

Putting All The Eggs In The Wrong Basket: Judicial Supremacy, The Supreme Court, And Gun Rights

by Erich Pratt

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The Los Angeles Dodgers were facing the San Francisco Giants in a momentous game in 1968. Don Drysdale was on the mound for the Dodgers, and he was trying to tie the record for the most consecutive shutout innings pitched.

He held the Giants to eight scoreless innings, but then ran into trouble in the ninth. The Giants loaded the bases, and then Drysdale, who was never afraid to brush back a batter with an inside pitch, did just that. He hit the batter, Dick Dietz.

But the home plate umpire immediately started waving his arms, yelling "No! No! No!" Harry Wendlestedt said the batter had moved into the pitch and proceeded to call the pitch a strike.

One can imagine how the Giants felt about the call. A mini-riot erupted, delaying the game for some time.

After order was restored, Drysdale got Dietz to fly out, and then managed to retire the next two batters. The runner on third base never scored, thus leaving the hurler's shot at the record intact.¹

Drysdale would go on to set the record at 58 consecutive scoreless innings—a record that stood until Orel Hershisier, also of the Dodgers, broke it 20 years later.

Who is the ultimate umpire in Washington?

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When it comes to sporting events, people appreciate the role that umpires play. They make the tough calls. They are the final authority. And while one team—and its fans—may not like a particular call, the men with the black hats are absolutely essential to preserving the continuity of any game.

In a way, then, it seems almost natural for people to look to the folks in black robes to settle constitutional controversies in Washington, DC.

When asked, most people would say that the Supreme Court is the final authority on what the Constitution means. Charles Evan Hughes, who would later become the Chief Justice of the United States, said that "we are under a Constitution, but the Constitution is what the judges say it is."²

Most people today would agree with Chief Justice Hughes. A Hearst Corporation poll found that 59% of Americans think that the Supreme Court "is the final authority on the interpretation of the Constitution."³

□ But this was not the view shared by most Founding Fathers. Thomas Jefferson, author of the Declaration of Independence and third President of the United States, had this to say about the three branches of government:

My construction of the Constitution . . . is that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action.⁴

Like most Founding Fathers, Jefferson believed that all three branches of government must independently judge what the Constitution means. He was emphatic on this point. To say that the Supreme Court is the ultimate umpire who can decide what the Constitution means would turn any given five men and women on the Supreme Court (a simple majority of its nine members) into a "despotic branch." He said:

The opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action, but for Legislature & Executive also in their spheres, would make the judiciary a despotic branch.⁵

□ If the Court were allowed to become the final authority, then it could easily substitute its opinion over and above what the Constitution says. After all, if the Supreme Court judges are the ultimate umpires, then who can question them? Who can overrule them?

It's one thing to give baseball umpires the final say in making tough calls. Baseball is just a game. But in Washington, the stakes are much higher. Giving one set of men and women the final authority to decide what the Constitution means can lead to horrible consequences. Nationally syndicated columnist Thomas Sowell says:

The Constitution gives different powers to different branches of government for a reason. "Separation of powers" is not just some arcane phrase used by constitutional lawyers. It is what keeps us free. Power is too dangerous to all be in one set of hands, whether judicial, executive or legislative.⁶

What about when the "judicial umpires" are dreadfully wrong?

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The fact that Supreme Court judges wear flowing black robes does not give them additional insight into what the Constitution means. Plus, the fact that they do correctly interpret the Constitution from time to time does not give judges the right to become the final arbiter of what the document says.

Sure the Court can be right—sometimes. But the Court can also be wrong.

For example, consider just some of the horrendous decisions that the Supreme Court has handed down:

- In 1857, the Supreme Court ruled in the infamous *Dred Scott* decision that blacks were not entitled to the same rights that are guaranteed to other Americans.**
- In the 1940's, the Supreme Court upheld President Franklin D. Roosevelt's order to**

put Japanese-Americans in prisons. Even though none of them had been convicted of any crime, the Supreme Court gave the "green light" and allowed more than 100,000 innocent people to be thrown into prisons that really amounted to concentration camps.

Despite these obvious gaffes, some people have the mistaken notion that if you have the Constitution on your side, you can simply sue the government, take your case all the way to the Supreme Court, and expect that they will see the wisdom of your argument.

Unfortunately, such happy endings don't always occur. While the high court has sometimes been right about the Constitution and Second Amendment, it has also been way off the mark:

- In 2002, the Court went out of its way to overturn good decisions at both the District Court and Court of Appeals levels, and in doing so, the Supremes used a very questionable felony conviction from Mexico to deny the gun rights of a U.S. citizen.

- The Supremes also blew a wonderful chance that year to adopt a pro-gun court decision at the District Court level, and instead chose to let the much weaker decision by the appellate court stand. The district court had ruled Dr. Timothy Joe Emerson's Second Amendment rights were violated by a federal law which banned people from possessing firearms, when such persons are under restraining orders. The appellate court, while stating individuals do have a right to keep and bear arms, reversed the district court's verdict and said, in essence, that gun control laws were not inconsistent with the Second Amendment. [Never mind those four important words: "shall not be infringed."]

- In September 2003, the Court wasted another wonderful opportunity to affirm the Second Amendment when it let Clinton's semi-auto ban remain in force. The case involved two gun manufacturers that were affected by the Clinton-Feinstein ban on semi-automatic firearms. Navegar and Penn Arms both challenged the law, arguing the federal government had exceeded its constitutional authority to enact such a ban in 1994. After the companies lost at both the district and appeals court levels, they brought their case to the highest court in the land. The Supremes, however, rejected their claim without comment, letting the lower anti-gun decisions stand.

It would be an understatement to say the Court has not always been faithful to the Constitution. Does that mean we should refrain from challenging unconstitutional laws?

Of course not. We should definitely challenge bad laws. See just *some* of the Supreme Court challenges to which [Gun Owners Foundation](#) has been a part.

But we should also realize that asking the Court to "settle the issue" may not bring the result we were hoping for.

Winning in the Supreme Court does not necessarily "settle the issue"

Does anyone really think that if we win a Supreme Court case, that the Brady Campaign (formerly known as Handgun Control, Inc.) will actually shrivel up and go away?

Don't bet on it, for that certainly didn't happen in 1995 when gun owners won a huge, landmark case in the Supreme Court. Anti-gun Senators simply came right back the next year and passed new legislation that essentially overruled the Court. (More on that below.)

The judges who sit on the Supreme Court are human, just like everyone else. So, when—not if—the Court makes a bad decision, should it have the ability to *force* the President and the Congress to obey it?

The Founding Fathers did not think so. For example, Alexander Hamilton said,

The judiciary ... has no influence over either the sword [the executive] or the purse [the legislature]; 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.⁷

In other words, the courts cannot force the Congress or the President to do anything. Hamilton's point is even more emphatic, for he says the courts are totally reliant upon the executive branch to carry out its opinions.

Almost to a man, the Founders did not want any branch of the federal government to become supreme over the others. To give one branch this kind of power would set up a "kingship" of the kind they had discarded in 1776. In fact, to give judges the final say in every constitutional dispute might even let judges try to steal a presidential election, as was attempted during the presidential elections of 2000, which pitted Al Gore versus George Bush.

The day a state court tried to steal a presidential election

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During the election of 2000, Americans began witnessing a classic violation of the separation of powers. The American people headed to the polls on November 7, and by the next morning, there was still no official winner. In some states—most notably Florida—the election results were so close that state law required an automatic recount. The American people would have to wait to see who their next President would be.

As the days progressed, it became clearly evident that the election would hinge on the official results from Florida.

The Election Day results had given Bush a less than 2,000 vote lead in that state. If this lead remained firm, the state of Florida—and the Presidency—would go to George W. Bush. Pursuant to state law, officials were scrambling to recount the machine ballots throughout Florida.

During this time, Gore backers began questioning the validity of Florida's election. Specifically, they suggested that the legal deadline for recounting the ballots should be waived. Even though machines were able to recount all the ballots in the state rather quickly, the Gore camp wanted extra time for election officers to visually examine every ballot in four heavily Democratic counties—a process which would almost certainly benefit Gore, not Bush.⁸

But a week later, Florida Secretary of State Katherine Harris refused to waive the official time limit set by Florida law and certified that George Bush was ahead by 300 votes. Later, this lead would grow to more than 900 votes after all the military ballots from overseas were counted.

Gore representatives were not about to give up. They appealed the official certification and demanded that the courts establish a new deadline for hand counting the ballots—a deadline which had no precedent in state law.

The Florida Supreme Court justices had already demonstrated a long history of usurping powers belonging to the other branches of government. But now, said columnist Thomas Sowell, their judicial arrogance was on display for the whole nation to see:

[The Florida justices] have given us a civics lesson in corruption—how the use of arbitrary power from the judicial bench can even determine who becomes President of the United States. But we have gotten used to judicial despotism and some even confuse the fiats of judges with the rules of law—which is the real danger for the future of this country.⁹

Well, the Florida Supremes did not disappoint the Gore camp. On November 22, the Court ignored the statutory deadline and ordered that the hand recounts be allowed to continue in the four heavily Democratic counties. This, of course, meant that the Democratic candidate, Al Gore, could very well pick up additional votes.

Because six of the seven justices on the Court were Democrats, onlookers across the nation accused them of engaging in the worst kind of partisan politics—of trying to use their power to swing the election to Al Gore.¹⁰

Many Americans railed against the Democratic judges on the court for substituting their will over that of the legislature and for inventing a new deadline out of "thin air." Writing for the *National Review Online*, Todd Gaziano reviewed the court's November 22 opinion:

The court decreed that the statutory deadline for tabulating the votes in Florida was not a firm deadline. The court then made up a deadline of its own, which—it told us—would be final. There is no purer expression of imperial activism than this. The first court-created deadline was Sunday, November 26, at 5:00 P.M. Why then? Why not at the date and time set forth by the Florida legislature in the Florida election code? Because the court said

so. . . . In essence, the Florida supreme court claimed the power of the Florida secretary of state, substituted its judgment for that of the elected officer, and declared its preference final. Activist judges elsewhere must be jealous that they did not discover the constitutional penumbra that conferred that power.¹¹

On appeal, the U.S. Supreme Court heard the case and asked the Florida Supremes by what authority they had extended the deadline. The state justices refused to answer, and instead ordered another recount to be announced on December 7.

Florida judges acting like lawmakers

The audacity of these Florida judges was startling. They were ignoring the law and making up their own deadlines—acting as if they were lawmakers.

During this presidential battle, John McIntyre wrote for *RealClear Politics* that:

The Florida Supreme Court is a perfect example of why the founding fathers set up a constitutional framework that allowed for the judicial branch to be confronted when they usurp power that is the prerogative of another branch of government. The legislative and executive branches in Florida have every legal right to fight what they feel to be illegal actions by the state judiciary.¹²

On December 7, 2000, the Florida Supremes disregarded state law yet again. Acting like lawmakers, they allowed officials to continue hand-counting ballots (contrary to law) and ordered a new date by which the results should be announced (also contrary to law). In essence, the Supremes had established a third deadline for reporting the state election results.

Even Florida's Chief Justice said the majority decision of the state Supreme Court "has no foundation in Florida law." Another judge on the high court said "neither this Court nor the circuit court has the authority to create the standards" by which the state must conduct the recount.¹³

So what was to be the remedy? Would the Florida court be allowed to trump the state legislature and the executive? Should the "men in black" always get the final say?

As if to answer this question, Florida lawmakers stepped to the forefront and went into special session. They were not about to let the justices steal the election. Todd Gaziano explains the Florida lawmakers' actions:

The Florida legislature has the ultimate power under the U.S. Constitution to decide who the electors from Florida will be. Article II of the Constitution expressly grants this power to the legislature of each state, and until the mid-19th century, many state legislatures directly chose the electors. Since then, state legislatures have passed laws allowing the people to choose the slate of electors. But the Florida legislature has an obligation to its citizens to reassert its authority when the courts try to steal the election from the people.

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Well, the Florida House of Representatives voted on December 12 to confirm the Bush electors. The Florida Senate then began debating the issue, and there was little doubt that the Republican-controlled Senate would follow suit.

Judges as "little tin gods"?

At this point, things were going badly for Vice-President Al Gore. The U.S. Supreme Court was not buying his arguments.¹⁵ The Florida Secretary of State had certified George Bush as the winner. And now the state legislature was about to confirm the Bush electors, too.

□ It is significant to note that while the U.S. Supreme Court didn't help Gore's cause, Gore was still considering, at least initially, how he could press forward after the Court's decision.¹⁶ The problem for Gore was that time was running out for his efforts to challenge the Florida vote since all recounts would definitely have to be completed before December 18 when the Electoral College was scheduled to meet. (December 18 was just six days away.)

To make matters worse for Gore, public opinion was turning against him. Americans believed, by a two to one margin, that he should concede the election to George Bush.

This figure included 26 percent of Gore's own supporters who believed he should give up the fight.¹⁷ Even Democratic legislators were publicly calling upon Gore to resign.¹⁸

So on December 13, 2000, Gore finally conceded the election to George Bush.

In seeing the white flag raised, the world learned how Americans could resolve a divisive and spirited controversy in a very peaceful way. But Americans learned a much more important lesson.

Americans realized the importance of truly separating the powers of government. More than just an ivory tower doctrine, the separation of powers helps keep us free. It not only prevents judges from exercising all power and settling every dispute, it also recognizes that judges are not infallible human beings who can be relied upon to make every decision in a correct and impartial manner. Sowell says:

The time is long overdue to stop regarding judges as little tin gods who can do no wrong. An independent judiciary does not mean a judiciary independent of the law. If it does, then we can forget about being a free and democratic nation. We are just the serfs of whoever happens to be on the bench.¹⁹

□ Sowell is basically repeating what Thomas Jefferson said 200 years ago. If we let the courts make the final call, then we will become subject to their whims.

□ The Florida legislature certainly did not treat its counterparts in the courts as the final authority during the Bush-Gore election. So why is it that most people do? What has changed since the time of Thomas Jefferson that most people now look to the courts as the ultimate umpire in our system of government?

□ The answer is not found in the Constitution, but in judicial opinions that have evolved over the years. So let's travel back to 1803 where some have supposed it all started.

Who ever said the Court gets the final say?

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□ The first real battle between the three branches occurred shortly after the election of Thomas Jefferson. Upon assuming office, he began nominating different men to assume different positions in his administration and others to positions in the federal courts. That was his right and duty as President.

□ The problem arose when he ordered his Secretary of State, James Madison, not to deliver commissions to several men who were nominated and confirmed (by the Senate) to judgeships at the last minute under the previous administration of President John Adams.

□ Adams belonged to the Federalist Party and, naturally, he appointed only Federalists to positions on the bench. Unfortunately for Adams, many of these appointments were not confirmed until very late in his administration, and so when Jefferson (a Democrat-Republican) became President, several men had still not received their commissions. That is, they still had not received their official papers certifying they were entrusted with the task of exercising the duties of their new offices.

□ After Jefferson ordered Secretary Madison not to deliver these commissions, William Marbury, who was one of the appointees, sued Madison and asked the Supreme Court to order the delivery of his commission as justice of the peace.

□ In 1803, the high court delivered its opinion.²⁰ Basically, Chief Justice John Marshall said that while Secretary Madison should have delivered the commission to Marbury, the Court lacked authority to force Madison to do so. Further, Marshall said that a congressional law purporting to give the Court that authority was unconstitutional.

□ In this decision, the Court correctly understood its position as a co-equal branch of government. It understood that neither the Congress nor the President could force judges to rule in a way that is contrary to our highest charter. So in this famous case, the Court analyzed the law and declared that, in its opinion, the law violated the Constitution.

□ But many have erroneously assumed that the Supreme Court was setting itself up as

the final arbiter of the Constitution.²¹ This it did not do.²² Commentators have correctly noted that nowhere in the case does Chief Justice Marshall ever elevate the Court to a higher status above the other two branches of government:

Marbury v. Madison in 1803 did establish the doctrine of judicial review and assured the court's coequal position with the executive and legislative branches of government. However, the idea that the courts are automatically the final arbiter of how we are governed is plainly wrong.

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□ William Van Alstyne, a law professor from Duke University, agrees with this assessment when noting that Marshall favored "judicial review" and not "judicial supremacy."²⁴

Judicial

review

occurs when the courts issue their opinions on the constitutionality of legislation.

Judicial

supremacy

occurs when the Court issues a ruling and then all the other branches are forced to adopt the Court's view.

□ Nevertheless, just visit most any law school in America today, and you will learn that *Marbury v. Madison*

supposedly established the Court as the supreme guardian—or the final arbiter—of the Constitution. Despite the fact that Marshall never said this, many who hold positions of power or who work in Washington, DC, hold to this view.

That is, they hold this view until the Supreme Court says something they don't agree with.

The double standard: "The Court's word is final as long as it agrees with me"

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□ Nowhere is this seen more clearly, perhaps, than in the literature of the anti-gun movement. Proponents of gun control frequently claim that the courts have "settled" the debate over the Second Amendment.²⁵

They choose selected court opinions and then conclude there is no constitutional right to keep and bear arms. "The courts have decreed it," they say, "they get the last word on interpreting the Constitution." But when the Supreme Court rules against their position, then they turn to one of the other branches of government to overrule the Court.

Consider a 1995 case, where the Supreme Court dealt a serious blow to gun control proponents across the country. This case, *U.S. v. Lopez*, involved a teenager who was convicted in the lower courts for bringing an unloaded gun to school. The student had violated a congressional law banning the possession of firearms, in most cases, within 1,000 feet of a school.

The facts of the case were clear—the student had broken the law. But the Supreme Court declared the law to be unconstitutional, and the student was ultimately exonerated.

The justices agreed that Congress has no authority to ban firearms around a school, since its powers are strictly limited by Article I, Section 8 of the Constitution.²⁶ Neither that section, nor any other provision in the Constitution for that matter, gives authority to propose restrictions upon firearms.

Even Laurence Tribe, a constitutional scholar who favors gun control, admitted that "If there ever was an act that exceeded Congress' commerce power, this was it."²⁷

So shouldn't this have settled the issue for gun control advocates? The highest Court had just spoken; it was unconstitutional for Congress to mandate a gun ban around schools. No need to revisit this issue. Right?

Wrong. Anti-gun Senators decided to reenact the gun ban one year later and offered new language which added just a few words to the original, unconstitutional gun ban.

"I personally disagreed with the Supreme Court decision," said Sen. Frank Lautenberg, one of the chief sponsors of the new language. "I urge my colleagues to support this important amendment and to help protect our children and our teachers from gun

violence."²⁸

Supporters forced the new ban into a money bill that was thousands of pages long. And then, ignoring the Court, President Bill Clinton signed the reenactment of the ban into law.

So what does one make of all this? Gun ban supporters considered the Supreme Court the final word on the subject until its opinion ran contrary to theirs. As soon as the Supreme Court issued a "bad opinion," they worked through the legislature to reinstate the ban.²⁹

A double standard? You bet. But what is interesting to note is the realization—even by those who claim the Supreme Court is always the final word—that there are three co-equal branches of government which must work independently of each other. This is the clear message found in the U.S. Constitution.

Constitution sets all three branches on an equal footing

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Nowhere does the Constitution establish the courts as the supreme interpreters of our highest law. In fact, the officials in each branch of government are required to swear an oath of allegiance to uphold the Constitution. Article VI says:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound, by Oath or Affirmation, to support this Constitution.

This is very significant. The Constitution is the supreme law of the land. All three branches of government must submit to this higher law, and no department can dominate the others. To elevate the judiciary above the other branches would make the courts, rather than the Constitution, the supreme authority in the land.

One could, perhaps, make an argument that if there were one branch that is slightly

"above" the others, it would be the legislature. Article VI of our supreme law says:

This Constitution, and the *Laws of the United States which shall be made in Pursuance thereof* . . . shall be the supreme Law of the Land.³⁰

This means that congressional laws made pursuant to the Constitution have equal status with the document and are on an equal par with it. Notice this section never lists Supreme Court opinions as being the supreme law of the land. The *Constitution* and *constitutional laws* are supreme; court opinions are not. That is a huge distinction in determining what is the "rule of law."

Does this mean that the Congress is "above" the other branches? To reach this conclusion would certainly lead to problems. Who is to say that a particular law passed by Congress is constitutional? The Congress will almost certainly say that it is, but the President or Supreme Court might disagree. To this, Jefferson would say that each branch has a duty to apply the Constitution without being controlled by the others.³¹

Of course, there are consequences for ignoring a law that most people would consider to be constitutional. A President who disregards a constitutional law can be defeated at the polls by the people, or impeached and convicted by the Congress. And while a judge cannot be defeated at the polls, he can be impeached and convicted by the Congress.³²

This tug-of-war between the three powers is exactly what one should expect from three co-equal branches of government. Our Constitution places all the departments on an equal footing, and each must apply the document without being dominated by the others.

A real set of Checks and Balances

Thomas Jefferson recognized this very important principle: The Supreme Court cannot force the President or the Congress to act one way or another; each branch has to interpret the Constitution for itself.

This tug-of-war occurred early in our nation's history after passage of the Alien & Sedition Acts of 1798. Many people thought the Sedition Act was unconstitutional since it could essentially punish anyone for criticizing the government.

President Thomas Jefferson was one of the opponents of the Sedition Act. He opposed it, believing the act was unconstitutional. Moreover, he would have refused to enforce the law had it still been on the books when he was President.³³ He would have ignored this law—despite what the courts had said. Jefferson wrote to Abigail Adams and made his case for why a President should disregard a law that made an end-run around the Constitution. Jefferson said:

You seem to think it devolved on the judges to decide on the validity of the sedition law, but nothing in the Constitution has given them a right to decide for the executive, more than to the executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them.³⁴

□ Abigail Adams thought the courts had "settled" the constitutionality of the Sedition Act. But Jefferson's point is that each branch of the federal government must decide for itself whether that law was constitutional or not. Continuing on, Jefferson said:

The judges, believing the [Sedition] law constitutional, had a right to pass a sentence of fine and imprisonment, because the power was placed in their hands by the Constitution. But the executives, believing the law to be unconstitutional, were bound to [relax or slacken] the execution of it, because that power has been confided to them by the Constitution. That instrument meant that its coordinate branches should be checks on each other.³⁵

□ Here we see the checks and balances at work:

- The Congress passed the law, presumably thinking it had the authority to pass such legislation.**
- The judges thought the law was constitutional, and thus they passed sentence on those who broke the law.**
- But if the President did not believe the law was constitutional, then he should not prosecute people for breaking that particular law.**

- Thus, each branch should do what it thinks is right (within its own scope of authority) and independently interpret the Constitution for itself.

One sees from this that no one branch is able to control the other branches; and yet, each has limited authority to check or restrain the effects that follow from the actions of the other.

The Court could not have compelled Jefferson to enforce the law, just as he could not have forced the judges to decide a certain way.³⁶ But as President, he would have had authority to ignore what he considered to be an unconstitutional law—and thus, he could have refused to arrest any "lawbreakers" who criticized the government.

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This is the only way to have real checks and balances. If the Supreme Court is made the sole and supreme judge of what the Constitution means, then there are no real checks and balances. Like putty, the Constitution could be molded into whatever the supreme justices desire, and they could impose their will upon the entire federal government.

As Jefferson said, the courts would then become a "despotic branch." The Constitution would be the highest law of the land in name only. The real authority would actually become the Supreme Court, as its view of the Constitution would have to be obeyed by everyone else—for good or for bad. Unfortunately, this is how many people view the Supreme Court today.

A constant tug-of-war among equals□

Many today would question Jefferson's view of the Constitution. Was it right for him, as President, to think that he could ignore or disregard a Supreme Court decision which he believed to be unconstitutional?

To answer this question, one should consider Article II, Section 2, Clause 1 of the Constitution:

The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Notice what this provision is saying. Even though the courts have convicted an individual for breaking a law, the President does not have to send that person to jail. His hands are not tied.

Except in the case of impeachment, the President is not obligated to punish the person who was duly convicted by the courts. Is this not incredible? If one assumes the Supreme Court always gets the final say, doesn't this provision create a huge dilemma?

Yes, it does create quite a quandary. But there is no dilemma if one understands this very important principle: all three branches are co-equal to, and independent of, each other. Neither the courts nor the Congress can force a President to punish someone. That is why the President can pardon a criminal.

□ This power has been applied in different ways. For example, George Washington pardoned the Pennsylvania farmers who were convicted of treason (in court) for their part in the "Whiskey Rebellion" of 1794.

Jefferson pardoned those who had been convicted for violating the Alien and Sedition Acts, and he justified his decision with constitutional arguments that had been rejected by the courts.³⁸

Like Washington and Jefferson, many Presidents have used this power of the pardon in selected instances. Other Presidents, while not officially issuing pardons, have simply ignored court decisions which they considered unconstitutional:

- In addition to those he pardoned, Jefferson suggested that as President, he would not prosecute people who violated unconstitutional laws such as the Alien and Sedition Acts.**

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- President Andrew Jackson vetoed a new charter for the Bank of the United States, even after the Supreme Court had upheld Congress' power to establish it.⁴⁰
- On another occasion, Jackson refused to carry out a Supreme Court opinion, simply saying "[Chief Justice] John Marshall has made his decision, now let him enforce it."⁴¹
- President Abraham Lincoln recognized that he was not bound by the Supreme Court's *Dred Scott* decision which said that blacks were not entitled to the same rights that are guaranteed to other American citizens.⁴²

This is how checks and balances are supposed to work. When the Supreme Court issues a wrong decision, it cannot force the other branches to simply ignore the Constitution. No, the President and Congress are duty bound to follow this document, not just to blindly follow the courts.

The reality under our Constitution is that no one—not the President, not 535 Congressmen, and not nine Supreme Court justices—are ever the *final judge* of what the Constitution says.

Each branch must judge for itself what its duties are under the Constitution—free from the control of another department.

That's how our system of checks and balances works. No one branch can be controlled by another. As noted by Thomas Jefferson:

The Constitution intended that the three great branches of the government should be coordinate, and independent of each other. As to acts, therefore, which are to be done by either, it has given no control to another branch.⁴³

The three branches are equal in rank, not in power

□ In Federalist 78, Hamilton stated that the courts are "beyond comparison the weakest of the three departments of power."⁴⁴ What did he mean by that? Aren't the courts an equal branch under the Constitution?

Yes, all three branches are equal in rank, since our highest law does not elevate any one branch over the others. None can force the other to adopt a particular interpretation of the Constitution, and each has authority to check the other. They are equally independent, but they are not equal in the power they wield. Notice how their power varies in regard to legislation:

- While the President is tasked with enforcing existing laws, he can also play a hand in keeping certain bills from ever becoming law. He does this by vetoing legislation that has been passed by the House and Senate.
- Conversely, the Congress can overturn a Presidential veto by getting a two-thirds vote in each house. With a tremendous show of force, the Congress can override a President's veto, and thus, enact a law all by itself.
- Then there's the judiciary. It has no power to keep a particular bill from becoming law. And yet, similar to the other branches, the courts do have a type of "veto" power. George Mason, who was a signer of the Declaration of Independence and a member of the Constitutional Convention, said that judges "could impede, in one case only, the operation of laws. They could declare an unconstitutional law void." ⁴⁵

□ **Now, was George Mason in conflict with Thomas Jefferson? Mason said that courts could declare an unconstitutional law to be void in "one case only." But Jefferson would have been quick to add that judges—even while declaring a law to be unconstitutional—could not force the executive branch to blindly follow their opinions if those opinions run contrary to the Constitution. So in actuality, these two men were not in conflict.**

Both men were consistent with this one important theme: the Constitution (and not any one department) is supreme. Mason affirmed the right of judges to act independently of the other branches and to state when laws are, in their opinion, contrary to the Constitution. Jefferson affirmed the authority of a President to act contrary to a judge's opinion—and even pardon a person who has been convicted in the courts—when the judge's opinion runs contrary to the Constitution.

Of course, when the courts issue opinions that are well reasoned and correctly apply constitutional principles, then Presidents and Congressmen would do well to defer to the courts in such instances. As stated earlier, an elected official could easily lose an

election if he ignores constitutional opinions that are handed down by the courts.

□ But make no mistake, the courts cannot *force* the other branches to follow its decrees. This is what Hamilton meant when he said that the courts have "no influence" over the executive or the legislative departments. "It may truly be said," Hamilton asserted, that the courts "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."

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By its very nature, the power of a judge is limited—especially when compared to the power of the other two departments. Consider some important differences.

While the power of the Congress and President is *active*, the power of the courts is *passive*.

That is, judges cannot solicit cases. They cannot haul defendants into court. They must wait for the case to come before them. Only then can the judges give their opinions, and in doing so, they cannot even enforce those judgments. That is the job of the executive branch.

Furthermore, Congress passes rules that apply to everyone, while judges give opinions that apply only to the specific case before them.⁴⁷ President Abraham Lincoln made this point in his first inaugural address, when addressing the Court's erroneous decision on slavery. Lincoln said Supreme Court opinions should be:

Entitled to very high respect and consideration in all parallel cases by all 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.⁴⁸

□ For this reason, many Founders would have agreed with Hamilton that the judicial branch was the weakest of the three. Keeping the judicial branch weak was no doubt intentional, since judges were not elected, and thus, not directly answerable to the people.

□ So here's the picture the Constitution gives us—all the branches are independent of each other. Each branch can check the other, but none can force its opinion on the other. It is a constant tug-of-war.

□ Some might wonder: If you don't have one branch that has the final say, then doesn't that lead to chaos—one department constantly fighting with the others? Isn't it much easier to have one branch settle arguments, much like an umpire who calls balls and strikes at a baseball game?

The people are the ultimate authority on what the Constitution means

—

□ The truth is, there is an ultimate umpire under the Constitution. But it is not the Congress, nor the President, nor the Supreme Court.

According to the Constitution, the supreme human authority in this nation is "We the People of the United States." We are the "umpires" who can settle disagreements between the three branches.

Of course, the three branches of government don't usually need an umpire. They usually settle their disagreements rather peacefully—just as most people do.

When kids play a pick-up game of baseball in a nearby park, it is not impossible to go the whole game without a serious disagreement. Two teams can usually get along with each other and work out most differences of opinion.

But sometimes there is a big enough disagreement that it would really help to have an umpire. Well, when that happens in our country—when there is a disagreement that cannot be settled among the three departments—then it is the people who act as the

umpire.

They "umpire" through the election process. Those officials that do not follow the Constitution can be voted out of office at election time.

In 1994, President Bill Clinton (D) fought the Congress over gun control and health care. Clinton favored more restrictions in both areas, while a majority in Congress, at least initially, was in opposition.

After privately meeting with several Congressmen and twisting many arms, the President was finally able to "convince" enough legislators to support a ban on more than 180 types of firearms. The ban squeaked through by one vote in the House and one vote in the Senate.⁴⁹ Appearing on the White House lawn on September 13, 1994, President Clinton signed the gun ban into law.

Having won this first battle, the President focused his efforts on the next conflict. Once again he tried to move Congressmen over to his position as he and his wife made a big push for a health care plan that would nationalize one-seventh of the economy.

Hearings were held. Legislation was introduced. But Congress failed to act on the President's health care takeover before the November elections that year.

The fight over health care would probably have continued into 1995, except that the President ran into a big speed bump on the way to bigger government. That "speed bump" was the election of 1994.

The umpires rein in their government, eject rogue players from the game

The people went to the polls and booted Congressional Democrats out of office. Members of the President's party were forced to begin looking for new jobs as people across the nation elected Republicans in their stead. Overnight, the control of Congress shifted. Republicans were put in charge. The only saving grace for Clinton was that he was not up for election in 1994, or else he too would probably have been unemployed.

The people had spoken with a loud voice. They had voted for a return to less government, as the umpires had thrown the rule-breakers out of the game.

"The American people resoundingly rejected the Clinton administration and everything that its record stands for," said Sen. Phil Gramm of Texas in the days following the election.⁵⁰

Even the President had to admit some of the responsibility after the election results were tabulated. In an almost teary-eyed confession to the nation, Clinton said, "I must certainly bear my share of responsibility, and I accept that."

He admitted that people did not like what was going on in Washington, DC. "I think they want a smaller government," Clinton said. "So what I think we have to do is to look at every single government department, every single government program and especially the nature of government regulation...."⁵¹

Clinton was even more emphatic when discussing the role that the gun ban played in the election. The fight for that gun ban "cost 20 [Democratic] members their seats in Congress," he said, and it is "the reason the Republicans control the House."⁵²

Less government. Fewer restrictions. Those were the lessons that many drew from the 1994 elections. And for a while, that's what Americans got. The following year, 1995, was characterized by attempts to cutback government spending and a nominal return to the Constitution of the United States.

The return was nominal, and it was short-lived. But it demonstrated that the people could effectively act as an umpire to force their government to play by the rules. To the extent that officials don't follow the Constitution's rules, it's the fault of the umpires for failing to hold them accountable.

The Constitution is the final word—not the Court, Congress or President

□ **The Constitution is the standard. It is the *highest law* to which every state and federal official must swear allegiance. Article V of the Constitution says, in part, that, "This Constitution . . . shall be the supreme law of the land."**

□

□ **But while the Constitution is the highest law that all officials must obey, it does not allow the Supreme Court—or any of the other two branches—to make the final call. To do so would result in the supremacy of that particular branch. Or to borrow the baseball analogy once again, putting one department into the role of final arbiter would be like letting one ball team always act as the head umpire—judging balls, strikes and outs. Would we be surprised if, under those conditions, Americans frequently saw one ball team bending the rules to suit its own interests?**

□ **Like Jefferson, President Lincoln warned against elevating the Supreme Court to the position of the ultimate umpire. That, in his view, would erode the people's authority:**

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

□ **This is sound advise from President Lincoln. If the "eminent tribunal" becomes the final human authority in the country, then the "people will have ceased to be their own rulers." The ultimate referee in this country will have shifted from the people of this nation to the Supreme Court. Or in the words of Thomas Jefferson, that would turn the Court into a despotic branch and the people into their slaves.**

Thus, each department of government should interpret the Constitution independently from the other branches. To let the Supreme Court be the final authority of what the Constitution means—or any branch for that matter—will continue to endanger the liberties of all Americans

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