



NORTHWESTERN
UNIVERSITY
SCHOOL OF LAW
CONSTITUTIONAL
THEORY
COLLOQUIUM SERIES

THE IRREPRESSIBLE MYTH OF *MARBURY*

Michael Paulsen

February 18, 2004

THE IRREPRESSIBLE MYTH OF *MARBURY*

*Michael Stokes Paulsen**

I. INTRODUCTION

Nearly all of American constitutional law today rests on a myth. The myth, presented as standard history both in junior high civics texts and in advanced law school courses on constitutional law, runs something like this: A long, long time ago — 1803, if the storyteller is trying to be precise — in the famous case of *Marbury v. Madison*,¹ the Supreme Court of the United States created the doctrine of “judicial review.” Judicial review is the power of the Supreme Court to decide the meaning of the Constitution and to strike down laws that the Court finds unconstitutional.

As befits the name of the court from which the doctrine emanates, the Supreme Court’s power of judicial review — the power, in Chief Justice John Marshall’s famous words in *Marbury*, “to say what the law is”² — is *supreme*. The Congress, the President, the states — indeed, “We the People” who “ordain[ed] and establish[ed]”³ the Constitution — are all bound by the Supreme Court’s pronouncements. Thus, the decisions of the Supreme Court become, in effect, part of the Constitution itself. Even the Supreme Court is bound by its own precedents, at least most of the time. Occasionally the Court needs to make landmark decisions that revise prior understandings, in order to keep the Constitution up to date with the times. When it does, that revised understanding becomes part of the supreme law of the land. Other than through the adoption of a constitutional amend-

* © Copyright Michael Stokes Paulsen 2003. Briggs & Morgan Professor of Law, University of Minnesota Law School. Graduate, John Marshall Elementary School (Wausau, Wisconsin, 1969). — Ed. Many people have influenced my thinking about *Marbury v. Madison* over the course of the years — so many that it is impossible to thank them all individually (or even remember all of them). I nonetheless would like to give special thanks to those who read and commented on this specific manuscript (Dan Farber, Casey Duncan, Dale Carpenter, and John Nagle), to the other participants at this 200th anniversary symposium, and to the editors of the *Michigan Law Review*.

The title of this Essay is inspired by John Hart Ely’s *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974). Professor Ely, who died this year, was one of the greatest constitutional scholars of our era. His thoughtfulness, insights, and good humor will long continue to serve as an inspiration and model for other scholars, as they have for me.

1. 5 U.S. (1 Cranch) 137 (1803).
2. *Marbury*, 5 U.S. (1 Cranch) at 177.
3. U.S. CONST. pmbl.

ment, however, the Supreme Court is the final authority on constitutional change.

Judicial review (the myth continues) thus serves as the ultimate check on the powers of the other branches of government, and is one of the unique, crowning features of our constitutional democracy. The final authority of the Supreme Court to interpret the Constitution has withstood the test of time. It has survived periodic efforts by the political branches, advanced during times of crisis (the Civil War and the Great Depression) or out of short-term political opposition to initially unpopular or controversial rulings (like *Brown v. Board of Education*⁴ and *Roe v. Wade*⁵), to undermine this essential feature of our constitutional order. Through it all — *Dred Scott*⁶ and the Civil War, the New Deal Court-packing plan, resistance to *Brown*, the Nixon Tapes case,⁷ the Vietnam War, the quest to overrule *Roe v. Wade* — the authority of the Supreme Court as the final interpreter of the Constitution has stood firm. Indeed, the Court's authority over constitutional interpretation by now must be regarded, rightly, as one of the pillars of our constitutional order, on par with the Constitution itself.

So the myth goes.

But nearly every feature of the myth is wrong. For openers, *Marbury v. Madison* did *not* create the concept of judicial review, but (in this respect) applied well-established principles. The idea that courts possess an independent power and duty to interpret the law, and in the course of doing so must refuse to give effect to acts of the legislature that contravene the Constitution, was well accepted by the time *Marbury* rolled around, more than a dozen years after the Constitution was ratified. Such a power and duty was contemplated by the Framers of the Constitution, publicly defended in Alexander Hamilton's brilliant *Federalist No. 78* (as well as other ratification debates), and well-recognized in the courts of many states for years prior to *Marbury*.⁸

Moreover, and also contrary to the mythology that has come to surround *Marbury*, the power of judicial review was never understood by proponents and defenders of the Constitution as a power of judicial *supremacy* over the other branches, much less one of judicial exclusivity in constitutional interpretation. *Nothing* in the text of the

4. 347 U.S. 483 (1954).

5. 410 U.S. 113 (1973).

6. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

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

8. See generally SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 13-89 (1990) (setting forth pamphlets, legislative debates, and cases accepting the doctrine of judicial review from independence to *Marbury*); William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 16-29 (explaining that the argument for judicial review was familiar and accepted by the time of *Marbury*).

Constitution supports a claim of judicial supremacy. The courts possess “[t]he judicial Power of the United States”⁹ and that power extends to “Cases, in Law and Equity, arising under this Constitution,”¹⁰ but nothing in the logic or language of such a statement of constitutionally authorized judicial *jurisdiction* implies judicial *supremacy* over the other branches of government. Jurisdiction to decide cases does not entail special guardianship over the Constitution. (If anyone could lay claim to the title of Special Trustee or Lord Protector of the Constitution, it would be the President, for whom the Constitution prescribes a unique oath that he will, “to the best of my Ability, preserve, protect, and defend the Constitution of the United States.”)¹¹

None of the Constitution’s authors or proponents ever suggested that the Constitution provides for judicial supremacy over the other branches in constitutional interpretation. All prominent defenses of the Constitution at the time of its adoption explicitly deny — indeed, take pains to refute — any such notion, which was sometimes charged by opponents of ratification but never accepted by the document’s defenders.¹²

Nothing in Chief Justice Marshall’s opinion in *Marbury* makes such a claim of judicial supremacy either. The standard civics-book (and law school casebook) myth misrepresents and distorts what John Marshall and the Framers understood to be the power of judicial review: a *coordinate, coequal* power of courts to *judge for themselves* the conformity of acts of the other two branches with the fundamental law

9. U.S. CONST. art. III, § 1.

10. U.S. CONST. art. III, § 2, cl.1.

11. U.S. CONST. art. II, § 1, cl. 8. I do not claim that the President’s oath makes him the unique protector of the Constitution, vested with interpretive supremacy over the other branches. I claim only that the judiciary is *not* the unique protector of the Constitution, vested with interpretive supremacy over the other branches.

The correct answer, James Madison and I submit, is that none of the branches has interpretive supremacy over the others. See THE FEDERALIST NO. 49, at 313 (James Madison) (Isaac Kramnick ed., 1987) (“The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.”) For an extended defense, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) [hereinafter, Paulsen, *The Most Dangerous Branch*].

12. Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1349-51 (1999) [hereinafter Paulsen, *Nixon Now*] (collecting authorities). Alexander Hamilton’s *The Federalist No. 78* is a careful defense of the propriety of judicial review while simultaneously an emphatic refutation of the anti-Federalist writer Brutus’s accusation of judicial supremacy. See Paulsen, *Nixon Now*, *supra*, at 1350 n.39; *id.* at 1353-56 (collecting sources); see also GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 126-36 (1981). *But cf.* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 186-87 (1997) (intimating that Brutus, rather than Hamilton, may have correctly understood the judicial supremacist implications of Article III of the Constitution).

of the Constitution, and to refuse to give acts contradicting the Constitution any force or effect insofar as application of the judicial power is concerned.

That was a big enough deal in its own right. The idea that written constitutions could serve as judicially enforceable checks on the powers of legislatures elected by the people is an important, distinctively American, contribution to what the founding generation called the science of politics.¹³ Written constitutionalism, combined with separation of powers — including an independent judiciary deriving its authority directly from the Constitution and not from the other branches — yields an *independent* judicial power to interpret and apply the Constitution in cases before the courts. That is the proposition of *Marbury v. Madison*, and it is a proposition of considerable significance (even if not original to the case).

But that proposition is nowhere close to a holding, or claim, of judicial *supremacy* over the other branches — a notion that would have been anathema to the founding generation, and that the Supreme Court in *Marbury* appeared explicitly to disavow.¹⁴ Nothing in *Marbury* supports the modern myth of judicial supremacy in interpretation of the Constitution. Quite the contrary, *Marbury*'s holding of judicial review rests on premises of separation of powers that are fundamentally inconsistent with the assertion by any one branch of the federal government of a superior power of constitutional interpretation over the others.

The logic of *Marbury* implies not, as it is so widely assumed today, judicial supremacy, but *constitutional* supremacy — the supremacy of the document itself over misapplications of its dictates by any and all subordinate agencies created by it. As a corollary, *Marbury* also stands for the independent obligation of each coordinate branch of the national government to be governed by that document rather than by departures from it committed by the other branches. Under Chief Justice John Marshall's reasoning (and Alexander Hamilton's before him in *Federalist No. 78*), the duty and power of judicial review do not mean the judiciary is supreme over the Constitution. Rather, the duty and power of judicial review exist in the first place because the Constitution is supreme *over the judiciary* and governs its conduct. As Marshall wrote in *Marbury*, "the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature."¹⁵

13. See generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 3, *passim* (1969).

14. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (disclaiming "all pretensions to . . . jurisdiction" over matters in which political branches "have a discretion").

15. *Marbury*, 5 U.S. (1 Cranch) at 179-80.

August 2003]

Irrepressible Myth

605

It is the fundamental betrayal of *Marbury's* premises and *Marbury's* logic that accounts for nearly all of what is wrong with "constitutional law" today. The twin peaks of constitutional law today are judicial supremacy and interpretive license. *Marbury* refutes both propositions. Correctly read, *Marbury* stands for constitutional supremacy *rather than* judicial supremacy. And constitutional supremacy implies strict textualism as a controlling method of constitutional interpretation, not free-wheeling judicial discretion.

This Essay proceeds in two Parts. First, I will discuss John Marshall's near-flawless argument for judicial review. This should be familiar ground, but it is not. *Marbury* truly fits Mark Twain's definition of a "classic": a work that everybody praises but nobody actually reads.¹⁶ *Marbury* is invoked today for the myth it has become, not for its actual reasoning and logic. I will challenge the reader to attend closely to what *Marbury* actually says — the premises set forth; the logic of the argument — and to shed the judicial supremacist preconceptions with which most modern readers, thoroughly corrupted by the Myth of *Marbury*, come to the case. If one does so, I believe, one will be forced to conclude that the case cannot bear a judicial supremacist reading. *Marbury* stands instead for constitutional supremacy, judicial independence, interpretive coordinacy, and the personal responsibility of all who swear an oath to support the Constitution to be guided by their best understanding of the Constitution and not pliantly to accede to violations of the Constitution by other governmental actors.

The second half of the Essay will then sketch the rather remarkable — even stunning — but entirely logical implications of *Marbury's* argument. Constitutional supremacy, interpretive coordinacy, and personal interpretive responsibility imply parallel duties of truly *independent* constitutional interpretation — that is, interpretation not controlled by the Supreme Court's decisions — by the executive and legislative branches of the national government, by *all* judges (irrespective of *stare decisis*), by juries, and even by agencies of state government. In short, if *Marbury's* reasoning is right, nearly all of our constitutional practice today is wrong.

16. Cf. MARK TWAIN, FOLLOWING THE EQUATOR: A JOURNEY AROUND THE WORLD 241 (1897). Akhil Amar has made the same observation. Akhil Reed Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443, 445 (1989).

II. *MARBURY'S* LOGIC

Marbury v. Madison is, of course, wrong about a great many things.¹⁷ But on the essential point for which the case is justly celebrated — the judiciary's power of independent constitutional review of the lawfulness of acts of the other branches — *Marbury's* premises are unassailable, its logic impeccable, and its rhetoric beautiful. All of which makes its contemporary betrayal so lamentable.

As has been noted by too many people to count, Chief Justice John Marshall's opinion for the Court in *Marbury* is questionable, perhaps even deliberately mischievous, on a number of points.¹⁸ But it is hard to find fault in Marshall's proof for judicial review. In part, this is because the argument was so well-rehearsed in the work of earlier writers and prior judicial opinions. Talent borrows and genius steals. And John Marshall was undoubtedly a talented guy. In *Marbury*, Marshall displays his skills as a subtle and gifted plagiarist, shamelessly borrowing from Hamilton's *The Federalist No. 78*. But he does add his own distinctive and important twist, as we shall see.

There are three core points to Marshall's argument for judicial review in *Marbury*. They can be summarized briefly, but then deserve attention in detail.

First, Marshall's absolutely foundational starting point is the principle of *constitutional supremacy*. Marshall finds this postulate inherent in the nature of written constitutionalism. It is reinforced by some strongly supportive, specific textual provisions. It is not, however, an argument that derives its forces from any particular provision, but from the document as a whole. It is the fact of *having* a written constitution, and the *nature* of written constitutionalism, that does the work.

Marshall's second core proposition in *Marbury* is the *interpretive independence* of the several branches of government, a consequence that flows both from constitutional supremacy and, implicitly, from the structural separation of powers of the various departments of

17. For an irreverent look at the case, see Michael Stokes Paulsen, *Marbury's Wrongness*, 20 CONST. COMM. [redacted] (forthcoming 2003) [hereinafter Paulsen, *Marbury's Wrongness*].

18. The phrase that has caught on is Robert McCloskey's description of the opinion as a "masterpiece of indirection," ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 40 (1960), in which Marshall simultaneously criticized the Jefferson administration as lawless; asserted the authority (in a proper case) to issue direct, coercive judicial orders to executive branch officers (at least with respect to ministerial duties and at least with respect to subordinate executive branch officers); avoided a direct confrontation with the President (which the Court surely would have lost) by finding no jurisdiction to issue the requested writ of mandamus to the Secretary of State; and in the process claimed the power of the judiciary to strike down acts of the legislature that the judiciary finds to violate the Constitution. Sandy Levinson has characterized the opinion as "intellectually dishonest." Sanford Levinson, *Law as Literature*, 60 TEXAS L. REV. 373, 389 (1982). Whether or not Marshall was dishonest, a lot of what the opinion says would seem to be just plain wrong. Paulsen, *Marbury's Wrongness*, *supra* note 17.

August 2003]

Irrepressible Myth

607

government. Marshall's contention is that it would be utterly inconsistent with the first principle of constitutional supremacy — indeed, inconsistent to the point of absurdity — for one branch to be able to bind another with its (by hypothesis) *erroneous* constitutional actions or views.

The third proposition of *Marbury* reinforces the conclusion following from the first two points, and it is Marshall's distinctive contribution to the traditional argument for judicial review. The *obligation of the oath* to support “this Constitution” requires that an interpreter have direct, unmediated recourse to the Constitution.

Marshall's three arguments yield the specific conclusion of the power of judicial review of legislative acts — the legitimate power of courts to refuse to give effect to legislative acts that the courts find to be in violation of a rule of law supplied by the Constitution. But his arguments are fully generalizable: they equally support parallel powers of constitutional review by each branch of the actions of the others; and, moreover, they refute decisively any notion of judicial supremacy.

Let us begin where Marshall does, with the postulate of constitutional supremacy. Marshall begins his argument for judicial review, intriguingly, with the first principle of the American Revolution: the right of the people to establish such principles for their own self-government as they deem most conducive to their well-being; the priority of those fundamental principles over the actions of government that depart from them; and the ultimate power of the people to judge whether such departures have occurred and to take remedial action. In a sense, the premises of the Declaration of Independence thus parallel the premises of judicial review, and one can hear distinct echoes of American revolutionary thought in the opening lines of Marshall's argument in *Marbury*:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.¹⁹

This is the cornerstone from which Marshall proceeds. The Constitution, as an original act of self-government by the supreme authority — “We the People” — must be regarded as supreme law limiting all government. This proposition is reinforced, later in the *Marbury* opinion, by noting Article VI's reference to the Constitution

19. *Marbury*, 5 U.S. (1 Cranch) at 176.

as “the *supreme* law of the land,”²⁰ but it is, characteristically for Marshall, a structural inference — a deduction from the nature of self-government and written constitutionalism, more than a specific text — that establishes the postulate that the Constitution is supreme law.

Marshall continues:

This original and supreme will [that is, the People] organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain *limits not to be transcended by those departments*. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. *To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.*²¹

Note how Marshall’s argument is a general one, not necessarily limited to legislative violations of the Constitution. The Constitution’s allocation of powers establishes “limits not to be transcended” by *any* of the different departments. The powers of the legislature are defined and limited in writing, but the same is of course true of the executive and the judiciary. Those limitations are binding, or else written constitutionalism — the power of the People to establish limits on their government agents — is abolished.

Marshall then draws the conclusion — deduces the theorem — that legislative enactments that violate the Constitution are void, since the only alternative is the unacceptable one of denying the supremacy of the written Constitution:

It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

20. *Marbury*, 5 U.S. (1 Cranch) at 180 (quoting, apparently, Art. VI, cl. 2 of the Constitution).

21. *Id.* at 176-77 (emphasis added).

August 2003]

Irrepressible Myth

609

Certainly all those who framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

*This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.*²²

This fundamental principle of constitutional supremacy is, however, “lost sight of” in almost all further consideration of the subject of judicial review by today’s academics, judges, lawyers, and students. They rush to a line that shows up a few paragraphs later in the opinion — “It is emphatically the province and duty of the judicial department to say what the law is”²³ — but wrench it from context. Marshall’s argument, to this point, has been that the written Constitution prevails over the inconsistent actions of government or else the Constitution is meaningless. And this point (as I will develop below) surely applies to the judiciary as well as the legislature. Indeed, one can (and, in a moment, I will) repeat Marshall’s argument to this point, substituting the words “court” for “legislature” and “judicial judgment” for “legislative act,” with no change in the logic and flow of the argument. And, of course, one can make precisely the same argument for “president” and “executive action.” Thus, it is a proposition “too plain to be contested” that either the Constitution controls the actions of the President and the decisions of the judiciary, or that the President and Supreme Court may alter the Constitution by their ordinary actions. If the Constitution is the “fundamental and paramount law of the nation,” then, under the logic of *Marbury*, the theory of our government must be that “an act [*of the President, or of the courts*], repugnant to the Constitution, is void” in the same way as an act of the legislature.

This principle, not “to be lost sight of in the further consideration of this subject,” helps to frame Marshall’s second step in the argument for judicial review in *Marbury*. That step is to ask whether the judiciary must give effect to unconstitutional enactments of the legislature: “If an act of the legislature, repugnant to the constitution is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law?”²⁴

22. *Id.* at 177 (emphasis added).

23. *Id.*

24. *Id.*

This, Marshall says bluntly, would be ridiculous. It “would be to overthrow in fact what was established in theory.”²⁵ It would be, Marshall says (in one of my favorite judicial phrases of all time), “an absurdity too gross to be insisted on.”²⁶

Is this because the Court, and not Congress, is designated as the authoritative interpreter of the Constitution? The next line in *Marbury* is the oft-quoted one that many take as supporting such a view: “It is emphatically the province and duty of the judicial department to say what the law is.”²⁷ But this does not get one very far. It is just a sonorous paraphrase of Hamilton’s line in *The Federalist* No. 78 that “[t]he interpretation of the laws is the proper and peculiar province of the courts.”²⁸ Neither Marshall’s version nor Hamilton’s claims exclusive or superior interpretive authority for the courts. Moreover, often neglected is the immediately following sentences from the same paragraph of *Marbury*, which explain *why* it is the province of courts to say what the law is: “Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”²⁹ This is a far cry from a claim of judicial supremacy. It is merely a statement that, when performing the judicial task calls for deciding whether an act of Congress departs from the Constitution, the courts are up to the task. It *is* within the judicial province to make such a determination, and to make it independently of what Congress has determined. (Remember: the whole point Marshall is trying to make is that the courts are *not bound* by Congress’s say-so — that this would be an “absurdity too gross to be insisted on.”³⁰) Making those types of determinations is no different in principle from the work courts do all the time when faced with conflicting statutes (a point Marshall also lifts straight from *The Federalist* No. 78).³¹ But it is a huge and illogical stretch, one certainly not warranted by the “emphatically the province” sentence and indeed quite inconsistent with the rest of Marshall’s argument, to move from the proposition that the courts are *competent to determine* constitutional cases to the proposition that the courts’ views *bind everybody else*. The Myth of *Marbury* is simply not very well grounded in the actual language of *Marbury*.

25. *Id.*

26. *Id.*

27. *Id.*

28. THE FEDERALIST NO. 78, at 439 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

29. *Marbury*, 5 U.S. (1 Cranch) at 177.

30. *Id.*

31. THE FEDERALIST, *supra* note 28, at 439 (discussing judicial determination of the effect of inconsistent laws — “it is the province of the courts to liquidate and fix their meaning and operation” — and its similarities and differences with judicial determination of the effect of inconsistent constitutional and statutory provisions).

In fact, the same arguments that Marshall uses to develop the proposition of independent judicial interpretation tend to support the conclusion that the *other* branches are similarly competent to interpret the Constitution and likewise *not bound* by the erroneous interpretations of their fellow branches:

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.³²

Such a view, Marshall warns, “reduces to nothing what we have deemed the greatest improvement on political institutions — a written constitution” That, he says, is “sufficient, in America” to reject the contention.³³

What is truly arresting about Marshall’s arguments here — at least to eyes not conditioned to reading *Marbury* through judicial supremacist lenses and shut to what *Marbury* actually says — is that the exact same reasoning would seem to apply with equal force to executive and legislative constitutional review of the propriety of acts of the judiciary. If the nature of a written constitution implies enforceable limitations on the powers exercised by the organs of government created thereunder, it implies limitations *on the powers of courts*, as well as Congress and the President. (Just a few paragraphs later, Marshall will write that the Constitution is an instrument “for the government of courts, as well as of the legislature.”³⁴) If requiring courts to carry out acts of the legislature contrary to the limits set by the Constitution “would overthrow in fact what was established in theory” and constitute “an absurdity too gross to be insisted on,” so too in principle requiring the political branches to carry out decisions or precedents of the courts contrary to the limits set by the Constitution likewise would, absurdly, “overthrow in fact what was established in theory.”

If the Constitution supplies rules and principles that Congress and the President must apply in performing their duties, just as it supplies

32. *Marbury*, 5 U.S. (1 Cranch) at 178.

33. *Id.*

34. *Id.* at 180.

rules and principles that courts must apply in performing theirs, are Congress and the President permitted to interpret the Constitution directly, or are they required to “close their eyes on the constitution” and “see only” the decisions of the courts? *Marbury* says that such a restriction, at least where urged on courts, “would subvert the very foundation of all written constitutions.”³⁵ Why this would not equally be true if the tables were turned is hard to answer, unless one were to assume judicial infallibility and perfect will-less-ness by the courts. But assuming that the courts might, like the legislature, misinterpret or misapply the Constitution, to then require the political branches to be bound by the courts’ departure from the “fundamental and paramount law of the nation” would similarly be to “declare that an act” — here, an act of the judiciary — “which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory.”³⁶ It would be to declare that if *the courts* do “what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual.”³⁷ It would be giving to *the courts* “a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits.”³⁸ Indeed, such a doctrine would, by *Marbury’s* logic, “reduce[] to nothing what we have deemed the greatest improvement on political institutions — a written constitution”!³⁹

Alexander Bickel, writing more than forty years ago in his classic book, *The Least Dangerous Branch*, made this same observation about *Marbury’s* logic, but went exactly the wrong way with it. It was perhaps true, Bickel conceded to John Marshall, that to leave the question of constitutionality to the legislature would, absurdly, “allow those whose power is supposed to be limited themselves to set the limits.” But the same could be said of the courts: “[T]he Constitution does not limit the power of the legislature alone. It limits that of the courts as well, and it may be equally absurd, therefore, to allow courts to set the limits.”⁴⁰

For Bickel, this was a weakness in John Marshall’s argument, for surely Marshall could not have intended to rest the power of judicial review, and against legislative supremacy, on premises that equally could be deployed against the supremacy of the judiciary’s constitutional determinations! But Bickel, like so many who have followed

35. *Id.* at 178.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 3-4 (2d ed. 1988).

him, erred in assuming that the point of *Marbury* was to establish judicial supremacy rather than to demolish legislative supremacy and establish coequal and independent judicial interpretive competence. The problem with Bickel's critique of *Marbury* was that he assumed that Marshall was trying to prove the modern Myth of *Marbury*, when Marshall was doing nothing of the kind. Bickel could not and did not point to any flaw in Marshall's reasoning — in fact, Bickel's analysis agrees with my own about where Marshall's reasoning leads. But *Marbury*'s reasoning in that case does not yield the conclusion that Bickel thought it ought to, or needed to, in order to justify modern practice. That is precisely my point: *Marbury*'s reasoning and modern constitutional practice are hopelessly irreconcilable with each other. *Marbury*'s logic stands opposed to any claim of judicial supremacy — the idea that the other branches are bound by the courts' actions no matter what. Bickel's analysis supports, quite unintentionally, my position here.⁴¹

The attentive defender of judicial supremacy might at this point interject that the premise of this extension of *Marbury*'s reasoning is that the Court is as likely to err as the political branches. Not at all. The premise is that the Court *could* err and that there is no more reason *in principle* — and none remotely suggested in the pages of *Marbury* — for Branch X to be bound by Branch Y's errors than for Branch Z to be bound by Branch X's. Marshall's whole argument for the coordinate interpretive competence and independence of the judiciary assumes the existence of an unconstitutional action by another branch. In such an instance, it is “an absurdity too gross to be insisted on” to require a coordinate branch to be bound, within the province of its duties, to enforce or acquiesce in such an act, contrary to the paramount law of the nation. Nowhere does Marshall say that “unconstitutional” is defined by whatever a court, and a court alone, says. Rather, he treats “unconstitutional” as an objective fact — whether something is unconstitutional is determined, interestingly enough, by *what the Constitution says*.⁴²

It is at this point that Marshall turns, finally, to specific constitutional provisions, which he uses not as proof-texts of judicial supremacy but as examples of the absurdity of requiring that courts be bound, within the sphere of their power and in the performance of their duties, by a plain violation of the Constitution perpetrated by another branch. In each case, the argument can be turned around and applied to interpretation of the Constitution by the executive and legislative branches.

41. See Paulsen, *The Most Dangerous Branch*, *supra* note 11, at 245.

42. I will have more to say about this below. See *infra* Section III.E (arguing that one of the implications of *Marbury* is that the proper controlling methodology of constitutional interpretation is textualism.)

The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?⁴³

Flawlessly logical. But the same logic applies, for example, to the President: the *executive* power of Article II extends to all matters of enforcement or execution of U.S. law. Moreover, the President is specifically charged to “take Care that the Laws be faithfully executed,” presumably including the Constitution as the paramount law of the Nation, and further obliged to swear an oath to “preserve, protect, and defend the Constitution of the United States.”⁴⁴ Could it be the intention of those who gave this power, and imposed a duty of faithfulness to the Constitution, to say that in carrying it out the Constitution should not be looked into? That a situation arising under the Constitution should be decided without examining the instrument itself? This, like a similar disability on the courts, “is too extravagant to be maintained.” In some case, the Constitution must be looked into by the President. If he can open it at all, what part is he forbidden to read?

The point is particularly easy to make with respect to the President, because the constitutional provisions giving him power and responsibility to “take Care” to faithfully execute the laws and to “preserve, protect, and defend” the Constitution are remarkably clear in assigning duties that require interpretation of the Constitution. Indeed, I have had some students advance the view, which I allude to above, that the Constitution in express terms makes *the President*, not the courts, the special “Guardian of the Constitution”! One need not go so far in order to make the simpler point that Article III’s assignment of “the judicial Power” to decide cases “arising under the Constitution” does not, in a regime of separation of powers, create a superior power of constitutional interpretation than does Article II’s assignment of a duty to “preserve, protect, and defend the Constitution of the United States.”

The same point can be made (albeit more awkwardly) with respect to Congress, and indeed with respect to *all* who exercise power under the Constitution. Every act of Congress is an implicit act of constitu-

43. *Marbury*, 5 U.S. (1 Cranch) at 179.

44. See U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed”); U.S. CONST. art. II, § 1, cl. 8 (prescribing presidential oath to “preserve, protect and defend the Constitution of the United States”).

August 2003]

Irrepressible Myth

615

tional interpretation concerning the scope of its Article I (or other legislative) powers. Under the logic of *Marbury*, if Congress is obliged to consider the question of the constitutional propriety of its actions, could it be the intention of those who imposed such an obligation to say that, in making the determination, the Constitution itself should not be looked into?

Marshall then proceeds with hypothetical examples of constitutional questions that easily could come up in a case appropriate for judicial resolution.

There are many other parts of the constitution which serve to illustrate this subject. It is declared that “no tax or duty shall be laid on articles exported from any state.” Suppose a duty on the export of cotton, of tobacco, or of flours; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares that “no bill of attainder or ex post facto law shall be passed.” If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

“No person,” says the constitution, “shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.” Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature.⁴⁵

Once again, Marshall’s logic is impeccable. And once again, it is easy to turn these hypotheticals into situations calling for executive or congressional interpretation of the Constitution, and pose the same rhetorical questions: Should Congress “close its eyes” to the Constitution before passing a law that is arguably a bill of attainder or an ex post facto law, or imposing an export duty on articles from a particular state, deferring such constitutional questions to (possible) subsequent judicial determination? If the courts’ precedents would uphold such a law in instances where Congress reads the Constitution to forbid such action, should Congress close its eyes? Or is it at least competent to judge for itself, within its province?⁴⁶ What if Congress

45. *Marbury*, 5 U.S. (1 Cranch) at 179-80.

46. More problematically, if the courts’ precedents would strike down such a law in instances where Congress reads the Constitution to permit such action, is Congress bound to see only the judicial decision, and not the Constitution? Congress may have the prerogative of independent constitutional interpretation in such a case, but it has no power to require the

passed, and the courts upheld, an unconstitutional tax or duty, or a bill of attainder or ex post facto law, or convicted a man of treason on the strength of the testimony of one witness rather than two? Would the President be bound to execute the law, shutting his eyes to the Constitution? If Congress should pass such a law, and a prior administration brought a prosecution pursuant to it, and a court wrongly “condemn[ed] to death those victims whom the constitution endeavors to preserve,” must the President go along?

There are, of course, some difficult questions posed by a theory that permits multiple actors independently to interpret the Constitution, particularly the question of which interpretation will or should prevail.⁴⁷ But my point here is simply that none of the hypotheticals posed by Marshall remotely suggests judicial exclusivity or even judicial priority in constitutional interpretation. They all involve constitutional questions of a type that could (and should) be considered in the ordinary course of business of the legislative and executive branches. There is nothing *uniquely* judicial about them, so as to suggest in any way that constitutional interpretation is a uniquely judicial activity. Marshall’s point — the crux of his argument for an independent power of judicial review — is that constitutional supremacy implies *independent* interpretive power because, once it is assumed that a coordinate branch might depart from the Constitution, it becomes absurd to say that one of the other coordinate branches is bound to ratify the error and is foreclosed from looking directly to the words and logic of the document itself.

Marshall’s third major argument in support of judicial review flows from the judges’ *oath* to support the Constitution. Up to this point, Marshall’s opinion has had the feel of a straightforward, deductive mathematical proof. It is only when he gets to the oath that the opinion becomes genuinely impassioned.⁴⁸ Immediately after stating that the Constitution is “a rule for the government of *courts*, as well as of the legislature,” Marshall asks:

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

judiciary to agree and abandon *its* independent interpretive power. This leaves open the question of whether it is legitimate for Congress, in pressing a position that probably will prove futile, to impose the costs of proving such futility on individual litigants. But that in the end is a question more of prudence and policy than of constitutional power.

47. For a discussion of how a decentralized model of constitutional interpretive power might work, see Paulsen, *The Most Dangerous Branch*, *supra* note 11, at 321-42.

48. *See id.* at 257-58.

* * *

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.⁴⁹

A crime! Marshall takes the oath requirement very seriously; indeed, the founding generation as a whole took oath-taking extremely seriously.⁵⁰ Article VI of the Constitution requires that *all* legislative, executive, and judicial officers, both of the United States government and of the governments of the states, “be bound by Oath or Affirmation, to support this Constitution”⁵¹ And, as we have already observed, Article II of the Constitution prescribes a special oath for the President, under which he is required to swear or affirm that he will, to the best of his ability, “preserve, protect and defend the Constitution of the United States.”⁵²

The implication of Marshall’s argument from the oath requirement is obvious: *Marbury* is no argument for judicial supremacy in constitutional interpretation. It is an argument for the personal constitutional responsibility of *all* who swear an oath to support the Constitution to resist and refuse support to usurpations or violations of that Constitution by all others. To paraphrase *Marbury* once again, why does the Constitution require that members of Congress, the President, other federal judges, state judges, state legislatures, and state executives, all swear an oath to discharge their duties agreeably to the Constitution of the United States if that Constitution forms no rule for their government? If it is closed to them, and cannot be inspected by them? “If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.”⁵³

49. *Marbury*, 5 U.S. (1 Cranch) at 180.

50. See Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457, 1486-90 (1997) (discussing centrality and seriousness of oath requirements for sworn testimony to understanding the original meaning, in social context, of the Fifth Amendment privilege against self-incrimination); Paulsen, *The Most Dangerous Branch*, *supra* note 11, at 257 & n.150 (discussing oath requirements and their importance in the founding generation).

51. U.S. CONST. art. VI, cl. 3.

52. U.S. CONST. art. II, § 1, cl. 8.

53. *Marbury*, 5 U.S. (1 Cranch) at 180. I develop the Oath Clause argument at greater length in other work, drawing as well on President Andrew Jackson’s reliance on the oath in support of his veto, on constitutional grounds that had been rejected by the Supreme Court, of the bill rechartering the Bank of the United States. Paulsen, *The Most Dangerous Branch*, *supra* note 11, at 257-62.

Again, Alexander Bickel is an unwitting ally in my cause. Here is his critique of Marshall's argument on this point:

Far from supporting Marshall, the oath is perhaps the strongest textual argument against him. *For it would seem to obligate each of these officers, in the performance of his own function, to support the Constitution. . . . Surely the language lends itself more readily to this interpretation than to Marshall's apparent conclusion, that everyone's oath to support the Constitution is qualified by the judiciary's oath to do the same, and that every official of government is sworn to support the Constitution as the judges, in the pursuance of the same oath, have construed it, rather than as his own conscience may dictate.*⁵⁴

Hold the phone a minute: What makes this latter alternative "Marshall's apparent conclusion"? Is this anything other than the modern Myth of *Marbury* read back into the case from a distance of a century and a half? Bickel was right, that the oath would seem to obligate each of these officers, in the performance of his own function, to support — and thus independently interpret, according to *Marbury* — the Constitution. But Bickel was wrong in thinking that this furnishes any sort of argument against Marshall's conclusion, for the simple reason that Bickel was wrong about what Marshall's conclusion *was*.

The Oath Clause is an important argument in *Marbury*. It is Marshall's icing on the cake of his proof of judicial review, a moral clincher that is Marshall's distinctive addition to the well-accepted argument for judicial review. And it is one, as we shall see in a moment, that has important implications in its own right, for it is the only purely textual (as opposed to structural or inferential) argument in *Marbury* that supports independent interpretive power by agencies of *state* government.

The final substantive paragraph of *Marbury* ends the opinion with what is, comparatively, a whimper. "It is also not entirely unworthy of observation," Marshall writes, half-heartedly, that the Supremacy Clause of Article VI lists the Constitution first, in its listing of what constitutes the "supreme law of the Land" and gives a similar status to statutes "made in *pursuance* of the constitution." This is only weak supportive evidence of a power of judicial review, because the Supremacy Clause proceeds to say that the judges "in every state" shall be bound by that supreme law. Still, Marshall notes, the Supremacy Clause "confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument."⁵⁵

54. BICKEL, *supra* note 40, at 8 (emphasis added).

55. *Marbury*, 5 U.S. (1 Cranch) at 180.

Once again, the concluding paragraph is hard to square with the judicial supremacist Myth of *Marbury*. If “courts, as well as other departments” are “bound by that instrument,” it would seem to follow that the other departments are bound to hold the courts, as well as each other, to “that instrument” and to serve as independent interpretive checks against deviations from the Constitution’s commands.

III. *MARBURY’S* IMPLICATIONS

If *Marbury’s* logic is right, then nearly all of our contemporary constitutional practice is wrong. The myth of judicial supremacy that stands at the center of constitutional law today — the notion that the Supreme Court’s decisions are final and binding on all other actors in our constitutional system, no matter what, so that all that really matters in constitutional law is the Supreme Court’s decisions and precedents — is utterly groundless as a matter of first principles of the Constitution. The myth finds no support in the text, structure, or history of the Constitution.⁵⁶ Instead, it rests on a complete misreading of the case that is supposed to be the source and justification for the myth: *Marbury*.

What if we were to take *Marbury’s* logic seriously on its own terms, and apply faithfully its core propositions: constitutional supremacy, interpretive independence, and the personal responsibility conferred by the oath to support the Constitution? In this Section, I will sketch, in broad strokes, four seemingly radical but entirely logical implications of *Marbury*, and a fifth implication that is not at all radical but also presents an indictment of present constitutional practice. My first four propositions are:

- (1) the existence of a power of “*executive review*” parallel to the power of judicial review;
- (2) the existence of a coequal power of *congressional* constitutional interpretation;
- (3) the unconstitutionality of the doctrine of *stare decisis* in constitutional law; and
- (4) the existence of a legitimate power of *state* government officials to engage in independent federal constitutional interpretation, in matters within their province.

My fifth proposition, somewhat less controversial than the others, is that *Marbury’s* conception of written constitutionalism implies a particular methodology of constitutional interpretation: originalist textualism — that is, the binding authority of the written constitutional

56. I have developed this specific proposition and supporting evidence at length in other writing, and will not repeat those points here. See Paulsen, *The Most Dangerous Branch*, *supra* note 11, at 228-62, 292-321; Paulsen, *Nixon Now*, *supra* note 12, at 1349-58.

text, considered as a whole and taken in context, as its words and phrases would have been understood by reasonably well-informed speakers or readers of the English language at the time.

A. “Executive Review”

It is, emphatically, the province and duty of the executive department to say what the law is. Those who apply the law to particular instances — and execution of the law is a quintessential example of applying the law to particular cases — must of necessity expound and interpret the law in the course of performing such duties.⁵⁷ The President applies the law. The Constitution is a rule for the governance of the President (and his subordinates⁵⁸), as well as for the courts and for Congress. Indeed, as noted, that instrument commands the President to “take Care that the laws be faithfully executed.”⁵⁹ The laws of the nation include its Constitution, which is listed first in Article VI’s description of the “supreme law of the Land.” As *Marbury* correctly holds, the Constitution is the “paramount law of the nation,” and is thus of superior obligation to other sources of law, like statutes and even judgments of the courts. The President is specifically assigned the sworn duty to “preserve, protect and defend the Constitution of the United States.” It follows that, in carrying out his executive duties as President, the President must give effect to the Constitution in preference to a statute, or judicial decree, in cases where they conflict. Again to borrow *Marbury*’s words, “[t]hat is of the very essence of [presidential] duty.”⁶⁰ If a statute, or a judicial ruling, be in opposition to the Constitution, such that the President must either take action conformably with the Constitution or conformably with the act of Congress or decision of the judiciary, he must choose — and he must choose the Constitution.

If, therefore, the President is to regard the Constitution, and to regard it as superior to any ordinary act of a subordinate institution created under it, must he close his eyes on the Constitution, and see only

57. *Cf. Marbury*, 5 U.S. (1 Cranch) at 177 (using parallel language with respect to the judicial department).

58. The structure of Article II, which vests the executive power solely in “a President,” binds all other executive branch officers to the President’s constitutional interpretation when exercising executive power on the President’s behalf. See Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385, 387-88 (1994) (stating that “[t]he situation of subordinate executive officials raises a special problem” in that “[t]he President is the executive branch” and subordinates have no constitutional right or authority to substitute their views for his, but nonetheless have a moral obligation not to act in violation of their sworn oaths to support the Constitution — a moral obligation that might require resignation in some circumstances).

59. U.S. CONST. art. II, § 3, cl. 4.

60. *Marbury*, 5 U.S. (1 Cranch) at 178. (“That is of the very essence of judicial duty.”).

August 2003]

Irrepressible Myth

621

the act of Congress, or the decision of the courts? Why does he swear an oath to preserve, protect, and defend the Constitution if it is closed to him? The oath certainly applies in a special manner to the President's conduct in his official character. How immoral to impose it on him, if he must be used as the instrument, and the knowing instrument, for violating what he has sworn to preserve, protect, and defend! To require the President to swear such an oath, yet require him, when persuaded that another branch has acted inconsistently with the Constitution, nonetheless to enforce its statute or its judicial judgment, makes a solemn mockery of the oath.

The argument for "executive review" — the power and duty of the President to exercise independent legal judgment and review of the validity of the actions of *both* other coordinate branches — is thus almost exactly parallel to the argument for judicial review set forth in *Marbury*. The President is bound by the Constitution. He is not bound by acts of other branches, where those acts are contrary to the Constitution, and he is not bound by those branches' *views* concerning the constitutional propriety of their own acts, if indeed those views are wrong by the lights of the Constitution itself. Rather, the President possesses an independent power of constitutional review of the actions of the other branches in any matter that falls within the sphere of his governing powers as President under Article II of the Constitution. This means that, just as the Supreme Court may, indeed must, refuse to apply an unconstitutional statute of Congress, so too the President may, indeed must, refuse to carry into execution an unconstitutional statute of Congress. That is precisely the same situation as *Marbury*: constitutional legal review of an act of Congress. But executive review, by the same logic, also means that the President may, indeed must, refuse to execute or carry out a decision *of the judiciary* that exceeds the limits the Constitution has imposed on that branch. This is constitutional legal review of the decisions of courts. Such a view stands in opposition to the operative premises of our constitutional system today. Almost no constitutional scholar today embraces such a view, but it follows inexorably from the logic of *Marbury*.⁶¹ Certain provisions of

61. I have set forth this argument, derived in part from *Marbury* and in part from other originalist sources, at length (with important qualifications and refinements) in earlier writing. See Paulsen, *The Most Dangerous Branch*, *supra* note 11. A few have followed the logic of this argument ninety percent of the way or better, see, e.g., Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421 (1999); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996), but I believe that no other scholar follows the logic of *Marbury* in this regard all the way to its logical conclusion. See Paulsen, *Nixon Now*, *supra* note 12, at 1355-57, n.66 (responding to these ninety-percenters); see also Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993) (arguing that there ultimately is no middle ground between the competing premises of judicial supremacy and the coordinacy of the several branches of the federal government).

the Constitution might be read as imposing specific restrictions on the President's power to act on his independent interpretation of the Constitution;⁶² the power might be restrained by principles of interpretive restraint and method;⁶³ and the power is of course subject to the check of the *other* branches' exercise of *their* independent interpretive powers. But in principle, the President's power of constitutional interpretation is closely parallel to the courts'. Thus, the Supreme Court's interpretations of the Constitution, federal statutes, and treaties no more bind the President than the President's or Congress's interpretations bind the Court. All of this, I submit, follows from *Marbury*, if one reads *Marbury* for what it says rather than for what it has been misappropriated to mean.

B. "Congressional Review"

If the presidency's awesome and wide-ranging constitutional powers and strategic position, combined with independent interpretive authority, make it "The Most Dangerous Branch,"⁶⁴ it is not an unchecked branch. Not only the courts but also Congress have a power and province of constitutional interpretation. Congress interprets the Constitution, implicitly or explicitly, all the time, in the course of performing its legislative duties. Indeed, it is no exaggeration to say that Congress interprets the Constitution every time it enacts a law, implicitly asserting that its enactment is within the scope of its constitutional powers. Congress may employ its legislative powers (and additional powers not strictly "legislative" in character) to check the errant or willful interpretations of the President or of the courts, and to advance its own views of the proper interpretation of constitutional provisions.

Marbury, of course, is all about independent judicial review of acts of Congress. But the premises and logic of *Marbury* — constitutional supremacy, interpretive coordinacy, and the responsibility of all who swear to support the Constitution to be guided by the document itself and not by the misinterpretations of the other branches — fully support a province and duty of Congress independently to interpret the Constitution. The Constitution governs Congress, along with the other

62. Paulsen, *The Most Dangerous Branch*, *supra* note 11, at 288 ("There are, of course, certain provisions of the Constitution the best reading of which specifically restricts the power of the executive branch to enforce its understanding of the law against individuals without the assent of some judicial actor."); *id.* at 288-92 (discussing the binding interpretive power of grand and petit juries in criminal cases, and the limited "gatekeeper" role of the judiciary in preserving this "trump-everybody" interpretive province of the jury).

63. *Id.* at 331-43 (discussing principles of "deference," "accommodation" and "executive restraint").

64. This is the title of my earlier article on executive branch constitutional interpretive power. Paulsen, *The Most Dangerous Branch*, *supra* note 11.

branches, and the Constitution's requirements are paramount, taking precedence over both presidential actions and judicial decrees that exceed the limits of those branches' constitutional powers. Must Congress nonetheless acquiesce in the actions or views of the Article II or Article III branches, where such actions depart from the language of the document? If presidential or judicial action repugnant to the constitution is void, does it, notwithstanding its invalidity, bind Congress, and oblige it to give effect to this action (assuming Congress possessed an effectual power with which to resist, or defeat, such unconstitutional executive or judicial action)? That would be, in *Marbury's* words, to overthrow in fact what was established in theory. And it would also require senators and representatives to violate their oaths: Article VI mandates that all members of Congress swear an oath to support the Constitution. Such oath, by *Marbury's* lights, would be a solemn mockery — and to swear it would be “a crime” — if Congress were forbidden to read the Constitution itself and inquire directly into the constitutional validity of acts of the other branches, but instead relegated to a role of docile servility to the constitutional determinations of one or both of the other branches.

Marbury's logic thus yields the same conclusion for Congress as it does for the President: *Congress is not bound by the constitutional views of either the President or the Supreme Court in the exercise of its constitutional powers, and may press its views with all the constitutional powers at its disposal.*

And Congress has quite a number of such powers, some with potentially sweeping consequence. Congress (the Senate alone, actually) possesses a substantial role in checking appointments of both executive and judicial officers, and it properly may exercise its power in this area based on its vision of how the Constitution should be interpreted and applied by the executive branch and by the courts.⁶⁵ Congress possesses substantial control over the jurisdiction and remedial authority of the federal courts, including the Supreme Court, and may employ that power to rein in an imperial judiciary.⁶⁶ Congress possesses broad

65. U.S. CONST. art. II, § 2, cl. 2 (Appointments Clause). *See generally* Michael Stokes Paulsen, *Straightening Out The Confirmation Mess*, 105 YALE L.J. 549, 562-78 (1995) (making the argument for this proposition in detail).

66. U.S. CONST. art. I, § 8, cl. 9 (power to “constitute tribunals inferior to the Supreme Court”); U.S. CONST. art. I, § 8, cl. 18 (power to make laws “necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”); U.S. CONST. art. III, § 1 (reference to “such inferior Courts as the Congress may from time to time ordain and establish”); U.S. CONST. art. III, § 2, cl. 2 (allocation of jurisdiction among federal courts subject to “such Exceptions, and under such Regulations as the Congress shall make.”). On the power of Congress over matters of judicial practice, procedure, and remedies, see *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 21-22 (1825) (“That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by [the Necessary and Proper Clause], seems to be one of those plain

discretion to enact laws “necessary and proper” for carrying into execution the powers of the judicial department. This discretion includes the power to prescribe rules of decision, procedure, and evidence that can substantially constrain judicial decisionmaking and, quite possibly, require the courts to hew to Congress’s vision of the Constitution’s text, structure, and intent.⁶⁷ As the ultimate trump card, Congress also possesses the power to impeach (the House of Representatives) and remove (the Senate) executive or judicial officers for “high crimes and misdemeanors,” a term that does not have a fixed, determinate meaning and, I submit, legitimately can extend to violations by an executive or judicial officer of his or her constitutional oath and constitutional responsibilities, as determined by the ultimate independent judgment of the House and the Senate.⁶⁸ Thus, Congress may impeach and remove a President whom Congress sincerely believes has acted in deliberate violation of the Constitution or of his constitutional duties, as interpreted (presumably in good faith) by Congress. Likewise, Congress may impeach and remove federal judges, including justices of the Supreme Court, who in the ultimate judgment of Congress, act in deliberate violation or disregard of the Constitution or otherwise willfully ignore, manipulate, or disregard controlling law.

That last proposition, of course, is utter blasphemy in the constitutional world dominated by the Myth of *Marbury*. In a regime of judicial interpretive supremacy, impeachment of justices on the ground that their decisions deliberately and flagrantly violate the Constitution (and thus violate their oaths) makes no sense. The justices’ decisions *are* the Constitution. Impeachment on such a ground reflects a basic confusion on the part of Congress.⁶⁹

But if the correct understanding of *Marbury*, and of the Constitution, is that no branch has interpretive supremacy; that each branch has independent interpretive power within its own sphere; and that the standard governing each, and to which each is required to ad-

propositions which reasoning cannot render plainer. The terms of the clause neither require nor admit of elucidation.”).

67. See generally *Wayman*, 23 U.S. at 21-22. For a defense of congressional power to prescribe rules of judicial decision, see Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1567-99 (2000) [hereinafter Paulsen, *Abrogating Stare Decisis by Statute*] (collecting cases and examples); Michael Stokes Paulsen, *Lawson’s Awesome (Also Wrong, Some)*, 18 CONST. COMM. 231 (2001) (responding to objections to this view).

68. See generally Michael Stokes Paulsen, *Impeachment*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1340 (L.W. Levy et al. eds., 2000).

69. A judicial supremacist Supreme Court (that is to say, the Supreme Court of the past fifty years or so) would quite possibly be prepared to intervene to hold such an impeachment proceeding unconstitutional, notwithstanding its prior holding that impeachment issues are nonjusticiable “political questions,” see *Nixon v. United States*, 506 U.S. 224 (1993), on the ground that it interferes with independent judicial power and the Court’s (asserted) final authority “to say what the law is.”

August 2003]

Irrepressible Myth

625

here, is the Constitution itself, then impeachment of judges on the ground of constitutional infidelity is not confused at all: it is the ultimate, and perhaps the only truly effective, means by which Congress might, with the cooperation of the executive, resist and check a series of attempted usurpations of power by the courts.⁷⁰ There may be important prudential reasons for restraint in the exercise of such a heavy-handed power; some might seriously debate whether impeachment on such grounds properly falls within the scope of the power to impeach for “high crimes and misdemeanors”; but there is no reason in principle why Congress is barred from independent consideration of these prudential and constitutional questions by reason of a claim that the judiciary’s decisions are immune from constitutional scrutiny by the other branches.⁷¹

In addition to these strong, but blunt, front-end and back-end checks on interpretive abuse by the other branches, Congress’s prov-

70. The propriety of impeachment of judicial officers for serious, willful disregard of the Constitution or other controlling law is strongly hinted at in two of Alexander Hamilton’s papers of *The Federalist* describing the judiciary. *The Federalist* No. 81 contains the most extensive discussion, ending a passage on the lack of danger from judicial usurpations with the punchline that the impeachment power would serve as a check against such a possibility:

It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority which has been upon many occasions reiterated is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations of the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument for constituting the Senate a court for the trial of impeachments.

THE FEDERALIST NO. 81, at 453 (Alexander Hamilton) (Isaac Kramnick ed., 1987); *see also id.*, NO. 79, at 444 (“The precautions for [the judges’] responsibility are comprised in the article respecting impeachments. They are liable to be impeached for misconduct by the House of Representatives and tried by the Senate; and, if convicted, may be dismissed from office and disqualified from holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character . . .”).

71. I hope to develop this theory in future work. For now, I will only respond to one obvious objection: that impeachment for faithless constitutional decisions violates the idea of judicial independence. “Judicial independence,” however, is not a freestanding constitutional command; it is, rather, a *consequence* of a tenure of “good behavior” and salary guarantees. “Good behavior” is properly understood as a description of tenure in office, not itself an impeachment standard, but that merely returns one to the question of whether deliberate disregard of the Constitution, in violation of one’s oath, could be considered a “high crime or misdemeanor” (the standard that Article II imposes on all “Officers of the United States,” a term that includes judges, *see* U.S. CONST. art. II, § 4) and the further question whether Congress has independent constitutional power to construe and apply this provision, or must accede to judicial interpretations of it.

inces of constitutional interpretation also include the power to propose constitutional amendments; the coequal power to interpret extremely important constitutional provisions, like the Thirteenth, Fourteenth, and Fifteenth Amendments, that Congress explicitly has been given the power to “enforce” through legislation⁷²; and, indeed, the legislative power generally, including the vitally important appropriations power. As noted, every legislative enactment by Congress is, in a sense, an act of constitutional interpretation — an implicit assertion by Congress that it has constitutional power to do what it is doing. And, whenever such an assertion runs up against the contrary views of the President or the courts, Congress legitimately may press its independent constitutional views with all the legislative powers at its disposal. It may not *bind* the other branches with its views, of course: that is the absolutely foundational principle of *Marbury*. But it follows by the same reasoning that the other branches may not bind Congress either. Congress has as much right to interpret the Constitution as does the Supreme Court, and arguably possesses greater powers with which to press its views.

C. *The Unconstitutionality of Stare Decisis*

If *Marbury* is right, the judicial doctrine of stare decisis — the practice of generally adhering to precedent “whether or not mistaken” — is wrong.⁷³ Stare decisis is, of course, not required by the Constitution, as even the Supreme Court concedes.⁷⁴ But even more fundamentally, when used in this strong sense of adhering to precedents even if wrong, stare decisis is *unconstitutional*. (In any other sense, stare deci-

72. The Supreme Court has recently said that Congress does *not* have coequal power to interpret and apply the Thirteenth, Fourteenth, and Fifteenth Amendments, but is limited to enforcing judicial understandings of those amendments. See *City of Boerne v. Flores*, 521 U.S. 507 (1997). But *that* judicial view of the scope of Congress’s power is, by the logic of the argument from *Marbury* sketched in the text, neither sound as a matter of principle nor binding on Congress when Congress is acting within its sphere. For persuasive arguments that *City of Boerne* is wrong in its specific interpretation of the scope of Congress’s legislative power to enforce the provisions of the post-Civil War Amendments, see Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997); Steven A. Engel, Note, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115 (1999).

73. The “whether or not mistaken” formulation comes from *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992), the Supreme Court’s most ambitious exposition of the doctrine of stare decisis. I have explained elsewhere why this is the core of the doctrine. Paulsen, *Abrogating Stare Decisis by Statute*, *supra* note 67, at 1538 n.8. In short, the idea of adhering to precedent, as an independent duty, has bite only if a court would decide the case differently absent such a supposed duty. *Id.* at 1538 n.8.

74. As to the nonconstitutional status of the doctrine, see Paulsen, *Abrogating Stare Decisis by Statute*, *supra* note 67, at 1537 n.1 (collecting cases acknowledging that the doctrine is one of judicial policy and not constitutional requirement); *id.* at 1543-51 (discussing and analyzing same).

August 2003]

Irrepressible Myth

627

sis is simply irrelevant, or deceptive: a court that invokes the doctrine to justify a decision it was prepared to reach on other grounds is adding a makeweight, or using the doctrine as a cover for its judgment on the merits.)

Consider again what *Marbury* says: The Constitution is supreme, paramount law, superior in obligation to other law. The judges are bound by the Constitution; the instrument is a rule for the government of courts. Imagine if you will — it isn't hard to do — a judicial decision that is not consistent with the Constitution; that ignores its provisions, or construes them wrongly; or where the Court has plainly exceeded the limits marked out by the Constitution's allocation of powers. *Marbury* says, with respect to legislative actions of such description, that "[t]he constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it."⁷⁵ The same holds true of judicial actions that depart from the Constitution: The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is alterable when the judiciary shall please to alter it. A doctrine of stare decisis that holds that a faithless judicial interpretation of the Constitution at time T1 is binding at time T2 is a doctrine of judicial alteration of the paramount law. If the Constitution is not alterable whenever the judiciary shall please to alter it, then "a [judicial precedent] contrary to the constitution is not law;" and if the alternative is true, that the Constitution is alterable at the judiciary's option, "then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."⁷⁶

The idea of precedent is almost sacrosanct to lawyers, conditioned by the common law and the case method, so much so that few have examined carefully its premises and whether those premises are compatible with a system that purports to accord primacy to a written, enacted text. But on what principle may one generation of judges purport to transform its power to decide cases into a prospective power to bind future judges in future cases? On what principle may a judge in a later case abandon his or her sworn duty to uphold the Constitution by deliberately following a precedent that the judge believes is inconsistent with that Constitution? Under the reasoning of *Marbury*, the Constitution must always be given preference over the faithless acts of mere government agents that depart from it. The Constitution is paramount law, and must take precedence (so to speak) over precedents that depart from it.⁷⁷

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

76. *Id.*

77. The argument in this paragraph owes much to a short article by Professor Gary Lawson several years ago. Gary Lawson, *The Constitutional Case Against Precedent*, 17

It follows, I submit, that no court should ever deliberately adhere to what it is fully persuaded are the erroneous constitutional decisions of the past. To do so is to act in deliberate violation of the Constitution. The judicial doctrine of *stare decisis* — the idea that courts should (as they sometimes say they do, and as they sometimes in fact do) adhere to the principles of prior cases even when persuaded that those principles are wrong as a matter of the correct interpretation of the Constitution or other controlling federal law — is fundamentally inconsistent with the Constitution and with the logic of *Marbury* itself. The doctrine should be repudiated entirely in the area of constitutional law.⁷⁸

And that goes for lower courts, too. Why should lower court judges be bound by higher court precedent, including Supreme Court precedent, where they are fully persuaded that the precedent is not consistent with the Constitution itself? *Marbury* says the Constitution is supreme; that departures from it cannot be regarded as binding; that the Constitution supplies a rule for the government of courts; and that the oath requires that its takers be guided by their best understanding of the Constitution and not pliantly accede to deviations perpetrated by others. All of these points apply to lower court judges — state and federal — who are called upon to decide cases arising under the Constitution and swear Article VI's mandated oath to support it. Unless some other constitutional provision trumps or ousts *Marbury's* reasoning as applied in this context — the words “supreme” and “inferior” in Article III are plausible candidates, but do not necessarily imply anything more than a hierarchy in which a higher court may review and reverse the judgment of a lower court, and do not transform such lower court judges into mere law clerks or potted plants⁷⁹ —

HARV. J.L. & PUB. POL'Y 23, 27-28 (1994) (“If the Constitution says *X* and a prior judicial decision says *Y*, a court has not merely the power, but the obligation, to prefer the Constitution.”); see also Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 408 (1988) (arguing that “judges are oath-bound to rule in accordance with the Constitution, not with prior opinions interpreting the Constitution”); Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 680 (1995) [hereinafter Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation*] (“[S]tare decisis is not just another bad idea. It is, I think, unconstitutional.”).

78. Of course, I invoke *Marbury* as *persuasive* authority only; by its own reasoning, it would not be controlling if it were wrong on the point in question. And it *is* wrong on many other points. See Paulsen, *Marbury's Wrongness*, *supra* note 17. But for those who worship at the altar of precedent, it is at the very least rather ironic that *Marbury v. Madison*, widely regarded as the foundational case of all constitutional law — a worthy precedent if ever there were one — logically dictates that precedent can never be regarded as controlling where it departs from a proper understanding of the Constitution.

79. See Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIGION 33, 77-88 (1989) [hereinafter Paulsen, *Accusing Justice*] (arguing that the word “supreme” only requires that the Supreme Court be a court of final jurisdiction in the sense that no appeal lies to another court; that the word

August 2003]

Irrepressible Myth

629

Marbury's logic applies for lower courts as well as others. Thus, a lower court may, and arguably must, "underrule" (to coin a term)⁸⁰ Supreme Court precedents that depart from a sound reading of the written Constitution. The Supreme Court usually will have the authority and jurisdiction to review and reverse such lower court underrulings; such jurisdiction is consistent with Article III and the constitutional structure generally.⁸¹ But that does not mean that the lower court judges are personally required to abet the constitutional violation. They can, and should, make the Supreme Court do its own dirty work. They can, and must, exercise *their own* (reverse-able) constitutional interpretive power independently, and correctly.

D. *State Interposition and Nullification*

The terms "interposition" and "nullification" are practically constitutional profanities these days. The terms are associated with secessionists of the mid-nineteenth century and segregationists of the mid-twentieth, both of whom employed somewhat warped notions of state interpretive authority in the service of the most unjust of causes. But the correctness of a constitutional theory cannot be judged by its misappropriation and misapplication by constitutional hijackers, including South Carolina's John Calhoun, the name most prominently associated with the theory.⁸²

The doctrines of interposition and nullification have reasonably respectable roots. The idea of independent state authority to interpret the Constitution — and to resist asserted violations of the Constitution by the instrumentalities of the national government — dates back at least a half-decade before *Marbury*, to the Virginia and Kentucky Resolutions of 1798 and 1799, and James Madison's "Report of 1800" for the Commonwealth of Virginia.⁸³ Indeed, they can claim support

"inferior" does not mean *subordinate* in the sense of being an agent of a principal; and that Article III provides for the structural equivalence of all federal judges). The phrase "potted plants" comes from Sanford Levinson, *On Positivism & Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843 (1993) (making a similar suggestion).

80. Paulsen, *Accusing Justice*, *supra* note 79, at 82 (defending power of lower court judges to "underrule" *Roe v. Wade*, if fully persuaded of its incorrectness as a matter of constitutional interpretation).

81. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

82. For an excellent historical treatment of nullification, see WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 1816-1836* (1965). For a lucid untangling of the assorted (and sordid) constitutional theories propounded at various times on this subject, see DANIEL FARBER, *LINCOLN'S CONSTITUTION* 26-91 (2003).

83. The Virginia and Kentucky resolutions, the Answers of several other states' legislatures, and Madison's Report are reprinted in 4 ELLIOTT'S DEBATES, at 528-80 (2d ed. 1891).

earlier yet, in the political theory of federalism and state checks on national power set forth in *The Federalist*.⁸⁴

Interestingly, the idea of state government authority to interpret the federal Constitution finds much to commend it in the reasoning of *Marbury*: the Constitution is supreme, not the actions of subordinate agencies under it; departures from the Constitution thus cannot be regarded as obligatory and binding lest we overthrow in fact what is established in theory; and those who swear an oath to support the Constitution must interpret it faithfully and independently and could not have been intended to have been forced to violate their consciences by accepting the unsound constitutional judgments of others. Again, all these points apply to state government officials who are called on to consider federal constitutional issues within the sphere of their state government functions, and who likewise swear an oath, pursuant to Article VI, to support the Constitution. True, officers of state governments are not coordinate departments of the national government, as Congress, the President, and the judiciary are. But everything else in *Marbury* applies, and *Marbury* makes as much of

84. For strong indications of support for this position in *The Federalist*, see THE FEDERALIST NO. 28, at 206-07 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (“If the representatives of the people betray their constituents, there is then no resource left but in the exertion of that original right of self-defense which is paramount to all positive forms of government, and which against the usurpations of the national rulers may be exerted with infinitely better prospects of success than against those of the rulers of an individual state. . . . Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves in to either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress. . . . It may safely be received as an axiom in our political system that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. . . . [P]ossessing all the organs of civil power and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community.”); *id.* NO. 33, at 225 (“But it will not follow from this doctrine [*i.e.*, the Supremacy Clause of Article VI] that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such.”); *id.* NO. 44, at 290 (noting that the people, by the “election of more faithful representatives,” may “annul the acts of the usurpers. The truth is that this ultimate redress may be more confided in against the unconstitutional acts of the federal than of the State legislatures, for this plain reason that as every such act of the former will be an invasion of the rights of the latter”); *id.* NO. 51, at 321 (“In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”); *id.* NO. 84, at 478 (“The executive and legislative bodies of each State will be so many sentinels over the persons employed in every department of the national administration . . .”).

August 2003]

Irrepressible Myth

631

the idea of constitutional supremacy, and of the obligation of the oath, as it does the coordinacy of the branches of the federal government.

It follows, I submit, that state government officials, who likewise swear an oath to support the U.S. Constitution as “supreme law of the Land,” are not bound to submit docilely to unconstitutional actions of the agencies of the national government. By the logic of *Marbury*, they cannot be bound by the erroneous constitutional views of organs of the national government, but are empowered, even required, to interpret the Constitution directly. But note that, just as *Marbury*’s proof of independent judicial *authority* to interpret the Constitution does not properly imply judicial interpretive *supremacy*, neither does the existence of *state interpretive competence* imply *state interpretive omnipotence*. This, or some modified version of it, was Calhoun’s mistake. States are not bound by federal interpretations, but the federal government is not bound by states’ interpretations either.⁸⁵

The right answer is that every government actor — state and federal — is sworn to uphold the Constitution, and that none is the master of the others in terms of what adherence to that oath requires. Each branch of the federal government possesses coequal interpretive authority with the others and may seek to make its interpretation of the Constitution “stick,” so to speak, with the constitutional powers at its disposal.⁸⁶ So too state government actors possess, by virtue of their

85. The same holds for state secession. President Abraham Lincoln’s argument against secession is absolutely sound: the Constitution confers no unilateral, plenary right of a state to secede. No state has a right to secede that the Nation as a whole must honor — a state’s interpretation does not, and cannot, bind the national government. See Lincoln, *First Inaugural Address*, reprinted in 2 ABRAHAM LINCOLN, SPEECHES & WRITINGS, 1859-1865: SPEECHES, LETTERS, MISCELLANEOUS WRITINGS, PRESIDENTIAL MESSAGES & PROCLAMATIONS 218 (“[N]o State, upon its own mere motion, can lawfully get out of the Union . . .”). But Lincoln also thought it necessary to argue that no violation of the Constitution had occurred that might be thought to justify secession, *id.* at 219 (“Is it true, then, that any right, plainly written in the Constitution, has been denied? I think not.”), apparently conceding the plausibility of the argument that a state might legitimately secede as an extreme remedy for an extremely serious breach of the Constitution by the federal government. *Id.* at 219 (“If, by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution — certainly would, if such right were a vital one. But such is not our case.”).

The question of secession is distinguishable in important respects from the question of interposition, but both potentially share the idea that state governments may, and arguably must, interpret the U.S. Constitution, and may with propriety resist violations of the Constitution by the federal government with whatever powers are available to state governments to check such abuses. But the existence of such state interpretive power surely does not bind the organs of federal government, which may properly resist *state* misinterpretations or abuses of the Constitution with all the power at *their* disposal, in order to correct such state departures from the Constitution. See, e.g., *Grant v. Lee* (Appomattox Court House, Apr. 1865). I develop the interposition and secession points at greater length in a forthcoming essay. See Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, __ U. CHI. L. REV. __ (forthcoming 2004).

86. THE FEDERALIST NO. 49, at 313 (James Madison) (Isaac Kramnick ed., 1987) (“The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.”).

oaths to support the U.S. Constitution and the supremacy of the written Constitution over all instrumentalities of the federal government, the prerogative and duty faithfully and independently to interpret the Constitution of the United States and to resist, with the powers at their disposal, violations of that Constitution by the federal government. Just as no branch of the federal government has interpretive supremacy, no level of government — federal or state — has interpretive supremacy. The precise accommodation of conflicting views is a function of the interaction among branches of government and between levels of government.

Now, this should be a bit unsettling. This *is* Governor George Wallace standing in the schoolhouse door.⁸⁷ But it is also James Madison and Thomas Jefferson leading Virginia and Kentucky in resistance to the Sedition Act, and vindicating the Constitution in the election of 1800. The fact that a constitutional theory or power might be misused does not prove that it is wrong. Interposition, like the Force, is a double-edged saber; it can be used for good or for evil, depending on how and by whom it is being wielded. This is true of interpretive power generally, including quite obviously interpretive power as wielded by the Supreme Court.⁸⁸ The true question is whether the Constitution provides for a multiplicity of interpreters, each independent of the others and armed with only a portion of the constitutional power to make their interpretations stick, or instead provides for a single authoritative interpreter whose decisions are conclusive and binding on all other actors, even where they are wrong — contrary to the written Constitution that is our paramount law — and even where they are wicked.

Marbury's answer is that the latter proposition “would subvert the very foundation of all written constitutions”⁸⁹ and thus “reduce[] to nothing what we have deemed the greatest improvement on political institutions.”⁹⁰ *Marbury*'s logic endorses instead a multiplicity of voices in constitutional interpretation, each independent of the others. To the

87. See Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation*, *supra* note 78, at 688 (using the same example). In addition, there are important theoretical problems with treating a state's constitutional interpretations as possessing parity with interpretations advanced by organs of the national government, some of which may require important qualifications to any theory of state interpretive autonomy — refinements I hope to develop in future work. For an enlightening brief treatment, see FARBER, *supra* note 82, at 45-69. Cf. Paulsen, *The Most Dangerous Branch*, *supra* note 11 at 312-16.

88. See, e.g., *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Lochner v. New York*, 198 U.S. 45 (1905); *Korematsu v. United States*, 323 U.S. 214 (1944); *Roe v. Wade*, 410 U.S. 113 (1973). See generally Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003).

89. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

90. *Id.*

August 2003]

Irrepressible Myth

633

extent that the implications of this position depart greatly from present constitutional practice — and they do — present practice represents a betrayal of the principles of *Marbury v. Madison*.

* * * * *

Now, I know what you're thinking: If this is truly where *Marbury* leads, following it would be anarchy! Chaos! Madness!

Calm down. Lawyers are lovers of order and prone to see disaster in the slightest degree of disagreement, disequilibrium, and disorder. A multiplicity of voices is not the end of the world. It is simply a *decentralized* approach to constitutional interpretation. Decentralization is not chaos; it is simply the antithesis of *centralized* interpretive authority. It is an example of “checks and balances.” If there is one thing we know about the Framers, it is that they feared the concentration of power and sought to prevent it in the design of the Constitution. Would it not be somewhat ironic (and quite unlikely) for the Framers, so concerned with the division and dispersal of power generally, to have concentrated the power *to interpret all other powers* and to bind all other actors with those interpretations in a single institution or organ of government? *Marbury* certainly suggests no such thing; practically every sentence of the opinion points in precisely the opposite direction. The power of constitutional interpretation — the power, in *Marbury*'s sonorous words, “to say what the law is” — is not vested in a single, authoritative body, but, like any other power too important to place in a single set of hands, is a divided, shared power. Division and shared responsibility admits of the possibility of disagreement, competing interpretations, ongoing tension, struggle, compromise (or deadlock), and lack of a definitive resolution. In other words, it admits of — indeed, virtually assures — *exactly* what separation of powers is designed to produce as a general proposition. Over time, and across a broad range of issues, such an arrangement tends to produce a kind of general equilibrium — not perfect stability or repose, but general equilibrium. (Does a regime of judicial supremacy really do any better than that?) Rough stability in the law is achieved, under such a model, not by the edicts of a centralized authority, but by the pull and tug of competing interpreters and competing interpretations, none of whom is bound by the views of the others and each of whom, armed with separate powers and overlapping spheres of authority, may press the interpretation it thinks is truest to the Constitution. Often, this will produce a core of consensus. It will also often produce a periphery of uncertainty, especially as to issues on which there is no agreed correct resolution. But that is as it should be. Where an issue remains genuinely contested, and the several branches of government legitimately and in good faith continue to disagree, the issue *should* remain unsettled.

E. *Interpretive Methodology*

Ah, you say, but there's the rub: All of this assumes *legitimate* disagreement, *good faith* interpretive differences, *genuine* disputes over constitutional meaning. What if one branch, or body, advances a highly idiosyncratic interpretation, not remotely supportable by fair reasoning from the Constitution, and insists, for its own policy or self-interested purposes, on pressing such a position to the wall? Decentralization permits a whole array of opportunities for bizarre, potentially destructive interpretive methodologies by any of a number of actors.

Put to one side for a moment the obvious possibility that a *single* authoritative interpreter might do exactly the same thing, but without any other authority supplying an effective check on such interpretive abuse. Also put to one side that this possibility might well be thought by many a fair characterization of the actual practice of the modern Supreme Court under the Myth of *Marbury*. The rhetorical force of this concern lies in the perception that the notion of "interpretation" permits the Interpreter to bend the Constitution to his will; and that, consequently, the only way to constrain the results is to designate an authoritative interpreter who can slap down everybody else, and to choose the branch or body least likely to be willful in its own interpretations.

Marbury rejects this approach in two ways. First, as already discussed, it eschews the single-authoritative-interpreter approach entirely, resting instead on *constitutional* supremacy and the absurdity (and immorality) of binding one actor with the unconstitutional acts of another. The second point is more subtle, but it is implicit throughout Marshall's analysis: the whole idea that *the Constitution* is supreme and that one actor cannot be bound by the *unconstitutional* action of another presupposes that there is some objective meaning to the Constitution that stands on its own, apart from the interpretations or applications of that document by any particular actor. *The Constitution means what it means*. When Marshall uses the hypothetical of a treason conviction based on the testimony of one, rather than two, witnesses to the same overt act, he is supposing that the meaning of the provision in question is something that exists independently of the interpretation offered by some person or institution, so that any objective observer might be able to judge that the person or institution doing the interpreting just plain got it wrong. The words and phrases of the Constitution have discernible, objective meaning. They are not empty vessels waiting to have content poured into them by an Interpreter. Without such an understanding of constitutional meaning, *Marbury* simply makes no sense.

Marbury, I submit, assumes that the proper way — the *only* proper way — to read the Constitution is to give the words, phrases, and

August 2003]

Irrepressible Myth

635

structures of the text the ordinary, natural or (occasionally) specialized meaning they would have had, in context, to reasonably informed readers and speakers of the English language in America, at the time those words and phrases were employed.⁹¹ Marshall does not say this in so many words, but it is implicit in every step he takes and every move he makes. The idea that the powers of and limitations on government are *written* is vitally important, says Marshall, at innumerable points in *Marbury*.

The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten the constitution is *written*. . . . Certainly all those who have framed *written constitutions* contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature repugnant to the constitution, is void. This theory is essentially attached to a *written constitution*, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject. . . . [To maintain] that courts must close their eyes on the constitution . . . would subvert the very foundation of all *written constitutions* That it thus reduces to nothing what we have deemed *the greatest improvement on political institutions* — a *written constitution* — would itself be sufficient, in America, where *written constitutions* have been viewed with so much reverence, for rejecting the construction. . . . [C]ourts, as well as other departments, are bound by *that instrument*.⁹²

More than that, it is this very writtenness of the Constitution that, in *Marbury*, supplies both the basis for judicial review and the standard for judging whether another branch has departed from the Constitution. *The paramount authority of the written text is the core of the argument for the power of judicial review and the controlling standard for the practice of judicial review. Marbury*, quite simply, stands for textualism as the proper method of constitutional interpretation.⁹³

91. For a defense of this methodology as *the* proper approach to constitutional interpretation, see Vasav Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, xxx *GEO L.J.* xxx (forthcoming 2003) [hereinafter Paulsen, *The Interpretive Force*]; see also Vasav Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 *CAL. L. REV.* 291, 398-99 (2002) [hereinafter Kesavan & Paulsen, *Is West Virginia Unconstitutional?*].

92. *Marbury*, 5 U.S. (1 Cranch) at 176-78, 180 (emphasis added).

93. Two refinements: first, “textualism” — the authority of the written text — in *Marbury*’s argument for judicial review includes arguments from the logic of the constitutional structure created by the text. In other words, textualism embraces not only specific words and phrases, but the architecture of the text as well. *Marbury* is clearly all about the structure and architecture created by the written text, as well as specific provisions. Second, to say that *Marbury* embraces textualism as the appropriate interpretive method in constitutional law is not to say that Marshall’s analysis of the constitutional text is sound, in all respects, throughout the opinion — for example, with respect to his holding that Section 13 of the Judiciary Act violates Article III of the Constitution. See Paulsen, *Marbury’s Wrongness*, *supra* note 17. Textualism can be the correct method of interpreting the Constitution and

We tend to forget or ignore this, because we are imprisoned by the Myth of *Marbury*. The myth of judicial supremacy tends to generate the corollary myth of plenary power over interpretive method. Because what the Court says controls, there is no control over what the Court says. The Court's power "to say what the law is" becomes "the law is what the Court says it is."⁹⁴ Whatever the Court says, goes.

What *Marbury* says, however, is that whatever *the Constitution* says, goes. The courts don't get to say whatever they want. They are "bound by that instrument."⁹⁵ There remains, of course, the enduring question about *how* to interpret that instrument — how to give effect to the authority of the written text — but that is a question to be answered by a different article.⁹⁶ For present purposes, it is sufficient here to note that the actual opinion in *Marbury*, as distinct from the myth that has grown up around it, rejects modern notions of interpretive freedom or interpretive license. The text strictly constrains what may with propriety be done in the name of the Constitution. And if what is done in the name of the Constitution is not consistent with the text, fidelity to "that instrument" requires fidelity to the text, and not what has been wrongly done in its name.

Thus, what seems to scare sensible people about coordinate and decentralized constitutional interpretation is that the interpreters might think themselves properly possessed of *Marbury*-Myth-like interpretive license to do whatever they like — that they might think that their equal power to say what the law is means that whatever *they* say, or whatever they can get away with saying, goes. But is that not something of a straw man? If, after all, what is being objected to is the *theory* of decentralized constitutional interpretive power, flowing from the logic of *Marbury*'s argument for judicial review, should not one be required to challenge that theory on grounds consistent with

still admit of some sharp disagreements as to the proper result to be reached by employing that method in any particular case.

94. Charles Evans Hughes, Speech before the Chamber of Commerce, Elmira, NY (May 3, 1907), in ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES, GOVERNOR OF NEW YORK, 1906 — 1908 at 139 (1908) ("We are under a Constitution. . . . The Constitution is what the judges say it is.").

95. *Marbury*, 5 U.S. (1 Cranch) at 180.

96. Fortunately, Vasana Kesavan and I have written the article that answers that question (!). Kesavan & Paulsen, *The Interpretive Force*, *supra* note 91. The correct answer, we submit, is that the Constitution itself (in Article VI's specification of "[t]his Constitution" as the supreme law of the land, *see* U.S. CONST. art. VI (Supremacy Clause) (emphasis added), and the nature of written constitutionalism generally), requires a methodology of original, objective-public-meaning textualism. By that we mean the following: The Constitution should be interpreted according to the meaning the words and phrases employed would have had, considered in historical context and within the context of the document as a whole, to an ordinary, reasonably informed reader or speaker of the English language in the relevant political community at the time the text was adopted as law. *See also* Kesavan & Paulsen, *Is West Virginia Unconstitutional?*, *supra* note 91, at 398-99.

August 2003]

Irrepressible Myth

637

Marbury's other assumptions about *how* interpretive power is legitimately to be employed?

To be sure, a “presidential activist” in constitutional interpretation is a dangerous constitutional loose cannon. To be sure, a state government that feels free to interpret the Constitution in a manner cut loose from the constraints of the objective, original meaning of the text’s words and phrases is a dangerous centripetal force. To be sure, if Congress cares not about the document itself, but decides, Humpty-Dumpty-like, that words mean whatever Congress wants them to mean, we could see a great fall. As I have written elsewhere:

*The more that interpretive power is conjoined with practical governing power, the more important it is that interpretive power be constrained by the relatively clear boundaries of text, intention, and structure.*⁹⁷

If one is to shed the Myth of *Marbury*, one must shed it completely. If one is to embrace *Marbury* in all its implications, one must embrace those implications fully. And if one does so, that is a constitutional world in which multiple actors, exercising their independent interpretive power, strive in good faith to check one another and hold each other to the meaning of the words of the Constitution’s text, and to guard against departures from the nation’s paramount law by any of the branches or organs of federal or state government. What a wonderful, wonderful world that would be.

IV. CODA

Alas, that is not the constitutional world we inhabit today. Instead, we live in a constitutional world in which the Supreme Court is sultan and a perversion of *Marbury v. Madison* is our governing constitutional myth. The myth is, by now, an ingrained one. The Supreme Court lives by the myth. The political branches by and large have accepted it.⁹⁸ And it has been taught as Holy Writ to several generations of elementary school and law school students. Disentangling our political culture from the Myth of *Marbury* is not a mere day’s work.

On this, the occasion of *Marbury's* 200th anniversary, however, it is worth reflecting on the fact that The Myth is a betrayal of everything that *Marbury* stands for, and a betrayal of the written Constitution that *Marbury* identifies as the appropriate object of veneration.

97. Paulsen, *The Most Dangerous Branch*, *supra* note 11, at 342.

98. See Paulsen, *Nixon Now*, *supra* note 12, at 1358-59 (“The judiciary’s assertion of hegemony does not make it so, of course. . . . Unfortunately, however, acceptance of the judiciary’s assertion of hegemony by the *other* branches tends to validate such hegemony as a practical matter . . .”).