



Bringing the Courts Back Under the Constitution

NEWT 2012 Position Paper Supporting Item No. 9 of the 21st Century Contract with America:

Restore the proper role of the judicial branch by using the clearly delineated Constitutional powers available to the president and Congress to correct, limit, or replace judges who violate the Constitution.

***The Greatest Dangers to Liberty
Lurk in Insidious Encroachment
By Men of Zeal
Well-Meaning but Without Understanding***

**Justice Louis D. Brandeis (1928)
Engraved in Stone, U.S. Capitol Building (H120A)**

Summary

The Founding Fathers felt strongly about limiting the power of judges because they had suffered under tyrannical and dictatorial British judges.

In fact, reforming the judiciary, along with “no taxation without representation”, was among the American colonists’ principal complaints about the British Empire prior to the revolution. A number of the grievances in the Declaration of Independence relate to judges dictatorial and illegal behavior.

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As a result the Constitution provided for a narrowly defined and limited judiciary as Alexander Hamilton made clear in the Federalist Papers.

Since the New Deal of the 1930s, however, the power of the American judiciary has increased exponentially at the expense of elected representatives of the people in the other two branches. The judiciary has acted on the premise of “judicial supremacy,” where courts not only review and apply laws, but also actively seek to modify and create new constitutional law from the bench that the Supreme Court has asserted should be binding on the other two branches.

Judicial supremacy operates on the assumption that a Supreme Court decision on constitutional interpretation is final for all branches of government unless the Court reverses itself in the future, or a constitutional amendment is passed. The result is that courts have become more assertive and politicized to the point of an abuse of power. As federal courts have intervened in sectors of American life never before imaginable, the public has increasingly come to view them as an usurpative device for unelected rulers. This abuse of power and loss of public confidence amounts to a constitutional crisis.

Yet judicial supremacy only survives due to the passivity of the executive and legislative branches, which have refused to use their respective powers to correct the Court.

Said House Minority Leader Nancy Pelosi in 2005 about the Supreme Court’s decision in *Kelo v. New London*, which weakened citizen protections against government seizure of property: "It is a decision of the Supreme Court. If Congress wants to change it, it will require legislation of a level of a constitutional amendment. So this is almost as if God has spoken. It's an elementary discussion now. They have made the decision."

Such a view holds that only a constitutional amendment can limit or overturn a Supreme Court decision on constitutional questions. But surely anyone holding this view would concede that the Supreme Court could reverse itself, which it has done well over 100 times. If Supreme Court decisions can only be overturned by a subsequent court decision or by constitutional amendment, then that would mean that that a Supreme Court decision interpreting the Constitution has the force of a constitutional amendment.

This view is fatally flawed. The Founding Fathers created a system of checks and balances among the three federal branches that was intended to operate in the normal course of governing. It was precisely this balance of power between the three branches that the founding fathers believed would protect freedom. They based their understanding of a constitutional division of powers on Montesquieu's writing which would have explicitly rejected any one branch's supremacy. The amendment process was reserved for making fundamental changes to our constitutional structures; the amendment power was not intended to be used as a way to check and balance Supreme Court decisions. Our founding fathers believed that the Supreme Court was the weakest branch and that the legislative and executive branches would have ample abilities to check a Supreme Court that exceeded its powers.

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Take for example the legislative check on the executive branch's war making powers. If the legislative branch disagrees with the executive's conduct, it can always decide to use its power of the purse to not appropriate monies that fund the executive branch's conduct of a war. The idea that the legislative branch would have to pass a constitutional amendment to oppose the executive branch's actions would strike anyone as ludicrous. Yet, if the Supreme Court were to hand down a decision concerning the constitutionality of the executive branch's war making powers with which neither the executive nor the legislative branches agreed, we are supposed to believe that the only recourse to checking this decision of the Supreme Court is to pass a constitutional amendment. This view is clearly fatally flawed.

Drawing together 290 House members, sixty-seven senators, and thirty-seven states to pass a constitutional amendment is a difficult and time-consuming task. It is little wonder that the American people lose interest, shrug their shoulders, and give up on the fight if they believe they have to do so in order to correct a decision of five fellow citizens serving on the Supreme Court.

However, a constitutional amendment is a fight that neither of the other two branches is required to undertake in order to exercise checks and balances under the Constitution. The Constitution does not require a constitutional amendment to correct a Supreme Court decision, nor has it been the American tradition.

This NEWT 2012 campaign document serves as political notice to the public and to the legislative and judicial branches that a Gingrich administration will reject the theory of judicial supremacy and will reject passivity as a response to Supreme Court rulings that ignore executive and legislative concerns and which seek to institute policy changes that more properly rest with Congress. A Gingrich administration will use any appropriate executive branch powers, by itself and acting in coordination with the legislative branch, to check and balance any Supreme Court decision it believes to be fundamentally unconstitutional and to rein in any federal judge(s) whose rulings exhibit a disregard for the Constitution. The historical and constitutional basis for this position is outlined in this paper.

Newt Gingrich looks forward to having a national conversation over the next year about reestablishing a Constitutional balance among the three branches, how best to bring the Courts back under the Constitution, and formulating executive orders and legislative proposals that will establish a constitutional framework for reining in lawless judges. This paper begins that conversation.

The rejection of judicial supremacy and the reestablishment of a constitutional balance of power among the legislative, executive, and judicial branches will be an intense and difficult undertaking. It is unavoidable if we are going to retain American freedoms and American identity.

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Introduction: The Constitutional Problem and the Constitutional Solution

If a man will stand up and assert, and repeat, and reassert, that two and two do not make four, I know nothing in the power of argument that can stop him.

-- Abraham Lincoln

Speech at Peoria, IL, October 16, 1854, in Nicolay, John and John Hay, The Complete Works of Abraham Lincoln, Volume XII (Tandy Thomas Co. 1905) (p. 58))

The Constitutional Problem

If the Supreme Court ruled that $2+2=5$, would the executive and legislative branches have to agree? Would we have to pass a Constitutional amendment to overrule the Court and reassert that $2+2=4$?

In 1958, all nine sitting justices of the Supreme Court signed on to a judicial opinion in the case *Cooper v. Aaron* that asserted that the Supreme Court's interpretation of the Constitution was supreme in importance to the constitutional interpretation of the other two branches of government, and that this judicial supremacy, all nine justices asserted, is a "permanent and indispensable feature of our constitutional system."

The Supreme Court assertions in *Cooper v. Aaron* are factually and historically false.

Nevertheless, following *Cooper v. Aaron*, the executive and legislative branches have largely acted as if the Constitution empowered the Supreme Court with final decision making authority about the meaning of the Constitution. The executive and legislative branches have further behaved as if they have no choice but to give total deference to Supreme Court decisions, even if the executive and/or legislative branch believes the Supreme Court has seriously erred in its constitutional judgments.

The repeated failure of the executive and legislative branches to use their own constitutional powers to check and balance what they believe to be unconstitutional judicial rulings has effectively rendered the unelected justices of the Supreme Court with the final word on the meaning of the Constitution.

The constitutional problem that arises from this set of circumstances is two-fold. First, our constitutional framework of three branches exercising their unique powers to check and balance the other two branches was designed to protect individual liberties while assuring government would act with the consent of the governed.

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A judicial branch that is largely unaccountable and not subject to meaningful checks and balances can -- and does -- routinely issue constitutional rulings that threaten individual liberties, compromise national security, undermine American culture, and ignore the consent of the governed. (More information about the negative outcomes that arise from judicial supremacy is outlined below.)

Second, a judicial branch that is composed of judges not subject to meaningful checks and balances leads to situations in which individual judges (acting by themselves or with other judges) behave tyrannically and render constitutional judgments completely divorced from the Constitution, American history, and our commitment to representative democracy. There is a profound reason Lord Acton asserted "power tends to corrupt and absolute power corrupts absolutely." Note that he drops "tends" when describing absolute power. Since 1958 the courts have asserted the kind of unchecked power that is inherently corrupting.

The Constitutional Implications

In the fifty-three years since *Cooper v. Aaron*, the Supreme Court has become a permanent constitutional convention in which the whims of five appointed judges have rewritten the meaning of the Constitution and assigned to themselves the last word in the American political process. Under this new all-powerful model of judicial supremacy, the Supreme Court -- and by extension the trail-blazing Ninth Circuit Court and even some bold or arrogant district judges — federal judges have been able to redefine the Constitution and the law unchecked by the other two co-equal branches of government.

The long, difficult process of amending the Constitution with its requirements for two-thirds majorities in Congress and for three-fourths of the states to concur was designed to make changing the Constitution very difficult. When Newt Gingrich was Speaker of the House of Representatives, he tried to get a balanced budget amendment and received the 290 votes necessary in the House but fell two votes short in the Senate. Even if the amendment had received the necessary votes in Congress, it would then have had to go to the states to secure thirty-eight states' ratification.

Yet all this effort to obtain constitutional change is currently matched by a 5 to 4 vote on the Supreme Court. Note that the reality is even worse than a 5 to 4 decision. If the justices are evenly divided, 4 to 4, then one justice (at the present time very often Justice Anthony Kennedy) becomes a one person constitutional arbiter.

If five justices decide we cannot say "one nation under God," cannot pray in schools or at graduation, cannot display the Ten Commandments, and cannot criticize politicians with campaign ads just before an election, then we lose those rights. If they decide that the First Amendment protects virtual child pornography on the Internet against Congressional prohibition, then that becomes the law of the land.

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This power grab by the Supreme Court is a modern phenomenon and a dramatic break from all previous American history.

The Constitutional Solution

The constitutional solution is threefold.

First, the executive and legislative branches can explicitly and emphatically reject the theory of judicial supremacy and undertake anew their obligation to assure themselves, separately and independently, of the constitutionality of all laws and judicial decisions.

Second, when appropriate, the executive and legislative branches can use their constitutional powers to take meaningful actions to check and balance any judgments rendered by the judicial branch that they believe to be unconstitutional. An outline of some of these constitutional steps is outlined elsewhere in this paper.

Third, the executive and legislative branches should employ an interpretive approach of originalism in their assessment of the constitutionality of federal laws and judicial decisions.

A Gingrich administration will undertake each of these steps.

Background: The Historic Balance of Power Among the Three Branches

Historically there was a balance of power among the three branches of the federal government, as the Constitution provided and the *Federalist Papers* explicitly described.

Alexander Hamilton expected the legislative branch would define the reach of the judicial branch. He argued in Federalist 80 that when the judiciary had to be modified, “the national legislature will have ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove these inconveniences.”

Hamilton was also confident the judicial branch could never seriously encroach upon the powers of the legislative branch. Hamilton said it was because the judicial branch had a “total incapacity to support its usurpations by force.” In Federalist 78, he called the judiciary ““beyond comparison the weakest of the three departments of power” and the one that could “never attack with success either of the other two”.

Hamilton further noted in Federalist 81, “There can never be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations.”

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Why was Hamilton so confident of the comparative weakness of the judicial branch? He tell us that this “inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security.”

Where Hamilton had relied on the legislature’s power to check and balance the judiciary, James Madison argued for the theory of a division of power into three branches based on Montesquieu: “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.”

Madison famously lays out the theory of separation of powers in Federalist 51:

To what expedient then shall we finally resort for maintaining in practice the necessary partition of power among the several departments, as laid down in the constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, 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.

Madison argues in Federalist 48 that there must be some type of “practical security for each [branch], against the invasion of the others”:

...that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others.

Madison feared that the legislative branch would be the primary source of encroaching on the power of the other branches. He was wrong. To use Madison’s words, the judiciary has in fact become the invading branch against which the other branches need to exercise some practical security.

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Judicial Supremacy and The Power Grab of the Lawyer Class: The Oligarchy Jefferson Feared

The lawyer class began a grand-scale power grab with the Warren Court in the 1950s. Larry Kramer, dean of Stanford Law School, captures the sudden dramatic shift in the Warren Court's interpretation of judicial supremacy:

In 1958...all nine Justices signed an extraordinary opinion in *Cooper v. Aaron* insisting that *Marbury* [*Marbury v. Madison*] had “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution” and that this idea “has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.” This was, of course, just bluster and puff. As we have seen, *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...the declaration of judicial interpretive supremacy evoked considerable skepticism at the time. But here is the striking thing: after *Cooper v. Aaron*, the idea of judicial supremacy seemed gradually, at long last, to find wide public acceptance. (Kramer, Larry, *The People Themselves*, Oxford University Press: 2004, 221)

Having declared the Supreme Court superior to the legislative and executive branches, the members of the Supreme Court now live in a world in which they have no peers. Because it is so important we repeat the warning about absolute power Lord Acton made in the mid-nineteenth century that “power tends to corrupt and absolute power corrupts absolutely.” Note that he drops the “tends” in describing the impact of absolute power.

Yet even the occasional Supreme Court justice has recognized that the court has engaged in the dangerous pattern of judges making law (not interpreting it) and usurping the power of the other branches.

In an 1893 dissent, Justice Stephen Johnson Field, wrote of the disturbing nature of judges creating new law whole cloth and imposing it on the people of the states:

Nothing can be more disturbing and irritating to the states than an attempted enforcement upon its people of a supposed unwritten law of the United States, under the designation of the general law of the country, to which they have never assented, and which has no existence except in the brain of the federal judges in their conceptions of what the law of the states should be on the subjects considered. (*Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368 (1893) (Field, dissenting))

Writing in 1973, Justice Lewis Powell pointed out that “the separation of powers was designed to provide, not for judicial supremacy, but for checks and balances.” (*National R.R. Passenger Corp. V. National Ass'n of R.R. Passengers*, 414 U.S. 453, 472 (1974) (Powell, dissenting))

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On the current Court, Chief Justice John Roberts and Justice Antonin Scalia have been among the most vocal opponents of judicial supremacy in their opinions. For a more comprehensive list of warnings against judicial supremacy by jurists, elected officials, and other commentators, please see [Appendix A](#).

Judicial Supremacy’s Assault on National Security, Religious Liberty, and National Sovereignty

The Supreme Court’s assertion of judicial supremacy – and the passive acquiescence of the executive and legislative branches to such a doctrine – entails real dangers to our national security and our individual liberties. Below is an accounting of three areas in which these dangers arise.

Putting Lives at Risk in the Court’s Interference with National Security Powers of the Executive and Legislative Branches

In 2008, the Supreme Court ruled in *Boumediene v. Bush* that alien combatants have the constitutional right of habeas corpus and can thus access American courts to challenge their wartime detention. By making this decision based on an interpretation of the Constitution instead of Congressional statute, the Supreme Court has asserted that it has the ultimate power, not the Congress, of determining what rights our enemies have in wartime.

Writing the opinion for the majority, Justice Anthony Kennedy underscored that it will be Court writing the law on wartime detention going forward, not Congress, when he went so far as to order that all “questions regarding the legality of the detention [of combatants] are to be resolved in the first instance by the District Court”.

In dissent, Chief Justice Roberts observed that “[o]ne cannot help but think, after surveying the modest practical results of the majority’s ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.” ((553 U.S. 723) (2008) (Roberts, dissenting))

Roberts went on to explain exactly the fundamental constitutional error of the Court’s decision: “All that today’s opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.”

In his dissent, Justice Scalia described the stakes:

Contrary to my usual practice, however, I think it appropriate to begin with a description of the disastrous consequences of what the Court has done today....The game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle

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vital to our constitutional Republic. But it is this Court’s blatant abandonment of such a principle that produces the decision today. ((553 U.S. 723) (2008) (Scalia, dissenting))

The willingness of the Executive and Legislative branches to check and balance erroneous decisions of the judicial branch is vital to avoiding the dangers to our national security that arise when the Supreme Court exceeds its judicial powers in decisions like *Boumediene* that bear upon the war making powers of the executive and legislative branches.

An Assault on Religious Liberty

The Warren Court was determined to break with previous Supreme Courts and the traditions of American history to define a much more radical America. Its prime target was religion. Its ultimate power was judicial supremacy.

Justice Hugo Black had laid the groundwork in *Everson v. Board of Education* (1947). Justice Black used a narrow case: Could New Jersey fund transportation for children to get to Catholic schools as well as public schools? But in doing so, he helped to create the sweeping principle that would turn the Establishment Clause of the First Amendment into a bulldozer for creating a secular America. He wrote:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.” (330 U.S. 1 (1947) (Black, for the majority))

This is a fundamental misreading of Jefferson—who did not believe there should be a wall between God and state but only between an established religion and the government.

As Michael Novak, author of the wonderful book *On Two Wings*, has observed:

From 1776 to 1948, the dominant metaphor for church-state relations was that public officials must act as “nursing fathers” to the religious and moral habits of the people (the phrase in quotes comes from Isaiah). Jefferson’s phrase “wall of separation” from a letter of 1802 lay totally unnoticed until it was cited by the Supreme Court in 1879 in *Reynolds v. United States* in a mistaken transcription of Jefferson’s original letter; the focus in 1879 was

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not on “separation” but on the term “legislative powers” (which the transcriber had written instead of Jefferson’s original clearly formed handwriting “legitimate power”). The metaphor otherwise lay unused and virtually unknown until Justice Black drew it from obscurity in 1947 (still using the erroneous translation.) (Novak, Michael. *On Two Wings*. San Francisco: Encounter Books, 2003. 70.)

James Hutson also provides interesting details on this often overlooked piece of history: [That Jefferson] supported throughout his life the principle of government hospitality to religious activities (provided always that it be voluntary and offered on an equal-opportunity basis) indicates that he used the wall of separation metaphor in a restrictive sense....government, although it could not take coercive initiatives in the religious sphere, might serve as a passive, impartial venue for voluntary religious activities. (Huston, James H., “Thomas Jefferson’s Letter to the Danbury Baptists: A Controversy Rejoined,” *William and Mary Quarterly*; Volume LVI, October 1999, 789)

Justice Black had asserted a ruthlessly secular, anti-religious definition of the Establishment Clause and it became the benchmark for future decisions, unchallenged by a cowed legislative and executive branch. But as the late Chief Justice Rehnquist noted in his dissent in *Wallace v. Jaffree*, the “wall of separation between church and State” is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.” (772 U.S. 38, 106 (1985) (Rehnquist, dissenting)).

The next big break with tradition came in 1962 when the Supreme Court in *Engel v. Vitale* struck down a New York State law that required school officials to open the day with prayer. Justice Potter Stewart’s dissent cited examples of the “deeply entrenched and highly cherished spiritual traditions of our nation.” As Justice Stewart noted, we “are a religious people whose institutions presuppose a Supreme Being.”

Presciently, Justice Douglas concurred in the majority but noted its ominous implications:

What New York does on the opening of its public schools is what we do when we open court. Our Crier has from the beginning announced the convening of the Court. God Save the United States and this Honorable Court. That utterance is a supplication, a prayer in which we, the judges, are free to join, but which we need not recite any more than the students need to recite the New York prayer. What New York does on the opening of its public schools is what each House of Congress does at the opening of each day’s business. (370 U.S. 421, 439 (1962) (Douglas, concurring))

Most people ignored Douglas’s observation at the time but we now know they should have taken it very seriously. The line was being crossed from a pro-religious nation to an anti-religious nation and with each judgment the momentum of secularism accelerated.

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In the 1963 decision *Abington v. Schempp*, the Supreme Court ruled that Bible reading in schools was unconstitutional. This case is widely regarded as the decisive break in which the Court began to use the Establishment Clause of the First Amendment to drive religion out of public life. Even those who sought to retain some reference to America's religious origin and the religious basis of the rights of Americans began doing so in the context of an acceptance of a sanitized, secular, non-religious public life.

The theme that God can remain in public life as long as He is not taken seriously was established in this case. Justice Arthur Goldberg noted that no practice is prohibited if it does not "have meaningful and practical impact." He went on to assert that acts could remain constitutional as long as they remained a "mere shadow" of religious reference and were not a "real threat." Note that God had gone from the source of salvation (personal and national), inspiration, and wisdom to being a "threat" that could be tolerated only if the threat was tiny and timid.

In the same case Justice William Brennan noted that patriotic exercises such as the Pledge of Allegiance were fine because "they had lost any religious significance through repetitive usage." In other words, God could survive in public only as long as no one thought the reference actually meant God. Here is Justice Brennan's reasoning:

This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded "under God." Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact. (374 U.S. 203, 303) (1963) (Brennan, concurring)

Justice Brennan made clear the break with the Founding Fathers and with American history: "A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected."

And still no meaningful response from the executive and legislative branches.

Justice Potter Stewart filed the only dissent and observed,

If religious exercises are held to be an impermissible activity in schools, religion is placed in an artificial and state-created disadvantage....And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at least, as governmental support of the beliefs of those who think that religious exercises should be conducted only in private. (374 U.S. 203, 313) (1963) (Stewart, dissenting)

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Federal judges will continue to erode religious and other liberties in its decision making until the political branches commit themselves to correct the decisions of federal judges.

A good place to start correcting federal judges is in Texas. This past June, a federal district court judge in West Texas issued an extraordinary judicial order that threatened local school officials with going to jail if they failed to censor the content of a student's speech at a high school graduation ceremony. Such oppressive and tyrannical behavior from a sitting federal judge is not constitutional and has no place in America. Congress would be well within its power to impeach and remove this federal judge from office, or failing that, work with the President to abolish his judgeship. **Appendix B** has more information about this case.

Diminished American Sovereignty Owing to the Growing Practice of Using Foreign Opinion as the Basis for U.S. Constitutional Interpretation

There is a new and growing pattern among the Left-liberal establishment to view foreign opinion and international organizations as more reliable and more legitimate than American institutions. In July 2004, about a dozen House members wrote a letter to United Nations Secretary General Kofi Annan asking him to certify the 2004 presidential election. When an amendment was offered to block any federal official involving the U.N. in the American elections, the Democrats voted 160 to 33 in favor of allowing the U.N. to be called into an American election. The Republicans voted 210 to 0 against allowing the United Nations to interfere.

The fact that a five-to-one margin of Democrats could vote in favor of United Nations involvement in an American presidential election is an astonishing indicator of the degree to which international institutions have acquired greater legitimacy among the Left-liberal establishment.

This same trend toward the reliance of foreign opinion and foreign institutions is also developing in the Supreme Court.

Former Justice O'Connor, in 1997, argued, "Other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit." Later, in 2002, she further asserted: "There is much to learn from...distinguished jurists [in other places] who have given thought to the same difficult issues we face here."

Justice Ruth Bader Ginsberg, in 2003, stated:

[O]ur "island" or "lone ranger" mentality is beginning to change. Our Justices...are becoming more open to comparative and international law perspectives. Last term may prove a milestone in that regard. *New York Times* reporter Linda Greenhouse observed on July 1 in her annual roundup of the Court's decisions: The Court has displayed a [steadily growing] attentiveness to legal developments in the rest of the world and to the Court's role

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in keeping the United States in step with them. **(Ginsburg, Ruth Bader. “Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication.” Sherman J. Bellwood Lecture delivered on September 18, 2003 at the University of Idaho)**

In other words, Justice Ginsberg is promising that as elites in other countries impose elite values on their people, the Supreme Court has the power and the duty to translate their new Left-liberal values on the American people. No more worrying about the legislative and executive branches. No more messy process of debating with the American people. No more old-fashioned defense of American traditions and American constitutional precedent.

Justice Ginsberg quotes approvingly Justice Kennedy’s opinion making same-sex relationships a constitutional right in part out of “respect for the Opinions of [Human]kind.” The Court emphasized: “The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries....In support, the Court cited the leading 1981 European Court of Human Rights decision...and the follow-on European Human Rights Court decisions.”

And most recently in February of 2006, Justice Ginsburg gave a speech in South Africa, on “The Value of a Comparative Perspective in Constitutional Adjudication” in which she was quite explicit about her view of using foreign law:

The notion that it is improper to look beyond the borders of the United States in grappling with hard questions...is in line with the view of the U.S. Constitution as a document essentially frozen in time as of the date of its ratification. I am not a partisan of that view. U.S. jurists honor the Framers' intent "to create a more perfect Union," I believe, if they read the Constitution as belonging to a global 21st century, not as fixed forever by 18th-century understandings. **(Ginsburg, Ruth Bader. “A decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, Constitutional Court of South Africa, February 7, 2006)**

For Justice Ginsburg, the U.S. Constitution does not belong to the United States but to “a global 21st Century”, whatever that means. Later in her speech, Justice Ginsburg gave an idea of her meaning when she cited approvingly the judgment of the Court in *Roper v. Simmons*. In this case, a Missouri jury of his peers judged that 17 year-old Christopher Simmons acted as an adult, with premeditation, when he broke into a woman’s home, covered her head in a towel, wrapped her up in duct tape, bound her hands and legs with electrical wire, and then dumped her over the side of a bridge and left her to drown to death. For his actions, the Missouri jury gave Simmons the death penalty.

The Supreme Court said no and that henceforth no Missouri jury would have the right, and no jury in any U.S. state shall ever again have the right, to determine whether justice calls for the death penalty to apply in cases like this. The Court decided that in the global 21st century it would henceforth be a violation of the Constitution for Americans to make such judgments, even though Americans had exercised this right for the previous two hundred plus years.

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DRAFT – 10/7/11
(Senior Editor: Vince Haley)
(Associate Editors: Brady Cassis and Emily Renwick)
NEWT 2012

What changed? The Court in *Roper* argued that the Constitution's 8th Amendment prohibition on cruel and unusual punishment is subject to interpretation in light of the "the evolving standards of decency that mark the progress of a maturing society". Justice Ginsburg called the decision in *Roper* as "perhaps the fullest expressions to date on the propriety and utility of looking to 'the opinions of [human]kind.'" She went on to note that the Court "declared it fitting to acknowledge 'the overwhelming weight of international opinion against the juvenile death penalty.'" She cited Justice Kennedy who wrote that the opinion of the world community provided "respected and significant confirmation of our own conclusions." Kennedy also wrote that "It does not lessen our fidelity to the Constitution [to recognize] the express affirmation of certain fundamental rights by other nations and peoples."

Justice Scalia dissents strongly from this view, writing that Constitutional entitlements cannot come from foreign governments: "Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct." Scalia asserts that "this Court...should not impose foreign moods, fads, or fashions on Americans." In his dissent in *Roper*, Justice Scalia blasted the majority's reliance on foreign opinion, rejecting that "the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners." (543 U.S. 551 (2005) (Scalia, dissenting))

In a 2002 case, *Atkins v. Virginia*, Chief Justice Rehnquist also dissented: "I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination...we have...explicitly rejected the idea that the sentencing practices of other countries could serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people." (536 U.S. 304, 325 (2002) (Rehnquist, dissenting))

Despite these dissents, the majority on the Court is continuing to look outside America for guidance in interpreting American law.

In her own actions, Justice Ginsberg noted that in the Michigan affirmative action cases, "I looked to two United Nations Conventions: the 1965 International Convention on the Elimination of all Forms of Racial Discrimination, which the United States has ratified; and the 1979 Convention on the Elimination of all Forms of Discrimination Against Women, which, sadly, the United States has not yet ratified....The Court's decision in the Law School case, I observed, accords with the international understanding of the office of affirmative action." Note that Justice Ginsberg is proudly stating her use of a United Nations Convention that the United States Senate has not yet ratified.

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DRAFT – 10/7/11

(Senior Editor: Vince Haley)

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NEWT 2012

Thus a mechanism has been locked into place by which five appointed lawyers can redefine the meaning of the U.S. Constitution and the policies implemented under that Constitution either by inventing rationales out of thin air or by citing whatever norms contained in foreign precedent they think helpful to buttress their own claims. This is not a judiciary in the classic sense, but a proto-dictatorship of the elite pretending to still function as a Supreme Court.

Rejecting Judicial Supremacy: History of Executive and Legislative Actions to Check and Balance the Judicial Branch

At the heart of the current grasp for power is the issue of whether the judiciary is truly the supreme interpreter of the Constitution.

Jefferson was quite clear about the absurdity of claims to judicial supremacy: “You seem...to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.” (**Letter from Thomas Jefferson to William C. Jarvis, September 28, 1820, in the Jeffersonian Cyclopedia (Funk and Wagnalls 1900) (P. 845)**) Jefferson warned that “the germ of dissolution of our federal government is in the constitution of the federal judiciary, an irresponsible body...working like gravity by night and day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all be consolidated into one.” (**Letter from Thomas Jefferson to C. Hammond, 1820, in the Jeffersonian Cyclopedia (Funk and Wagnalls 1900) (P. 131))**)

Jefferson further wrote that “the great object of my fear is the federal judiciary. That body, like gravity, ever acting, with noiseless foot, and unalarming advance, gaining ground step by step, and holding what it gains, is engulfing insidiously the special governments into the jaws of that which feeds them.” (**Letter from Thomas Jefferson to Spencer Roane, 1821, in the Jeffersonian Cyclopedia (Funk and Wagnalls 1900) (P. 842))**) The Jeffersonians had asserted unequivocally that the legislative and executive branches were coequals of the judiciary branch and that when two of the three branches were united, they could in effect trump the third branch.

President Thomas Jefferson knew exactly what he was describing. He was the first American president to confront a hostile judiciary. The Federalists had used the federal judiciary to enforce the Alien and Sedition Acts of 1798 to imprison Jeffersonian activists. After the Federalists lost the election of 1800, they had from November until March 1801 (back then inauguration did not occur until March) to try to slow down the emerging Jeffersonian majority. The Federalists more than doubled the number of federal circuit judges, picked the judges, and had their departing Senate majority approve the new Federalist judges. Thus the Federalists prepared to give up power confident they had boxed in the new majority.

The Jeffersonians reacted to this post-election court packing with fury. They called the new appropriators Midnight Judges. Jefferson and the new Congress abolished over half the federal judgeships and reorganized the federal judiciary with their repeal of the Judiciary Act of 1801

(Paid for by NEWT 2012)

DRAFT – 10/7/11

(Senior Editor: Vince Haley)

(Associate Editors: Brady Cassis and Emily Renwick)

NEWT 2012

and their passage of the Judiciary Act of 1802. In the election of 1802 the Jeffersonians increased their majority over the Federalists in a campaign that further strengthened the legislative and executive branches against the judicial branch.

The Supreme Court ruled in *Stuart v. Laird* that this action was within Congress's constitutional powers under Article III.

Jefferson was not the last President to confront a judicial branch that exceeded its authority.

President Andrew Jackson similarly interposed the executive branch against the Supreme Court during the debate over removing the charter of the Bank of the United States. To those who asserted that the Bank was constitutional because of Supreme Court precedent, Jackson retorted: "The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve" (**President Jackson's Veto Message Regarding the Bank of the United States, July 10, 1832**)

Abraham Lincoln reentered politics largely in response to the Supreme Court's *Dred Scott* decision enforcing slavery throughout the United States. Lincoln saw the Supreme Court decision as an assault on the freedom of all Americans. Lincoln's entire presidential campaign was driven by his opposition to the extension of slavery embodied in the Supreme Court's decision. In many ways it could be argued that the Supreme Court created the legal setting in which the people of the United States had to settle what their Constitution meant and that settling this argument required a civil war.

In his inaugural address, Lincoln laid out his approach to dealing with a Supreme Court that had clearly encroached into matters reserved to the executive and legislative branches:

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. (**Lincoln's First Inaugural Address, March 4, 1861**)

(Paid for by NEWT 2012)

DRAFT – 10/7/11

(Senior Editor: Vince Haley)

(Associate Editors: Brady Cassis and Emily Renwick)

NEWT 2012

For Lincoln, it was not just slavery at stake but American self-government, for if the Court became the last word in American politics, then it would mean a surrender of self-government.

Note that Lincoln was not reckless in asserting a constitutional basis for the executive branch to balance the Supreme Court. He clearly defined which type of Supreme Court decisions did not require absolute adherence by the whole population once they were handed down. These included decisions upon “vital questions” that “affected the whole people” that were to be “irrevocably fixed” in the litigation before the parties “the instant they are made”. Lincoln readily acknowledged that all decisions by the Court would be binding upon the parties to the litigation but that did not mean that all decisions had to become a politically binding rule for the rest of the country.

Lincoln had also been careful in his earlier public statements about *Dred Scott*. In a speech in 1857, Lincoln “took the position that *Dred Scott* could be challenged because it had not been unanimous, because it was consistent with neither ‘legal public expectations’ nor past political practices, and because it was the first time the Court had addressed the issue. Were things otherwise, he mused, ‘it then might be, perhaps would be, factious, nay, even revolutionary, not to acquiesce in it as a precedent.’” (Larry Kramer, *The Supreme Court 2000 Term: Foreword: We the Court*, 115 Harv. L. Rev. 4 (2001))

In office, Lincoln followed through on his refusal to accept judicial supremacy by refusing to treat *Dred Scott* as legally binding on the executive branch. For example, his administration issued U.S. passports to free blacks and treated them as full citizens notwithstanding the *Dred Scott* Court’s refusal to do so. Lincoln also signed legislation that placed restrictions on slavery in the federal territories, a position directly at odds with *Dred Scott*.

None of Lincoln’s actions on behalf of free blacks would have been possible had he accepted judicial supremacy. Judicial supremacy would have entailed the continued outrage against the dignity of black Americans.

For his part, when Franklin Delano Roosevelt found the Supreme Court consistently throwing out New Deal legislation, he attempted to pack the Court with additional Supreme Court justices. While Roosevelt ultimately lost the battle in Congress, the assault had so intimidated the conservative justices that they shifted their opinions dramatically to accommodate the views of the vast majority of the American people as expressed in their votes for president and Congress. Roosevelt lost the battle but won the war.

During one of his famous Fireside Chats in March 1937, Roosevelt laid out his vision of a court with dramatically scaled down powers:

I want - as all Americans want - an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written, that will refuse to amend the Constitution by the arbitrary exercise of judicial power - in other

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DRAFT – 10/7/11

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NEWT 2012

words by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts which are universally recognized...

During the past half-century the balance of power between the three great branches of the federal government has been tipped out of balance by the courts in direct contradiction of the high purposes of the framers of the Constitution. It is my purpose to restore that balance. You who know me will accept my solemn assurance that in a world in which democracy is under attack, I seek to make American democracy succeed. You and I will do our part. **(Roosevelt's Fireside Chat on the Reorganization of the Judiciary, March 9, 1937, available at Franklin Delano Roosevelt Presidential Library, <http://docs.fdrlibrary.marist.edu/030937.html>)**

Thus there is significant precedent in American history of the legislative and executive branches acting to correct or otherwise restrict the reach of judicial decisions. These actions have also shown upon occasion that they can strongly influence the judicial branch into changing its views when they are out of touch with the values of the vast majority of Americans.

What then can be done today to bring the Supreme Court and the other federal courts back under the Constitution and respecting the rule of law?

Reestablishing a Balance of Power Today: Reasserting Executive and Legislative Branch Powers to Check and Balance the Judiciary

There is a sense of defeatism among the American people when it comes to the federal courts. People get angry but then give up because the elite media and elite lawyers insist on judicial supremacy and assert that the only way to check and balance the Courts is to pass a constitutional amendment.

But as this paper has outlined, the Constitution does not require a constitutional amendment to check and balance the judiciary. The President and each member of Congress takes an oath to defend the Constitution; if they believe that the judicial branch is acting contrary to the Constitution, then they have an obligation to use their Constitutional powers to check and balance the judicial branch.

Below are several constitutional steps that the legislative and executive branches, along with the people, can take to check and balance the judiciary and reestablish a constitutional balance.

These powers should be used sparingly and only in proportion to the extent that the judicial branch is exceeding its powers. Some people will read this list and conclude these strategies are too bold. But if we don't act boldly, the judicial branch will continue to curtail our liberties and force their arbitrary beliefs on us. We must either be willing to check the judiciary, or live in a radically changed America. We choose to keep America and check the ways of the judiciary.

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DRAFT – 10/7/11

(Senior Editor: Vince Haley)

(Associate Editors: Brady Cassis and Emily Renwick)

NEWT 2012

Electing the right Senators

The American people can insist on electing senators who promise to confirm judges who enforce the Constitution as written according to the original understanding of the people who enacted the Constitution. But nominating and confirming judges who are unlikely to legislate from the bench is not enough.

Nominating and Confirming the right Judges

The President and Senate should work together to insist that only those individuals who are committed to an originalist understanding of the Constitution are nominated and confirmed as Supreme Court justices and lower federal court judges. Judges with an originalist understanding will subordinate themselves to the meaning of the Constitution as it was intended by the framers, and not substitute their own judgments about its meaning. The inherent judicial self-restraint that comes from an originalist approach to the Constitution offers the best long term assurance that federal judges will not exceed their powers.

Setting Limitations on Federal Court Jurisdiction

Article III, section 2, clause 2 provides that “the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make”. This power, along with Congressional power to create and abolish all lower federal courts, provide for a powerful check on the judiciary. Acting together, the legislative and executive branches can therefore limit the jurisdiction of the federal courts through ordinary legislation. This legislation would remove the power of the courts to hear certain types of cases that the executive and legislative branches believe that the federal judiciary has simply gotten wrong in the past.

How might this approach play out in practice? For example, Americans can ask that Congress pass a law insisting on the centrality of “our Creator” in defining American rights, the legitimacy of appeals to God “in public places,” and the absolute rejection of judicial supremacy as a violation of the Constitution’s balance of powers. If the Supreme Court ruled that such a law was unconstitutional, the legislative and executive branches could take corrective action. Congress and the president could pass the law a second time but include a provision that affirms the legislative and executive branches’ constitutional role to define the Court’s jurisdiction. This law could also include a specific provision that barred the lower federal courts from reviewing it.

If this does not convince the judges to stand down, the legislative and executive branches have additional options. They could explicitly provide by statute that any federal judge that refused to adhere to the legislative limitations on jurisdiction would be subject to impeachment and removal from office. While not necessary, explicit notice to the judicial branch in the form of legislation that ignoring limitations on jurisdiction can lead to their impeachment may temper judicial behavior. It also may provide additional political support for the removal of judges in a future impeachment proceeding on the grounds of a judge ignoring statutory limitations on its jurisdiction.

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DRAFT – 10/7/11

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NEWT 2012

The Founding Fathers believed that in a struggle between the popularly elected branches and the appointed branch, the judges would inevitably lose.

Impeachment Power

Judges who issue unconstitutional decisions or who otherwise ignore the Constitution and the legitimate powers of the two other co-equal branches of the federal government can be subjected to impeachment. For example, any federal judge who joins in an opinion that flouts explicit limitations on jurisdiction in legislation establishing military commission should be subject to impeachment for violating the Constitution. An impeached judge who escapes conviction in the Senate due to its 2/3 voting requirement may nevertheless also face the possibility of his judgeship simply being abolished, an option outlined below which would require fewer votes in the Senate. ([Appendix C](#) has a more detailed description of the impeachment power.)

Congress Can Create Statutory Guidelines for the Impeachment of Federal Judges

Congress can create specific statutory measures that govern the impeachment of federal judges. The simple Congressional action itself of codifying existing constitutional authority to impeach judges on various grounds, including the issuing of unconstitutional opinions, asserting arbitrary power, and otherwise usurping the authority of the legislature will send an unmistakable signal to all federal judges of a renewed commitment by the legislative and executive branches to defend the Constitution against oppressive and tyrannical judges.

Judicial Accountability Hearings

Congress can establish procedures for relevant Congressional committees to express their displeasure with certain judicial decisions by holding hearing and requiring federal judges come before them to explain their constitutional reasoning in certain decision and to hear a proper Congressional Constitutional interpretation.

Abolish Judgeships and Lower Federal Courts

The Constitution vests Congress with the power to create and abolish all federal courts, with the sole exception of the Supreme Court. Congress even has the power, as Congressman Steve King of Iowa frequently notes, to “reduce the Supreme Court to nothing more than Chief Justice Roberts sitting at a card table with a candle.” During the administration of Thomas Jefferson, the legislative and executive branches worked together to abolish over half of all federal judgeships (18 of 35). While abolishing judgeships and lower federal courts is a blunt tool and one whose use is warranted only in the most extreme of circumstances, those who care about the rule of law can be relied upon to consider whatever constitutionally permissible tools they can find to fight federal judges and courts exceeding their powers. It is one of many possibilities to check and balance the judiciary. Other constitutional options, including impeachment, are better

(Paid for by NEWT 2012)

DRAFT – 10/7/11

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NEWT 2012

sued in most circumstances to check and balance the judiciary.

Spending Power

Congress has the power of the purse. It can reduce or eliminate funding of Courts to carry out specific decisions or a class of decisions.

Executive and Legislative Branch Adoption of Originalism

Both the executive and legislative branches should be encouraged to adopt originalism as a mode of constitutional analysis when deciding on the constitutionality of executive and legislative branch actions as well as the constitutionality of legislation. Originalism posits that the interpretation of the Constitution should adhere to the meaning of the text as it was understood by those who enacted it. Originalism rejects the idea of substituting one's own view about the meaning of the Constitution for how the Constitution was originally understood. A Gingrich administration will adhere to a theory of originalism in its judgments about constitutional interpretation.

Limiting the General Application of a Judicial Decision

Abraham Lincoln outlined in his First Inaugural that in certain circumstances, the holdings of Supreme Court decisions should be limited to the litigants in a case, and not be held to apply as a general controlling standard for similar cases. As the head of the executive branch, a President could command all executive branch agencies in certain circumstances to limit the application of a Supreme Court decision to only the litigants involved and otherwise ignore it as a rule of general application.

Ignoring a Judicial Decision

In very rare circumstances, the executive branch might choose to ignore a Court decision. One can imagine such a circumstance when Courts attempt to usurp the foreign policy powers of the executive and legislative branches and such usurpation compromises the national security of the United States and threatens the safety of Americans.

For example, if the Congress were to enact a statute on military commissions that explicitly limited federal court jurisdiction, then the President would be warranted in ignoring any judicial decision or action that violated the limitation on jurisdiction. It is proper to do so because the Congress that enacted the law presumptively believed it was constitutional. The President who signed it (assuming no veto) thought it was constitutional and the President who ignores the court decision thought it was constitutional. Thus, it is two branches against one, in an area where the Constitution empowers the executive and legislative branches (not the judicial branch), and in a case in which the judicial branch is violating constitutional limitations on its authority.

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DRAFT – 10/7/11

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NEWT 2012

Challenging Precedents via the Solicitor General

In areas of law in which the executive branch believes that the judicial branch has made decisions that exceeded its constitutional powers, the President can direct the Solicitor General to join litigation challenging the existing jurisprudence believed to be unconstitutional.

Statements of Executive Branch and Legislative Branch Policy Directed to the Judicial Branch

The Executive Branch and Legislative branches should routinely make clear to the Judicial Branch by statements of policy and/or by legislation their beliefs about the constitutional limits of judicial power in certain cases and in certain class of cases.

When the 9th Circuit ruled in 2002 that the words “under God” in the Pledge was unconstitutional, Congress made its views very clear about the decision. By a 99-0 Senate vote and 401-5 in the House, Congress specifically reaffirmed the language of the 1954 Pledge Law. The President then signed this legislation. The Supreme Court apparently got the message. Two years later it struck down the Ninth Circuit case on procedural grounds.

Make the Issue of Defeating Judicial Supremacy a Campaign Issue

Americans can play a vital role by supporting politicians that make specific pledges to check and balance the Supreme Court when the Court makes a constitutional error.

For example, if every major candidate running for President in 2012 were to pledge to join the effort to challenge judicial supremacy, then it would send an unmistakable signal to the judicial branch that it had better consider its rulings carefully lest it subject itself to severe erosion in its public support.

A Role for State Legislatures and the People

The people can also appeal to their state legislatures to call on Congress and the president to act every time the courts infringe on their liberties, traditions, and history or whenever pending litigation threatens to dramatically change the existing legal system in a state. If there was a nationwide watchdog committee monitoring the courts and engaging the state legislatures whenever the courts behave radically, judges might think twice about radicalizing our laws. State legislators and state Attorneys-General might similarly take actions to issue warnings to the federal judiciary about the consequences of the judicial branch exceeding its powers.

A Role for Law Schools

The majority of lawyers are being educated in law schools that primarily teach an all powerful model of the federal judiciary and later become members of legal professional associations that

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DRAFT – 10/7/11

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NEWT 2012

largely embrace this philosophy. As the executive and legislative branches vigorously reject judicial supremacy, emphasize the importance of originalism in constitutional interpretation, and reassert their constitutional powers to check and balance the judicial branch, we can expect law schools to take notice. It is important for every law student to explore the historical legal and non-legal materials to understand why judicial supremacy constitutes a fundamental violation of American constitutional thinking, a radical departure from the constitutional system that the Founding Fathers invented, and a dangerous model for the survival of a free society. Legal educators should allow for a robust dialogue in the law schools about the importance both intellectually and for the health of the country to return to a more modest sense of the role of the judiciary.

Statements of NEWT 2012 Policy on the Disposition of Certain Cases and Category of Cases Pending in the Federal Judiciary

Below are three NEWT 2012 policy statements regarding certain pending judicial matters. They provide an illustration of the types of statements that a Gingrich administration will make available from time to time to the judicial and legislative branches about its policy regarding certain pending judicial matters.

Hosanna-Tabor Evangelical Lutheran Church v. EEOC

In the event that the Supreme Court’s final judgment in this case eliminates the “ministerial exception” for religious organizations from the application of employee non-discrimination laws (or narrows the exception, as argued for by the Holder Justice Department, to cover only “those employees who perform exclusively religious functions”), the President should take the following actions:

- order the EEOC, and all executive branch agencies, to maintain the “ministerial exception” doctrine as it existed in federal jurisprudence prior to the Court’s decision as the standard of decision making for all EEOC proceedings beyond the case and litigants in the actual Supreme Court case.
- submit to Congress legislation that will codify a broad “ministerial exception” to the application of non-discrimination laws to religious organizations.
- submit to Congress legislation that limits the jurisdiction of the federal courts from hearing cases challenging the ministerial exception for a period of not less than ten years.

Cases Affecting the Executive Branch’s Foreign Policy and National Security Powers

In a series of rulings issued after 9/11 – *Rasul v. Bush* (2004), *Hamdan v. Rumsfeld* (2006), and *Boumediene v. Bush* (2008), the Supreme Court exceeded its proper judicial role and interfered with the executive branch’s constitutional powers in foreign policy, including the commander in

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DRAFT – 10/7/11

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NEWT 2012

chief's wartime powers. In addition, in *Boumediene*, the Supreme Court ignored the constitutional limits placed by Congress on its jurisdiction over aliens held by the United States as enemy combatants at Guantanamo Bay, holding such limits invalid and effectively declaring that the Court would be the final arbiter (not Congress) of federal court jurisdiction.

The Supreme Court behaved irresponsibly in this set of cases and thereby sent very powerful signals to the entire federal judiciary that judges can rule with impunity according to their own standards of decision-making, not constitutional standards. If federal judges can act without regard for the Constitution in matters as serious and weighty as the conduct of war and the safety of the nation and its men and women in uniform, it will be much easier for federal judges to act just as casually and more so in constitutional matters of lesser concern.

The Supreme Court used to understand that the very nature of executive decision making in foreign policy and military affairs – especially the conduct of war and the gathering of intelligence – is political, not judicial. Courts lack the competence to make such decisions. Moreover, our constitutional system was designed for the political branches to act together in these areas, making the political branches accountable to the people who are directly affected by their judgments in matters of war. Unfortunately, the Supreme Court has forgotten these most basic of constitutional principles.

Therefore, Gingrich administration policy vis-à-vis the judicial branch concerning national security rulings will be made very clear. The political branches were given power over defense and the conduct of war. The federal courts were given no such power. Should the Supreme Court issue decisions during a Gingrich administration that unconstitutionally empower federal judges with certain national security responsibilities, such decisions will be ignored. The President is accountable to the whole of the people, and can be held accountable at the next election. Federal judges do not have such accountability. Moreover, if the Congress believes that a President's explanations for ignoring such decisions of the Supreme Court are unacceptable, Congress always has the power of impeachment.

In 1942, eight spies sent by Nazi Germany to commit sabotage in the United States were captured on U.S. soil. A military commission was established. Upon learning that the German saboteurs had petitioned the Supreme Court to intervene in the military commission trial, President Roosevelt communicated to the Chief Justice of the Supreme Court that he did not care what the Court had to say and that he would ignore any order of the Court directing him to release the prisoners of war.

A Gingrich administration will show no less tenacity than FDR in protecting the lives of Americans and the security of the United States by communicating to the Supreme Court that the federal judiciary has no role in the conduct of war.

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NEWT 2012

Cases Affecting the Definition of Marriage

In 1996, Speaker Newt Gingrich and the House of Representatives passed the Defense of Marriage Act (DOMA) by a vote of 342 to 67. The Senate also passed the measure by a vote of 85-14. It was subsequently signed by President Bill Clinton and enacted into law.

Given that there existed in 1996, and continues to exist, vast differences in the opinions among the people of the several States about how they wish their state to define marriage, DOMA provided a means that respected the wishes of the people in each state to determine what legal treatment to accord same sex relationships.

The different outcomes on this issue in the various states show that the DOMA framework for handling the issue of the legal status of same sex relationships is being worked out by the people through democratic and political means.

But federal judges threaten to derail this process and make the decision once and for all by themselves.

The Constitution of the United States has absolutely nothing to say about a constitutional right to same sex marriage. Were the federal courts to recognize such a right, it would be completely without constitutional basis. It would be substituting its own political views for the political views of the people. The federal courts would be replacing the right of the people to make such decisions for themselves with the manufactured authority of the Court to rule in such a case.

The country has been here before. In 1856, the Supreme Court thought it could settle the issue of slavery once and for all and impose a judicial solution on the country. In 1973, the issue was abortion and once again a Supreme Court thought that it could impose a judicial solution on the country once and for all.

Judicial solutions don't solve contentious social issues once and for all, especially when they are manufactured without regard to any constitutional basis.

Should the Supreme Court fail to heed the disastrous lessons of its own history and attempt to impose its will on the marriage debate in this country, it will bear the burden of igniting a constitutional crisis of the first order. The political branches of the federal government, as well as the political branches of the several States, will surely not passively accept the dictates of the federal judiciary on this issue. An interventionist approach by the Court on marriage will lead to a crisis of legitimacy for the federal judiciary from which it may take generations to recover.

Bringing the Courts Back Under the Constitution

Americans are a law-abiding people and we therefore tend to have an instinctive respect for the Supreme Court and its judgments. We respect and admire the Court's historic commitment to racial equality in *Brown v. Board of Education* and a series of civil rights decisions. We

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NEWT 2012

continue to appreciate in most cases its principled defense of our First Amendment rights to freedom of speech, for example in the recent case of Citizens United. But we must not make the mistake of supposing that the Supreme Court's - or any federal court's - judgments are infallible.

The Founding Fathers were well aware that federal judges - like Congressmen and Presidents - are fallible human beings that can make mistakes. They established a system of checks and balances to ensure that each of the branches of government could correct and balance mistakes by the other branches.

The history of the Supreme Court's decisions in the last five decades amply confirms the founders' insight: the Supreme Court - as well as lower federal courts - has proven in numerous decisions that it is far from infallible. Just a few examples confirm this fact. In 1973, the Supreme Court decided that the Constitution created a right to have an abortion, despite the absence of any hint of this right in text or history of the Constitution and our nation's long tradition of prohibiting abortions. The Court initially decided that a woman had a near-absolute right to have an abortion during the first two trimesters of her pregnancy, then later decided that states could not impose an "undue burden" on the right to have an abortion, and recently replaced this standard with yet another opaque standard - still nowhere to be found in the Constitution - for limitations on the right to an abortion.

In 1972, the Supreme Court decided that imposition of the death penalty was unconstitutional in all states and imposed a moratorium on the death penalty that lasted for four years, despite our long tradition of imposing the death penalty for serious crimes. The Supreme Court then reinstated the death penalty, but with new procedural rules - again, nowhere to be found in the text of the Constitution. Over the past two decades the Court has frequently revisited constitutional limits on the death penalty, each time inventing new restrictions often based on foreign law and the judges' own personal notions of justice.

Regardless of what one thinks of the merits of these decisions, the speed at which the Court changes its mind and its interpretation of the Constitution shows that it cannot possibly be infallible: if it were, why would the Court constantly find the need to reverse or modify its precedents? The Constitution has not changed much in the last sixty years but constitutional law has changed dramatically during this period: either the Court has been making a lot of mistakes or it is simply making some things up as it goes along. Either way, the decisions of the Supreme Court and the federal courts clearly do not deserve instinctive or uncritical reliance. Rather, we should recognize that judges can and do make mistakes. When serious constitutional mistakes are made, it is the proper role of the legislative and executive branches to correct them, and a judge who consistently makes serious mistakes - just like a Congressman or the President - must be held accountable.

This insistence on accountability does not threaten the rule of law or judicial independence. As Justice Roberts has remarked, "the rule of law is not the rule of lawyers." One of the most basic principles of the rule of law is that we as a people are governed by laws not by men (or judges)

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and thus no one - not even a judge - is above the law. An independent judiciary is an important protection of the rule of law, but judicial independence does not mean judicial supremacy - it does not mean that judges can never be held accountable for their judgments or that the American people are powerless to correct the decisions – however extreme and unfounded -- of five appointed lawyers. Unfortunately, the federal judiciary operates today on precisely that mistaken assumption and the legislative and executive branches have been far too reluctant to challenge it. For too long the Supreme Court has abused the trust reposed in it by the American people and subtly converted the principles of the rule of the law and judicial independence into a theory of judicial supremacy. It is time for the people's elected representatives to reassert their co-equal role in the interpretation and implementation of the Constitution and to check the pretensions of the judicial branch.

Appendices

Appendix A – Catalog of Warnings About the Dangers of Judicial Supremacy and the Judicial Branch Exceeding its Authority

Appendix B – Federal District Court Judge Orders the Censoring of High School Graduation Speech

Appendix C – Historical Grounds for the Impeachment of Judges

Appendix D – Relevant Source Materials on the topic of Judicial Supremacy and Executive and Legislative Powers to Check and Balance the Judicial Branch

Notes about this NEWT 2012 Position Paper

1. A substantial amount of material and writing contained in this draft is compiled from previous writings of Newt Gingrich.
2. It is contemplated this this position paper will be updated over time.

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**Catalog of Warnings About the Dangers of Judicial Supremacy and the
Judicial Branch Exceeding its Authority**

BY PRESIDENTS

Thomas Jefferson (1799)

“Of all the doctrines which have ever been broached by the federal government, the novel one, of the common law being in force & cognizable as an existing law in their courts, is to me the most formidable. All their other assumptions of un-given powers have been in the detail. The bank law, the treaty doctrine, the sedition act, alien act . . . &c., &c., have been solitary, unconsequential [sic], timid things, in comparison with the audacious, bare-faced and sweeping pretension to a system of law for the U S, without the adoption of their legislature, and so infinitely beyond their power to adopt.” (SOURCE: Letter from President Thomas Jefferson to Edmund Randolph, Aug. 18, 1799, in Thomas Jefferson: Writings 1066 (Library of America 1984) (Merrill D. Peterson, ed) (P. 36). In commenting on this passage, Professor LaCroix of University of Chicago Law writes, “August 1799, Jefferson had confided his fears about the expansion of the federal government – in particular, the federal judiciary – in a letter to Edmund Randolph. Specifically, Jefferson worried that the growth of federal courts’ jurisdiction would lead to a body of federal common law separate from state law that would become a tool of federal oppression. Jefferson’s use of pronouns to refer to the government – and thus to the Federalists – is particularly illuminating.” LaCroix, Alison L., *The New Wheel in the Federal Machine: From Sovereignty to Jurisdiction in the Early Republic*, (Working Paper for SUPREME COURT REVIEW) (Jan. 2008), available at http://ssrn.com/abstract_id=1085378.)

Thomas Jefferson (1820)

“To consider the judges as the ultimate arbiters of all constitutional questions is a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.” (SOURCE: Letter from Thomas Jefferson to William C. Jarvis, September 28, 1820)

Thomas Jefferson (1821)

“The great object of my fear is the federal judiciary. That body, like gravity, ever acting, with noiseless foot, and unalarming advance, gaining ground step by step, and holding what it gains, is engulfing insidiously the special governments into the jaws of that which feeds them.” (SOURCE: Letter from Thomas Jefferson to Spencer Roane, 1821, in the *Jeffersonian Cyclopaedia* (Funk and Wagnalls 1900) (P. 842))

Andrew Jackson (1832)

“John Marshall has made his decision; let him enforce it now if he can.” (SOURCE: **Andrew Jackson, as quoted by Horace Greeley, registering his disagreement with the Marshall Supreme Court’s decision in Worcester v. Georgia (1832). Meacham, Jon., *American Lion: Andrew Jackson in the White House.* (Random House 2009) (P. 204))**

Andrew Jackson (1832)

“It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent...

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.” (SOURCE: **President Jackson’s Veto Message Regarding the Bank of the United States, July 10, 1832, in which he disagrees with proponents of the Bank who cite Supreme Court precedent as reason that the Bank is constitutional, from ACompilation of the Messages and Papers of the Presidents Prepared under the direction of the Joint Committee on printing, of the House and Senate Pursuant to an Act of the Fifty-Second Congress of the United States.** (Bureau of National Literature, Inc. (1897))

Abraham Lincoln (1857)

If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation and with the steady practice of the departments throughout our history, and had been in no part based on assumed historical facts which are not really true; or, if wanting in some of these, it had been

before the court more than once, and had there been affirmed and reaffirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, not to acquiesce in it as a precedent.

But when, as is true, we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country. But Judge Douglas considers this view awful.

(SOURCE: Lincoln speech at Springfield, IL on *Dred Scott* decision, June 26, 1857, in Nicolay, John and John Hay, *The Complete Works of Abraham Lincoln, Volume I* (Lincoln Memorial University 1894) (P 315))

Abraham Lincoln (1858)

“If I were in Congress and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of the *Dred Scott* decision, I would vote that it should . . . Somebody has to reverse that decision, since it is made, and we mean to reverse it, and we mean to do it peaceably.” **(SOURCE: Lincoln speech at Chicago, IL, in response to Stephen Douglas, July 10, 1858, in Haines, Charles Grove, *The American Doctrine of Judicial Supremacy* (Macmillan 1914) (P. 266))**

Abraham Lincoln (1858)

“Now, as to the *Dred Scott* decision; for upon that [Stephen Douglas] makes his last point at me. He boldly takes ground in favor of that decision.

This is one-half the onslaught, and one-third of the entire plan of the campaign. I am opposed to that decision in a certain sense, but not in the sense which he puts on it. I say that in so far as it decided in favor of *Dred Scott*'s master and against *Dred Scott* and his family, I do not propose to disturb or resist the decision.

I never have proposed to do any such thing. I think, that in respect for judicial authority, my humble history would not suffer in a comparison with that of Judge Douglas. He would have the citizen conform his vote to that decision; the member of Congress, his; the President, his use of the veto power. He would make it a rule of political action for the people and all the departments of the government. I would not. By resisting it as a political rule, I disturb no right of property, create no disorder, excite no mobs.” **(SOURCE: Lincoln Speech in Reply to Stephen Douglas at Springfield, July 17, 1858, in *The Complete Lincoln-Douglas debates of 1858* (Paul McClelland Angle, ed.) (University of Chicago Press 1958) (P. 78))**

Abraham Lincoln (1861)

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.” **(SOURCE: Lincoln’s First Inaugural Address, March 4, 1861)**

Franklin Delano Roosevelt (1937)

“... I described the American form of government as a three-horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government - the Congress, the executive, and the courts. Two of the horses, the Congress and the executive, are pulling in unison today; the third is not. Those who have intimated that the president of the United States is trying to drive that team, overlook the simple fact that the presidents, as chief executive, is himself one of the three horses.

It is the American people themselves who are in the driver’s seat. It is the American people themselves who want the furrow plowed. It is the American people themselves who expect the third horse to fall in unison with the other two.

In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policymaking body.

I want - as all Americans want - an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written, that will refuse to amend the Constitution by the arbitrary exercise of judicial power - in other words by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts which are universally recognized...

“During the past half-century the balance of power between the three great branches of the federal government has been tipped out of balance by the courts in direct contradiction of the high purposes of the framers of the Constitution. It is my purpose to restore that balance. You who know me will accept my solemn assurance that in a world in which democracy is under attack, I seek to make American democracy succeed. You and I will do our part.” **(SOURCE: Roosevelt’s Fireside Chat on the Reorganization of the Judiciary, March 9, 1937, available**

-4-

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at Franklin Delano Roosevelt Presidential Library,
<http://docs.fdrlibrary.marist.edu/030937.html>)

BY SUPREME COURT JUSTICES

Justice Stephen Johnson Field (1893)

“The independence of the states, legislative and judicial, on all matters within their cognizance is as essential to the existence and harmonious workings of our federal system as is the legislative and judicial supremacy of the federal government in all matters of national concern. Nothing can be more disturbing and irritating to the states than an attempted enforcement upon its people of a supposed unwritten law of the United States, under the designation of the general law of the country, to which they have never assented, and which has no existence except in the brain of the federal judges in their conceptions of what the law of the states should be on the subjects considered.” (SOURCE: *Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368 (1893) (Field, dissenting) (dissenting on the grounds that the plaintiff, a locomotive fireman, should have been compensated by his employer for an accident on the job).)

Justice Lewis Powell (1974)

“The separation of powers was designed to provide, not for judicial supremacy, but for checks and balances.” (SOURCE: *National R.R. Passenger Corp. V. National Ass’n of R.R. Passengers*, 414 U.S. 453, 472 (1974) (Powell, dissenting) (dissenting on the grounds that the aggrieved Amtrak passengers had standing).)

Justice Antonin Scalia (1988)

“Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government at all.” (SOURCE: *Morrison v. Olson*, 487 US 654, 712 (1988) (Scalia, dissenting) (dissenting on the grounds that the executive’s powers were usurped by the appointment of independent counsel under the Independent Counsel Act).)

Chief Justice John Roberts (2007)

“There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. See *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.” (SOURCE: *United Haulers Ass’n, Inc. v. Oneida-Herkmer*, 550 U.S. 330, 347 (2007) (Roberts, for the majority) (striking

down a statute under the Commerce Clause requiring waste haulers to bring waste to facilities owned by a state-created public benefit corporation.))

Chief Justice John Roberts (2008)

“One cannot help but think, after surveying the modest practical results of the majority’s ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants. . . All that today’s opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.” **(SOURCE: Boumediene v. Bush, 553 U.S. 723 (2008) (Roberts, dissenting) (dissenting on the grounds that the military tribunal system for Guantanamo detainees that the political branches constructed does adequately protect any constitutional rights aliens captured abroad and detained as enemy combatants may enjoy.)**

BY OTHER COMMENTATORS

William Blackstone (1765)

“Were [the judicial power] joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe.” **(SOURCE: William Blackstone, Commentaries 1:149--51, 259—60)**

Robert Bork (1971)

“If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic.” **(SOURCE: Robert H. Bork, “Neutral Principles and Some First Amendment Problems,” 47 IND. L.J. 1-11 (1971))**

“The requirement that the Court be principled arises from the resolution of the seeming anomaly of judicial supremacy in a democratic society. . . The anomaly is dissipated, however by the model of government embodied in the structure of the Constitution, a model upon which popular consent to limited government by the Supreme Court also rests.” **(SOURCE: Robert H. Bork, “Neutral Principles and Some First Amendment Problems,” 47 IND. L.J. 1-11 (1971))**

Edwin Meese (1986)

“...I would like to consider a distinction that is essential to maintaining our limited form of government. This is the necessary distinction between the Constitution and constitutional law.

-6-

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The two are not synonymous. What, then, is this distinction?

The constitution is—to put it simply but one hopes not simplistically—the Constitution. It is a document of our most fundamental law...The Constitution is, in brief, the instrument by which the consent of the governed—the fundamental requirement of any legitimate government—is transformed into a government complete with the powers to act and a structure designed to make it act wisely or responsibly...

Constitutional law, on the other hand, is that body of law that has resulted from the Supreme Court's adjudications involving disputes over constitutional provisions or doctrines. To put it a bit more simply, constitutional law is what the Supreme Court says about the Constitution in its decisions resolving the cases and controversies that come before it." (SOURCE: Meese speech at Tulane University, October 21, 1986, in Calabresi, Steven, *Originalism: A Quarter Century of Debate* (Regnery 2007) (P. 101-102))

Edwin Meese (1986)

“Once we understand the distinction between constitutional law and the Constitution, once we see that constitutional decisions need not be seen as the last words in constitutional construction, once we comprehend that these decisions do not necessarily determine future public policy, once we see all of this, we can grasp a correlative point: constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government.” (SOURCE: Meese speech at Tulane University, October 21, 1986, in Calabresi, Steven, *Originalism: A Quarter Century of Debate* (Regnery 2007) (P. 105))

Larry Kramer (2004)

In 1958...all nine Justices signed an extraordinary opinion in *Cooper v. Aaron* insisting that *Marbury* [*Marbury v. Madison*] had “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution” and that this idea “has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.” This was, of course, just bluster and puff. As we have seen, *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...the declaration of judicial interpretive supremacy evoked considerable skepticism at the time. But here is the striking thing: after *Cooper v. Aaron*, the idea of judicial supremacy seemed gradually, at long last, to find wide public acceptance. (SOURCE: Kramer, Larry. *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press 2006) (P. 221))

Charles Warren

“[h]owever the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decisions of the Court.” (SOURCE: Legal historian Warren, as cited by Meese in speech at Tulane University, October 21, 1986, in Calabresi, Steven, *Originalism: A Quarter Century of Debate* (Regnery 2007) (P. 105))

BY THE AUTHORS OF THE FEDERALIST PAPERS:

Alexander Hamilton (1788)

“Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” (SOURCE: **Federalist Paper No. 78: Hamilton, June 14, 1788**)

Alexander Hamilton (1788)

“This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power¹; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."¹ And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.” (SOURCE:

-8-

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Federalist Paper No. 78: Hamilton, June 14, 1788. Footnote 1: The celebrated Montesquieu, speaking of them, says: "Of the three powers above mentioned, the judiciary is next to nothing." "Spirit of Laws." vol. i., page 186.)

Alexander Hamilton (1788)

“Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.” (SOURCE: **Federalist Paper No. 78: Hamilton, June 14, 1788**)

Alexander Hamilton (1788)

“There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.” (SOURCE: **Federalist Paper No. 78: Hamilton, June 14, 1788**)

Alexander Hamilton (1788)

“If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.” (SOURCE: **Federalist Paper No. 78: Hamilton, June 14, 1788**)

Alexander Hamilton (1788)

“Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.” (SOURCE: **Federalist Paper No. 78: Hamilton, June 14, 1788**)

Alexander Hamilton (1788)

“...the national legislature will have ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove these inconveniences.” (SOURCE: **Federalist Paper No. 80: Hamilton, June 21, 1788**)

Alexander Hamilton (1788)

“In the first place, there is not a syllable in the plan under consideration which DIRECTLY empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution; and as far as it is true, is equally applicable to most, if not to all the State governments. There can be no objection, therefore, on this account, to the federal judicature which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to legislative discretion.” (SOURCE: **Federalist Paper No. 81: Hamilton, May 28, 1788**)

Alexander Hamilton (1788)

“But perhaps the force of the objection may be thought to consist in the particular organization of the Supreme Court; in its being composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain and that of the State. To insist upon this point, the authors of the objection must renounce the meaning they have labored to annex to the celebrated maxim, requiring a separation of the departments of power. It shall, nevertheless, be conceded to them, agreeably to the interpretation given to that maxim in the course of these papers, that it is not violated by vesting the ultimate power of judging in a PART of the legislative body.” (SOURCE: **Federalist Paper No. 81: Hamilton, June 25, 1788**)

Alexander Hamilton (1788)

“It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty, from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument for constituting the Senate a court for the trial of impeachments.” (SOURCE: **Federalist Paper No. 81: Hamilton, June 25, 1788**)

Alexander Hamilton (1788)

“The arguments, or rather suggestions, upon which this charge is founded, are to this effect: "The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the SPIRIT of the Constitution, will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power, in the last resort, resides in the House of Lords, which is a branch of the legislature; and this part of the British government has been imitated in the State constitutions in general. The Parliament of Great Britain, and the legislatures of the several States, can at any time rectify, by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless." This, upon examination, will be found to be made up altogether of false reasoning upon misconceived fact.” (SOURCE: **Federalist Paper No. 81: Hamilton, June 25, 1788**)

James Madison (1788)

“One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct.” (SOURCE: **Federalist Paper No. 47: Madison, January 30, 1788**)

-11-

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James Madison (1788)

“No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.” (SOURCE: **Federalist Paper No. 47: Madison, January 30, 1788**)

James Madison (1788)

“...the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.

The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on this point.” (SOURCE: **Federalist Paper No. 47: Madison, January 30, 1788**)

James Madison (1788)

“The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort.” (SOURCE: **Federalist Paper No. 47: Madison, January 30, 1788**)

James Madison (1788)

“Again: ‘Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR. Were it joined to the executive power, THE JUDGE might behave with all the violence of AN OPPRESSOR.’” (SOURCE: **Federalist Paper No. 47: Madison, January 30, 1788**)

James Madison (1788)

“I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.

It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved.” (SOURCE: **Federalist Paper No. 48: Madison February 1, 1788**)

James Madison (1788)

“The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.” (SOURCE: **Federalist Paper No. 48: Madison, February 1, 1788**)

James Madison (1788)

“We have seen that the tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments. The appeals to the people, therefore, would usually be made by the executive and judiciary departments.” (SOURCE: **Federalist Paper No. 49: Madison, February 2, 1788**)

James Madison (1788)

“TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, 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. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable

us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.” (SOURCE: **Federalist Paper No. 51: Madison February 6, 1788**)

James Madison (1788)

“But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.” (SOURCE: **Federalist Paper No. 51: Madison, February 6, 1788**)

James Madison (1788)

“But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of

the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department?" (SOURCE: **Federalist Paper No. 51: Madison, February 6, 1788**)

-15-

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Appendix B

Federal District Court Judge Orders the Censoring of High School Graduation Speech

On June 1, 2011, Fred Biery, Chief Judge of the United States District Court for the Western District of Texas in San Antonio, issued an order in the case of Schultz v. Medina Valley Independent School District (Civil Action No.. SA-11-CA-422-FB) to stop a high school's valedictorian from saying a prayer as part of her graduation speech.

Biery did so in the name of the First Amendment, which is supposed to prevent government prohibitions of the free exercise of religion and protect the freedom of speech.

Biery ruled in favor of two Medina Valley parents, noting that their son would "suffer irreparable harm" if there was prayer at the ceremony.

Biery explicitly forbade the use of particular words and phrases, including "join in prayer," "bow their heads," "amen," and "prayer." He ordered that the "invocation" and "benediction" be changed to "opening remarks" and "closing remarks."

The judge threatened dire penalties for school officials if students or teachers disobeyed his ruling, ordering that it be "enforced by incarceration or other sanctions for contempt of Court if not obeyed by District official (sic) and their agents." After public outcry from parents, students, and even Texas Senator John Cornyn, the Fifth Circuit court stepped in to issue an emergency ruling days later that overturned Biery's ruling.

Judge Biery's decision clearly is not about defending the Constitution. It is the anti-religious judicial thought police at work here in America.

As a first step toward reining in out-of-control, anti-religious bigotry on the federal bench, Congress can start by impeaching and removing Biery from office. And if that fails, Congress can seek to abolish his office.

The American people would be better off without a judge whose anti-religious extremism leads him to ban a high school valedictorian from saying even the word "prayer."

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Historical Grounds for Impeachment of Judges

There are many people who mistakenly believe that criminal activity is the only grounds for the impeachment of judges. It is not.

Alexander Hamilton in Federalist 81 could not be clearer. Impeachment is “the important constitutional check” of judges who would repeatedly and deliberately usurp the authority of the legislature.

*It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty, from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. **And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security.***

*There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, **while this body was possessed of the means of punishing their presumption, by degrading them from their stations.** (Alexander Hamilton, Federalist No. 81 (1788))*

In Federalist 65, Hamilton describes impeachment as a valid remedy for “injuries done immediately to the society itself”.

*The subjects of its [impeachment's] jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words from the abuse or violation of some public trust. They are of a nature which with peculiar propriety be denominated **POLITICAL**, as they relate chiefly to injuries done immediately to the society itself. (Alexander Hamilton, Federalist No. 65 (1788))*

In his magisterial *Commentaries on the Constitution of the United States*, Supreme Court Justice Joseph Story paraphrased and summarized the work of Richard Wooddeson, a

preeminent English jurist who was regularly cited by courts in the young American republic, who wrote that judges could be impeached if they “mislead their sovereign by unconstitutional opinions.” Justice Story summarizes Wooddeson:

*In examining the parliamentary history of impeachments it will be found that many offenses not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanors worthy of this extraordinary remedy. Thus, lord chancellors and judges and other magistrates have not only been impeached for bribery, and acting grossly contrary to the duties of their office, **but for misleading their sovereign by unconstitutional opinions and for attempts to subvert the fundamental laws, and introduce arbitrary power...** (Joseph Story (Supreme Court Justice from 1811-1845), in his *Commentaries on the Constitution of the United States*, 1833)*

Justice Story further notes in his *Commentaries* that judges are subject to impeachment for offenses that are not criminal:

“The jurisdiction is to be exercised over offences, which are committed by public men in violation of their public trust and duties. Those duties are, in many cases, political; and, indeed, in other cases, to which the power of impeachment will probably be applied, they will respect functionaries of a high character, where the remedy would otherwise be wholly inadequate, and the grievance be incapable of redress. Strictly speaking, then, the power partakes of a political character, as it respects injuries to the society in its political character

*Again, there are many offences, purely political, which have been held to be within the reach of parliamentary impeachments, not one of which is in the slightest manner alluded to in our statute book. And, indeed, political offences are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it [N]o one has as yet been bold enough to assert that the power of impeachment is limited to offences positively defined in the statute book of the Union, as impeachable high crimes and misdemeanors...” (Joseph Story, *Commentaries on the Constitution of the United States*, 1833)*

Justice Story also described certain presumptions about the character of legislative leaders who are responsible for impeachment actions:

The Constitution supposes that men may be trusted with power under reasonable guards. It presumes that the Senate and the executive will no more conspire to overthrow the government than the House of Representatives. It supposes the best pledges for fidelity to be in the character of the individuals, and in the collective

*wisdom of the people in the choice of agents. It does not in decency presume that the two-thirds of the Senate representing the States will corruptly unite with the executive, or abuse their power. **Neither does it suppose that a majority of the House of Representatives will corruptly refuse to impeach . . .**" (Joseph Story, Commentaries on the Constitution of the United States, 1833)*

For more information about the historical basis of the impeachment power of judges, see **Steven W. Fitschen**, "Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny. *Regent Law Review*, 10 Regent U.L. Rev. 1111 (1998)

Appendix D

Relevant Source Materials on the topic of Judicial Supremacy and Executive and Legislative Powers to Check and Balance the Judicial Branch

ARTICLES:

Chicago Kent Law Symposium: A Symposium on *The People Themselves: Popular Constitutionalism and Judicial Review*, by Larry Kramer, *Chicago-Kent Law Review*, Vol. 81, No. 3, (2006)

(Symposium Articles can be found at the following web address: http://lawreview.kentlaw.edu/Contents_81-3.html)

Introduction

By Daniel W. Hamilton

A Historiography of *The People Themselves* and Popular Constitutionalism

By Morton J. Horwitz

A Discrete and Cosmopolitan Minority: the Loyalists, the Atlantic World, and the Origins of Judicial Review

By Daniel J. Hulsebosch

Iredell Reclaimed: Farewell to Snowiss's History of Judicial Review

By Gerald Leonard

Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion

By Saul Cornell

Pre-Revolutionary Popular Constitutionalism and Larry Kramer's *The People Themselves*

By Richard J. Ross

Give "The People" What They Want

By Keith E. Whittington

Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debates

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By Mark A. Graber

Popular Constitutionalism in the Civil War: a Trial Run

By Daniel W. Hamilton

Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule

By William E. Forbath

Popular Constitutionalism as Political Law

By Mark Tushnet

Politics, Police, Past and Present; Larry Kramer's *The People Themselves* By Christopher Tomlins

Preempting the People: The Judicial Role in Regulatory Concurrence and its Implications for Popular Lawmaking

By Theodore W. Ruger

Tom Delay: Popular Constitutionalist?

By Neal Devins

Popular Constitutionalism as Presidential Constitutionalism?

By David L. Franklin

Constitutional Education for *The People Themselves*

By Sheldon Nahmod

Comment: Popular Law and the Doubtful Case Rule

By Frank I. Michelman

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By Sarah Harding

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On the Issuance of U.S. Passports for Blacks by the Lincoln administration in defiance of Dred Scott’s holding in 1857 that Blacks were not citizens under the U.S. Constitution

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