# THE CONSTITUTION'S FINAL INTERPRETER: WE THE PEOPLE

HONORABLE JOHN N. HOSTETTLER *
THOMAS W. WASHBURNE **

## I. INTRODUCTION

In 1994, I was elected to represent the people of the Eighth Congressional District of Indiana in the Congress of the United States. Shortly thereafter, I took an oath to uphold the Constitution and began my service in Washington as one of the infamous freshmen of the 104th Congress. I am not a legal scholar -- my degree and professional experiences have been as a mechanical engineer -- but a legal education is not a prerequisite to construing the Constitution. In fact, if it were, I do not think I could have faithfully taken my oath.

One of the more interesting aspects of the Constitution is the lack of express language concerning how, and by whom, its wording is to be interpreted. Of course, this is not a problem in those instances where the branches of government are functioning independently. The President, the Congress, and the Supreme Court are all bound by their oaths to uphold the Constitution, and each branch is forced to form an initial interpretation and then decide whether its proposed actions would be appropriate. However, the issue of who is the final interpreter of the Constitution becomes critical when the branches are forced to act in concert. This is particularly true in situations where interpretations of the Constitution by the legislative or the executive branches differ with those of the judicial branch. It is also true where such judicial constructions differ with the interpretations of the Constitution made by the People through state ballot initiatives.[1]

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* John N. Hostettler is a second-term Congressman representing the Eighth Congressional District of Indiana.

** Thomas W. Washburne, J.D., serves as Counsel to Representative Hostettler. From 1990 through 1992, he served as law clerk for the Honorable S. Hugh Dillin, Judge, United States District Court for the Southern District of Indiana.

In my discussions with constituents, it is readily apparent that there is a general perception that the Supreme Court is the final interpreter of the Constitution. The Court's interpretations of the Constitution are thought to be supreme; and, once rendered, there is nothing that may be done to correct an erroneous interpretation until the Court's composition changes or the Constitution is amended, a process requiring concurrences by two-thirds of the House, two-thirds of the Senate, and three-fourths of the States.[2]

This perception is not based upon the best reading of the Constitution. The duties of the Supreme Court under the Constitution are very limited. In fact, the role of the judicial branch in constitutional interpretation must be gleaned from only three provisions.[3] Understandably, the uncertainty in this area of constitutional law has led to much confusion over the weight which should be given to the Court's interpretation.

## II. JUDICIAL REVIEW VERSUS JUDICIAL SUPREMACY

Many of the issues involved in the debate over the scope of the judiciary's role in construing the Constitution can be avoided if, from the outset, two doctrines are carefully distinguished: (1) the doctrine of judicial review; and, (2) the doctrine of judicial supremacy. These doctrines are fundamentally distinct, although they have been easily confused.

Briefly, the doctrine of judicial review provides that the Supreme Court has the right to rule on the constitutionality of an act of Congress that has been signed into law by the President. This judicial right was first articulated most fully in *Marbury v. Madison*.[4]

Until *Marbury*, there were apparently Founders who doubted

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1. For a review of the current oligarchical rule by the Court where personal preference of the justices presides over constitutional principle, *see* Robert Bork, *Our Judicial Oligarchy*, 67 FIRST THINGS 21 (Nov. 1996).

2. U.S. CONST. art. V.

3. The Constitution is the supreme law of the land. U.S. CONST. art. VI, cl. 2. The judicial power extends to all cases in law and equity which arise under the Constitution. U.S. CONST. art. III, § 2, cl. 1. The Supreme Court of the United States is vested with the final judicial power. U.S. CONST. art. III, § 1.

4. 5 U.S. (1 Cranch) 137 (1803).

whether the Supreme Court had any greater right to review constitutionality than any other branch of the federal government.[5] The *Marbury* Court opined that a certain judicial appointment made by President Adams at the close of his term was valid under the Constitution. However, the Court also ruled that the prospective judge -- Mr. Marbury -- did not have a way to enforce the decision, specifically holding that the section of the act providing for a remedy was unconstitutional, since the act improperly granted original jurisdiction to the Supreme Court. While there are those who contend that *Marbury* was decided erroneously, which I do not, the right of judicial review will be considered settled for purposes of this essay.[6]

Unlike the doctrine of judicial review, the doctrine of judicial supremacy assumes that once the Supreme Court has determined that a particular act is unconstitutional, its decision is the "law of the land" and all, including the Congress, the President, and the People, must conform to its interpretation.[7] This supremacy goes well beyond the Supreme Court's mere right to review acts of Congress and opine on their constitutionality. This doctrine essentially sets forth that the Supreme Court is the final arbiter of the Constitution.[8] It also gives rise to much of the current public perception of the duties of the Supreme Court.

The role of the Supreme Court in constitutional interpretation hinges in many respects on whether judicial review should be accompanied by judicial supremacy. If judicial supremacy is a correct doctrine, the debate is settled in that the judiciary must logically become the final interpreter of the Constitution. If judicial supremacy is not supported by the Constitution, it behooves the legislative and

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5. For a discussion of the case against the right of judicial review, *see* R. DORNAN & C. VEDLICK, JUDICIAL SUPREMACY, THE SUPREME COURT ON TRIAL 1-2 (1986); for an early presentation to the contrary, *see* W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 357 (1803) (Appendix D by St. George Tucker).

6. *See* American Fed'n of Labor v. American Sash & Door Co., 335 U.S. 538, 556-57 (1949) ("Our [Supreme Court's] right to pass on the validity of legislation is now too much part of our constitutional system to be brought into question.").

7. *See, e.g., Colorado's Anti-gay Amendment Thrown Out; Jury Awards Reined In . . . The U.S. Supreme Court Is The Law Of The Land And The Ruling Pleased Many . . .*, SAN DIEGO TRIBUNE, May 21, 1996, at A-1, A-13.

8. DORNAN & VEDLICK, *supra* note 5, at 1-2.

executive branches to take notice.

The issue of whether review encompasses supremacy is as old as the United States. The Founders were faced with the basic dilemma of how to create an independent judiciary without creating a tyrannical body. William Rawle, an early commentator on the Constitution, summed up the tension in the following manner:

> It is supposed to be the natural disposition of man, when placed above control, to abuse his power. . . . On the other hand, if . . . the judge submits to be governed by the opinions of others; if he allows the desire to retain his office, the fear of giving offense, or the love of popularity, to form any part of the ingredients of his judgment, an equal violation of his trust is apparent. It is therefore not without anxiety that the patriotic mind endeavors so to regulate the organization of this all essential power, that it shall be safely steered between the two extremes.[9]

As noted above, at least since *Marbury*, it has been the right of the Supreme Court to review an act and to determine its constitutionality. Even so, it is important to note that nothing in the Constitution, nor in *Marbury*, requires that the Supreme Court's constitutional interpretations have supremacy over the interpretations of the President or Congress. In fact, after the *Marbury* decision was issued, President Thomas Jefferson simply disregarded the Supreme Court's constitutional interpretation that the appointment was valid and refused to appoint Mr. Marbury.

University of Minnesota Professor of Law Michael Paulsen recently summed up this constitutional reality:

> But who died and left them [the Supreme Court] boss in the first place? Nowhere does the Constitution make the Supreme Court our master in matters of constitutional interpretation. Nowhere is it written in our holy words that

9. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 276 (2nd ed. 1829).

> the Supreme Court's interpretations bind the other branches of government. Indeed, to vest interpretive supremacy, the power to determine *the meaning of all other constitutional powers*, in just one branch of the national government is contrary to the founding generation's premises about separation-of-powers. Rather, the framers intended that the power of constitutional interpretation, like many other important powers conferred on the federal government, be divided and shared among the three branches of government, with none literally bound by the decisions of any of the others. That way, the People would not lose control over their Constitution to *any* mere organ of government.[10]

Professor Paulsen is not alone. President Jefferson -- in addition to refusing to seat Mr. Marbury -- clearly rejected the doctrine of judicial supremacy:

> [T]o consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. . . . [A]nd their power [is] the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The constitution has erected no such single tribunal.[11]

The fact that the Constitution does not grant express supremacy for the judiciary is perhaps most clearly seen in the four principal checks placed upon the judicial branch by the Constitution: (1) the impeachment power over the judiciary; (2) the limiting of Supreme

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10. Michael Stokes Paulsen, *James T. Kirk and Constitutional Interpretation*, 59 ALB. L. REV. 671, 682 (1995) (citation omitted) (emphasis in original).

11. THOMAS JEFFERSON, *Letter to William Charles Jarvis, Sept. 28, 1820, in* 10 WRITINGS OF THOMAS JEFFERSON 160 (Ford ed., 1899).

Court jurisdiction; (3) the amendment process; and, (4) the inherent powers of the executive and legislative branches.[12] Each of these checks has the effect of negating a particular aspect of judicial supremacy.

**Check 1: Impeachment**. Under the Constitution, justices serve during time of good behavior and are subject to impeachment for violations of this condition.[13] Impeachment is generally understood today to relate to removal of justices for improper motives or corruption, such as bribery. Accordingly, it is not typically thought of as a check on judicial usurpations of power except in the most extreme of circumstances. It is interesting, however, that impeachment for substantive matters, such as improper reasoning, etc., is not without support.[14]

An obstacle which arises in regard to the use of the impeachment power as a check on constitutional supremacy by the judiciary for reasons other than improper motives or corruption is how to implement such a check while maintaining any sense of an independent judiciary. Any justice interested in maintaining his or her position would seemingly always feel compelled to check the political popularity of a particular construction. Given that such popularity can be fleeting, the best decisions may be unduly hindered.

**Check 2: Limiting Jurisdiction.** It is expressly within the power of the Congress to limit the jurisdiction of the federal courts and thus negate the supremacy of the Supreme Court on most subjects.[15] Limiting the jurisdiction of the federal judiciary has often been suggested as a means of curtailing the power which the judicial branch

12. *See infra* notes 13, 15, 18 and 21, respectively.

13. U.S. CONST. art. III, § 1.

14. *See, e.g.*, DAVID BARTON, IMPEACHMENT! RESTRAINING AN OVERACTIVE JUDICIARY (1996); JAMES KENT, *An Introductory Lecture to a Course of Law Lectures, 1794, in* 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805 943-44 (Hyneman & Lutz eds., 1983).

15. U.S. CONST. art. III, § 2, cl. 2. For a thorough analysis of the constitutional issues raised in using the withdrawal of jurisdiction as a check on the Court, *see* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

now wields.[16] In fact, in 1867, Congress passed legislation designed to repeal a law which gave the Supreme Court the right to hear appeals in habeas corpus cases. This was in direct response to the case of the Confederate William McCardle of Vicksburg, Mississippi, who was being held by federal authorities and had previously filed for a writ of habeas corpus. President Johnson vetoed the bill, but was overridden. The Supreme Court was then faced with whether Congress could withdraw jurisdiction in a case for which a lower court decision had been rendered and was on appeal. The Court held that Congress could so act and refused to hear the merits of the case.[17]

At least two problems arise in widely implementing this check. First, where jurisdiction is curtailed, judicial review as well as judicial supremacy are curtailed. By silencing the Court, the Court's insights -- gained through the process of review -- are lost. Second, by cutting off jurisdiction, uniformity in the judicial branch on the issue is lost. This is critical on matters arising under the national Constitution. Nevertheless, where a clear judicial usurpation has taken place, this check on judicial supremacy remains viable. It is perhaps best used in those situations where the national interest -- such as the case after the Civil War -- calls for extraordinary measures on the part of the legislative and executive branches. Whether America has reached that point is an issue currently under debate.

**Check 3: Amending the Constitution.** Expressly set forth in the Constitution is the right of the States to amend it.[18] However, besides the length of time and logistical problems associated with this approach to checking the supremacy of the Supreme Court, it is plagued by at least one other problem: it affirms the supremacy of the judicial branch. In other words, the amendment process assumes that the Constitution is at fault and that it must be corrected. However, in the event that the Supreme Court has misinterpreted the Constitution -- which is the subject at issue -- the Constitution is not at fault, the

16. *See, e.g.*, JOHN WHITEHEAD, THE SECOND AMERICAN REVOLUTION 175 (1982) (advocating curtailing jurisdiction as a check upon the Supreme Court); George & Ponnuru, *Rule by Law*, NAT'L REV., Feb. 26, 1996 at 54 (promoting use of power to restrict jurisdiction as a check on judicial power).

17. *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

18. U.S. CONST. art. V.

majority of the Supreme Court is.

This was recognized by Justice Story,[19] who viewed the amendment route as the last resort to be used only where the Congress, the President, and the Supreme Court have ignored the Constitution:

> But in the next place, (and it is that, which would furnish a case of most difficulty and danger, though it may fairly be presumed to be of rare occurrence,) if the legislative, executive, and judicial departments should all concur in a gross usurpation, there is still a peaceable remedy provided by the constitution. It is by the power of amendment, which may always be applied at the will of three-fourths of the states.[20]

**Check 4: The Inherent Powers of the Legislative and Executive Branches.** Both the legislative and executive branches possess constitutional powers to rein in the judicial branch; yet, the use of these powers has been neglected in recent history.[21] When their use is mentioned, such powers are often characterized as "civil disobedience by legislatures and executives."[22] However, as early as 1805, just two years after his *Marbury* decision, even Chief Justice Marshall noted the desirability of the legislature to interpose a substantive check on the Supreme Court's interpretations.

In a letter to Justice Samuel Chase, who was then facing

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19. Justice Story has been referred to as the "original commentator on the Constitution." Justice Story's father was one of the "Indians" in the Boston Tea Party of 1773. Story graduated from Harvard in 1798 and was admitted to the bar in 1801. He served as a member of the Massachusetts Legislature from 1805 to 1807, and again in 1811. He served as a U.S. Representative from 1808 to 1809. In 1811, Story was appointed to the U.S. Supreme Court by President James Madison. He served on the court for 34 years, at the same time serving as professor of law at Harvard between 1829 and 1845. D. BARTON, ORIGINAL INTENT 420 (1996).

20. JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION 374 (1833).

21. *But see* Michael Stokes Paulsen, *James T. Kirk and Constitutional Interpretation*, 59 ALB. L. REV. 671 (1995) (Paulsen's "Third Modest Proposal," while not expressly stating so, puts forth the notion of the executive and legislative barrier.).

22. Robert H. Bork, *Slouching Towards Gomorrah, Can Democratic Government Survive?*, NATIONAL REVIEW, Sept. 16, 1996, at 48.

impeachment proceedings as a result of his disagreements with President Jefferson, Chief Justice Marshall wrote:

> [T]he amount of the present doctrine seems to be that a Judge giving a legal opinion contrary to the opinion of the legislature is liable to impeachment . . . . I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the Judge who has rendered them unknowing of his fault.[23]

So shocked by this was Marshall's biographer, Albert Beveridge, that he made the following comments:

> Marshall thus suggested the most radical method for correcting judicial decisions ever advanced, before or since, by any man of the first class. . . . Had we not evidence of Marshall's signature to a letter written in his well-known hand, it could not be credited that he ever entertained such sentiments.[24]

The use of the inherent powers of the elected branches over the judiciary was also recognized by Chief Justice Marshall's contemporary, Justice Joseph Story, an early commentator on the meaning of the Constitution. In his *Commentaries on the Constitution,* Justice Story addressed the precise relationship between judicial review and judicial supremacy. He certainly advocated that the judicial power extended to review of acts for constitutionality.[25] However, he hedged the check against judicial supremacy on the direct, inherent powers of the legislative and executive branches. In reference to violations of the Constitution, he provided the following

23. ALBERT J. BEVERIDGE, 3 THE LIFE OF JOHN MARSHALL 177 (1919).
24. *Id.* at 178.
25. STORY, *supra* note 20, at 358.

insights:

> In the first place, the people, by the exercise of the elective franchise, can easily check and remedy any dangerous, palpable, and deliberate infraction of the constitution in two of the great departments of government; and, in the third department, they can remove the judges, by impeachment, for any corrupt conspiracies. . . . *And if the judicial department alone should attempt any usurpation, Cngress, in its legislative capacity, has full power to abrogate the injurious effects of such a decision.*[26]

> On the other hand, the worst, that could happen from a wrong decision of the judicial department, would be, that it might require the interposition of congress, or, in the last resort, of the amendatory power of the states, to redress the grievance.[27]

> [I]f the usurpation [of the Constitution] should be by the judiciary, and arise from corrupt motives, the power of impeachment would remove the offenders; and *in most other cases the legislative and executive authorities could interpose an efficient barrier*. A declaratory or prohibitory law would, in many cases, be a complete remedy.[28]

In other words, Justice Story maintained that if the Supreme Court had usurped the Constitution, it was within the power of the executive and legislative branches to restrict the influence of the judicial branch's decision. To carry out this duty, a legislative or executive barrier could be interposed until such time as the majority of the offending justices change positions or are replaced.

Alexander Hamilton gave support to the reasoning of Justice Story. Hamilton, in explaining the weakness of the judicial branch in

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26. *Id.* at 351-52 (emphasis added).
27. *Id.* at 358.
28. *Id.* at 373 (emphasis added).

the *Federalist Papers*, acknowledged that the Supreme Court had a "total incapacity to support its usurpations by force."[29] Consequently, and as was recognized by Justice Story, if the President so chose -- and Congress refused to intervene legislatively to stop him -- the President could simply refuse to enforce certain judicial pronouncements, thereby erecting an executive barrier.[30]

Hamilton's reasoning was wholly in accordance with Article II, Section 3 of the Constitution. This section provides that the President "shall take care that the laws be faithfully executed." It must be noted that Article II certainly does not extend to unconstitutional court decisions or orders.

As noted by the former Dean of the Regent University School of Law, Herbert Titus,

> [i]f a legislative act 'repugnant to the Constitution, is void,' as Marshall penned in *Marbury*, then a court order repugnant to that Constitution is void. For, as Marshall stated, 'the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.'[31] . . . Having no authority to promulgate rules, no court opinion or order can possibly be law, because law by definition is a rule binding on people generally, not just upon individuals who happen to be parties to a case.[32]

While Beveridge considered Marshall's suggestion that the legislature examine the substantive merit of judicial decisions "the most radical method for correcting judicial decisions ever advanced," it was certainly not, as Beveridge suggested, unique in America's history. The use of the inherent powers of the elected branches in countering judicial supremacy will be examined in Section III of this

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29. THE FEDERALIST NO. 81, at 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

30. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 262-284 (1994).

31. Herbert Titus, *Roe v. Wade*, THE FORECAST NO. 5, Feb. 1996, at 4 (quoting *Marbury*, 5 U.S. (1 Cranch) at 179-80)).

32. *Id.* (quoting WILLIAM BLACKSTONE, COMMENTARIES at 38-39,44).

essay.

Given the lack of express constitutional support for the doctrine of judicial supremacy, it is interesting that the doctrine enjoys such widespread popularity. However, it is not too difficult to understand why the elected branches of government have transferred so much authority to the judiciary. Put simply, judicial supremacy can be a very politically expedient doctrine.

Elected officials wrestling with an agenda questionable under the Constitution -- such as was the case with slavery or much of President Roosevelt's "New Deal" legislation -- have found judicial supremacy a useful doctrine. This is, in large measure, due to the fact that it is an easy-out for a politician to state on controversial issues that: (1) "The Supreme Court allows me to do it;" (2) "The Supreme Court stopped me from doing it;" or, (3) "The Supreme Court made me do it", without having to render a decision on the constitutional merits that then subjects them to political judgment back home.

The political tension regarding judicial supremacy is seen in the Lincoln-Douglas debates of 1858. Senator Douglas of Illinois, and his opponent, Abraham Lincoln, touched on the *Dred Scott* decision on numerous occasions.[33] Senator Douglas wished to appear neutral on slavery, and it was he who had pushed for passage of the Kansas-Nebraska Act in 1854, which allowed for the settlers in those territories to decide the matter for themselves. In his 1858 Illinois Senate race against Lincoln, Douglas took the politically expedient position of urging the people to follow the Supreme Court's holding in *Dred Scott* that Congress could not prohibit slavery in the territories, not because slavery was good or bad, but because the Supreme Court had so ruled.

Lincoln, who was critical of the Supreme Court's decision, challenged Douglas on this position without mercy:

> He [Douglas] would have the citizen conform his vote to that decision [*Dred Scott*]; the Member of Congress, his; the President, his use of the veto power. He would make it a

33. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). This decision is discussed more fully later in this paper.

> rule of political action for the people and all the departments of the government. I would not. . . . I do not expect to convince the Judge [Douglas]. It is part of the plan of his campaign, and he will cling to it with a desperate gripe [sic]. Even, turn it upon him -- turn the sharp point against him, and gaff him through -- he will still cling to it till he can invent some new dodge to take the place of it.[34]

Given the percentage of voters who stay away at each election, one has to wonder if the doctrine of judicial supremacy has not become convenient for many who simply do not want to consider the difficulties of the issues facing America today. To some, the conflict that might result if Americans had to take a position on the great issues of our day is not worth the liberty given up to have an elite decide the matter for them.[35]

## III. THE USE OF THE INHERENT POWERS OF THE EXECUTIVE AND LEGISLATIVE BRANCHES IN CURTAILING JUDICIAL USURPATIONS OF THE CONSTITUTION

If judicial supremacy is a doctrine without support in the Constitution, as argued in Section II of this essay, the power finally to interpret must logically reside in the executive branch, the legislative branch, or both. If it is further accepted that the power of impeachment is directed to corruption of motive and that the limiting of judicial jurisdiction is not a preferred recourse, the best check on the power of the judiciary by the elected branches is through their inherent powers. These powers include the duties to legislate, to appropriate funds, and to enforce the law. As set forth in Section II of this essay, these inherent powers yield a conclusive check.

That judicial supremacy may be controlled through the inherent powers of the executive and legislative branches enjoys historical support. The executive check has been most often used. In fact,

34. ABRAHAM LINCOLN, *Speech at Springfield, Illinois, July 17, 1858, in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 516 (Roy Basler ed., 1953).

35. The authors are indebted to the writings of the late Dr. Francis Schaeffer for this proposition.

Presidents Jefferson, Jackson, and Lincoln all maintained that the Supreme Court had no right to decide with finality for the other branches the issue of constitutionality.[36]

Besides his refusing to appoint Mr. Marbury, the actions of President Jefferson regarding the sedition laws of 1798 demonstrate the President's indirect check on the Supreme Court. In 1798 -- prior to the election of Jefferson -- Congress enacted legislation making seditious libel a federal crime. The courts upheld the constitutionality of the act, thereby establishing the constitutionality of the prosecutions. Nevertheless, after Jefferson assumed the Presidency, he pardoned those under the Act because he believed the law to be unconstitutional. Jefferson understood that the Constitution did not call for judicial supremacy to dictate his opinion or actions.[37]

In a letter to Abigail Adams in 1804, President Jefferson explained his position:

> You seem to think that it evolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, any more than for the Executive to decide for them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment, because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was

36. Titus, *supra* note 31, at 3.
37. *Id.*

> bound to remit the execution of it; because that power has been confided to him by the Constitution.[38]

President Jefferson was not alone. In the early 1800's the Supreme Court decided that a national bank was constitutional.[39] President Jackson, in his veto message regarding the creation of the Bank of the United States on July 10, 1832, maintained the view that the decisions made by other departments of the government, including the Judiciary, were not binding on the President:

> Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. . . . The opinion of the judges has no more authority over the Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive.[40]

The rejection of judicial supremacy is also illustrated in the events following the Supreme Court's *Dred Scott* decision of 1857.[41] In that case, the Supreme Court declared that the Constitution did not allow for the prohibition of slavery by the federal government and declared the Missouri Compromise of 1850 to be unconstitutional. Thereafter, in 1862, President Lincoln, as head of the Executive branch, issued the Emancipation Proclamation, completely disregarding the Supreme Court's interpretation of the Constitution. As David Barton notes in his book, *Myth of Separation*, "[h]ad Lincoln allowed the Court's ruling to be binding upon the executive branch -- had he not been

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38. THOMAS JEFFERSON, *Letter to Abigail Adams, 1804, in* 8 THE WRITINGS OF THOMAS JEFFERSON 310 (Ford ed., 1897).

39. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Osbourne v. United States Bank, 22 U.S. (9 Wheat.) 738 (1824).

40. ANDREW JACKSON, *Veto Message, July 1832, in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 1145 (James D. Richardson ed., 1897).

41. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

guided by his own understanding of the Constitution -- he could not have declared freedom for the slaves."[42]

It should be noted that in regard to the *Dred Scott* decision, the Congress also rejected the supremacy of the Supreme Court's interpretation of the Constitution. On June 19, 1862, Congress passed an act prohibiting the extension of slavery into the territories after the Supreme Court had said that this action was unconstitutional.[43] Like President Lincoln, if Congress had given deference to the supremacy of judicial branch interpretation, it could not have prohibited the extension of slavery.

Challenging *Dred Scott* was not the only time President Lincoln challenged the supremacy of the judiciary. In 1861, Lincoln suspended the writ of habeas corpus in light of the public emergency of the Civil War. His action was challenged in court by John Merryman, a pro-confederate resident of Maryland, who was being held by federal troops.[44] Chief Justice Roger Taney, riding Circuit in Maryland, agreed with Merryman, holding that the writ could not be suspended by the President without Congressional authorization. Chief Justice Taney issued the writ, but the military commander to whom it was addressed refused to produce Merryman in view of Lincoln's order. Taney was accordingly incapable of enforcing his own decision and received no help from the President. Lincoln later defended his actions on the basis of the Constitution.[45]

In more recent times, one might argue that the Religious Freedom Restoration Act of 1993 (RFRA), signed into law by President Clinton, was a direct attempt to negate judicial supremacy.[46] By mandating a compelling interest standard in judicial review of First Amendment Free Exercise claims, the Executive and Legislative Branches forced the Court to abandon its own rational basis standard.[47] Of course, the final outcome of this action has yet to be

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42. DAVID BARTON, MYTH OF SEPARATION 243 (1992).
43. Acts of the Thirty-Seventh Congress, p. 432, Sess. II. Ch. 111 (June 19, 1862).
44. *Ex parte* Merryman, F. Cas. 9487 (1861).
45. WILLIAM REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 148-49 (1987).
46. 42 U.S.C. § 2000bb *et seq.* (1993).
47. Employment Division v. Smith, 494 U.S. 872 (1990).

seen, given that cases challenging the constitutionality of the Act have yet to be decided by the Court.[48]

This leads us to the question, what might legislative or executive barriers, as suggested by Justice Story, entail? The answer, of course, depends upon the constitutional issue being addressed. However, as a theoretical example, let us consider the current debates surrounding the public expression of religion.

Let us assume, for the sake of argument, that a majority of the people firmly believes that the First Amendment's Establishment Clause only applies to actions of the federal legislature -- the United States Congress. After all, this is the express wording of the First Amendment. Let us further assume that the majority also believes that the Supreme Court's 1947 decision in *Everson v. Board of Education*,[49] which, for the first time, applied the Establishment Clause of the First Amendment to the actions of a local government (school board), was a gross misreading of the Constitution and a direct violation of states' rights preserved by the Tenth Amendment.[50] What might legislative and executive barriers intended to negate the Supreme Court's usurpation of the Constitution entail in practice?

One possibility would be for Congress to pass a law which eliminates personal liability for cases relying on the reasoning above. For example, the laws which provide for monetary damages and attorney's fees in constitutional cases could be amended to preclude their application to cases arising out of First Amendment challenges to the actions of local and state governments.[51] This would certainly encourage local government officials to challenge the Establishment Clause's limits in a variety of situations without fear of economic consequences. Similarly, Congress might utilize not only the inherent power of the legislative branch to address this problem, but also the express power granted to the Congress under Section Five of the

48. The issue is expected to be decided by the Court in the current term.

49. 330 U.S. 1 (1947).

50. This assertion is not without support. *See, e.g.*, ADAMS & EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGIOUS CLAUSES 34-35 (1990); F. William O'Brien, *The Blaine Amendment 1875-1876*, 61 U. DET. L. REV. 137, 198 (1963).

51. *See, e.g.*, 42 U.S.C. § 1983 (1994).

Fourteenth Amendment to clearly limit federal judicial interpretation of state action in the context of First Amendment Establishment Clause cases.[52]

An example of an executive barrier, inferred from the writings of Alexander Hamilton, would be for the President to refuse to enforce future federal court decisions that arise from the reasoning above. Such a barrier would have the effect of freeing state and local government from the threat of judicial fines, injunctions, and restraining orders. Of course, if two-thirds of the Congress disagreed, this power of the President could be legislatively curtailed by mandating enforcement in the context of a duly enacted law under Article II of the Constitution.

## IV. THE FINAL INTERPRETER

Often, proponents of judicial supremacy contend that if the Supreme Court is not the final arbiter of the Constitution, there will be no effective check on the legislative and executive branches. As a federal legislator, I know from first-hand experience that this is not the case. The People are still here.

The Preamble to the Constitution states that the Constitution was ordained and established by the "People of the United States." What exactly did the people ordain? In its simplest formulation, the Constitution is little more than a delegation of power for a time from the sovereign, the People, to those who govern them. It is, therefore, a written standard by which the people judge the performance of those in government. The Founders believed that without this agreed upon standard, which would not change except by Amendment, there could be no certainty that order or liberty would be maintained.

If the Supreme Court is considered to be the final interpreter of the Constitution -- and there is little question that this is the prevailing view in America -- several very serious issues arise. The foremost issue is that the people become practically unable to control their own government. This was recognized clearly by President Lincoln, a

52. Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

skilled lawyer, who explained:

> I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court. . . . At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made . . . the people will have ceased to be their own rulers, having . . . resigned their Government into the hands of that eminent tribunal.[53]

This theme is further echoed by Presidents Washington and Jefferson:

> The power under the constitution will always be in the people. It is intrusted for certain defined purposes, and for a certain limited period, to representatives of their own choosing; and, whenever it is exercised contrary to their interest, or not agreeable to their wishes, their servants can and undoubtedly will be recalled.[54]

> When the legislative or executive functionaries act unconstitutionally, they are responsible to the people in their elective capacity. The exemption of the judges from that is quite dangerous enough. I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education. This is the true corrective of abuses of constitutional power.[55]

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53. ABRAHAM LINCOLN, *Inaugural Address, March 4, 1861*, *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 9 (James D. Richardson ed., 1897).

54. GEORGE WASHINGTON, *Letter to Bushrod Washington, November 10, 1787*, *in* 9 THE WRITINGS OF GEORGE WASHINGTON 279 (Jared Sparks ed., 1835).

55. Jefferson, *supra* note 11.

The manner in which the Supreme Court is judged by the people, checked against the Constitution as it was originally intended, is necessarily through the elected branches of government. This is the principle that Story, Jackson, and Lincoln were implicitly recognizing, i.e., that the people are ultimately the final interpreters of the Constitution -- not the Supreme Court. If the people do not approve of the Supreme Court's interpretation, they may elect officials who will step up and curb or block the implementation of the Supreme Court's interpretation. If, on the other hand, the people's representatives wrongly interpret the Constitution, they are to be replaced.

The words of William Rawle speak to this issue:

> The biennial election of the house of representatives, of which the people can by no artifice be deprived, secures to them the power of removing every member who has shown, either an inability to comprehend, or an unwillingness to conform to the transcendent obligations of the Constitution, which he has sworn to support.[56]

The Preamble to the Constitution reveals the will of the American people to "form a more perfect union . . . ."[57] The Constitution was created as the framework to govern that union. Yet, another way to view the Constitution is as a template for a sound republican form of government. As we the people lay down that template over the operation of our current federal government, we have the opportunity to determine -- or judge -- whether those stewards in whom we have placed the public trust have appropriately applied its immutable principles. If we judge that they have not, we must exercise our constitutional prerogative and take corrective action, because, ultimately, "We the People" are, and should be, the final interpreters of the Constitution of the United States of America.

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56. RAWLE, *supra* note 9, at 285.
57. U.S. CONST. pmbl.