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Source: *The Review of Politics*, Spring, 2004, Vol. 66, No. 2 (Spring, 2004), pp. 233-256

Published by: Cambridge University Press for the University of Notre Dame du lac on behalf of Review of Politics

Stable URL: https://www.jstor.org/stable/1408954

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Recovering the Political Constitution: The Madisonian Vision

George Thomas

Constitutional theory has recently turned to the importance of extrajudicial constitutional interpretation. Yet much of the scholarly debate remains rooted in "legal" views of the Constitution, which continue to give primacy to the Court. This article seeks to go further by articulating a Madisonian view of the Constitution, which resituates questions of interpretation within a larger institutional framework. This Madisonian view suggests that the Constitution calls forth continual debate about constitutional meaning. The "settlement" of constitutional issues is not an essential feature of our constitutional system and, thus, constitutional politics with overlapping views, discontinuities, and essentially unsettled meanings are inherent features of the Madisonian Constitution. Recovering the Madisonian vision is an essential step in restoring both the political branches and the Court to the proper place in the constitutional scheme and, in doing so, overcoming the deeply ingrained myth of judicial supremacy.

In the last decade, a lively debate about "extrajudicial" constitutional interpretation has broken out among constitutional scholars, and judicial supremacy has come under fire from both the left and the right. Driven by normative and polemical concerns of constitutional interpretation, these critiques tend to focus on the contemporary Court and particular judicial decisions. The insistence is often that the Court got it wrong in this or that instance. The plea is usually for judicial restraint, a particular theory of interpretation, or, on occasion, a repeal of judicial power.[1] And while scholars have revealed the importance of extrajudicial constitutional interpretation, much of this scholarship remains rooted in a "legal" view of the Constitution and continues to give primacy to the

I would like to thank Dean Alfange, John Brigham, Mark Graber, Shelly Goldman, Jeff Sedgwick, and Keith Whittington for comments on an earlier version of this article.

1. *First Things*, November 1996 Symposium, "The End of Democracy? The Judicial Usurpation of Politics";Michael Perry, *We the People: The Fourteenth Amendment and the Supreme Court* (New York: Oxford University Press, 1999), pp. 3-14 (both of which focus on the judicial usurpation of politics in particular Court decisions); Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1998) (appealing for judicial minimalism); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1998) (rejecting judicial review), pp. 6-32.

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Court.[2] Even as a more political view of the Constitution has emerged, disputes between the political branches and the Court are seen as rare instances of constitutional politics, after which we quickly return to "ordinary" politics where the Court, once more, takes primary responsibility in articulating and settling constitutional meaning.[3] Even departmentalists—drawing largely on Presidents Jefferson, Jackson, Lincoln, and FDR—see extrajudicial interpretation as a rare event, something that supplements judicial articulation of constitutional meaning. Here, too, settling constitutional dispute appears to be fundamental, as each particular constitutional regime is seen as a coherent whole that ultimately finds expression by way of judicial interpretation.[4]

This article seeks to go further, drawing on the thought of James Madison, the "father of the Constitution" himself, to rethink the very nature of the Constitution. A Madisonian view of the Constitution takes the political framework as primary, which itself invites "interpretive plurality," suggesting that questions of constitutional interpretation be resolved as part of constitutional politics and often in the ordinary political process. Moreover, multiple and conflicting views of the Constitution are an inher-

2. See, generally, Walter Murphy, "Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter" *Review of Politics* 48 (1986). Keith Whittington has most fully elaborated the political Constitution, but he draws a distinction between interpretation and construction that, in the end, tends to reinforce the Court's connection with the (legal) Constitution. *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence, KS: University Press of Kansas, 1999). Other works have articulated a political view of the Constitution, but see it as giving way to the legal view. See especially Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (Princeton: Princeton University Press, forthcoming); Stephen Griffin, *American Constitutionalism: From Theory to Practice* (Princeton: Princeton University Press, 1998), p. 45; and Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990). But see also, Scott Gordon, *Controlling the State: Constitutionalism From Ancient Athens To Today* (Cambridge: Harvard University, 1999) and George Thomas, "As Far as Republican Principles Will Admit: Presidential Prerogative and Constitutional Government" *Presidential Studies Quarterly* 30, no. 3 (2000), (which situates presidential prerogative within the Madison Constitution).

3. See especially, Bruce Ackerman, *We the People: Transformations* (Cambridge, MA: Harvard University Press, 1998) and Keith Whittington, "The Political Foundations of Judicial Power" in *Constitutional Politics: Essays on Constitutional Making, Maintenance, and Change*, ed. Robert George and Sotirios Barber (Princeton: Princeton University Press, 2001) and "Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning," *Polity* 33, no. 3 (2001).

4. This is especially true of Ackerman's *We the People*, where the Court, essentially, ratifies the people's constitutional transformation.

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ent—even healthy—part of this framework.[5] Indeed, the Constitution itself, by dividing power between institutions, calls forth debate about constitutional meaning and the proper ordering of constitutional values. My aim in articulating this Madisonian vision is conceptual and theoretical. I seek to deepen our sense of what it means to view the Constitution through a political lens. Rejecting the presuppositions of the "legal" Constitution, I reframe how we think about extrajudicial interpretation, judicial supremacy, judicial review, and the very notion of constitutional settlement.[6] In some ways, the quest to treat constitutional questions as amenable to "legal" resolution is puzzling, given our persistent conflicts over "creedal passions," which could only result in a sort of disharmony.[7] Given that the Constitution is both fundamental law and our political framework, it should not surprise us that it is the source of continued dispute.

In offering a Madisonian vision, this article rejects the Supreme Court's insistence that it alone speaks for our constitutional values, that constitutional government is rendered meaningless if we, as a people, fail to heed the Court's voice.[8] This sentiment finds expression even in the opinions of the Court's leading "originalist," who caustically and frequently berates the Court for its arrogant usurpation of the democratic process.[9] Yet, Justice Scalia too—despite copious citations to Madison scattered throughout his opinions—has fully digested the tenets of judicial supremacy. In fact, originalism's insistence on grounding judicial will and deferring to the democratic process stems largely from its acceptance of

5. Wayne Moore, *Constitutional Rights and Powers of the People* (Princeton: Princeton University Press, 1996). When I refer to the Madisonian Constitution or the Madisonian solution to maintaining constitutional government, I do not mean to suggest that it has developed exactly as Madison himself would want it to, or that it is "proper" because Madison saw it this way. Rather, I argue that the system can be described as Madisonian because it operates broadly as he suggested even if many of the particulars go against his own vision.

6. Louis Seidman, *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* (New Haven: Yale University Press, 2001) examines how judicial review may work to unsettle politics, but the argument on the whole is a normative justification for a particular view of the Court and judicial review.

7. Samuel Huntington, *American Politics: The Promise of Disharmony* (Cambridge, MA: Harvard University Press, 1981).

8. See especially *Planned Parenthood v. Casey* 505 U.S. 833, 868 (1992); *City or Boerne v. Flores* 521 U.S. 507, 529 (1997); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). John Brigham has described this as *The Cult of the Court* (Philadelphia: Temple University Press, 1987).

9. *Casey*, Justice Scalia dissenting at 981, 996, 999. See also Scalia's dissent in *Lawrence v. Texas* 539 U.S. ____(2003).

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judicial supremacy, which stands as an unquestioned axiom of the modern Court.[10] Contrary to this view, I argue that the prideful independence of the political branches in taking up constitutional questions is not only central to American constitutionalism, but is the proper way to temper judicial power.[11] Pleas for judicial restraint oddly invoke a sort of "willfulness" on the part of the Court, as judicial deference is largely a matter of will.[12] Instead of deference on the part of any branch, the Madisonian Constitution is driven by constitutional principle: each branch defends its view of the Constitution against the others—including the Court. After all, if the political branches overstep constitutional limits, the Court is constitutionally obligated to act; it is neither subordinate nor superior in the constitutional scheme.[13] Recovering the Madisonian vision is an essential step in restoring the political branches as well as the court to their proper constitutional footing and, in doing so, overcoming the deeply ingrained myth of judicial supremacy.

The Madisonian Constitution

Much like Thomas Jefferson and John Marshall, Madison agreed that a written constitution was our "peculiar security," the great improvement of our "political institutions."[14] A written constitution "prescribes the limits of all delegated power,"[15] by writing those limits

10. The insistence of grounding judicial review is characteristic of the originalism of Rauol Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Indianapolis: Liberty Fund, 1998), Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1991), and Antonin Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1996). Recent originalists, however, are more concerned with principled constitutional interpretation, rather than grounding judicial will. See Keith Whittington, *Constitutional Interpretation*, Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: Princeton University Press, 2004), and Hadley Arkes, *The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights* (Princeton: Princeton University Press, 1994).

11. See Madison's "The Virginia Report" in *The Mind of the Founder: Sources of Political Thought of James Madison*, ed. Marvin Myers (New York: Bobs-Merrill, 1973), pp. 297-349.

12. For a subtle defense of judicial deference that tacitly recognizes this dilemma see Paul Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (Chicago: University of Chicago Press, 2003).

13. This does not reject deference in all circumstances. It is proper to defer if the Constitution vests a particular branch as the central constitutional actor (as may be argued in the case of war and the political branches).

14. *Marbury v. Madison*, 1 Cranch 137 (1803) at 178.

15. Gordon Wood, *Creation of the American Republic* (Chapel Hill: University of North Carolina Press, 1998 [1969]), p. 281.

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down for all to see; they are thus subject neither to the whim of the legislature nor the will of the judge.[16] Written constitutionalism is an attempt to bond the polity by way of text.[17] But can the polity be bound by words? Madison insisted that the mere act of writing the Constitution, "a mere demarcation on parchment,"[18] did not make it self-enforcing. One could surely imagine, as Marshall did in *Marbury v. Madison*, a government overstepping its prescribed constitutional limitations—and doing so despite the fact that those limitations are clearly demarcated. If constitutional limitations were not somehow enforced, Marshall said, then "a written constitution was an absurd attempt on the part of the people to limit a power that is illimitable."[19] On this score Madison agreed with Marshall. To be effective, the Constitution's written limits had to be maintained. But how?

Structure: Political Institutions and the "Self-Governing" Constitution

The legal solution to maintaining the Constitution relies on the very writtenness of the Constitution (as law) with the judiciary enforcing the text. Madison's great innovation was to make the constitutional framework "self-governing."[20] The key to constitutional maintenance for Madison is the very structure the written constitu-

16. St. George Tucker, *View of the Constitution of the United States* (Indianapolis: Liberty Fund, 1999) p. 105. See also Wood, *The Creation of the American Republic*, p. 275, and Gary McDowell, "Coke, Corwin, and the Constitution: The 'Higher Law Background' Reconsidered," *Review of Politics* 55, no. 3 (1993). The Madisonian Constitution draws explicitly on the written nature of the Constitution. The ability to read the Constitution—to make sense of it as fundamental law—did not require special training, but could be clearly grasped by the average citizen. Indeed, the very move to mark down the Constitution in writing was a rejection of the unwritten British constitution, not just because it could be easily altered, but because such a constitution was removed from the citizens who were the basis of all legitimate authority in the American mind. The Americans thus rejected Coke's dictum that the law was based on "artificial reason" and therefore the peculiar province of those tutored in the law insofar as it applied to discerning constitutional meaning. This highlights, as well, the fundamental distinction between ordinary law (where this might be acceptable) and the written Constitution. Thus, rooting judicial supremacy in the peculiar training of lawyers and courts undermines the very foundation of a written Constitution as conceived by the Americans. See Madison's "Virginia Report."

17. William Harris, *The Interpretable Constitution* (Baltimore: Johns Hopkins University Press, 1993), p. 2. See also Mark Brandon, *Free in the World: Slavery and Constitutional Failure* (Princeton: Princeton University Press, 1998).

18. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Mentor Books, 1999), No. 48, p. 281.

19. *Marbury* at 177.

20. Madison, *The Federalist Papers*, No. 51, pp. 290-91. See also Michael Zuckert, "Epistemology and Hermeneutics in the Constitutional Jurisprudence of John Marshall" in *John Marshall's Achievement: Law, Politics and Constitutional Interpretations*, ed. Thomas Shevory (Westport, CT: Greenwood Press, 1989).

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tion calls forth. The division of power between the national and state governments, the large republic, and the separation of powers and checks and balances are all institutional innovations that structure our politics in very particular ways: they favor certain political outcomes over others, and through the ordinary political process maintain a functioning constitutional system. But Madison's criticism of "parchment barriers" goes deeper: it suggests that constitutional limits are essentially unenforceable if the will of the political community is intent upon overriding them. This is particularly evident in Madison's initial skepticism about a bill of rights, where he insisted to Jefferson that a people who reject constitutional limits will not be restrained by textually enumerated rights. Surveying the various bills of rights in the state constitutions, Madison noted "that repeated violations of these parchment barriers have been committed by overbearing majorities in every state."[21] Here the judiciary cannot save us from ourselves, as is all too evident in the Supreme Court's failure to enforce the terms of the Fourteenth and Fifteenth Amendments in the wake of the Civil War, its evisceration of the Fourteenth Amendment's "privileges and immunities" clause,[22] or its countenancing the internment of Japanese-Americans during World War II.[23] In these instances, the Court willingly abdicated to the "popular current." As the Constitution is a human and political construct, it is imperfect and open to the possibility of failure: "Is there no virtue among us?" asked Madison. "If there be not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure."[24]

Madison's idea was to so contrive the institutional framework as to generally thwart "the physical and political force of the nation" when such a force was heedless of constitutional limits. Constitutional maintenance is an essentially political task called forth by an active institutional framework—a sort of "living constitution." This living constitution is not brought to life by facile views of judicial evolution, where an enlightened Court progressively brings the Constitution "up to date." Rather, this dynamic is captured by President Lincoln's famous statement in his "First Inaugural." "The candid citizens must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decision of the Supreme Court, the instant they are made ... the people will have

21. Madison to Jefferson, October 17, 1788 in Myers, *The Mind of the Founder*, p. 206.

22. *Slaughterhouse Cases*, 83 U.S. 36 (1873).

23. See especially *Korematsu v. United States*, 323 U.S. 214 (1944).

24. Madison, Virginia Ratifying Convention. See also Mark Graber, "Our (Im)Perfect Constitution" *Review of Politics* 51 (1989): pp. 86, 101.

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ceased, to be their own rulers, having, to that extent, practically resigned their government, in to the hands of that eminent tribunal."[25]

In his criticism of Chief Justice Taney's *Dred Scott* decision and Judge Douglas's defense of it, Lincoln squarely rejected authoritative judicial settlement, as if the Constitution were law that must be settled.[26] Authoritative settlement is not the primary constitutional value. Constitutional issues can be left unsettled or worked out as constitutional values are argued over within the confines of the political process, subject to change and revision over time.[27] To see the Constitution through a Madisonian lens, as Lincoln does, is to realize that the "Constitution does not always speak through the judiciary and does not always speak with one voice."[28] It is also to recognize, as a corollary, that not all constitutional issues are legal issues resolvable by the judiciary.[29]

Coordinate Construction: Interpretation within the Constitutional Structure

Scholars have long insisted that the judiciary is not the sole or authoritative interpreter of constitutional meaning. If we take the Constitution seriously, we are bound by the Constitution and not the Court's interpretation of it, which are hardly the same thing. Thus the other branches of government must have a say in constitutional interpretation. Coordinate construction, or departmentalism, as this has come to be known, emphasizes the political nature of the Constitution more than is often realized. It is not just that the president and Congress have a legitimate say in interpreting the Constitution. The point I want to make is deeper. Debates over constitutional meaning are not simply legal debates that call for judicial resolution (even if they begin with extrajudicial interpretation); rather, such debates are part of a larger political dynamic that brings the Constitution to life

25. "First Inaugural Address" in *Lincoln: Selected Speeches and Writings* (New York: Vintage Books, 1992), p. 290.

26. At least in an immediate sense. Lincoln, much like Madison, seems open to the fact that such issues may be settled overtime through the political process—but not by the Court alone. See also Graber, *Dred Scott and the Problem of Constitutional Evil.*

27. Mark Tushnet, "Marbury v. Madison and Judicial Supremacy" in *Great Cases in Constitutional Law*, ed. Robert George (Princeton: Princeton University Press, 2000), p. 43.

28. Whittington, *Constitutional Interpretation*, p.172.

29. *Ibid.* Pp. 172, 174. See also Whittington, "The Road Not Taken: *Dred Scott*, Judicial Authority, and Political Questions," *The Journal of Politics* 63, no. 2 (2001): 365-91 and Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991).

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by finding workable solutions to constitutional problems. Constitutional interpretation is only a part of the constitutional enterprise, and it is not a distinctly legal enterprise. If the Constitution is law, it is law of a fundamentally different sort. John Agresto frames the issue perfectly:

> If, following Marshall, we base our understanding and defense of judicial review on the idea that "the Constitution is law," then the primacy of the Court in the American system of governance becomes more set. But if our basic view of the Constitution begins not with what the Constitution is—law—but with what it establishes—a constitutional democracy of separated powers, checked and balanced—then the activity of judicial review becomes part of an interlocking totality of governance. In other words, the idea of the Constitution as law interpreted by judges and the idea of the Constitution as a framework for limited government may well lead to different results.[30]

And surely they do. Political constitutionalism begins from the institutional framework, whereas judicial supremacy begins from the axiom that the Constitution is law.

Madison's political vision relies on the thick Constitution: things such as the bicameral structure of Congress, the unitary executive, the independent judiciary, the division of powers between the states and the national government, the fact, even, that one must be of a certain age before being eligible to take office. A glance at much of current constitutional law and theory might suggest that this is all "mere surplusage."[31] Oddly, though, it is the bulk of our Constitution. Indeed, the structure of our Constitution dominated early constitutional debates and thinking. Paying attention to the actual institutions the Constitution creates will allow us to address two important and intimately related points. It will show us how institutional design was meant to preclude certain possibilities and maintain constitutional boundaries without resorting, in most cases, to the law, but instead by relying on politics.[32] In a similar fashion, Madison sought to make it nearly impossible for one branch of the government—perhaps dominated by a majority—to ignore the Constitution's putative limits. It is

30. John Agresto, *The Supreme Court and Constitutional Democracy* (Ithaca: Cornell University Press, 1984), p, 71.

31. *Marbury* at 174. Christopher Eisgruber, *Constitutional Self-Government* (Cambridge, MA: Harvard University Press, 2001), for example, begins with the notion that our Constitution is a framework of governance, but then very quickly argues that judges *should* interpret the Constitution based *on their notions of justice* (with very little concern about how this has actually worked out historically).

32. Griffin, *American Constitutionalism*, pp. 59-87.

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the thick Constitution that gives the political branches incentives to maintain constitutional propriety.[33]

It is interesting, in this light, that the *Federalist Papers*, the great exegetical writing on the Constitution, rarely refers to what we would today call constitutional law. Rather, the *Federalist Papers*, particularly Madison's writings, refer to the institutional dynamic of the new Constitution.[34] In explaining why the new Constitution is a great improvement in political institutions and how it will effectively provide for limited (and effective) government, Publius devotes the bulk of the *Federalist Papers* to institutional forms. Madison's most famous discussion of this comes in the widely cited fifty-first *Federalist Paper*. *Federalist*, No. 51, begins by asking how we are to maintain "in practice the necessary partition of power among the several departments as laid down in the Constitution?"[35] Madison says that the first reliance on maintaining constitutional boundaries is supplied by "exterior provisions" (as discussed above). However, lest these devices fail, we must trust in auxiliary precautions: "by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[36]

While power is separated, it must also be checked. To keep the legislature, Madison's first concern, from encroaching upon the powers of the executive or overstepping its constitutional bounds, the executive is fortified with a negative (the veto) against the legislature. The negative, however, is not absolute. Although the executive is the weaker branch, it too may overstep constitutional limits. What is needed is to order the Constitution—to give it life,

33. Tushnet, *Taking the Constitution Away From the Courts*, pp. 95-128.

34. This has perhaps changed with the ratification of the Fourteenth Amendment, which arguably paved the way for the legalization of the Constitution shifting our focus to rights (and courts) and away from constitutional structure. But such a reading relies on a legalist view of the amendment overlooking the fact that Congress seems to have been entrusted by way of section 5 with defending (and perhaps defining) constitutional rights. Furthermore, recent scholarship casts serious doubt on any special connection between rights—even in a bill of rights—and the judiciary, suggesting that the articulation of rights fits within a political view of the Constitution. See Akhil Amar, *The Bill of Rights* (New Haven: Yale University Press, 1998) and John Dinan, *Keeping the People's Liberties* (Lawrence, KS: University Press of Kansas, 1998).

35. *The Federalist Papers*, No. 51, p. 288.

36. *Ibid.*, p. 288. For a discussion of the solutions Madison rejected, see Robert Burt, *The Constitution in Conflict* (Cambridge, MA: Harvard University Press), p. 47.

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so to speak, in such a way that the various parties under it will have an interest in maintaining its boundaries: "But the great security against a gradual concentration of the several powers in the same department consists in giving those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[37] To drive home this point, Madison argued, "The interest of the man must be connected with the constitutional rights of the place."[38] Constitutional limits will be maintained in that those who hold office under it will have an interest in enforcing its written provisions; indeed, an institutionally structured self-serving interest. The branches of government themselves, referring to the text of the Constitution to answer particular questions, would police the Constitution's boundaries in their political capacity through the framework. In fact, Madison, like most Federalists, thought the "[r]eal interpretation of the Constitution would occur as decisions taken within government gradually settled its operations in regular channels."[39]

At the same time, Madison recognized that "in the ordinary course of government ... the exposition of the laws and the constitution devolves upon the judicial branch." But, he insisted, this did not mean that the Court was, in any way, the final arbiter on the meaning of the Constitution, particularly when it came to "the limits of the powers of the several departments." Here Madison insisted that none "of these independent departments has more right than another to declare their sentiments on that point."[40] To give that power to the judiciary, Madison argued, was not only to make that department "paramount in fact to the legislature, which was never intended," but, even more problematic, it was to render the Constitution a mere legal document. Can this be avoided? As Stephen Griffin argues, "The experience of American constitutionalism shows that you can maintain the written quality of the constitution only at the expense of abandoning the framework character of the

37. *Ibid.*, p. 289.

38. *Ibid.*, p. 290.

39. Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1996), p. 345.

40. Annals of Congress, 1: 519-21 (June 17, 1789). See also Rakove, *Original Meanings*, p. 348 and "Judicial Power in the Constitutional Theory of James Madison," *William and Mary Law Review* 43 (2002): 1513-47. It is interesting to note that the "great" presidents all advocated their power of constitutional interpretation against the Court, often going so far as to engage in constitutional politics and articulating their own "constitutional vision," which, as reconstructive presidents, all became dominant. See Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to George Bush* (Cambridge, MA: Harvard University Press, 1993).

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document and you can maintain the framework character of the constitution only by abandoning the idea that all important constitutional change must occur through formal amendment."[41] Griffin's point about amendments may be open to question, but he is certainly right to highlight the tension between the "text" of the Constitution and the "framework" character, which does seem to call forth constitutional politics, open to constitutional conflict and change by way of the framework.

This framework character of the Constitution invites the political branches to speak to, create, and settle constitutional issues, raising important questions of how they do so. At the same time, the very logic of checks and balances also gives rise to the notion of judicial review. Interestingly, Madison does not refer to judicial review in *Federalist*, No. 51, his most prominent discussion of checks and balances. But the nature of judicial review seems to be part of the institutional logic he spells out in *Federalist*, No. 51. It is, seemingly, the judiciary's check on the legislature and the executive. But, paradoxically, this check appears to elevate the judiciary above the legislature and executive if the judiciary is given "the unique power to enforce the Constitution," as the "Constitution structures politics and government."[42] Moreover, such a move gives the Constitution a legalist gloss. The power of judicial review "arises circumstantially, literally through the chronology of action—yet absent any conflicting vision, it expresses the latent intent of the document itself."[43] Checks and balances give rise to judicial review, which, coupled with a legal view of the Constitution, leads to judicial supremacy. Can an independent judiciary exercising judicial review be placed within the constitutional framework rather than above it?

Those who insist on departmentalism in constitutional exposition seek to relocate a discussion of constitutional interpretation in the context of the separation of powers. Even following this logic, however, judicial review may still be problematic. It is not simply that judicial review is a check on the other branches of government, but that it is based on the notion that the Court is peculiarly suited to the task of interpreting the Constitution (as it is law). Today the separation of powers is viewed as an essentially preventative check; that is, it effectively, if inefficiently, puts the brakes on governmental power. Such a view of the separation of powers comes to us from Woodrow Wilson and other Progressive critics of Madison's Constitution, and fails to

41. Griffin, *American Constitutionalism*, p. 41.
42. *Ibid.*, p. 45.
43. Rakove, *Original Meanings*, p. 348.

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notice the peculiar effectiveness of the separation.[44] It is not simply that power is divided between different branches of government, but that the branches themselves are structured in a manner that makes them suited to their particular tasks.[45] To follow this logic is to impart the Court with the constitutional function of passing on the constitutionality of legislation, as current proponents of judicial supremacy like Alexander and Schauer argue. As Alexander and Schauer would have it, the separation of powers gives rise to a sort of judicial finality in that the Court, unlike the political branches, is suited to the task of constitutional interpretation.[46] While I disagree with Alexander and Schauer, they do put their finger on a peculiar problem. To put the question in the idiom of modern constitutional thinking: can judicial review be separated from judicial supremacy? How this has worked out in practice is an empirical question, but conceptualizing the Constitution in political terms unlinks judicial review from the legal Constitution. To draw on Walter Murphy's formulation, it separates the "who of interpretation" from the "what of the Constitution."[47] Judicial review may then be resituated within the separation of powers rather than above it.

To begin to sort this out, I turn to two early constitutional debates in the Congress: (1) the removal debate and (2) the debate over the first national bank.

Madisonian Constructions: Constitutional Politics

The tendency to regard the Constitution as a legal text leads us to focus on constitutional law at the expense of the Constitution itself.[48] Constitutional law is taken to be the equivalent of constitutionalism.

44. Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1910).

45. See Jeffrey Tulis, *The Rhetorical Presidency* (Princeton: Princeton University Press, 1986) and Jessica Korn, *The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto* (Princeton: Princeton University Press, 1996).

46. Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation," *Harvard Law Review* 110 (1997): 1359-87 and "Defending Judicial Supremacy: An Argument," *Constitutional Commentary* 17 (2000): 455-82, 464. See also Laurence Tribe, *American Constitutional Law*, third edition, volume one (New York: Foundation Press, 2000). For critiques of Alexander and Schauer, see Keith Whittington, "Extrajudicial Constitutional Interpretation—Three Objections and a Response" *University of North Carolina Law Review* 80 (2002): 3 and Bruce Peabody, "Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research," *Constitutional Commentary* 16 (1999): 63-90.

47. Murphy, "Who Shall Interpret?" p. 402.

48. Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1989), p. 43.

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So much so, in fact, that we are preoccupied by the Court and judicial review and, thereby, pay less attention to how constitutional meaning is shaped by the political branches of government in ways that do not even come before the judiciary, or how judicial power itself is historically situated.[49] Such a narrow focus neglects crucial moments of American constitutional development, where constitutional issues remained in an essentially contested state, or were settled either by the political branches or through the interaction of the political branches, the public, and the Court.[50] Early debates on the nature and meaning of the Constitution occur primarily between the executive and the legislature as well as within these branches. The debates over the president's removal power and the establishment of the national bank[51] touch on central issues of constitutional interpretation and development, but in no way center on judicial interpretation and exposition. In these pivotal "Madisonian Moments" of constitutional development, the judiciary was essentially silent.

The President's Removal Power

In 1789 the First Congress, which of course included many delegates to the Constitutional Convention, debated whether officials in the executive branch—who had been appointed with the advice and consent of the Senate—could be removed by the president alone. Madison argued that the legislature ought to construe the Constitution in such a way as to give the president the sole power of removal. Madison's conclusion was not simply based on interpreting Article II's vesting clause as requiring this solution. For Madison, the Constitution was not self-evident on this point, and it was the task of the Congress to settle such disputes, laying the ground rules for future interpretation and setting a clear precedent. Said Madison, "Among other difficulties, the exposition of the Constitution is frequently a copious source [of difficult questions] ... and must continue so until its meaning on all great points should have been settled by precedents"[52]—

49. Fisher, *Constitutional Dialogues*, pp. 231-74.

50. Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, MA: Harvard University Press), p. 5. This also suggests a deeper point that is often neglected by our focus on the judiciary, and that is the political underpinnings of judicial power. Judicial independence may depend, in one way or another, on the compliance of the other branches. See Whittington, "The Political Foundations of Judicial Power."

51. The repeal of the Judiciary Act of 1801 by the Judiciary Act of 1802 is also a prime example, but one I do not take up for reasons of space.

52. Madison to Thomas Jefferson, June 30, 1789 in *The Papers of James Madison*, ed. William T. Hutchinson, William M. E. Rachal, and Robert Rutland (Chicago: University of Chicago Press, 1962), 12: 290-91. See also Rakove, *Original Meanings*, p. 349.

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in this case the precedents of the Congress. Madison did not see the legislation Congress drafted giving the executive the sole power of removal as merely advisory, but rather sought to settle a constitutional dispute—and settle it by way of legislative construction of the Constitution. William Smith of South Carolina objected to this construction, insisting that the consent of the Senate was necessary to remove an appointee as it was necessary to appoint him in the first place. In drawing out his argument, Smith pointed to *Federalist*, No. 77, where Alexander Hamilton, Madison's great collaborator as Publius, argued that the Senate was necessary "to displace as well as appoint." Smith then pushed his argument a step further, insisting that the Congress—particularly the House—had no business in deciding the matter. Given that constitutional meaning was in doubt, Smith suggested that this was preeminently a judicial question. Rather than illegitimately attempting to expound on the Constitution, Smith thought the Congress should wait until the question came before the judiciary to be settled.[53]

Madison insisted that the judiciary was not, nor could it have been meant to be, the primary expositor of the Constitution. "But the great objection drawn from the source to which the last arguments would lead us is, that the Legislature itself has no right to expound the constitution; that whenever its meaning is doubtful, you must leave it to take its course, until the Judiciary is called upon to declare its meaning."[54] For Madison, the Congress had as much right to determine constitutional meaning as the judiciary; indeed, he doubted whether "this question could even come before the judges."[55] Madison's argument is often taken as the great defense of departmentalism in constitutional interpretation.[56] This may be so, but we must be clear on the meaning of departmentalism. In some guises, departmentalism is taken to mean that each department is the primary interpreter of *its* constitutional power; that is, it interprets those provisions of the Constitution that apply

53. Gary Jacobsohn notes that the consensus in Congress—unlike Madison's argument—did not question "the finality of the judicial determination of constitutionality," although that is not quite the same things as endorsing it. *The Supreme Court and the Decline of Constitutional Aspiration* (Lanham, MD: Rowman and Littlefield, 1986), p. 123.

54. Annals of Congress, 1: 519-21 (June 17, 1789).

55. *Ibid.* See also Rakove, *Original Meanings*, p. 348.

56. Fisher, *Constitutional Dialogues*, pp. 231-79. Agresto's departmentalism seems to be more along these lines as well, insofar as he puts emphasis on the dynamic of the checks and balances and interaction between the branches, *The Supreme Court and Constitutional Democracy*, pp. 99-102. Gary Jacobsohn suggests that Lincoln's views on judicial review, properly understood, also put it in this light. *The Supreme Court and the Decline of Constitutional Aspiration*, pp. 95-112.

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to it specifically.[57] In this instance, the Court is not the final authority on Congress's power, although it may well be on issues addressing the judiciary. This is clearly not Madison's argument here. Instead, Madison insists that the Congress (or any branch) can touch upon constitutional questions. In fact, Madison claims that "interpretive plurality" is central to maintaining the Constitution. If such a task were vested in a single body, the chances of error and misgovernment would be far higher. By vesting this task in multiple institutions, the Constitution is more likely to be adhered to. As Madison argued, "But, I beg to know, upon what principle it can be contended, that any one department draws from the constitution greater powers than another, in making out the limits of the powers *of the several departments*?" And again, "If the constitutional boundary of either be brought into question, I do not see that any one of these departments has more right than another to declare their sentiments on that point."[58] In this case Congress is largely defining *executive* power.

For Madison, the Court had no special relation to the Constitution. Madison fully recognized that the Constitution would contain ambiguity and indeterminacy, but that did not mean the Court alone should give clarity and final meaning to the Constitution over the other branches. Madison thought that Congress's construction would be preferable in this matter. The legislature would be the best place to come up with a workable solution to this constitutional question, drawing on its experience to craft a competent solution to an immediate problem. This also illustrates that Congress may speak to constitutional meaning in ways that do not adhere to the dichotomy between "law" and "politics" or "interpretation" and "construction," even while taking fidelity to the Constitution seriously. Madison brought this to bear in the "Decision of 1789." If Congress's construction of the Constitution "is the

57. See Robert Lowry Clinton, Marbury v. Madison *and Judicial Review* (Lawrence, KS: University Press of Kansas, 1989) for perhaps the most influential statement of this view. See also, Charles Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence, KS: University Press of Kansas, 1996). Hobson suggests that Marshall's "defense of judicial review fully agreed with the "departmental" theory of constitutional interpretation, according to which each of the three coordinate departments of government had final authority to interpret the Constitution when acting within its own sphere of duties and responsibilities," p. 67. Although Edward Corwin, *Court Over Constitution* (Princeton: Princeton University Press, 1938) who coined the term, surely meant "coordinate construction."

58. Annals of Congress, 1 (June 16, 1789). See also Madison, "The Virginia Report," pp. 303, 330; Madison to Spencer Roane, September 2, 1819 in Myer, *The Mind of the Founder*, p. 458; and Rakove, *Original Meanings*, p. 348.

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true construction of this instrument, the clause in the bill is nothing more than explanatory of the meaning of the Constitution, and therefore not liable to any particular objection on that account." Here Madison seems to be speaking distinctly of congressional *interpretation* as clarification and insisting that Congress's interpretation ought to stand—not because it is Congress's interpretation, but because it is the correct interpretation. If, on the other hand, the Constitution "is undecided as to the body which is to exercise it [the power of removal], it is likely that it is submitted to the discretion of the Legislature, and the question will depend on its own merits."[59] This sounds much more like construction (as Keith Whittington dubs it), which Madison is saying depends on the political judgment of Congress to create a constitutional settlement. Either way, for Madison, Congress's construction of the Constitution should settle the matter and guide future questions of constitutional meaning on this point.[60] Madison's solution lays forth a prudent and practical course of constitutional governance, but one that squares with Article II concerns and is thus rooted in a larger constitutional vision. What is so important is not just reducing the Constitution to a particular meaning—by construction or interpretation—and passing that along; it is the framework the constitutional text calls forth. The framework character of the Constitution, holding out the possibility of disputes between the branches, moves us to focus on the persuasiveness (and even political viability) of answers to constitutional questions rather than acceptance of the answers imposed by a single branch—especially given the chance that a single branch could get it wrong or come up with an unworkable solution.

THE BANK OF THE UNITED STATES

We see a reliance on nonjudicial precedent and settled meaning from Madison as president when he signed the Second Bank of the United States into law in 1816. Madison had argued against the establishment of the First Bank of the United States in the First Congress. In this great debate over the nature of the Constitution and how to properly interpret it, Madison joined Jefferson against

59. The Annals of the First Congress, 1789-1791, pp. 464, 461.

60. When the Court later addressed the president's removal power, Chief Justice Taft turned to Madison's arguments in the House. *Myers v. United States*, 272 U.S. 52 (1926). This power was qualified in later Court decisions regarding the president's power to remove officers performing quasi-legislative and quasi-judicial duties, *Wiener v. United States*, 357 U.S. 349 (1958) and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). See also Fisher, *Constitutional Dialogue*, p. 238.

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his onetime ally Hamilton.[61] From Congress, Madison argued that the Constitution did not grant the national government the power of incorporation and, therefore, the government could not incorporate a national bank. Jefferson echoed this argument from the executive branch as secretary of state. Hamilton, also from the executive branch as secretary of the treasury, insisted that the national government, relying on the "necessary and proper clause," had the power. While the debate over constitutional interpretation is fascinating in and of itself, it is not my primary concern. The compelling point is the politically contested state of this constitutional question that works its way, by and large, through the ordinary political process where it is seemingly settled (at least twice) and then reopened.

Madison's and Jefferson's arguments are interesting in that members of Congress and the executive articulate constitutional meaning in a way that limits their power. This negative function—a saying "no" to governmental power by drawing on the Constitution—is not just a judicial function. But there is an even more revealing point, which is altogether neglected by the proponents of judicial supremacy. To really understand the constitutional framework, the branches of government need to be seen in relation to one another examining what each is doing at a particular moment. As the Court is essentially a reactive institution, its role depends upon the actions of the executive and legislature, suggesting variation across time, forcing thinking about any particular institution to be contextually sensitive. If the Court, for example, has a broader vision of constitutional permissiveness than the Congress or the president, then it will rarely—if ever—be positioned to strike down acts of Congress as unconstitutional. Conversely, a truly activist Congress and president with a broader view of their power than the Court has, will likely result in a much more active Court.[62] Even the terms "activism" and "restraint" must be seen in relation to the specific actions of the political branches. Thus, the Court may be a defender of constitutional limits and rights at a particular time, given a particular Congress

61. "But the proposed bank could not even be called necessary to the government; at most it could be but convenient." James Madison, "The Bank Bill, House of Representatives 2 Feb. 1791," in, *The Founder's Constitution,* ed. Philip Kurland and Ralph Lerner (Indianapolis: Liberty Fund, 1987), 3: 245. "A bank there is not necessary, and consequently not authorized by this phrase," Thomas Jefferson, "Opinion on the Constitutionality of the Bill for Establishing a National Bank, 15 Feb. 1791," p. 246. See also Alexander Hamilton, "Opinion on the Constitutionality of the Bank, 23 Feb. 1791," *ibid.*, pp. 247-50.

62. Mark Graber, "The Jacksonian Origins of Chase Court Activism," *Journal of Supreme Court History*, 25, no. 2 (2000): 18-19.

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and president, but it may not be at a later time. These are empirical questions, not simply questions of theory and logic.

Against Madison and Jefferson's objections, the First Congress established the bank, and was signed into law by President Washington. This alone, however, was not enough to settle the issue; in fact, the constitutional issue was only settled over a period of decades (and was ultimately reopened).[63] Indeed, this construction, Madison later said,

> had undergone ample discussions in its passage through the several branches of the Government. It had carried into execution throughout a period of twenty years with annual legislative recognition . . . and with the entire acquiescence of all the local authorities, as well as of the nation at large; to all of which may be added, a decreasing prospect of any change in the public opinion adverse to the constitutionality of such an institution.[64]

Today Marshall's decision in *McCulloch v. Maryland* is seen as settling this question; a constitutional dispute is taken to be settled only if the Court has addressed it.[65] In an interesting way, though, the question of whether the national government could charter a bank was taken to be settled by the time it came before Marshall and the Court. As Marshall himself recognized in his opinion, "It

63. Gerard Magliocca, "Veto! The Jacksonian Revolution in Constitutional Law," *University of Nebraska Law Review* 78 (1999): 205-62.

64. Madison quoted in Gary Rosen, *American Compact: James Madison and the Problem of Founding* (Lawrence, KS: University Press of Kansas, 1998), p. 172. See also Madison to Spencer Roane, September 2, 1819 and Madison to Reynolds Chapman January 6, 1831 both in Kurland and Lerner, *The Founder's Constitution*, 3: 259, 262.

65. In discussing *McCulloch*, perhaps the leading constitutional law casebook, Gerald Gunther and Kathleen Sullivan, *Constitutional Law* (New York: Foundation Press, 1997) 13th ed., gives a history of the debate prior to McCulloch and speaks of scholarly debate since McCulloch, but does not speak of Jackson's veto and the effective settlement of the issue for several decades seemingly against Marshall's opinion. Gunther and Sullivan acknowledge that "the McCulloch decision, important as it is, was no more the end than the beginning of the debate." Yet, they are speaking of the national legislature's ability to reach local affairs and not the power to establish a bank. Two leading books by political scientists fare no better. David O'Brien's *Constitutional Law and Politics* (New York: W.W. Norton, 1998), 4th ed., gives a similar history and suggests that Marshall's interpretation seems correct and has been confirmed by subsequent Court opinions—namely, *The Legal Tender Cases* (1884) and *Katzenbach v. Morgan* (1966). But this (1) eclipses a large portion of our constitutional history (1819-1884) and (2) focuses again on the Court missing how the other branches seem to have settled a vital constitutional questions without turning to the Court. Lee Epstein and Thomas Walker's *Constitutional Law* (Washington, D.C.: CQ Press, 1998), fourth edition, gives a history of the conflict prior to Marshall's opinion but says nothing of what came after 1819. This from two leading empirical political scientists! Murphy, Barber and Fleming, *American Constitutional Interpretation*, give a history of the conflict and Jackson's statement rejecting Marshall's opinion. But then this book specifically seeks to give an alternate view of the Constitution and questions of constitutional interpretation, rejecting much of conventional understanding.

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has truly been said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation."[66] It would have been wholly shocking if Marshall had decided the case other than he did, given the constitutional politics that had already addressed the question (and given his own inclinations).[67] What is interesting about Marshall's opinion is its claim to judicial supremacy. Marshall insisted, "the constitution of our country, in its most interesting and vital parts, is to be considered."[68] And then continued, "But [the question] must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty."[69] Marshall is too often taken at his word. But subsequent history belies his argument. The Court's opinion did not cease constitutional argument on the question. Just over a decade later, the debate was rejoined when President Jackson rejected Marshall's *McCulloch* opinion and insisted the bank was unconstitutional.[70] Subsequent presidents, "articulating" Jackson's constitutional "reconstruction,"[71] vetoed a new bank on similar grounds. The constitutional issue was settled for a large portion of the nineteenth century *against* the bank—even if *McCulloch* was never overturned allowing it to be resurrected by twentieth-century constitutional law while ignoring our actual constitutional history. "[President] Tyler's vetoes prevented the dismantling of Jacksonian Democracy's major political achievements. Those same vetoes, however, blocked a case challenging the bank's constitutionality from reaching a Supreme Court packed with Jackson's anti-bank partisans. Thus, Tyler may have inadvertently saved *McCulloch* from the dustbin of history

66. *McCulloch v. Maryland* 4 Wheat. (17 U.S.) 316, 401 (1819).

67. At least on the question of whether the national government could establish a bank. Whether or not a state may tax that bank once established was an open question. See also Moore, *Constitutional Rights and Powers of the People.*

68. *McCulloch* at 400-401.

69. *Ibid.*

70. Andrew Jackson, Veto Message, July 10, 1832 in Lerner and Kurland, *The Founder's Constitution*, 3: 263-67.

71. Skowronek, *The Politics Presidents Make.*

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and denied Jackson's movement what would have been its greatest victory."[72] Constitutional meaning may be settled over time and in ways that cannot be divorced from politics. Such settlements are likely to depend upon the political forces of the day, suggesting that a particular constitutional vision may only be as stable as the political forces which support it, leaving open the possibility that there is no such thing as "authoritative settlement" in the long run—whether judicial or otherwise.

These early debates on constitutional meaning are notable, particularly to modern tastes, in that the judiciary plays such an insignificant role in them. Here are the great early debates about constitutional exposition and governance, absent (mostly) the great expositor of the Constitution—the judiciary. Yet, Madison's political Constitution does not reject judicial interpretation of the Constitution; it only rejects the notion that the Court is the final interpreter of the Constitution.[73] Madison did worry that judicial interpretation might inexorably lead to judicial supremacy. In an oft-quoted letter to John Brown, he made evident this concern:

> In the State Constitutions and indeed in the Federal one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making ye decision, it results to them by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper.[74]

72. Magliocca, "Veto!," p. 212.

73. While judicial review might seem to flow ineluctably from the very notion of checks and balances, Madison does not discuss it in those terms. In his classic exegesis of checks and balances in *Federalist*, No. 51, discussed above, Madison never even mentions the judiciary. In fact, he rejects a means similar to judicial review. One notable solution to keeping the majority in check, Madison says, is to create "a will in the community independent of the majority—that is, of the society itself." The Court, as an unelected and undemocratic branch of government, that great "countermajoritarian" institution, seems suspiciously independent of society, a solution unacceptable to Madison. It can scarcely be doubted that Madison was genuinely perplexed by the notion of judicial review. Other than Hamilton's *Federalist*, No. 78, perhaps the most prominent reference is in *Federalist*, No. 16, also by Hamilton, "If the judges were not embarked in a conspiracy with the legislature, they would pronounce the resolution of such a majority to be contrary to the supreme law of the land, unconstitutional, and void" (*The Federalist Papers*, p. 85).

74. Madison to John Brown, October 12, 1788, "Remarks on Mr. Jefferson's 'Draught of a Constitution'" in Myers, *The Mind of the Founder*, pp. 65-66. Madison's argument must also be separated from arguments for legislative supremacy, the type that John Bannister Gibson made in *Eakin v. Raub*, 12 Sergeant & Rawle 330 (1825). Legislative supremacy, too, was unacceptable.

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Judicial review may be kept distinct from judicial supremacy by situating it within the Madisonian vision. For Madison, constitutional meaning would be settled across time by the political interplay between the branches, an activity that would also maintain the limits of the Constitution. Judicial review is only one dimension of a functioning constitutional government and exists within the contours of constitutional politics.

Coda: The Madisonian Constitution Today

I have focused on early constitutional debates to draw out the Madisonian Constitution—prior, admittedly, to the dominance of the legal Constitution in the latter half the nineteenth century. Conceptualizing the Constitution in such terms is relevant for the early twenty-first century as well. A full empirical analysis is far beyond the scope of this article, but even a cursory glance at the historical functioning of our constitutionalism is suggestive in illuminating this political dynamic. When the political branches contest judicial interpretations of the Constitution, they often succeed in overturning past judicial decisions without resorting to constitutional amendment. The most significant constitutional changes in the twentieth century have come from political changes in constitutional meaning, not by way of formal constitutional amendment (whether against past Supreme Court opinions or not).

In the early years of the twentieth century, presidents Teddy Roosevelt, Woodrow Wilson and Franklin Roosevelt contested the Court's view of national power. After decades of constitutional drift and debate over the scope of the Commerce Clause, the Court came into line with the political branches' expansive view of national power.[75] This led to a settlement on the most contentious issue of the day—the national government's power to regulate economic life. This very settlement, however, insofar as it established sweeping governmental power, provoked a debate on the very nature of constitutional rights—now dubbed "civil liberties." In the face of overarching state power, the central constitutional debate focused on how to define and protect individual rights.[76] The origins of this debate reside in the constitutional politics of the New Deal and progressive era, while the debate itself remains essentially unsettled.

75. Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998).

76. Howard Gillman, "Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence," *Political Research Quarterly* 47, no.3 (1994).

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Presidents Nixon and Reagan seized on one strand of New Deal constitutionalism in their critique of "judicial lawmaking" and rejection of what has come to be known as "substantive due process,"[77] exemplified by the Court's abortion decision in *Roe v. Wade*. At the same time, these presidents rejected the New Deal constitutional vision of national power. Both Reagan and Nixon sought a return of constitutional federalism and offered a far more limited view of national power. If Reagan has been unsuccessful in altering the terms of *Roe*, he has, at the very least, unsettled the New Deal view of governmental power. This might even be partly true of *Roe*. Given the persistent conflict over abortion rights, it would be difficult to call *Roe* "authoritatively settled." The Court's own opinions have evolved on the matter, with the justices themselves squabbling over the meaning of precedents.[78] If there is a consensus that women ought to have a constitutional right to terminate a pregnancy in the early months, the evidence suggests this is based on social and political understandings and not derived from the Court's constitutional reasoning.[79] Thus, for the majority of the twentieth century, the reach of national power and the nature of constitutional rights have been heavily contested within the constitutional framework, rather than settled and enforced by the Court. Indeed, the Court often acts as a catalyst to constitutional struggle.

Perhaps this is most evident in recent years on the very issue of judicial supremacy. In *City of Boerne v. Flores,* the Court insisted that it was the sole principled preserver of constitutional meaning. It did so, all the more remarkably, on the scope of Congress's power under Section 5 of the Fourteenth Amendment, which seemingly invites congressional interpretation.[80] Yet Justice Kennedy argued that under Section 5, Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth

77. This is at least true of the Chief Justice and Justices Scalia and Thomas. Indeed, their rejection of "substantive due process" places them squarely within the contours of the "Constitutional Revolution of 1937" when it comes to so-called unenumerated rights.

78. *Stenberg v. Carhart* 530 U.S. 914 (2000). See especially the exchange between Justices O'Connor (at 947) and Kennedy (at 957) over the meaning of *Casey*.

79. See Jeffrey Rosen, "Worst Choice: Why We'd be Better off Without Roe," *The New Republic*, February 24, 2003.

80. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The United States Constitution, Amendment XIV, Section 5.

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Amendment].'"[81] Conflating the Constitution with Court opinions, Kennedy reasoned that the Constitution was what the Court says it is. Thus the Congress may "enforce" the Court's interpretation of the Fourteenth Amendment, but it may not engage in independent constitutional interpretation. If Congress could interpret the Constitution, Kennedy reasoned, constitutional meaning would "change" at the whim of shifting legislative majorities. Here Kennedy drew on the separation of powers, insisting that the Court had been designated as the guardian of the Constitution. For, unlike the political branches, the Court was driven by reason and principle; it was, moreover, attuned to following precedent and therefore providing for constitutional settlement and stability. In support of these sweeping propositions, Justice Kennedy offered no evidence.

Oddly, though, *Boerne* struck down an act of Congress that went out of its way to protect the rights of religious minorities—The Religious Freedom Restoration Act (RFRA). In place of Congress's broad view of religious freedom, the Court offered a far narrower view. Comparing congressional debates over RFRA with the Court's opinion in *Boerne* does not lead to the inexorable conclusion that the Court is a principled defender of the Constitution while the Congress is blithely unconcerned with constitutionalism.[82] At issue between these two branches is the very meaning of religious liberty. And it is not at all clear that the Court provides constitutional stability against shifting political views. As this very case illustrates, Court opinions evolve and change as much as political attitudes. RFRA was passed, after all, because the Court had offered a "new" reading of the "free exercise clause" and Congress (perhaps acting too deferentially) was requiring the courts to return to an older reading. The Court's shifting view was all the more evident when it turned to precedent regarding Congress's Section 5 power. Fittingly, *Boerne* drew on the *Civil Rights Cases* of 1883. In that case the Court sealed its retreat from the promise of the Civil War amendments (moving into line with the politics of the day) by striking down a section of the Civil Rights Act of 1875. Kennedy's understanding of the *Civil Rights Cases*, however, ignored the rather different understanding of the immediate Warren Court precedents.

81. *City of Boerne v. Flores* 521 U.S. 507 (1997). See also *Cooper v. Aaron*, 358 U.S. 1 (1958).

82. Robert Nagel, *The Implosion of American Federalism* (New York: Oxford University Press, 2001), pp. 92-93; Carolyn Long, *Religious Freedom and Indian Rights: The Case of Oregon v. Smith* (Lawrence, KS: University Press of Kansas, 2000), pp. 227-50; and Louis Fisher, *Religious Liberty in America: Political Safeguards* (Lawrence, KS: University Press of Kansas, 2002), pp. 175-201.

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Simply put, constitutional meaning "changed" at the whim of a shifting Court majority.[83]

Despite the Court's insistence upon judicial supremacy, the Congress appears reluctant to accept the Court's reading of section 5. In the wake of *Boerne*, Congress passed the Violence Against Women Act (VAWA) on similar grounds as RFRA, as well as re-passing a modified version of RFRA.[84] Relying on *Boerne*, the Court struck down VAWA in *Morrison.*[85] We are, once more, in the midst of constitutional struggle. The result will almost certainly depend on the political give and take between the branches of government, as constitutional values are argued over and realized through the political process. The foregoing sketch touches all too briefly on all too few constitutional issues; it serves, nonetheless, to illustrate that this political dynamic is not a relic of the early nineteenth century. Not only is the Madisonian Constitution at home with these incongruities, it fosters them.

Conclusion: Dueling Constitutions

Madison's constitutionalism suggests that constitutional politics is an ordinary part of our constitutional system. As a polity we may give primacy to the Court in determining constitutional meaning. But even if this is true—and it is an empirical question that is under investigated—the Court's role is subject to change over time and thus is historically contingent. Patterns of constitutional development depend upon what all of the branches of government are doing. While judicial supremacy may be accepted at one moment—suggesting a political basis to judicial power even at these moments—this acceptance may well be contingent on the very actions of the judiciary. This draws our eye toward important constitutional issues and developments that are not, properly speaking, legal but political.

To see the Constitution in a more political light is to recover a more traditional understanding of constitution; it is to see how our Constitution constitutes our political life. Recovering such a view may even give us a deeper sense of ourselves as a polity, illuminating the ways in which the Constitution shapes our politics and, in turn, is shaped and reshaped by them.

83. See Lucas A. Powe, *The Warren Court and American Politics* (Cambridge, MA: Harvard University Press, 2000), pp. 264-65.

84. Dubbed "Son of RFRA" passed in 2000.

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

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