession near schools.<sup>34</sup> On this view the people are not concerned about losing their republic to judges because, in fact, they haven't lost it and are not even close to losing it.

We could say that we really do not care what the people think about the Court's gradual theft of their authority. Perhaps the people are too uninformed about the danger. Perhaps the issues are just too complicated for them to understand. Perhaps they are preoccupied by other issues, prosaic ones, they regard as more central to their lives. If so, constitutional theorists may have to save their Constitution for them, in part by sounding the alarm and waking them from their slumber. But this would be an uncomfortably elitist response from commentators who celebrate self-government, and who seek to preserve popular constitutionalism, understood as the voice of "the people" in constitutional interpretation.

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33. William G. Ross, *Judicial Review: Blessing or Curse?*, 38 WAKE FOREST L. REV. 733, 766. One exception was the regulation of child labor, which the Supreme Court resisted until the 1930s. Kramer, *supra* note 4, at 121 n.513.

34. *United States v. Lopez*, 514 U.S. 549 (1995).

## II. JUDICIAL SUPREMACY: THE CRITICS THEN

Opposition to the Supreme Court's authority as final arbiter of constitutional meaning has been a sporadic fact of American politics since *Marbury*. That opposition has come from the coordinate branches of the federal government, from the states, and from the people themselves. What follows offers only a small taste of that opposition, emphasizing popular resistance to Supreme Court decisions in the states. The record shows that opposition to judicial supremacy has commonly been a matter of expediency rather than principle. Judicial supremacy has often been criticized when the objector's interests are harmed by the exercise of judicial authority and invoked when that authority is useful.

Antagonism between Congress and the Court has surfaced repeatedly.<sup>35</sup> During various Court-curbing periods in its history, Congress has utilized or attempted to utilize several methods to resist constitutional decisions from the Court.<sup>36</sup> As an one example, when the Court rejected organized school prayer in *Engel* the public reaction was overwhelmingly hostile. Congressional rhetoric was correspondingly super-charged, with one representative calling it "the most tragic decision in the history of the United States."<sup>37</sup> A proposed constitutional amendment to allow organized school prayer failed.<sup>38</sup> The most Congress managed in response was a unanimous vote to place the words "In God We Trust" behind the House Speaker's desk.<sup>39</sup> President Kennedy's reaction was meeker still, fully accepting the supreme interpretive authority of the Court:

The Supreme Court has made its judgment. Some will disagree and others will agree. *In the efforts we're making to maintain our Constitutional principles, we will have to abide by what the Supreme Court says.*<sup>40</sup>

He then suggested that Americans' remedy was to pray more at home and to attend church.<sup>41</sup> Outright congressional defiance of the Supreme Court, as opposed to mere criticism or

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35. See, e.g., C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT (1961).

36. Stuart S. Nagel, *Court-Curbing Periods in American History*, in THE IMPACT OF SUPREME COURT DECISIONS 35, 42-44 (Theodore L. Becker ed., 1969).

37. THE IMPACT OF SUPREME COURT DECISIONS, *supra* note 36, at 22.

38. *Id.* at 23-24.

39. *Id.*

40. *Id.* at 25 (emphasis added).

41. *Id.*

court-curbing actions concededly within congressional authority, is rarer still.<sup>42</sup>

Occasional statements of opposition to judicial supremacy from Presidents have been widely discussed. Suffice it to say the opposition has come from our most revered presidents. Thomas Jefferson maintained that the Court could not order the Congress or the President to comply even with the most clear obligations imposed on them by law and the Constitution, such as failing to take a census or refusing to issue “requisite commissions” of judges (the latter being an unmistakable reference to *Marbury*).<sup>43</sup> Andrew Jackson, vetoing partly on constitutional grounds the re-chartering of the National Bank whose constitutionality the Court had upheld in *McCulloch v. Maryland*,<sup>44</sup> averred that the Supreme Court had no more authority over the Congress or the President on matters of constitutional meaning than they had over it.<sup>45</sup> Abraham Lincoln somewhat ambiguously challenged the Court’s authority after *Dred Scott*, suggesting that while parties to a particular decision were bound by it, no part of the government was bound to follow the decision in future policymaking.<sup>46</sup> Franklin Roosevelt thought that the executive and legislative branches could not “stand idly by and [] permit the decision of the Supreme Court to be carried through to its logical, inescapable conclusion” where that would “so imperil the economic and political security of this nation that the legislative and executive officers of the Government” must act contrary to the decision.<sup>47</sup> Each of these statements, it should be noted, occurred in contexts where a Court ruling contravened or threatened to contravene the president’s own policy preferences.

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42. Congressional leaders have occasionally challenged judicial supremacy. Northerners, frustrated with a pro-slavery Supreme Court, even began adopting the language of states’ rights to oppose the Court’s authority. In 1850, Ohio Senator Salmon P. Chase, who later succeeded Roger Taney as Chief Justice, disagreed with a Supreme Court decision, adopting Jefferson’s and Jackson’s views in declaring that Congress was not bound by the Court’s decisions. In 1852, Charles Sumner similarly declared the Court “cannot control our duty as to legislation. . . .” FORREST McDONALD, *STATES’ RIGHTS AND THE UNION: IMPERIUM IN IMPERIO 1776-1876*, at 172-73 (2000).

43. Letter to William C. Jarvis, Sept. 28, 1820 in 10 *THE WRITINGS OF THOMAS JEFFERSON* 160 (Paul L. Ford ed., 1899).

44. 17 U.S. (4 Wheat.) 316 (1819).

45. Veto Message, July 10, 1832 in 2 *MESSAGES AND PAPERS OF THE PRESIDENTS* 576, 581-83 (James D. Richardson ed., 1896).

46. First Inaugural Address, March 4, 1861 in 6 *MESSAGES AND PAPERS OF THE PRESIDENTS*, *supra* note 45, at 5, 9-10.

47. Proposed speech on the Gold Clause Cases, Feb. 1935, in 1 *F.D.R.—HIS PERSONAL LETTERS, 1928-1945*, at 459-60 (Elliott Roosevelt ed., 1950).

Despite these occasional executive statements criticizing judicial authority, however, outright defiance of federal court orders by the executive branch has been rare. The only example of actual defiance of a federal court order may be Lincoln's decision to ignore an order to release a prisoner held by federal authorities when Lincoln suspended habeas corpus in part of Maryland shortly after the Civil War began.<sup>48</sup> But even this example is ambiguous.

Defiance of judicial supremacy has been more direct and more common from the states, at least when it suited their self-interest. The early challenge by the Virginia state courts to the Court's role as supreme constitutional expositor is well known, resulting in *Martin v. Hunter's Lessee*.<sup>49</sup> The Court's attempt to assert judicial supremacy over the states was strongly criticized in Virginia's newspapers, leading Marshall to complain privately that there was "no such thing as a free press in Virginia."<sup>50</sup> Yet when the Court ruled for *Virginia* in a dispute with Kentucky over the constitutionality of a Kentucky law benefitting its own inhabitants in a land-boundary dispute,<sup>51</sup> Virginians overwhelmingly welcomed the decision.<sup>52</sup> Henry Clay complained that the Court's decision "cripples the Sovereign power" of a state more "than any other measure ever affected the Independence of any state in this Union, and not a Virginia voice is heard against the decision."<sup>53</sup>

In *McCulloch*, the Court struck down a Maryland tax on the National Bank of the United States. Several states refused to follow the decision. Ohio's state auditor, in contempt of a federal district court order, seized by force more than \$120,000 from the Bank's Ohio branch to collect state taxes.<sup>54</sup> In Kentucky, the state legislature asked the governor to advise it how "to refuse obedience to the decisions and mandates of the Supreme Court

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48. *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487). Lincoln's defiance is described in WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (2000); and in Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 *CARDOZO L. REV.* 81 (1993). See Part III, *infra*.

49. 14 U.S. (1 Wheat.) 304 (1816).

50. MCDONALD, *supra* note 42, at 79. Writers in Ohio and Kentucky began a decade-long campaign to challenge the federal courts. *Id.*

51. *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823).

52. MCDONALD, *supra* note 42, at 80.

53. Henry Clay to Francis T. Brooke, August 28, 1823, in 3 *THE PAPERS OF HENRY CLAY* 478-79 (James F. Hopkins ed., 1963).

54. MCDONALD, *supra* note 42, at 82. The controversy resulted in *Osborn v. Bank of the United States*.

of the United States considered erroneous and unconstitutional” and asked whether “it may be advisable to call forth the physical power of the State” to defy the Court.<sup>55</sup>

When the Court, in 1854, struck down on Contract Clause grounds a state statute depriving a bank of exemption from taxation granted in its act of incorporation, an Ohio newspaper denounced the Court as a “silk-gowned fogydom, a goodly portion of it imbecile with age, a portion anti-republican in notions, a portion wedded to the antiquated doctrine of established precedents, no matter whether truth or fallacy.”<sup>56</sup>

Also in 1854, the California supreme court openly challenged the Supreme Court’s exercise of appellate jurisdiction over the states because such jurisdiction surrenders “a power which belongs to the sovereignty we represent. . . .” Accordingly, the California court held that a congressional act giving jurisdiction to the federal courts over appeals from state courts, the constitutionality of which had been affirmed by federal courts, was unconstitutional.<sup>57</sup>

In general, after *Marbury*, the North had been more comfortable with judicial supremacy than had the South. For example, in the 1830s, noted the *New York Times*, South Carolina had “denied the paramount authority of the Court” while Massachusetts asserted the “absolute, unqualified duty of every citizen and every State to yield implicit obedience to its decisions upon all questions.”<sup>58</sup>

As the Supreme Court became more favorable to Southern interests during Chief Justice Taney’s tenure, however, Northerners became more critical of judicial supremacy and Southerners began to see it as a bulwark of liberty—a reversal of their earlier positions. When Wisconsin state courts defied a federal court by ordering the release of a man convicted under the federal Fugitive Slave Act for assisting a runaway slave, Northerners praised this act of nullification. The abolitionist *New York Tribune* wrote that “the North is just now taking lessons in Southern jurisprudence. South Carolina, Georgia, and little Florida have, at one time or another, displayed a glorious independence of Federal legislation, whenever it suited their purposes. . . .” The Wisconsin courts continued to issue writs of

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55. MCDONALD, *supra* note 42, at 84.

56. *Id.* at 173.

57. Johnson v. Gordon, 4 Cal. 368, 369 (1854).

58. MCDONALD, *supra* note 42, at 175.

habeas corpus for the convicted man, the Supreme Court continued to overrule the decisions, and the matter remained unresolved until the Civil War.<sup>59</sup>

In the immediate pre-war period, Southern leaders were almost unanimous in their praise of the Court and of judicial supremacy. Senator James C. Jones of Tennessee gushed, "For purity, integrity, virtue, honor, and all that ennobles and dignifies, it [the Supreme Court] stands unimpeached and unimpeachable." South Carolina's Andrew Butler declared that, "Judges are the sentinels and defenders of the Constitution. . . ." Charleston's *Southern Quarterly Review* argued that all that stood between the South and the North's "invading flood of aggression" was "the barrier of judicial independence which the great architects of the Constitution have set up." Without the federal courts, the "Constitutional order and State's Rights" would be "levelled before the rolling waves of that mighty ocean."<sup>60</sup>

Fast forward to what C. Vann Woodward has called "the Second Reconstruction," the period in the mid-20th century when the nation began to undo the institutions of racial segregation. By that point, as federal courts initiated and led the dismantling of segregation, the South's views on judicial supremacy had reversed course again.<sup>61</sup>

When the Court declared in *Brown v. Board of Education*<sup>62</sup> that public-school segregation violates the Equal Protection Clause, there was initially little public outcry in the South because there seemed little urgency in the Court's command to desegregate.<sup>63</sup> By the beginning of 1956, however, nineteen federal court decisions had ordered desegregation.<sup>64</sup> Senator Harry F. Byrd of Virginia called for "massive resistance" to *Brown*. Leaders in his state claimed a right of "interposition" of state authority against the Supreme Court.<sup>65</sup> By the end of 1956, eleven Southern states had adopted 106 pro-segregation statutes.<sup>66</sup>

The states openly defied the Court's constitutional authority. Alabama declared *Brown* "null, void, and of no effect." Georgia announced its intention to ignore the decision. Missis-

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59. *Id.* at 174.

60. *Id.* at 175-76.

61. WOODWARD, *supra* note 2, at 139.

62. 347 U.S. 483 (1954).

63. WOODWARD, *supra* note 2, at 150-53.

64. *Id.* at 153.

65. *Id.* at 156.

66. *Id.* at 162.

sippi declared the decision “unconstitutional and of no lawful effect” and created a State Sovereignty Committee “to prohibit compliance . . . with the integration decisions.” Louisiana’s legislature unanimously passed an interposition resolution. An interposition act introduced in the Virginia General Assembly declared the “commonwealth is under no obligation to accept supinely an unlawful decree of the Supreme Court of the United States based upon an authority which is not found in the Constitution of the United States nor any amendment thereto.”<sup>67</sup> Four states imposed sanctions and penalties for compliance with *Brown*. Some states denied funds to school districts that integrated. Georgia went further, making it “a felony for any school official of the state or any municipal or county schools to spend tax money for public schools in which the races are mixed.”<sup>68</sup>

Reflecting strong popular opposition to the *Brown* decision, the states devised a variety of measures to frustrate desegregation. This included converting public schools to “private” schools supported by state funds. To slow the pace of litigation, states transferred authority over pupil enrollment and assignment to local authorities, which made it necessary to sue each local unit. Unless the Court’s decision in *Brown* was respected as a mandate beyond the parties to that case—that is, unless judicial supremacy in its strongest form<sup>69</sup> were accepted—there were literally thousands of local school boards that would need to be sued to achieve desegregation in the South. “There is no one way, but many” to oppose the *Brown* decision, said Alabama’s John Temple Graves. “The South proposes to use all of them that make for resistance. The decision tortured the Constitution—the South will torture the decision.”<sup>70</sup>

Nor was Southern resistance to judicial supremacy limited to the acts of legislatures or the rhetoric of politicians. It also included acts of vigilantism and mob violence, a form of popular constitutionalism more common in the early days of the republic.<sup>71</sup> Consider the violence that engulfed Little Rock, Arkansas, when a federal court ordered desegregation of the city’s schools. After nine black schoolchildren entered the school “a huge wait-

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67. 1 RACE REL. L. REP. 252, 253 (1956). The state attorney general, however, opined that Virginia had no power to “nullify,” or to suspend enforcement of, the Court’s decision in *Brown*. *Id.* at 464.

68. WOODWARD, *supra* note 2, at 156-57.

69. See Daniel A. Farber, *The Importance of Being Final*, 20 CONST. COMMENT 359 (2003).

70. WOODWARD, *supra* note 2, at 158-60.

71. Kramer, *supra* note 4, at 28-29.

ing mob, hysterical, shrieking, and belligerent, defied police and forced the removal of the Negro children."<sup>72</sup>

It is worth recalling that after the Supreme Court issued its strong defense of judicial supremacy and reaffirmed the desegregation order in *Cooper v. Aaron*, Arkansas Governor Orval Faubus closed the public schools rather than comply with the order. He was subsequently reelected for an unprecedented third term by an overwhelming popular vote.<sup>73</sup>

As C. Vann Woodward wrote in his classic work, *The Strange Career of Jim Crow*, this defiance was not confined to the South:

Southern resistance to federal authority received aid and comfort from other parts of the country. . . . In Congress the Court was subjected to assaults of explosive violence. The House passed bills restricting the Court's powers, and the Senate came within eight votes of nullifying several Supreme Court decisions and within one vote of prohibiting the Court from excluding states from any legislative area occupied by Congress unless that body specifically agreed.<sup>74</sup>

These acts encouraged and stiffened Southern resistance.<sup>75</sup> Moreover, resistance was effective. While 712 schools were desegregated in the first three years after *Brown*, only 13 were desegregated in 1958, 19 in 1959, and 17 in 1960.<sup>76</sup> Nine years after *Brown*, fewer than 13,000 black public school students out of 2,803,882 were in school with whites in the South.<sup>77</sup> The opponents of judicial supremacy in the South in the 1950s and 1960s left a legacy of delay and injustice that cannot be forgotten.

Woodward aptly sums up the post-*Brown* situation. "[I]t was clear that the law of the land as defined by the Supreme Court had been defied and that the defiance had the support of responsible spokesmen for millions of Americans."<sup>78</sup> Further, "[t]raditional respect for the law had been overridden by the conviction of millions that the *Brown* decision and its sequels were not to be properly regarded as the law of the land."<sup>79</sup> Here was a consequence of opposition to judicial supremacy.

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72. WOODWARD, *supra* note 2, at 166.

73. *Id.* at 167.

74. *Id.* at 167-68.

75. *Id.* at 168.

76. *Id.* at 167.

77. *Id.* at 173.

78. *Id.* at 162-63.

79. *Id.* at 168.

In the 1950s and 1960s, popular opposition to judicial supremacy had reached a high-water mark, especially in one region of the country. This included opposition not only to the Court's desegregation decisions, but also to its decisions invalidating official public-school prayers and Bible-reading, its increased scrutiny of attempts to outlaw obscenity, its protection of the procedural rights of criminal defendants, and its "one man, one vote" reapportionment decisions.<sup>80</sup> Though there has been populist and popular criticism of the Supreme Court and judicial supremacy since the era of Warren Court activism, nothing has come close to the intense and widespread assault it withstood then.

### III. JUDICIAL SUPREMACY: THE CRITICS NOW

While popular opposition to judicial supremacy has receded, scholarly criticism and even opposition to it rose in the 1980s and 1990s. This was, not coincidentally, about the time Reagan- and Bush-appointed conservatives began to flex their muscles in the federal judiciary, especially on the Supreme Court. Notably, some academic liberals began arguing to take the Constitution away from the courts<sup>81</sup> only when the courts were taken from the liberals.<sup>82</sup> As in times past, how one feels about judicial supremacy seems often to depend on whose ox is gored, or whose Gore is axed.

#### A. WE THE EXECUTIVE

Whatever the cause of this renewed interest in constraining the judiciary, there is now a substantial body of scholarship challenging at least some aspects of judicial supremacy.<sup>83</sup> Among conservatives, Michael Paulsen has articulated the most ambitious and radical (in the sense of going to the root of the issue) critique of judicial supremacy so far. It is also the one that best

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80. See generally THE IMPACT OF SUPREME COURT DECISIONS, *supra* note 36, at 89-187.

81. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

82. I am not the first to notice this development. "Tushnet's book is the logical culmination of two trends in liberal scholarship: the view that judicial review makes little positive difference and the strong disagreement with many decisions of the last quarter-century by the Burger and Rehnquist Courts." Erwin Chemerinsky, *Losing Faith: America Without Judicial Review?* 98 MICH. L. REV. 1416, 1417 (2002) (reviewing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999)).

83. See Paulsen, *supra* note 10, at 226 n.19 (listing liberal and conservative critics of judicial review); Kramer, *supra* note 4, at 7 n.9 (listing critics).

challenges the premises of judicial supremacists' arguments. I will start with a consideration of Paulsen's views.

Here, in brief, is Paulsen's argument. The executive, legislative, and judicial branches are coequal and coordinate parts of the federal government. They are "'co-ordinate' in the sense that they are all *ordained* (co-ordained) by the same authority—the People themselves—and are, consequently, coequal in title and rank as representatives of the People. None is subordinate (the very opposite of 'coordinate') to another."<sup>84</sup> Paulsen calls this the "coordinacy postulate" that underlies separation of powers.

Judicial supremacy in matters of constitutional interpretation upsets this design because it elevates the judicial branch above the other two, and above the states. Interpretive power "is divided and distributed among *all three* branches of the national government, among multiple actors within each branch, and between federal and state levels of government, with *no* actor literally bound by the views of any of the others."<sup>85</sup> "Executive review," the power of the President to interpret the Constitution as he sees fit even in the teeth of a contrary judicial interpretation, is justified not because the framers consciously intended it but because it "follow[s] logically from the agreed premises they held and the structure the Constitution embodies."<sup>86</sup>

Executive review entails the power of the President, among other things, to refuse to enforce a statute he deems unconstitutional, even if the Supreme Court has upheld its constitutionality.<sup>87</sup> Most controversially, it entails executive refusal to enforce a judicial order in a particular case. The President may simply refuse to execute a court decree if "the President does not agree with the decision."<sup>88</sup> No other recent critic of judicial supremacy has gone that far.

There are many things to say about Paulsen's powerful argument against judicial supremacy and in favor of recognition of independent executive review. I will limit myself here to a few thoughts.

First, whatever the merits of Paulsen's proposed arrangement under which multiple parties (the three federal branches and each of the 50 states) have co-equal roles in constitutional

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84. Paulsen, *supra* note 10, at 228-29 (footnote omitted).

85. *Id.* at 222.

86. *Id.* at 227.

87. *Id.* at 267-72.

88. *Id.* at 276.

interpretation, it has never been the practice in this country. Judicial supremacy has been, to an increasing degree over time, the practice for the better part of the two centuries since *Marbury*. Thus, while Paulsen is a self-described conservative, his critique of judicial supremacy is not itself conservative in the Burkean sense of respecting traditional practices that have developed incrementally in response to experience. Judicial supremacy, whatever its deficiencies, has grown out of the governing experience of the nation. It has evolved through a process of testing and trial. By fits and starts, judicial supremacy gained ground among both theorists and the public after *Marbury* and was firmly established in the public mind by the late 19th century, though some states resisted when it was in their interest to do so.<sup>89</sup> Having experienced alternatives involving resistance to judicial supremacy by the states and by their allies in Congress and the executive branch, the people also came to accept judicial supremacy after the Civil War and Reconstruction.<sup>90</sup> *Cooper v. Aaron* did not invent judicial supremacy; it confirmed it. For a true conservative, any change in such a longstanding practice must bear a heavy burden of persuasion. Paulsen has not met this burden.

Consider Paulsen's most controversial proposal, that the President may refuse to execute court judgments.<sup>91</sup> The idea is a radical departure from our current practice, a profound repudiation of our history, inconsistent with the President's textual constitutional duty to execute the law, and without practical precedent in the governing experience of the country.

*Ex Parte Merryman*,<sup>92</sup> involving President Lincoln's unilateral but limited suspension of habeas corpus, is the only arguable example where a President acted on a theory of independent interpretive authority to resist a court order.<sup>93</sup> But, for several reasons, *Merryman* is not a very persuasive or powerful precedent for Paulsen's view.<sup>94</sup>

89. See Part II.

90. McDONALD, *supra* note 42, at 224.

91. Even ardent "departmentalists," who like Paulsen believe the branches have co-equal roles in interpretation, accept that the President should execute a court's judgment. See, e.g., Calabresi, *supra* note 10, at 1427. . . .

92. 17 F.Cas. 144 (C.C. Md. 1861) (No. 9,487).

93. The rule is for presidents to comply with court orders, even when the stakes are high, as President Truman did during the Korean War. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

94. To be fair, Paulsen does not put much stock in precedent, Michael Stokes Paulsen, *Abrogating Stare Decisis By Statute*, 109 YALE L.J. 1535 (2000), another un-Burkean position he vigorously defends.

To begin, it is not clear Lincoln was acting on a constitutional theory contrary to the court's. He may have been doing so, but his words on the subject were rather ambiguous. Lincoln seemed to recognize that his act in unilaterally suspending the writ of habeas corpus might be technically unconstitutional, albeit necessary under the dire circumstances to save the government.<sup>95</sup> Recall that Lincoln's suspension of the writ had been limited to areas of Maryland where Confederate sympathizers were sabotaging and attacking Union troops as they were being positioned to defend the capitol.<sup>96</sup>

Further, even if Lincoln was defying Chief Justice Taney's order on constitutional grounds, he was not defying an order of the *Supreme Court*, the judicial body that possesses ultimate judicial authority. Taney ruled only as a member of a circuit court. If there are degrees of executive defiance of judicial orders, ranging from disobeying a district judge to disobeying an appellate court to disobeying the Supreme Court, Lincoln's defiance was at the lower end of the spectrum.

Thus, there is no example in our history of a president openly defying an order of the Supreme Court.

Indeed, even if Taney's order could be considered an order of the Supreme Court, it may be fairer to characterize Lincoln's response as foot-dragging rather than complete defiance. Lincoln never responded directly to Taney's order. Merryman was confined to Fort McHenry for only seven weeks before he was indicted and transferred to civil authorities in Maryland. He was never tried.<sup>97</sup>

Finally, Lincoln himself, criticizing the Court for its decision in *Dred Scott*, recognized, as have other presidents critical of the Court, that the Court's decisions in particular cases must be followed.<sup>98</sup> Lincoln's action in suspending habeas corpus, then, seems less like the assertion of a general executive authority to

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95. "[A]re all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?" Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 1 COLLECTED WORKS OF ABRAHAM LINCOLN 430 (Roy P. Basler ed. 1953). Presumably, the lone law "to be executed" was the law of the Constitution as the courts interpreted it. In his July 4, 1862 message to Congress, Lincoln did argue that the Constitution's text was silent on which branch—the executive or the legislative—could suspend the writ. This suggests an independent constitutional interpretation guided his actions. REHNQUIST, *supra* note 48, at 38.

96. REHNQUIST, *supra* note 48, at 11-25.

97. Paulsen, *supra* note 10, at 279 n.225.

98. Abraham Lincoln, Inaugural Address (March 4, 1861), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 95, at 268.

resist judicial judgments than it does the desperate, temporary measure of a beleaguered president confronted with half a nation in rebellion and insurrectionists at the gates of the capitol.

A second response to Paulsen's critique of judicial supremacy is that his critique does not necessarily "logically flow" from the "agreed premise" that the federal branches are coequal and coordinate. Indeed, abolishing judicial supremacy may undermine this agreed premise. Preserving the postulate of coordinacy may require judicial supremacy.

Under a theory of executive review, all of the powers peculiar to the other two branches, plus his own, would be concentrated to a greater degree in the hands of the president. As Paulsen rightly observes, the president already possesses to some degree the powers of all three branches. He possesses *executive* power, of course, since he controls the manner in which laws are executed. He possesses *legislative* power in the form of "the formidable negative and agenda-shaping positive power of the veto." And he possesses some (so far) limited judicial power to interpret the law as he applies it to particular cases.<sup>99</sup> Madison, in a passage from *Federalist 47* that Paulsen quotes, worried about precisely this concentration: "The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."<sup>100</sup>

Yet Paulsen's proposal dangerously concentrates power by increasing the president's share of the power presently enjoyed by the other two branches.<sup>101</sup> Executive review in the strong Paulsenian form would obviously augment the president's judicial powers since the president now would have not only the power to use interpretive authority to apply laws in particular circumstances but would also have interpretive authority to decide the general rule that should govern those particular cases. The President's share of judicial power would now extend to the beginning, middle, and end of the process of law interpretation.

The President's already considerable influence over the legislative process would also grow. Suppose the president vetoes legislation he deems unconstitutional, or more likely, simply un-

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99. Paulsen, *supra* note 10, at 219-20.

100. THE FEDERALIST No. 47, at 244 (James Madison), *quoted in* Paulsen, *supra* note 10, at 230.

101. This is true even if the President's constitutional interpretations are not conclusive on the other branches, since the remaining checks on the President's power, principally impeachment (legislative check) and *res judicata* (judicial check), are effective only if the President decides to respect and be bound by them.

wise. Suppose further Congress overrides the veto by the requisite 2/3 margin in each house. Under Paulsen's approach, the president could then simply refuse to enforce the objectionable legislation if he unilaterally and independently deemed it unconstitutional. This is an enormous expansion of the President's role in law-making.

Third, it is not clear that in the absence of judicial supremacy the executive would actually engage in much principled constitutional interpretation, understood here to mean interpretation independent of the interpreter's own personal policy preferences. A number of interpretative tools have commonly been offered to restrain judges, including textual, originalist, structural, and precedential considerations. In theory, these same methods could constrain the executive's interpretive exercise.<sup>102</sup>

But how likely is that? Courts employ these interpretive methods as a way to compensate for the fact that they are unelected; the President, by contrast, faces election every four years. This gives the President a democratic legitimacy, a moral authority to govern, that the federal courts lack. But it also gives the President a powerful incentive to govern based on the political imperatives of the moment, reflected in majority consensus, rather than on independent constitutional principle. Faced with a choice between a strong majority for a particular policy and a principled argument that the policy is unconstitutional, how likely is the President to buck the public to which he is ultimately accountable?<sup>103</sup>

It is true the Court has rarely resisted a powerful national consensus and so is clearly influenced by majority will. But at least the Court is more likely to stem the tide until the momentary consensus erodes or becomes a more fully deliberated one. The controversy over flag-burning comes to mind. The Court held unconstitutional a state law criminalizing flag-burning.<sup>104</sup> The representative branches (reflecting strong public opinion) reacted by passing new federal legislation criminalizing it, legislation the Court also struck down.<sup>105</sup> Many members of Congress

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102. Paulsen, *supra* note 10, at 340-42.

103. John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive and Historical Prolegomenon*, 15 *CARDOZO L. REV.* 375, 436 (1993) ("Executive interpretation is likely to reflect the national will more than judicial interpretation because the President is the nation's elected representative.").

104. *Texas v. Johnson*, 491 U.S. 397 (1989).

105. *United States v. Eichman*, 496 U.S. 310 (1990).

supported a constitutional amendment to overrule the Court's decision, an action that might have weakened the First Amendment, but fell just short of the necessary votes in the Senate. In time public and congressional passions have subsided, the flag remains venerated, and free-speech principles protecting unpopular expression remain intact. Under Paulsenian executive review the President might to this day be bringing prosecutions of flag-burners under his independent "interpretation" that the Constitution permits criminalization of their acts.<sup>106</sup>

Aside from catering to the wishes of a majority against the demands of the Constitution, the President may simply act on his own policy preferences despite what he thinks the Constitution requires or, more likely, will quickly come to the conclusion that his policy preferences and the Constitution are fully harmonious. When has a President, convinced of the rightness of legislation as a matter of wise policy, vetoed that legislation *solely* because he came to his own independent conclusion that it was unconstitutional (aside from what courts had decided)? I cannot think of a single time that has happened, even during the golden age when presidents thought themselves the equal of the Supreme Court in constitutional interpretation. It is at least very rare. True, presidents routinely oppose or even veto legislation for what they claim are constitutional concerns, as Jackson vetoed the re-chartering of the National Bank, but these putative concerns always seem to coincide with the president's policy objections to the legislation, as did Jackson's. For presidents, the Constitution seems to follow policy, not policy the Constitution.<sup>107</sup>

It is also true that the executive branch, even now, routinely considers the constitutionality of legislation through the institutional mechanisms of the Justice Department and other parts of

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106. Federal courts could dismiss the prosecutions, following the Supreme Court's authority. (Query: under Paulsen's approach, would state courts, as independent constitutional interpreters, have to dismiss flag-burning prosecutions brought in their states?) But the chilling effect on speech of facing the expense, worry, and embarrassment of prosecution would still occur.

107. The same could fairly be said of many Supreme Court decisions: For Justices, the Constitution seems to follow policy, not policy the Constitution. I have no illusions about that. But at least institutional design and the reduction of popular pressures on the judiciary point toward principled decisionmaking. And for all its political decisionmaking, I am convinced the Court's interpretive methods have occasionally reached results contrary to the Justices' individual policy preferences. I cannot say the same has *ever* been true of the President, whose position is political by design.

Some would maintain that decisionmaking, whether by presidents or by justices, is always a function of policy preference and that interpretive methods used to constrain individual policy preferences are ineffective. I doubt Paulsen, however, would take that view. Paulsen, *supra* note 10, at 331-42 (describing methods for constraining interpreters).

the executive branch. We can concede that the executive officers charged with this interpretive mission generally exercise it with a great degree of skill and in as principled a fashion as humanly possible.<sup>108</sup> But, until now, they have done so within a framework in which courts generally would pass authoritatively on their handiwork, a framework that has disciplined and confined their analysis. Cut loose from this framework, as they would be under Paulsen's theory of executive review, how likely is it they would begin to cater to their boss's perceived and actual policy preferences rather than to constitutional principle?<sup>109</sup> Preferring judicial supremacy to executive review is not just a matter of trusting in courts' superior *comparative competence* to interpret the Constitution,<sup>110</sup> but of recognizing their superior *comparative incentive* to "interpret" it at all.

Finally, the branch of government into which Paulsen's theory would pour more power is already, as Paulsen candidly and admirably acknowledges, "the most dangerous branch."<sup>111</sup> By contrast, even with judicial supremacy in its quiver, the branch from which Paulsen would take power is still "the least dangerous branch."<sup>112</sup> This reverse-Robin Hood constitutional theory would take from the relatively power-poor judiciary to give to the relatively power-rich executive.

Let's pause to reflect why the executive is the most dangerous branch. The President of the United States commands the most powerful military apparatus in the world, indeed, by far the most powerful military force the world has ever known. He commands, too, the law-enforcement mechanisms of the federal government. He influences, as I pointed out above, the legislative process through the veto. Even in the area of law interpretation, the President's power is already "by far the greatest," according to Paulsen, since the executive is often the first and last branch to act on a specific legal controversy.<sup>113</sup> Add to all of this

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108. Paulsen, *supra* note 3, at 391.

109. Executive branch officials have been candid about the effect of policy considerations on their legal judgments even under a system of judicial supremacy. "Unlike a court, the executive branch lawyer is part of an administration that is accountable to the People and should thus strive, within the bounds of the best view of the law, to achieve its policy goals." Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective From the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1330 (2000).

110. *Id.*

111. Paulsen, *supra* note 10 at 223 ("Truly, the executive—the Presidency—is the most dangerous branch.").

112. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

113. Paulsen, *supra* note 10, at 223.

the fact that the executive is the sole unitary branch. A member of Congress is one of 535. A Justice is one of nine. Though the executive branch comprises many subordinate officials, the president is in the final analysis *one of one*. If a member of Congress or a Justice lets her constitutional authority go to her head, tempting her to abuse it, she can be effectively checked by her clearer-minded equals. The executive, alone among the branches, combines great power with great conceit.

The danger of that combination is not a matter of theory but of historical experience, and here a page of history is worth a volume of logic. The United States has not faced a “meltdown scenario”<sup>114</sup> when one branch attempted to seize all power. But if such a scenario were ever to come, it surely would be precipitated by a power-grabbing executive. Consider President Richard Nixon, a crook on many dimensions who tried to shield his own and his subordinates’ criminality in a matter involving his own reelection campaign. It was a corruption deforming the very heart of our political system, one out of many perpetrated by an administration whose abuses of power become clearer every year.<sup>115</sup> For all the mistakes the Supreme Court has made over the past two centuries, and there have been many, there has never been anything quite like a “cancer-on-the-judiciary” moment in which the Court’s error threatened the very foundation of our political system.<sup>116</sup>

Nixon fell from power because, while he had abused just about every other prerogative held by the executive, and had undermined every other principle of American government, he adhered in the end to the doctrine of judicial supremacy.<sup>117</sup> That adherence caused him to relinquish evidence exposing the extraordinary depth of his administration’s corruption, which contributed to a snowball of legislative action and political opposition he could not resist.<sup>118</sup> But what if Nixon had lived in

114. The term is Paulsen’s. *Id.* at 324.

115. Paulsen is unsparing in his condemnation of Nixon as a “crook.” Michael Stokes Paulsen, *Nixon Now*, 83 MINN. L. REV. 1337, 1343 (1999).

116. On the other hand, if one believes that *Roe* authorized and *Casey* reaffirmed the genocide of between one and 1.5 million persons a year, the Supreme Court’s malevolence is far worse in terms of its human cost than Nixon’s or any other single president’s. Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003).

117. *United States v. Nixon*, 418 U.S. 683 (1974). Whether the Court should have taken jurisdiction of the dispute between Nixon and the special prosecutor, Leon Jaworski, in what was formally an intra-branch dispute is another question. See Calabresi, *supra* note 10 (arguing the Court should not have heard the matter).

118. Paulsen calls *Nixon* the “proximate cause” of Nixon’s downfall. Paulsen, *supra*

Paulsen's world, where the background political, legal, and cultural assumption would be that the president may do what he wants on matters constitutional and may even refuse to obey a court order? Legislative and popular pressures might still eventually have slain him, but at what additional delay and cost to the nation?

To add yet more constitutional interpretive power to a branch that already effectively has the first and last word on legal meaning, that is already the most powerful and dangerous branch, that has a history of abuse of power and hubris, is to increase the risk of the very meltdown we have so far successfully avoided under a system that includes judicial supremacy. I do not say this will happen if Paulsen's theory of executive review prevails. Presidents will continue to face limited constitutional checks from Congress<sup>119</sup> and practical political constraints from the public. I only predict the risk would rise to an unknowable degree. Before we take this leap, we better have a very good reason to do so. I have not yet heard it.

#### B. WE THE INDETERMINATE

Writing from the other end of the political spectrum, Professor Larry Kramer offers some of his own observations about the Rehnquist Court that might justify reining in the Court's interpretive authority over the meaning of the Constitution, although Kramer offers no specific proposals for doing so. Here, briefly, is his argument.

Kramer, unlike Paulsen, has for now made a pragmatic peace with judicial supremacy.<sup>120</sup> However, he warns the

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note 115, at 1337.

119. As Paulsen notes, Congress would still have its impeachment and spending powers to check the president's actions. Paulsen, *supra* note 10, at 223.

The judiciary, by contrast, would have no constitutional check on the executive beyond the power to dismiss unconstitutional criminal prosecutions. *Id.* at 290-91. Yet how much of a check would even this be? For example, among many other criminal procedural guarantees, the Constitution requires trial by jury. U.S. CONST. amend. VI. Paulsen argues the president would have to obey that command, which is "fairly read to prohibit punishment for crime without a jury determination of guilt of the accused." Paulsen, *supra* note 10, at 289. But under Paulsen's robust executive review the president could interpret the Sixth Amendment to mean trial by an impartial jury comprising the Joint Chiefs of Staff, perhaps with appeal only to the president. Who could overrule the president's interpretation? Certainly the federal courts could not, since the President could ignore them.

120. "We may come to accept judicial supremacy, because we need someone trustworthy to settle certain constitutional disputes once and for all, and for a variety of historical, jurisprudential, and political reasons, the Supreme Court seems like our best option." Kramer, *supra* note 4, at 113. "There is a place for judicial supremacy, but it has

Rehnquist Court is moving us from judicial supremacy (courts having the *last* word on constitutional meaning) to judicial sovereignty (courts having the *only* word on constitutional meaning).<sup>121</sup> “The Rehnquist Court no longer views itself as first among equals,” Kramer writes, “but has instead staked its claim to being the *only* institution empowered to speak with authority.”<sup>122</sup> This judicial “power grab” has come at the expense of what Kramer calls “popular constitutionalism,” the responsibility of “We the People” to see that the Constitution is properly interpreted and implemented.<sup>123</sup> Under popular constitutionalism, “government officials are the regulated, not the regulators, and final interpretive authority rests with the people.”<sup>124</sup>

In the early days of the republic, the people exercised their influence on constitutional meaning through a variety of tools. If Congress tried to overstep its constitutional limits the people would constrain it “via elections, juries, popular outcries, or, in the unlikely event all of these failed, by more violent forms of opposition.”<sup>125</sup> By 1840, as democratic practice grew more institutionalized and suffrage expanded, “popular constitutionalism meant popular will as expressed by and through elected representatives.”<sup>126</sup> Nowadays, popular constitutionalism is expressed through “mediating institutions” such as “political parties, lobbies, the media, public interest organizations, unions, and the like.”<sup>127</sup> Conspicuously missing from this list is the role of the states as a voice of popular constitutionalism.

A reconciliation between judicial supremacy and popular constitutionalism was achieved through what Kramer calls “the New Deal settlement.” This settlement had three elements: (1) judicial enforcement of constitutional prohibitions on the states; (2) judicial deference regarding the definition and scope of congressional and executive powers; and (3) judicial enforcement of individual rights, including the Bill of Rights, the 14th Amendment (including the rights of racial and other minorities), voting

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bounds.” *Id.* at 163. It appears, however, that Kramer may have withdrawn even this concession to judicial authority in a forthcoming book. LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL SUPREMACY* (forthcoming 2003).

121. Kramer, *supra* note 4, at 13.

122. *Id.* at 14.

123. *Id.* at 12.

124. *Id.* at 86.

125. *Id.* at 72.

126. *Id.* at 113.

127. *Id.* at 164.

rights, and the operation of the political process.<sup>128</sup> This accommodation was consistent with historical practice under which the Court rarely intervened to enforce limits on federal legislative and executive authority, yet actively superintended the role of the states.<sup>129</sup> It also “offered a relatively sensible allocation of responsibilities.” Individual rights are least well handled by majoritarian institutions. But placing rigid limits on national authority in a complex environment “is much too complicated” for the Court.<sup>130</sup> That task should be left to popular constitutionalism, namely to Congress itself.

The problem, for Kramer, is that “[t]he Rehnquist Court has, quite simply and literally, abandoned the New Deal settlement, reoccupying ground taken for the people in the 1930s without yielding so much as an inch of territory already held.”<sup>131</sup> In the field of individual rights, most (though not all) of the current Court’s activism “has been in the service of conservative political ends,” such as undermining affirmative action and affording somewhat greater protection to economic liberties.<sup>132</sup> Otherwise, the Court has largely halted the Warren and Burger Courts’ expansion of individual rights.<sup>133</sup>

Kramer is far more concerned, however, about the Court’s renewed enforcement of limits on Congress’s power under the Commerce Clause. The key cases are *United States v. Lopez*,<sup>134</sup> which invalidated the Gun-Free School Zones Act, and *United States v. Morrison*,<sup>135</sup> which invalidated part of the Violence Against Women Act (VAWA). Here, Kramer claims that the Court has “restored heightened scrutiny,” abandoning a six-decade practice of deference.<sup>136</sup>

Kramer’s argument, like Paulsen’s, is nuanced and complex. After some general thoughts on the idea of “popular constitutionalism,” I will confine myself to a few issues dealing primarily with the Court’s expansion of its own interpretive authority and its limitations on congressional power.<sup>137</sup>

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128. *Id.* at 122.

129. *Id.* at 124-25.

130. *Id.* at 126-27.

131. *Id.* at 128.

132. *Id.* at 131.

133. *Id.* at 130.

134. *United States v. Lopez*, 514 U.S. 549 (1995).

135. *United States v. Morrison*, 529 U.S. 598 (2000).

136. Kramer, *supra* note 4, at 137. See Kramer’s discussion of *Lopez* and *Morrison*, *id.* at 138-44.

137. I agree with Kramer that *Bush v. Gore* wrongly prevented remand of the dis-

Popular constitutionalism is an appealing concept. It highlights the role of the people in all aspects of self-government, the whole point of this enterprise called the United States. Simply articulating the concept encourages the people to treat seriously their government. But it is also a frustratingly amorphous concept. After reading 169 pages of densely-footnoted text, I am unclear precisely what it means, how it is supposed to operate in practice, or what constitutional significance we should attach to it. Popular constitutionalism may be neither popular nor constitutionalism.

How do we know when the expression of popular constitutionalism is sufficiently “popular” to be called a form of “constitutionalism”? I know when the Court has reached a conclusion about the meaning of the Constitution because I can count to five. But how are we to know when popular constitutionalism has reached some determination about constitutional meaning? What quantum or duration of consensus among the “political parties, lobbies, the media, public interest organizations, unions, and the like” is required before we can say with confidence “the people” have spoken in their constitutional voice?<sup>138</sup>

Further, how can we be sure popular constitutionalism is even “constitutionalism”? How do we know the people’s expression reflects a view about the nation’s fundamental law rather than a very strong policy preference (favoring, for example, laws that require a powerful central government) arrived at independent of any consideration of the Constitution’s meaning? The concern here is similar to my concern with Paulsen’s “executive review.” It is not so much that the people (or the executive, in Paulsen’s world) will “err” in constitutional interpretation (although I wonder if more than five out of 100 citizens can name a constitutional right other than “free speech” or the “right to bear arms”). It is that they will not interpret the Constitution at all. Like the president, the people will act on expediency, not on constitutional principle. The same is true for their elected representatives in Congress, for whom constitutional meaning also seems to be determined by policy preference independent of the Constitution.

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pute to the Florida courts. *Id.* at 154. I suspect, however, that the Court’s action had little to do with its distrust of potential congressional handling of the dispute and much to do with concern that the Florida Supreme Court was acting in a partisan fashion.

138. Bruce Ackerman has a theory to explain when such constitutional moments arrive, Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279 (1999), but Kramer has not adopted it.

Aside from the indeterminacy of popular constitutionalism, let's consider Kramer's argument that the Rehnquist Court is robbing us of it by expanding its own interpretive domain while at the same time limiting congressional power. Kramer is convincing in arguing that the *rhetoric* of some Rehnquist Court opinions bespeaks a judicial hauteur about the Court's role in constitutional interpretation. Two quibbles: First, I am not persuaded that the current Court's rhetoric is more self-congratulatory and self-aggrandizing than that of the Warren or Burger Courts. Second, I would have emphasized more than Kramer does the current Court's truly breathtaking rhetoric in *Casey*, in which the Court claimed to speak before all others on constitutional matters and asserted a power to call the contending sides in a national controversy to end their bitter constitutional dispute. That is a rhetorical defiance of popular constitutionalism that may be unequaled in the Court's history. Kramer gives *Casey* some attention in this regard,<sup>139</sup> but not nearly enough. It would fit uneasily, I think, with Kramer's claim that the Court's arrogance is a product of *conservative* triumphalism.

Kramer is less convincing in arguing that the *substantive* results in Rehnquist Court decisions unravel the New Deal settlement on the issue of congressional power. First, note that the New Deal settlement, as described by Kramer, is itself a repudiation of the underlying concern that Marshall used to justify judicial review in *Marbury*. Marshall did not justify judicial review in *Marbury* as a method to protect individual rights or to ensure federal supremacy over the states. To Marshall, judicial review was needed in order to limit the powers of the other federal branches, especially the Congress.<sup>140</sup> "The powers of the legislature are defined and limited . . . . The distinction between a government of limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed . . . ." <sup>141</sup> If the Constitution is not an "absurdity," the constitutional limits on the power of the legislature cannot be "alterable when the legislature shall please to alter it."<sup>142</sup> This "would be giving to the legislature a practical and real omnipotence . . . ." <sup>143</sup> To the extent the Court is fumbling toward re-

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139. Kramer, *supra* note 4, at 136 (devoting two sentences to *Casey*).

140. It is true, however, that Marshall spent much of the next thirty years on the Court expanding federal authority and constraining that of the states. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

141. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176.

142. *Id.* at 177.

143. *Id.* at 178.

newed judicially enforceable limits on congressional power, it is acting in the spirit of *Marbury*.

Second, the limits placed on Congress's commerce clause power by the Rehnquist Court have themselves been limited.<sup>144</sup> Let's first do the math. In the eight years since the supposed repudiation of the New Deal settlement in this area began, the Court has invalidated exactly *two* federal laws as exceeding the judicially enforceable limits of the commerce clause (the Gun-Free School Zones Act in *Lopez* and the VAWA in *Morrison*). In a third case, involving federal regulation of wetlands, the Court construed the Clean Water Act narrowly to avoid potential constitutional problems presented by "significant impingement of the States' traditional and primary power over land and water use."<sup>145</sup> Of course, more such invalidations could come anytime, but so far, at least, this is a judicial revolution on a very slow fuse.

Note also the limited nature, so far, of the substantive limitation placed on Congress's commerce power. If the Court is truly applying "heightened scrutiny" to exercises of that power—an unstated though plausible reading of *Lopez* and *Morrison*—it is only doing so in cases where Congress is regulating what the Court regards as intrastate "noneconomic activity." In both *Lopez* and *Morrison*, it was only after the Court determined Congress was regulating activity that was both intrastate and noneconomic that it applied "heightened scrutiny."

Whatever one thinks of the distinction between economic and noneconomic activity, it does not appear so far to be a strong basis for challenging much of what Congress actually does.<sup>146</sup> Although the Court has not made clear where the economic-noneconomic line is to be drawn, it appears "economic" will have an expansive meaning. It includes, for example, *every* commerce-power regulation of intrastate activity the Court has

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144. So long as the Court's commerce clause limitations remain modest, its stingy reading of congressional power under Section 5 of the Fourteenth Amendment will have little practical effect since, as Kramer acknowledges, "federal lawmakers can still do many of the same things under the commerce clause." Kramer, *supra* note 4, at 148.

145. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (the Army Corps exceeded its statutory powers under the Clean Water Act by attempting to regulate the landfill of small ponds). The case was decided after Kramer's article appeared.

146. Kramer candidly admits that "[w]e do not yet know how aggressive [the Court] plans to be in restricting what Congress can do under the commerce clause," yet he fears the worst because "the conservative litigation machine is gearing up." Kramer, *supra* note 4, at 159-60.

ever approved in its history.<sup>147</sup> Thus, in *Lopez* the Court even reaffirmed *Wickard v. Filburn*,<sup>148</sup> a case in which the Court allowed Congress to regulate the production and consumption of wheat grown entirely for home consumption.<sup>149</sup>

Nothing in the Court's new commerce clause jurisprudence yet suggests it is headed for a return to its pre-*Jones & Laughlin Steel* days. The National Labor Relations Act and the rest of the New Deal are safe, as are the various civil rights acts, and seemingly almost everything else Congress regulated from 1937 to 1995. That is a huge domain for congressional power.

Second, the Court may not have silenced popular constitutionalism in Congress so much as refused to silence its expression in the states. It has done this in two ways. First, it has resisted additional encroachments on areas of traditional state authority where the people have always been free to govern themselves at the level of government closest to them. A concern along these lines is expressed in both *Lopez* and *Morrison*, where the Court openly worried that Congress's next regulatory target might be states' general criminal and family law. In *Lopez*, for example, the defendant was initially charged under a *state* law prohibiting gun possession in public schools. Second, every recognition of an "individual right" against state law imposes a corresponding limitation on the power of the people to govern themselves—to express their constitutional priorities—through their elected state representatives. To the extent the Court has been less aggressive in recognizing "new rights" it has preserved a space for the legislative expression of popular constitutionalism in the states.

## CONCLUSION

In a representative democracy, the very phrase "judicial supremacy" is bound to cause alarm. It conjures an image of aloof and elitist judges ruling the people like "a bevy of Platonic Guardians."<sup>150</sup> But in this case the alarm is unjustified; the

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147. *United States v. Morrison*, 529 U.S. 598, 613 (2000). ("[T]hus far in our nation's history our cases have upheld commerce clause regulation of intrastate activity only where that activity is economic in nature.")

148. 317 U.S. 111 (1942). For an excellent discussion of the background, see Jim Chen, *Filburn's Forgotten Footnote*, 82 MINN. L. REV. 249 (1997).

149. *United States v. Lopez*, 514 U.S. 549, 573-74 (1995) (reaffirming *Wickard* and other commerce clause decisions of the post-New Deal era).

150. "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." LEARNED HAND,

phrase has far more bark than bite. The rule of the judges is very limited at best, playing at the edges of national and state policy, and responsive to the zeitgeist even in its limited domain.

I suspect that on balance judicial supremacy has been a good thing for our democracy. *Marbury* began the project of having unelected courts occasionally nudge popular institutions in the direction of constitutional principle. This project has, through much trial and error, played at least a small role in getting us where we are today: a free people and an enormously prosperous nation whose many imperfections remain correctable through self-government. That's not to say the courts have always gotten the constitutional principles right. In times of great national uproar they have been practically powerless to prevent the abuse of governmental power. But the people are certainly not discontent with judicial supremacy.

Perhaps we can suddenly end this project, strip the Court of its historically developed role in our national life, and hope for the best. Probably nothing much bad will happen; other democratic nations, with different histories and cultures to be sure, have managed without judicial supremacy. Or perhaps even some good will come of the change. But given what we've achieved with what we've got, why take that chance?