"AS IF GOD HAD SPOKEN"

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ABSTRACT: *One of the key issues that the Federalists and Antifederalists debated at our nation's founding was whether the United States should have a supreme federal court and, if so, how much power it should have. Anti-federalists like Brutus saw the proposed Supreme Court as an undemocratic and potentially uncheckable institution. While those in favor of a supreme federal judiciary won the day, the early Supreme Court stood on very tenuous ground. Even the great Chief Justice Marshall had to bend over backwards to avoid crossing President Jefferson. Today, on the other hand, the "swing" justice on the Supreme Court is sometimes referred to as the most powerful person in America. The Court is held in awe by the other two branches of government, and when it rules, it is as if the Constitution itself had spoken, or, as Nancy Pelosi puts it, "as if God had spoken."*[1]

How did this radical turnaround in the court's authority come about? More importantly, is this a constitutional change? This paper will argue that the recent acquiescence of the president and Congress to the will of the Supreme Court is an unprecedented and unconstitutional trend. It will begin by demonstrating how giving the power to interpret the Constitution solely to one branch creates an imbalanced government, continue by showing the undemocratic and irresponsible nature of judicial supremacy, and conclude with a historical argument showing how unprecedented judicial supremacy is.

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1 Jeff Jacoby, *Supreme Court Can't Be Absolute*, The Boston Globe, Jan 1, 2012.

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One of the first things a young student learns about the American government is its system of checks and balances. The Constitution was designed to set up three equal and separate governmental branches: the executive, the judiciary, and the legislature, none of them meant to dominate any of the others (although each has special areas of authority.) Alexander Hamilton explains why this is the case in Federalist Paper #71. "The same rule which teaches the propriety of a partition between the various branches of power, teaches us likewise that this partition ought to be so contrived as to render the one independent of the other. To what purpose separate the executive or the judiciary from the legislative, if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative?"[2] While there were a few Framers who supported a dominant legislature, those wanting a balanced, 3-part government were the majority, as reflected by the Constitution.

Throughout most of America's history, this system has worked quite well. There have been periods when one branch has had an inordinate amount of power, but the problem has been generally noticed and rectified over time. However, a new threat to the balance of the American government is rising, one that might not go away. Commonly known as "judicial supremacy," this view takes the power of judicial review and runs with it. While judicial review merely asserts the right of the Court to review specific laws passed by Congress in light of the Constitution, judicial supremacy claims that the Court, and the Court alone, is allowed to determine

2 THE FEDERALIST No. 71 (Alexander Hamilton)

the constitutionality of a law or executive order.

Unlike the departmentalist view of constitutional interpretation (which will be analyzed in more depth later on), where the executive can refuse to enforce a law because he deems it unconstitutional, judicial supremacy takes interpretation of the Constitution entirely out of the hands of the other two branches. In other words, judicial supremacy asserts that it is the Court's job to interpret the Constitution for the other two branches, and once the Court's decision is given, the issue is closed with no room for further debate.

One of the earliest and boldest statements of judicial supremacy came in *Cooper v. Aaron*.[3] In this decision, a unanimous Supreme Court ruled that the desegregation plan instituted by *Brown v. Board of Education* could not be suspended and must be immediately acted upon. More pertinent to this paper, however, is the Court's statement that all elected officials are obligated, not to follow the Constitution, but rather the Constitution as interpreted by the Supreme Court. Chief Justice Warren, in his ruling, referred to *Marbury v. Madison* as laying the foundations of this view. He quotes the opinion of then-Chief Justice Marshall from *Marbury v. Madison*[4], "it is emphatically the province and duty of the judicial department to say what the law is." Warren concludes his argument for judicial supremacy with this interesting statement, ". . . that principle (the quote from Marshall in *Marbury v. Madison*) has ever

3 Cooper v. Aaron (1958) *reprinted in* AMERICAN CONSTITUTIONALISM: VOLUME I, 440-442.

4 Marbury v. Madison (1803) *reprinted in* AMERICAN CONSTITUTIONALISM: VOLUME I, 106-112.

since been respected by this Court and Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land."

Unfortunately, there are some problems with this argument. First of all, it is an argument heavy on precedent and light on Constitutional analysis. Second, it is not altogether clear that precedent is quite so much on the side of Warren as he might wish. The historical precedent on this issue will be discussed in more depth later on, but Warren's argument warrants a quick look at *Marbury v. Madison*. In *Marbury v. Madison*, Chief Justice Marshall was trying to establish judicial review without stepping on the toes of President Jefferson. The Supreme Court at the time could only dream of being an equal with the president or Congress, let alone hold absolute constitutional authority over the other two branches. It would have struck anyone in Marshall's time as absurd to state that Marshall's opinion established judicial supremacy.

Warren's error in interpreting Marshall's meaning comes from two assumptions he makes about Marshall's quote. First, he assumes that Marshall means the Constitution when he says "the law". And secondly, even if one grants that Marshall meant the Constitution, Warren assumes that when Marshall said that it is the duty of the judiciary to say what the Constitution is, Marshall was also saying that it is not the duty of any of the other branches to interpret the Constitution. Both of these assumptions are highly problematic. In both the immediately preceding and following paragraphs, Marshall clearly distinguishes between the law, which

can be changed, and the Constitution, which is unchangeable except through amendment ("if both the law and the Constitution apply to a particular case . . ."). [5] It seems unlikely that Marshall would have reversed the meaning of "the law" in the intermediating paragraph. The second assumption is a basic case of Warren interpreting Marshall's statement in light of what he wanted Marshall to be saying.

In his work "The Unbearable Rightness of *Marbury v. Madison*: Its Real Lessons and Irrepressible Myths," [6] William H. Prior presents an entirely different interpretation of Marbury v. Madison, namely, that Marshall is merely asserting the Court's responsibility to judge individual cases in light of the Constitution. Prior argues that Marshall's point is not that the Court is supreme, but that the Constitution is supreme, and all branches, including the judiciary, are held accountable to it ("courts, as well as other departments, are bound by that instrument"). [7] Nowhere in Marshall's opinion do we see an assertion that it is the Court's job to tell the other branches what the Constitution means. Warren's argument reads into Marshall's opinion, manufactures precedent that is not there, and has very little constitutional foundation.

Furthermore, his argument leaves one wondering if the judicial system would not be worse off had his reasoning been right. The governmental structure Warren lays out in his opinion

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5 Marbury v. Madison (1803) *reprinted in* AMERICAN CONSTITUTIONALISM: VOLUME I, 106-112.

6 WILLIAM H. PRIOR, THE UNBEARABLE RIGHTNESS OF *MARBURY V. MADISON*: IT'S REAL LESSONS AND IRREPRESSIBLE MYTHS.

7 Marbury v. Madison (1803) *reprinted in* AMERICAN CONSTITUTIONALISM: VOLUME I, 106-112

does not appear to be very balanced. The Constitution is the basis for the entire American state, and if one branch can decide what it means, that branch can go a long way toward determining how the entire American state will operate. It does not matter which branch has supreme Constitutional authority–the government would still become imbalanced.

Thomas Jefferson, one of the most important Founding Fathers and author of the Declaration of Independence, predicted the danger of a judiciary which saw itself as the sole interpreter of the Constitution. In a letter to Spencer Roane he wrote,

> "If this opinion (that the Supreme Court is the final authority on the meaning of the Constitution) be sound, then indeed is our constitution a complete *felo de se* [suicide]. For intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation . . . The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."[8]

Despite the fact that at the time of the founding the "hypothesis" Jefferson was writing about seemed improbable and

8 Thomas Jefferson, *Thomas Jefferson on Departmentalism*, (September 6, 1819) *reprinted in* AMERICAN CONSTITUTIONALISM: VOLUME *1*, 113 (Howard Gilman, 2013).

unrealistic, Jefferson was right. The Supreme Court would not even establish judicial review as constitutional until *Marbury v. Madison*, and even then they could not exercise it for fear of being ignored. However, that is no longer the case today. One of the branches of the American government has decided it has the power to tell the rest of the government what the Constitution means, and the other branches have meekly acquiesced, leaving a profoundly unbalanced government.

However, the unbalanced character of judicial supremacy is not the only issue. One of the foundational principles of the American government is that it is a government "of the people, by the people, for the people."[9] While avoiding the dangers of a democracy, the American government was designed to incorporate democratic principles into a republican form of government, leaving most of the power to the people to decide who their leaders will be.

This paper has already asserted that setting up a "voice of God" – giving supreme Constitutional authority to any single branch of government – creates an unbalanced government. However, the fact that the judiciary has decided that it in particular is the special branch makes it even worse. Now, not only is the American government unbalanced, it violates the natural right of popular sovereignty. Jefferson's letter to Roane also addresses this concern, throwing in the line, "and to that one too, which is unelected by, and independent of the nation." Suddenly, the Constitution, which begins "We the People of the United States of America,"[10] has its

9 Abraham Lincoln, *The Gettysburg Address* (1863).

10 U.S. CONST. Pmbl.

meaning determined by the only branch that the people do *not* have direct oversight over.

Lincoln, too, addressed judicial supremacy and its violation of popular sovereignty. After Taney's decision in *Dred Scott v. Sandford*, Stephen Douglas said, "I am content to take that decision as it stands delivered by the highest judicial tribunal on earth . . . [a] decision that becomes the law of the land, binding on you, on me, and on every good citizen, whether we like it or not."[11] Lincoln, on the other hand, strongly disagreed. He contested Douglas' assertions of judicial supremacy in their famed debates, and reiterated his beliefs on the matter in his first inaugural.[12] "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers." Once again, one can see concern expressed by a historically important American politician over the tendency of judicial supremacy to subvert popular sovereignty long before the Court's supremacy reached the lengths it has today.[13]

There is a somewhat less obvious outcome to judicial supremacy than either an unbalanced or an undemocratic government, however. It creates a government of less accountability. Accountability was an important part of the Founders' plan for

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11 Stephen A. Douglas, *Third Debate with Stephen A. Douglas at Jonesboro, Illinois*, (1858) *in* THE COLLECTED WORKS OF ABRAHAM LINCOLN 102.

12 Abraham Lincoln, *Lincoln's First Inaugural*, (1861) *in* THE COLLECTED WORKS OF ABRAHAM LINCOLN 268.

13 As an interesting note on democracy and judicial supremacy, there is an old Latin saying "vox populi, vox dei", which means that the voice of the people is the voice of God. Not only would it have been odd for the Founders to set up a fundamentally unbalanced government by setting up a supreme branch of Constitutional authority, it would be even more odd for that "voice of God" to be the one branch that is not the voice of the people.

the American government. In the Congressional Debates on the president's appointment and removal powers, Madison and the other major founders argued that the president should be allowed to fire executive employees without the approval of Congress so that he and he alone could be held accountable for the actions of the executive branch.

> "This... makes the President responsible to the public for the conduct of the person he has nominated and appointed to aid him in the administration of his department. . . You here destroy a real responsibility without obtaining even the shadow; for no gentleman will pretend to say the responsibility of the Senate can be of such nature as to afford substantial security."[14]

However, a government where the judiciary tells the other branches what the Constitution means automatically lessens the constitutional responsibility of the other two branches. Now, Congress and the president do not have to worry whether their actions are constitutional. The Court will tell them whether their actions are constitutional or not after they have done them. It strikes one as highly likely that the eager acquiescence of the other two branches to the Supreme Court is because they do not want to have the responsibility of performing a Constitutional check before acting.

Still, one would imagine that Madison's checks and balances would prevent one branch from gaining control of the

14 James Madison, *House Debate on Removal of Executive Officers* (1789) *reprinted in* AMERICAN CONSTITUTIONALISM 170-171.

government, even if it was in the interest of the other two branches. Unfortunately, the advent of partisanship, in the form of a two-party system, damaged the system of checks and balances. If the Court attempted to gain more power (as it did in *Dred Scott* and *Brown v. Board*) and the president and Congress liked what the Court was accomplishing in the decision, they would be much less likely to challenge the Court's decision. Without partisanship and the lessened responsibility that accompanies it, it would have been much harder for judicial supremacy to gain the foothold it has today in American politics.

This leaves one wondering what the alternative is. If the government America of today is unbalanced, undemocratic, and irresponsible due to judicial supremacy, what is the remedy? The Anti-Federalists were excellent at pointing out the problems of the Constitution, but not so great at finding solutions.[15] The states-rights advocates were upset when the federal government started overruling states, but could not find a better solution than secession, which led to America's bloodiest war.

Happily, this is not the case with alternatives to judicial supremacy. The answer is departmentalism. Departmentalists argue that while judicial review is constitutional, judicial supremacy is not. The Supreme Court's view on the Constitution is no weightier than that of the other branches. The president must judge for himself whether a law is constitutional or not before he enforces it. The same goes for Congress; it is their job to evaluate the constitutionality

15 HERBERT STORING, WHAT THE ANTIFEDERALISTS WERE FOR INTRODUCTION (1981).

of a law before they pass it. Immediately, all the problems with judicial supremacy are solved. The government is balanced because all three branches have a right to interpret the Constitution for themselves. The process is not opposed to democratic principle because the elected officials of the people are now expressing their opinion on the constitutionality of actions. Finally, responsibility of the government is insured, because each branch must defend their own actions *before* they make them.

In addition, departmentalism is not some new and untried scheme. In fact, it was the model for Constitutional interpretation from America's founding to the 1960's. Many of America's best politicians and lawmakers have written eloquent defenses for departmentalism.

In his third debate with Stephen Douglas, Lincoln applied the principle of departmentalism to the *Dred Scott* decision.

> "We do not propose that when Dred Scott has been decided to be a slave by the court, we, as a mob, will decide him free . . . but we nevertheless do oppose that decision as a political rule . . . which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision."

Lincoln, while acknowledging the legitimacy of judicial review, is affirming the departmentalist assertion that while this particular case may be decided, the issue of slavery was not closed for all time. The meaning of the Constitution was certainly not permanently set by the Court's ruling in *Dred Scott*.

Jefferson, too, outlined the workings of departmentalism in a letter to Abigail Adams. Speaking about the validity of the sedition law,

> "Nothing in the Constitution has given them [the Supreme Court] a right to decide for the Executive, more than to the Executive to decide for them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment, because the power was placed in their hands by the Constitution. But the Executive, believing the law unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution."[16]

In this case, the president acted as an executor of the Constitution, and not of the Court. In both instances, departmentalism has helped balance the government, given the power of Constitutional interpretation back to the representatives of the people, and made the other branches responsible to evaluate the constitutionality of political actions.

However, there is one more aspect to this issue that this paper has yet to consider: the place of precedent. The placement of the idea of precedent at the end of this paper is in no way meant to downplay its importance. In the United Kingdom, their precedent *is* their Constitution. Stare decisis is an important factor in most Constitutional cases. Depending on the situation, it can make or break a constitutional argument. Furthermore, many judicial

16 Thomas Jefferson, *Thomas Jefferson on Departmentalism* (September 11, 1804) *reprinted in* AMERICAN CONSTITUTIONALISM: VOLUME 1, 113.

supremacists have made bold assertions as to the precedent they were following in having the Court interpret the Constitution for the other branches. As seen earlier, Chief Justice Warren in *Cooper v. Aaron* stated,

> ". . . that principle [judicial supremacy] has ever since been respected by this Court and Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land."

As it turns out, precedent is overwhelmingly in favor of Departmentalism. Warren's statement has left many wondering to what precedent he was referring. There is no evidence of judicial supremacy being anything other than a minority view until the mid-1900's after the New Deal. Larry Kramer, dean of Stanford's Law School, puts it this way in his book, *The People Themselves: Popular Constitutionalism and Judicial Review*, "This was all just bluster and puff . . . *Marbury* said no such thing and judicial supremacy was not cheerfully embraced in the years after *Marbury* was decided. The justices in *Cooper* were not reporting a fact so much as trying to manufacture one."[17]

This is true. This paper has already mentioned how the Court had to fight even to get into existence and later establish judicial review. In fact, as late as 1867, not only was the Court

17 LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 21 (2004).

not asserting judicial supremacy, it was admitting the right of the president to decide what was constitutional to execute. In *Mississippi v. Johnson,* Chief Justice Chase said that it is not the place of the Court to tell the president what he should and should not enforce, and rather that it is up to the president to determine what is constitutional. "The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department."[18] A pretty striking defense of departmentalism from the Supreme Court itself.

It is not until the Civil Rights cases of the mid-1960s that the Court began asserting judicial supremacy. For a variety of reasons, the president and Congress acquiesced. One reason previously proposed in this paper is the lessened responsibility. Another, for the most part, is that the president and Congress agreed with the actions of the Court in the Civil Rights cases. This reason, has been the downfall of the Founders' brilliant checks and balances scheme: if politicians agree with an end, they will be tempted to support it no matter what dangerous precedent it sets for the American government. Whatever the reasons, President Eisenhower gave his approval to the Court's decisions in the 1960s and Congress made nary a peep.[19] From there on out, besides a few dissents from Newt Gingrich and other conservatives, judicial supremacy has gone

18 *Mississippi v. Johnson* (1867) *reprinted in* AMERICAN CONSTITUTIONALISM: VOLUME 1, 258-261 (Howard Gilman, 2013).

19 Dwight Eisenhower, *Address to the Nation on the Introduction of Troops in Little Rock* (1957) *reprinted in* AMERICAN CONSTITUTIONALISM: VOLUME 1, 258-261.

largely unchallenged.[20]

It is only natural that a country would eventually drift from the original creation of its founders. In many ways, it is amazing that America has remained as faithful as it has to the Constitution. Yet the current indifference of the American government and people to the incursion of judicial supremacy is unfortunate to say the least. Thanks to that indifference, America now has a government that is less balanced, less true to democratic principles, and less responsible. America now has an unprecedented "voice of God."

20 Newt Gingrich, *The Rule of Law* (2011) *reprinted in* A NATION LIKE NO OTHER: WHY AMERICAN EXCEPTIONALISM MATTERS, 149-151