PROPER JUDICIAL ACTIVISM

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Judicial review, and judicial activism in particular, have never enjoyed a wealth of popular support in this country. Indeed, the practice of judges overturning legislative enactments has been the subject of several sharp critiques over the years, particularly in the area of constitutional law. As President, Ronald Reagan described the kinds of judges of which he disapproves as those who love "short-circuiting the electoral process and disenfranchising the people through judicial activism."[1] His one-time nominee to the Supreme Court, Robert Bork, has commented that "[w]e have known judicial activism of the right and of the left; neither is legitimate."[2] Regardless of ideology, it has become a staple of opponents of a particular judicial decision to accuse the court of activism, which is synonymous with an affront.[3]

Despite its negative connotation, judicial activism, in several forms, has a long, if not storied, tradition in this country. Since *Marbury v. Madison*,[4] striking down legislation passed at the federal and state levels has been met with varying degrees of acceptance and criticism. It is the premise of this paper that in constitutional law there is a correct kind of judicial activism, toward which the Supreme Court should be focused. As mandated by the Constitution, the proper form of judicial activism is activism based upon preserving the structure of our constitutional government. Professor Steven Calabresi comments, "There is nothing in the U.S. Constitution that should absorb more completely the attention of the U.S. Supreme Court" than the structures embedded in "[t]hat great document."[5] This article aims to demonstrate that a faithful rendering of the Constitution by the Supreme Court demands

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1 Ronald Reagan, I PUB. PAPERS 1270, (Oct. 21, 1985).

2 *Id.* at 41, Jan. 14, 1988. In describing Bork and his "disciples," Professor Harry Jaffa says they believe "that judicial activism is usurpation, denying to the political processes of democracy their rightful role in governance." Harry V. Jaffa, *Jaffa Replies to His Critics* 235 app. IV-A, at 292 (The Closing of the Conservative Mind) *in* ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION (Harry V. Jaffa et al., 1994). In part, that is exactly the sentiment this paper hopes to refute. Proper judicial activism flows from the nature of our system, as will be shown, and as such is not usurpation.

3 *See* David L. Anderson, Note, *When Restraint Requires Activism: Partisan Gerrymandering and the Status Quo Ante*, 42 STAN. L. REV. 1549, 1559 (1990).

4 5 U.S. (1 Cranch) 137 (1803).

5 Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 770 (1995).

concentration on the structures of government as the most justified and least dangerous way to practice judicial review.

To explain and substantiate this claim, it is necessary to divide this paper into five parts. Part I defines the terms involved in order to help the reader better understand what is and is not being argued. Part II explains the vast importance of structure to our constitutional scheme as it relates to the Founding and today. Part III spells out why judicial review is a tool best employed on the structural front. Part IV examines some criticisms of and alternatives to the approach espoused here, as well as some responses to those various views. Finally, Part V reflects on why this argument is important to our world today and to the government in which we participate.

I. DEFINITIONS

In general terms, the structures of the Constitution are not difficult to discover or define. They include the separation of powers, checks and balances, federalism, bicameralism, representation, an independent judiciary, and judicial review.[6] Many of these structures are rarely, if ever, questioned on propriety or efficacy grounds. "Elections are held when they are supposed to be held, presidents and congresses come and go, California and Wyoming send two representatives to the Senate, [and] constitutional amendments are proposed and are almost always defeated . . . ."[7] Most of these structures have held a consistent definition since the Founding; after all, little is left to the imagination when the Constitution says that Congress shall consist of two houses or that a senator has a six-year term of office. Two of these structures, however, have displayed fluid tendencies over the years, causing many to question their wisdom and even their very existence: the separation of powers and federalism.[8] Ironically, the Founders considered these the most important innovations placed in the Constitution,[9] and are the structures on which this article will focus.[10]

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[6] Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 982 (1987).

[7] Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435, 1452 (1997).

[8] The legitimacy of judicial review has also been questioned at length, given the lack of any Constitutional text on the subject. However, there seems little doubt that, whether the device was intended by the Framers or not (this paper will make a structural argument that it was), it is not going away. As Professor Erwin Chemerinsky has pointed out, "What we really should be talking about is what is the appropriate content of judicial review, not whether the power exists or not." Erwin Chemerinsky, *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L.J. 17, 51 (1996). That is exactly what this paper is about—the appropriate content of judicial review.

[9] WILLIAM EATON, WHO KILLED THE CONSTITUTION: THE JUDGES V. THE LAW 3 (1988): "The Founding Fathers understood thoroughly the corruptions of power and the temptations of office. They feared most of all the tyranny of *unchecked* government power.

The concept of judicial activism requires some careful elucidation. It falls under the rubric of what is commonly called judicial review.[11] Judicial review occurs, as Justice Marshall famously put it,

> If a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case.[12]

At the broadest level, judicial activism is any occasion where a court intervenes and strikes down a piece of duly enacted legislation. This is activism because it "impose[s] a judicial solution over an issue erstwhile subject to political resolution."[13] The key to categorizing this broad definition of activism is determining on what basis the legislation or policy is struck down.

For instance, Professor Lino Graglia describes judicial activism as "the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit."[14] Professor Graglia's version of activism is actually improper judicial activism because it possesses no constitutional basis. However, rarely, if ever, does a judge admit in an opinion that his

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And so they fashioned a system of checks and balances to operate against the *institutions* of government to which particular powers are granted." *Id.*

[10] While I will elaborate extensively on these devices, it is important to note that this paper does not attempt to present any definitive standards the Supreme Court ought to use in the line-drawing problems raised in cases dealing with these issues. What is an executive function as opposed to a legislative one, how much sovereignty do the states retain, and how far does the power to regulate commerce extend are all intriguing questions, but each are topics for full papers in themselves.

For some sample answers to these questions along the lines of the kind of jurisprudence espoused in this paper, *see* Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993) (arguing for a structural interpretation of the Necessary and Proper Clause which fundamentally restricts its scope); Thomas W. Merrill, *Toward a Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y 31 (1998) (presenting a clearer alternative to the understanding in *Lopez* of the Commerce Clause for the purpose of enabling the Court to continue to police constitutional limitations on federal power); Bernard Schwartz, *Of Administrators and Philosopher-Kings: The Republic, the Laws, and Delegations of Power*, 72 NW. U. L. REV. 443, 446 (1977) (reflecting on the practical non-existence of the current delegation doctrine).

My concern is drawing attention to the intrinsic nature and importance of these structures, and consequently, the need for vigorous judicial policing in these areas.

[11] Of course, judicial activism also can occur when no constitutional question is at issue. This paper, however, focuses on the use of activism in constitutional cases.

[12] Marbury v. Madison, 5 U.S. 137, 178 (1803).

[13] *See* Anderson, *supra* note 3, at 1570.

[14] Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293, 296 (1996).

decision does not come from the Constitution. Thus, more precision is necessary to differentiate proper from improper activism.

Improper activism finds its roots in the "belief that law is only policy and that the judge should concentrate on building the good society according to the judge's own vision."[15] Judge William Wayne Justice,[16] a self-proclaimed activist, is illustrative when he describes his own thinking in a certain case: "Having found a constitutional violation by a state institution, I acted upon the belief that simply declaring a practice unconstitutional was not the limit of my duty as a judge. Judges are more than social critics. The power of law and justice lies in actions, not pronouncements."[17] Thus, this kind of activism employs "natural law or basic notions of humanity, [and] the necessary consultation of extratextual source[s] for constitutional interpretation."[18] It is the kind of activism Judge Skelly Wright called, when referring approvingly to the Warren Court, "judging in the service of conscience."[19]

In contrast, proper judicial activism stresses restraint, even when striking down duly enacted legislation.

> In this understanding of judicial review, the power to initiate policy remains with the legislature or the executive. The Court merely exercises a judicial veto in the event that an act of one of the other branches of government goes beyond the power granted to that branch by the Constitution, or is in conflict with some provision of the Constitution.[20]

While practicing this "restraint in activism," it is my contention that the Supreme Court's focus ought to be on the structures of the Constitution, especially the separation of powers and federalism. In discussing the history of Supreme Court judicial review, Calabresi notes, "The Supreme Court's main role until 1937 was to police the lines of jurisdictional competence set out in the constitutional text . . . . Federalism and separation of powers were thus core concerns of American constitutional law . . . ."[21] They should be again.

As we shall see, proper judicial activism focuses on policing the boundaries of power between the jurisdictional government entities

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[15] Archibald Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint*, 47 MD. L. REV. 118, 121-22 (1987).

[16] United States District Court for the Eastern District of Texas.

[17] William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 10 (1992).

[18] *Id.* at 4.

[19] J. Skelly Wright, *The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges*, 14 HASTINGS CONST. L.Q. 487, 489 (1987).

[20] *See* EATON, *supra* note 9, at 17.

[21] Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1375 (1988) (footnotes omitted).

within our system. Improper activism seeks to substantively correct perceived injustices in the law through the use of any number of extra-constitutional sources. The bottom line reason why the former is to be preferred to the latter is that judicial review based upon the Constitution demands nothing less. As Judge Frank Easterbrook[22] puts it, "The text of the Constitution is *about* structure - about form. Application of the *Marbury* principle means that rules . . . must be applied mechanically. Anything else is faithless to the premise of constitutionalism."[23]

II. OUR CONSTITUTIONAL SCHEME AND THE IMPORTANCE OF STRUCTURE

A. The Principles of Structure

On a recent visit to the campus of Regent University, Associate Justice of the Supreme Court Antonin Scalia made an observation to the matriculating law students that where Constitutional Law is concerned, "structure is destiny."[24] Stalwart proponents of the Bill of Rights would disagree, but the point still maintains cogent force. To put Justice Scalia's point a slightly different way, "[T]he text of our written Constitution devotes only fifty-two words to the protection of individual liberty from the depredations of state government in the Fourteenth Amendment, while devoting several thousand words to the subject of allocating and dividing power among government institutions."[25] That point reminds us of something that many tend to forget: the whole of our Constitution was written without a Bill of Rights originally in mind. James Wilson said, "[I]t would have been superfluous and absurd to have stipulated with a fœderal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act [the Constitution], that has brought that body into existence."[26] When we keep this fact in mind, the awesome importance of

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[22] United States Court of Appeals for the Seventh Circuit.

[23] Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13, 18 (1998).

[24] Justice Antonin Scalia, Address at Regent University (Fall 1998).

[25] Calabresi, *supra* note 21, at 1376-77.

[26] JAMES WILSON, JAMES WILSON'S SPEECH AT A PUBLIC MEETING (October 6, 1787), *reprinted in* 1 DEBATE ON THE CONSTITUTION, at 64 (Bernard Bailyn ed., 1993) [*hereinafter* 1 DEBATES]. Several other Founders made similar statements. *See Answers to Mason's "Objections"; "Marcus" [James Iredell] I-V*, NORFOLK AND PORTSMOUTH JOURNAL, Feb. 20, 1788, *in* 1 DEBATES, *supra,* at 364; Benjamin Rush, *Benjamin Rush to David Ramsay*, COLUMBIAN HERALD (Charleston, S.C.), Apr. 19, 1788, *reprinted in* 2 DEBATE ON THE CONSTITUTION, 417 (Bernard Bailyn ed., 1993) [*hereinafter* 2 DEBATES]; *John Marshall on the Fairness and Jurisdiction of the Federal Courts, in* 2 DEBATES, *supra,* at 740.

structure to our constitutional scheme, in the light of history, becomes more readily apparent.[27]

Chief Justice John Marshall reminds us that "[t]he security of a people against the misconduct of their rulers, must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions."[28] Following the jurist's sage advice, we start with the first principles upon which the structure of this government was designed to operate. The overarching practical principle guiding the Founders was a fear of the concentration of political power in government. "[I]t would be difficult to deny that in establishing their complex structure, the Framers were virtually obsessed with a fear - bordering on what some might uncharitably describe as paranoia - of the concentration of political power."[29] This fear arose out of another first principle, that man by his nature is corrupt. Madison stated it exquisitely:

> It may be a reflection on human nature, that such devices should be necessary to controul 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 controuls 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 controul the governed; and in the next place, oblige it to controul itself.[30]

The "devices" he refers to are the structures of government. For, if it is true that "[e]nlightened statesmen will not always be at the helm,"[31] then "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."[32] In essence, the Founders devised the tools of separation of powers, federalism, checks and balances, and judicial review to keep at

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[27] "So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary." Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

[28] Fletcher v. Peck, 10 U.S. 87, 144 (1810).

[29] Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 451 (1991).

[30] THE FEDERALIST NO. 51 (James Madison), *reprinted in* 2 DEBATES, *supra* note 26, at 164. As Madison observed elsewhere, "The latent causes of faction are thus sown in the nature of man; and we see them every where brought into different degrees of activity, according to different circumstances of civil society." THE FEDERALIST NO. 10 (James Madison), *reprinted in* 1 DEBATES, *supra* note 26, at 406.

[31] THE FEDERALIST NO. 10 (James Madison), *reprinted in* 1 DEBATES, *supra* note 26, at 407.

[32] THE FEDERALIST NO. 51 (James Madison), *reprinted in* 2 DEBATES, *supra* note 26, at 163.

bay the grasping desires of people in government to obtain more power.[33] The best way to achieve that result was to divide power among various individuals and groups.[34]

A third major principle underlying this system is that "The government of the United States has been emphatically termed a government of laws, and not of men."[35] This means that rules are followed despite circumstances and the law offers favor to no one. As Judge Bork put it during his confirmation hearings: "The judge, to deserve that trust and that authority, must be every bit as governed by law as is the Congress, the President, the State Governors and legislatures, and the American people. No one, including a judge, can be above the law."[36] Connected with this principle is the fact that we have a written constitution, which carries with it certain implications.[37]

The first implication of our written constitution is that "[t]he Constitution created a Federal government of limited powers."[38] The government, therefore, cannot enlarge or contract its powers without amending the Constitution. The second implication is that the courts usually should invoke the Constitution as an instrument of continuity in the system. This is how judges employed the Constitution originally. In the past, "Decisions holding acts unconstitutional had done no more than uphold or block legislative or executive initiatives."[39] The reason for this necessarily follows from the first implication: if the government's powers are limited and enumerated, then a judge invoking the Constitution has only so much material to call upon in making his decision. Charles Cooper, former clerk to Chief Justice Rehnquist, elaborates: "Once a

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[33] *See* John Fonte & John Andrews, *Why 'The Federalist' Belongs in the Classroom*, INDEPENDENCE ISSUE PAPER (Independence Institute), Dec. 6, 1991, *at* http://i2i.org/SuptDocs/Education/FederalistBelongs.htm (last visited Nov. 15, 2001).

> In a sense, the entire American constitutional edifice of a democratic republic with majority rule and minority rights, federalism, limited government, and the separation of powers among legislative, executive and judicial branches is based [upon] the Founders' concept of human nature as derived from their experience and their reading of history.

[34] *See* Calabresi, *supra* note 5, at 785-86.

[35] Marbury v. Madison, 5 U.S. 137, 163 (1803).

[36] *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, United States Senate, 100th Cong. 103 (1987) (opening statement of Robert H. Bork). This speaks to the boundaries within which a judge can make a ruling. Improper judicial activism, as I said earlier, relies on the judge's personal predilections of what the law should be, rather than what the law is. The hope is that structural activism is less likely to be used this way, and thus conforms to this important principle of our republic.

[37] Calabresi, *supra* note 7, at 1438.

[38] Gregory v. Ashcroft, 501 U.S. 452, 457 (1991); *see also*, United States v. Lopez, 514 U.S. 549, 552 (1995) ("The Constitution creates a Federal Government of enumerated powers.").

[39] Cox, *supra* note 15, at 128.

judge ventures beyond the Constitution and the laws of our society, he has only his individual conscience to call upon, and a judge's conscience is not law."[40] In other words, the judge should not amend the Constitution. The Constitution should be a landmark of destination in constitutional jurisprudence, not a landmark of departure. The third implication of our written constitution is that judicial review is inferred.[41] Limited powers and written-down boundaries imply that there must be some enforcement of those provisions, since "[t]he distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed."[42] Because "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[43] the duty for policing the boundaries of Constitutional power falls prominently on the courts.

In addition to a fear of centralized political power, the inherent corrupt nature of man, and the establishment of a government of laws with a written constitution, another key principle to understanding the role of structure in our government is the belief that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."[44] This rule represents another justification for judicial review. If Congress could pass laws without any check on whether the legislation was constitutional, it would "subvert the very foundation of all written constitutions,"[45] because Congress, not the Constitution, would be the supreme law of the land.[46]

A final principle concerning structure and the foundation of our government, one that cannot be over-stressed, is that the constitutional design exists to protect the people, not just abstract ideas. In other words, "Any purported dichotomy between constitutional structure and

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[40] Charles Cooper, *Panel Discussion*, *supra* note 8, at 59.

[41] *See* Marbury v. Madison, 5 U.S. 137, 177-78 (1803); *see also supra* text accompanying note 11; *see also* EATON, *supra* note 9, at 14.

[42] *Marbury*, 5 U.S. at 176-77.

[43] *Id.* at 177. This particular passage is often quoted as purported support by Marshall of judicial exclusivity in constitutional interpretation. The misrepresentation is unfortunate because all Marshall was referring to, in the context of the opinion, is the duty of the judiciary to explain the law when a case comes before it. Of course the judge will tell the parties what the law is in adjudicating a dispute; that does not mean that Congress and the President are not able to make their own determinations of what the Constitution means. Indeed, Congress does so each time it passes legislation.

[44] THE FEDERALIST NO. 10 (James Madison), *reprinted in* 1 DEBATES, *supra* note 26, at 406.

[45] *Marbury*, 5 U.S. at 178.

[46] John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1383 (1997); *see also* City of Boerne v. Flores, 521 U.S. 507, 529 (1997).

constitutional rights is a dangerous and false one."[47] Government institutions are designed to serve as buffers against encroachments on personal liberties.[48] This connects to the previous point that the Bill of Rights is not the whole or even the focus of the Constitution. The Bill of Rights was a supplement to the original Constitution, not a replacement. "The Bill of Rights and the structural elements of the Constitution should be viewed as a whole . . . ."[49] To give short shrift to the structures of our Constitution is to do great violence to the system as a whole. "[T]he entire Constitution was created to avoid tyranny and protect liberty. To separate out the individual rights provisions for special judicial protection ignores the document's careful intertwining of 'back-up' systems."[50] Moreover, not only does "bifurcation between constitutional structure and substantive law" lead to unfaithful renderings of the text, it also "leads to most unsatisfactory conclusions."[51]

These principles lead to one conclusion: that structure is vitally important to any proper understanding of the Constitution and, consequently, to proper use of judicial review. "The Framers of the Constitution could not command statesmanship. They could simply provide structures from which it might emerge."[52] The Founders did the only thing they could to provide for a lasting Constitution: frame the system for success, because after they died the substantive actions of government would be up to succeeding generations. If the system is ignored or, worse, deliberately sabotaged, then the parchment-inscribed words of the Constitution may as well turn to dust; the checks and balances designed to counteract man's power-hungry ambitions would be worthless, and even the precious freedoms embodied in the Bill of Rights would prove little protection against the onslaught of concentrated political power.[53]

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47 Redish & Cisar, *supra* note 29, at 452.

48 *Id.*

49 Yoo, *supra* note 46, at 1392.

50 Redish & Cisar, *supra* note 29, at 493.

51 Richard A. Epstein, *The Cartelization of Commerce*, 22 HARV. J.L. & PUB. POL'Y 209, 209 (1998). As usual, Epstein deals with the practical consequences of the structural theories on the market, rather than their logical pull. This particular article of Epstein's does not primarily focus on policy, but for an excellent piece focusing on this angle, see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

52 Clinton v. City of New York, 524 U.S. 417, 452-53 (1998) (Kennedy, J., concurring).

53 *See* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

B. The Framework of Structure

1. Separation of Powers

Given their general importance, it is prudent to examine more closely each of these structures, and how they are intended to work. Light will be shone on these structures, bearing in mind the impact that proper judicial activism should have on each. There were no secrets to the overarching plan of the Founders in writing the Constitution. They designed

> a national government of limited powers, with those powers divided among the three branches, each with a different function and different personnel, and all of this in the context of a federal system in which a large amount of the totality of all governmental power would be reserved to the states.[54]

Two major features of that design are separation of powers and federalism.

In arguing for passage of the Constitution, Madison tells us that 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."[55] Because of this, the Founders wrote the principle of separation of powers directly into the Constitution.[56] As noted above, the Founders' primary concern was preventing the concentration of political power, and the separation of powers went directly to this goal. The idea was grounded on "the deceptively simple principle that no branch may be permitted to exercise any authority definitionally found to fall outside its constitutionally delineated powers."[57] The theory holds that if a person or body is given power to do two or all three of these functions, it would be very easy to go against the people's wishes and deny freedom unjustly. For instance, if a person possessing such power promulgated a law ordering that all babies under the age of two should be killed, that person could implement the law as well using the executive power. There would be no way to prevent the execution of the unjust law. If the legislative and executive functions are divided as the Constitution provides, however, then the executive could simply refuse to implement

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[54] Pasco Bowman, *The Separation of Powers: Myth or Reality?*, *in* DERAILING THE CONSTITUTION 114, 117 (Edward B. McLean ed., 1995).

[55] THE FEDERALIST NO. 47 (James Madison), *reprinted in* 2 DEBATES, *supra* note 26, at 121.

[56] "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. CONST. art. I, § 1. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1. "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

[57] Redish & Cisar, *supra* note 29, at 453.

the unjust law, protecting the citizenry. Additionally, since the judicial department in such a system is separate and independent from the other two, it could declare the law void and have it thrown out altogether, using the power of judicial review.

Of course, that is the theory. As the Supreme Court has noted, for the Founders, "[T]he doctrine of separation of powers was not mere theory; it was a felt necessity."[58] Therefore, Madison and the others believed that "a mere demarkation [sic] on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[59] They needed more than the words in the Constitution to insure that this vital principle would be observed. To that end, the Founders included what have become known as *checks and balances* in the framework of the Constitution. The goal was a government where "the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others."[60] When Madison said, "[a]mbition must be made to counteract ambition,"[61] he meant, in part, that each branch should watch the others. Thus, we have the Presidential veto, Senate confirmation of Presidential appointments, judicial appointments by the President, and so on. "[The Constitution] enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[62]

The Founders were attacked for this "mixture" of powers, so ingrained was the idea of separation in the minds of the people.[63] Yet, because they believed that the doctrine needed to be more than a "parchment barrier," the Founders stuck to their proposal.

> The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of

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58 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring).

59 THE FEDERALIST NO. 48 (James Madison), *reprinted in* 2 DEBATES, *supra* note 26, at 141.

60 *Id.* at 139.

61 THE FEDERALIST NO. 51 (James Madison), *reprinted in* 2 DEBATES, *supra* note 26, at 164.

62 *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring).

63 *See, e.g., Reply to Wilson's Speech: "Centinel" [Samuel Bryan] II* (1787), *in* 1 DEBATES, *supra* note 26, at 77, 87; *Reply to Wilson's Speech: "Cincinnatus" [Arthur Lee] V* (1787), *in* 1 DEBATES, *supra* note 26, at 114, 117; *Joseph Spencer to James Madison, Enclosing John Leland's Objections* (1788), *in* 2 DEBATES, *supra* note 26, at 267, 269.

> Government from one another would preclude the establishment of a Nation capable of governing itself effectively.[64]

Out of the theory of separation comes the principle of non-delegation. Congress may not delegate its legislative power to the President, not only to prevent tyranny, but also to hold Congress accountable.[65] "Unchecked delegation would undercut the legislature's accountability to the electorate and subject people to rule through ad hoc commands rather than democratically considered general laws."[66] If Congress could delegate its legislative power to the executive, people could not find out easily who is responsible for legislation they disagree with or wish to change.[67] The non-delegation principle holds even though Congress presumably waives it voluntarily. This is because "the concept of congressional waiver ignores the fact that separation of powers protections were not inserted to protect the other branches, but rather to protect the populace."[68] So, not only is separation of powers designed to be a preventive measure against tyranny; it is also supposed to enhance the working of democracy.[69]

Separation of powers is clearly an important institutional tool, and as the Court has pointed out, "To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded."[70] The only questions remaining are: how are the lines between the branches drawn, and who is to draw them? The first question is beyond this paper's scope, and so it is minimally addressed. Traditionally, promulgation of laws is generally considered a legislative function, while their execution is considered an executive function, and interpretation of those laws in the context of a particular dispute is a judicial function. Defining which is which on some occasions is a difficult task, as even James Madison admitted.[71] No

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64 Buckley v. Valeo, 424 U.S. 1, 121 (1976).

65 Field v. Clark, 143 U.S. 649, 692 (1892).

66 David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1224 (1985).

67 *Id.* at 1244-45.

68 Redish & Cisar, *supra* note 29, at 487. This point is similar to one we shall see later concerning federalism. Structural principles, just like the Bill of Rights, are first and foremost intended as protections for the people, not the government.

69 Justice Kennedy puts it pointedly: "Abdication of responsibility is not part of the constitutional design." Clinton v. City of New York, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring). For a work expounding on the value of the separation of powers as a bulwark of liberty, see Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991).

70 INS v. Chadha, 462 U.S. 919, 957-58 (1983).

71 *James Madison to Thomas Jefferson* (Oct. 24, 1787), *reprinted in* 1 DEBATES, *supra* note 26, at 192, 198. "Even the boundaries between the Executive, Legislative & Judiciary powers, though in general so strongly marked in themselves, consist in many instances of mere shades of difference." *Id.*

matter how they are defined in detail, because the Constitution explicitly states that the federal government only possesses those powers delegated to it (through written enumeration), "the separation of powers provisions clearly impose an absolute, rather than a conditional, standard of implementation."[72]

Tied closely to the necessity of an absolute standard is the answer to the second question: who draws the lines distinguishing power between the branches? This question dovetails directly with the themes of this paper. Two requirements are necessary to have a vigorous separation of powers doctrine: absolute standards and an independent judiciary.[73] The Founders believed that the courts would be a necessary part of separation enforcement. As mentioned above, checks and balances were a key ingredient to the Founders' version of separation of powers. Judicial review was one of those checks. Alexander Hamilton referred to the courts as "bulwarks of a limited constitution against legislative encroachments."[74] The Founders believed 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."[75] Part of that protection includes holding fast to the separation of powers principle. This is one of the several reasons that the Constitution provides for an independent judiciary: an independent arbiter is needed to settle disputes of power between the executive and legislative branches. To have Congress decide for itself what powers it can delegate would violate the founding principle, discussed in *Part A*, that no one is to be the judge in his own case; the conflict of interest for Congress is obvious.[76] Conversely, leaving the decision to the President feeds the natural desire for power that the Founders sought so far as possible to squelch.

Dividing the powers of government seems almost second nature to us, since it has been practiced for so long. At the Constitution's inception, it was considered a relatively new, scientific advance in the

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[72] Redish & Cisar, *supra* note 29, at 503. For a work attempting to give an answer on how to define the powers along this line, see Schoenbrod, *supra* note 67 (offering a complex theory for the Court in attempting to enforce the delegation doctrine to replace the unworkable "intelligible principle" rule, and giving several reasons why it should do so. He argues for a qualitative test for proper delegation of power by Congress to the Executive, as opposed to a quantitative one).

[73] Redish & Cisar, *supra* note 29, at 458.

[74] THE FEDERALIST NO. 78 (Alexander Hamilton), *reprinted in* 2 DEBATES, *supra* note 26, at 471-72.

[75] *Id.* at 470.

[76] Redish & Cisar, *supra* note 30, at 498.

practice of government.[77] It was deemed so important to the creation of the new government that the writers of the Constitution deliberately placed the powers of each branch of government in three separate articles of the document, to emphasize their distinct natures and unique responsibilities. Yet, separation for its own sake was not the goal, as we have seen with the simultaneous creation of the system of checks and balances. Protection of liberty, within a working system of government, was the goal. That is still the goal and the reason why judicial activism is necessary in this area. The judiciary fulfills its duty in the separation scheme, enforces congressional accountability, and protects the people as a whole when it enforces a strict separation of powers doctrine.[78]

2. Federalism

On the subject of federalism, John Marshall stated that "[i]n America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither is sovereign with respect to the objects committed to the other."[79] Put simply, "our Constitution establishes a system of dual sovereignty between the states and the Federal Government."[80] This design was nothing short of revolutionary, and, perhaps, not so simple. It was a common maxim of politics before the Constitution that two sovereign entities could not exist within the same boundaries. Anti-Federalists, such as Thomas Tredwell, pointed this out consistently as a flaw in the new governmental system. "The idea of two distinct sovereigns in the same country, separately possessed of sovereign and supreme power, in the same matters at the same time, is as supreme an absurdity, as that two distinct separate circles can be bounded exactly by the same circumference."[81] The idea understandably confused them, and even confused some of the Constitution's supporters.[82] This confusion led to

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[77] "The chief improvement in government, in modern times, has been the compleat [sic] separation of the great distinctions of power . . . ." *Reply to Wilson's Speech: "Centinel" [Samuel Bryan] II* (1787), *reprinted in* 1 DEBATES, *supra* note 26, at 77, 87.

[78] Schoenbrod, *supra* note 67, at 1278. The Court is not the only check in the separation scheme, obviously, but it plays a pivotal role.

[79] McCulloch v. Maryland, 17 U.S. 316, 410 (1819).

[80] Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

[81] 1 THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 6 (Jonathan Elliot ed., Washington 1827).

[82] "Can the sovereignty of each state in all its parts exist, if there be a sovereignty over the whole[?] Is it not nonsense in terms, to suppose an united government *of any kind*, over 13 co-existent sovereignties?" *Rebuttal to "An Officer of the Late Continental Army": "Plain Truth"*, INDEPENDENT GAZETTEER (Philadelphia), Nov. 10, 1787, *reprinted in* 1 DEBATES, *supra* note 26, at 105-06. Historian Forrest McDonald has observed, "[The Founders] introduced an entirely new concept into the discourse, that of federalism, and in

repeated attacks that the Constitution would destroy the sovereignty of the states.[83] The Founders, just as repeatedly, denied these claims. "The proposed Constitution, so far from implying an abolition of the State Governments, makes them constituent parts of the national sovereignty by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power."[84]

Given the controversy, "[i]t would be in vain to deny the possibility of a clashing and collision between the measures of the two governments."[85] Accordingly, Justice O'Connor proclaimed that "discerning the proper division of authority between the Federal Government and the States" is a question "as old as the Constitution."[86] This old question arises because the principle of federalism, that different levels of government possess authority in different areas, is not textually stated in the Constitution. The reason the Supreme Court accepts it as a "fundamental principle" is that federalism is fairly easily implied in the Constitution.[87] The Tenth Amendment all but states the principle in black and white: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[88] However, recall that many Founders felt the Bill of Rights originally unnecessary - particularly in this area. James Madison cited the principle of enumeration, flowing from a written constitution, as proof of the matter. "The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite."[89] This fact, a written constitution, testifies to the existing sovereignty of the states.

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the doing, created a *novus ordo seclorum*: a new order of the ages." Forrest McDonald, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION, 261 (1985).

[83] "[I] repeat, that the proposed constitution must eventually annihilate the independant [sic] sovereignty of the several states." *"The Defect is in the System Itself": Robert Whitehill on the Dangers of the Powers of Congress and the Illogic of the Habeas Corpus Clause*, *reprinted in* 1 DEBATES, *supra* note 26, at 811.

[84] THE FEDERALIST NO. 9 (Alexander Hamilton), *reprinted in* 1 DEBATES, *supra* note 26, at 344. It will be noticed that half of the argument Hamilton gives here for state sovereignty, i.e., the election of Senators to Congress by state legislatures, no longer exists because of the Seventeenth Amendment. This structural change will play a part in some observations later in the paper.

[85] Gibbons v. Ogden, 22 U.S. 1, 238 (1824) (Johnson, J., concurring).

[86] New York v. United States, 505 U.S. 144, 149 (1992).

[87] Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

[88] U.S. CONST. amend. X.

[89] THE FEDERALIST NO. 45 (James Madison), *reprinted in* 2 DEBATES, *supra* note 26, at 105. Alexander Hamilton expressed a similar sentiment, believing that "the State Governments would clearly retain all the rights of sovereignty which they before had and

One statement in the text, however, arguably changes everything: the Supremacy Clause.[90] Several view this clause as the proverbial "trump card" in federalism issues.[91] That was certainly the feeling of many opposed to the proposed Constitution. The dissenters in the Pennsylvania ratifying convention, listing their reasons for voting in the negative, stated that:

> two co-ordinate sovereignties would be a solecism in politics . . . one or the other would necessarily triumph in the fullness of dominion. However, the contest could not be of long continuance, as the state governments are divested of every means of defence, and will be obliged by "the supreme law of the land" *to yield at discretion*.[92]

That threat of Federal dominance, however, remained relatively benign for about seventy-five years, as the Supreme Court policed the boundaries between state and federal power with a careful eye.[93] Then something happened which changed the federal-state structure dramatically: the Civil War. "[H]istorical federalism has been repealed by history. Much of that repeal occurred at the time of the Civil War when the Thirteenth and Fourteenth Amendments to the Constitution were passed, conferring broad new powers on the federal government."[94] The Court did not take broad practical notice of this until the 1930s.

> Beginning in the 1930s, however, and with accelerating speed after 1937, the Supreme Court began to abandon its textually implied role of playing jurisdictional policeman in order to take up a new antitextual role as a nationalist rights-creating body. The structural constitutionalism of the written text fell by the wayside . . . .[95]

Some believe that this change announced the death of federalism in America.[96] Today's Supreme Court apparently does not agree. Justice O'Connor referred to our system as one of "dual sovereignty" in an opinion for the Court in 1991[97] and quoted at length some very strong

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which were not by that act *exclusively* delegated to the United States." THE FEDERALIST NO. 32 (Alexander Hamilton), *reprinted in* 1 DEBATES, *supra* note 26, at 678.

90 "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI, cl. 2.

91 *Dissent of the Minority of the Pennsylvania Convention*, PENNSYLVANIA PACKET (Philadelphia), Dec. 18, 1787, *reprinted in* 1 DEBATES, *supra* note 26, at 538.

92 *Id.*

93 Calabresi, *supra* note 21, at 1377.

94 Richard Neely, *Mother, God, and Federalism*, *in* DERAILING THE CONSTITUTION, *supra* note 55, at 89-90; *see also* Yoo, *supra* note 46, at 59 n.10.

95 Calabresi, *supra* note 21, at 1377.

96 Neely, *supra* note 94, at 90 ("When today's political science professors point out that the federal government is a government of 'delegated' powers, we all chuckle because by common consent state power has become more a matter of administrative convenience than an element of sovereignty.").

97 Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

states-rights language from an 1869 Supreme Court decision.[98] While this may indeed represent more lip-service than reality to the federalism situation today, the Court has backed these strong words with several federalism-premised decisions.[99] So it seems that federalism's funeral was premature, and it behooves us to notice why this structural provision has been so resilient a constitutional player.

The chief danger the Founders sought to guard against was a concentration of political power. In a republic, this could happen just as easily through a tyranny of the majority as a tyranny of one branch of government. One charge against the proposed Constitution, and one of the known political axioms of the time, was that for a republic to function, it must be small in geographic size, because the representatives of the government must be capable of gauging the needs and desires of the people.[100] The larger the sphere being governed, the more difficult this becomes.

James Madison and the other Founders turned this axiom on its head, claiming that "the larger the society, provided it lie within a practicable sphere, the more duly capable it will be of self government."[101] Madison explained that to secure the public good and private rights from the dangers of factions (i.e. special interests) ruling in government, it was necessary to

> [e]xtend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exits, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.[102]

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[98] *Id.* (quoting Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868)).

> Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

Id.

[99] *See* Printz v. United States, 521 U.S. 898 (1997) (holding that Congress cannot commandeer state executive officials to carry out federal programs, without the officials' consents); United States v. Lopez, 514 U.S. 549 (1995) (holding that the "Gun Free School Zone Act" exceeded congressional authority to regulate interstate commerce); New York v. United States, 505 U.S. 144 (1992) (holding generally that the Constitution does not authorize Congress to commandeer state legislatures to legislate for them).

[100] THE FEDERALIST NO. 51 (James Madison), *reprinted in* 2 DEBATES, *supra* note 26, at 167-68.

[101] *Id.* at 168.

[102] THE FEDERALIST NO. 10 (James Madison), *reprinted in* 1 DEBATES, *supra* note 26, at 410.

Moreover, not only does federalism diminish the likelihood of a tyranny by the people; as Hamilton explained, it also discourages tyranny by government.

> This balance between the national and the state governments ought to be dwelt on with peculiar attention, as it is of the utmost importance.—It forms a double security to the people. If one encroaches on their rights, they will find a powerful protection in the other.—Indeed they will both be prevented from overpassing their constitutional limits, by a certain rivalship, which will ever subsist between them.[103]

Federalism thus protects the liberty of the people from their governments by having two of them, and it protects liberty from factions of people by extending the sphere that a faction must control before it becomes potent. This is why Madison believed that in "the extent and proper structure of the Union, therefore, we behold a Republican remedy for the diseases most incident to Republican Government."[104] The chance for a successful republic hinges heavily on proper structure.

The Court has invalidated statutes commandeering state officials because skirting the structure of federalism diminishes the accountability of Congress and of state officials. "Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation."[105] Both parties can "pass the buck:" Congress by having state officials implement unpopular programs, keeping congressmen "insulated from the electoral ramifications of their decision;"[106] and state officials by blaming Congress for passage of unpopular legislation. The people thereby have difficulty holding the responsible party accountable, defeating the purpose of a republic.[107] A strict adherence to federalism prevents this occurrence.

"American federalism in the end is not a trivial matter or a quaint historical anachronism. American-style federalism is a thriving and vital institutional arrangement."[108] As the Supreme Court has explained,

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[103] *Melancton Smith and Alexander Hamilton Debate Representation, Aristocracy, and Interests* (1788), *reprinted in* 2 DEBATES, *supra* note 26, at 772.

[104] THE FEDERALIST NO. 10 (James Madison), *reprinted in* 1 DEBATES, *supra* note 26, at 411.

[105] New York v. United States, 505 U.S. 144, 169 (1992).

[106] *Id.*

[107] *See* United States v. Lopez, 514 U.S. 549, 576-77 (1995).

> If, as Madison expected, the Federal and State Governments are to control each other . . . and hold each other in check by competing for the affections of the people . . . those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function.

Id.

[108] Calabresi, *supra* note 5, at 770.

> [Federalism] assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic process; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[109]

Most importantly, as the Founders emphasized, federalism serves as a check on the abuse of government power, helping achieve the Constitution's main goal.[110]

The only question remaining is who polices the boundaries between the federal and state governments? The necessity of a policeman seems obvious. "If this 'double security' [of federalism] is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty."[111] Once again the first principles discussed in *Part A* come into play. Since our written Constitution implies the federalist system, and because a State or Federal legislative branch deciding who controls what violates the rule that no man should be a judge in his own case, an impartial arbiter is needed to canvass the structure of the Great Text and decide these issues. If Congress called the shots, it would clearly be able to all but destroy the states, given the existence of the Supremacy Clause. If the State legislatures called the shots, the Federal government would become impotent, as was the case under the Articles of Confederation.

The impartiality of the judiciary again plays a vital role. Some believe that federal courts will not be impartial in reality, because when they expand Congress' power, they expand their own.[112] The force of this argument is difficult to deny. However, "When we talk about the institutional competence of either the Court or Congress [or any body for that matter], we must remember that we are talking about an 'as compared to what' question . . . . A perfect, reliable institutional actor does not exist."[113] Congress is the institution best suited to policy-making

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[109] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[110] *Id.*

[111] *Id.* at 459.

[112] Brutus, an arch Anti-Federalist, predicted as much:

> Every body of men invested with office are tenacious of power . . . the same principle will influence them [the judiciary] to extend their power, and increase their rights; this of it itself will operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority."

Brutus XI, N.Y. J., Jan. 31, 1788, *reprinted in* 2 DEBATES, *supra* note 26, at 129, 134.

[113] Lillian R. BeVier, *Religion in Congress and the Courts: Issues of Institutional Competence*, 22 HARV. J.L. & PUB. POL'Y 59, 62-63 (1998).

because it takes the widest range of views into consideration, it can act prophylactically, and it allows for broad public debate. It is not the perfect institution of law-making, but it is the best our experience has enabled us to produce. The same argument applies to the judiciary in deciding federalism questions. An impartial actor familiar with the system of the Founders is necessary to make these decisions. Is the Court *ideally* impartial for the task? It probably is not, but it is the best institutional actor we have for the task. It only makes sense that "continuing vigilance of the courts in protecting states' rights is of critical importance if the state-federal balance of power so necessary to the preservation of our liberty is to be maintained."[114]

C. Separation of Powers and Federalism: A Seamless Web

Examined individually, separation of powers and federalism are both important concepts in our constitutional scheme. Yet, we only studied them in this manner for ease of examination. In reality, the two are anything but separate. "[The Framers] used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts."[115] In fact, federalism can be seen as part of the system of separation of powers because it separates power vertically, where division of power among the branches separates it horizontally. As Madison himself indicates,

> In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.[116]

Sometimes, when faced with attacks on their model of federalism, the Founders responded by pointing to the separation of powers as an additional bulwark for preserving federalism.[117] In *New York v. United States*,[118] a federalism case, the Court cites two separation of powers

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[114] John C. Yoo, *Judicial Review and Federalism*, 22 HARV. J.L. & PUB. POL'Y 197 (1998). When I say "courts," in this case I refer to those both at the state and federal levels. Both exist to protect rights, thus both also exist to secure structure.

[115] Clinton v. City of New York, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

[116] THE FEDERALIST NO. 51 (James Madison), *in* 2 DEBATES, *supra* note 26, at 166. The reader will note the stark similarity between this point and the one made by Hamilton found in the text at note 104. The repetition is no accident, because the scheme of government was no accident. Creating "double securities" for the people against tyranny from any quadrant constantly consumed the designs of the Founders.

[117] Yoo, *supra* note 46, at 1384-85.

[118] New York v. United States, 505 U.S. 144 (1992).

cases, *Buckley v. Valeo*[119] and *INS v. Chadha*,[120] to make its point concerning the consent of state officials to congressional actions. "The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States."[121] All of this demonstrates that federalism and separation of powers are inextricably linked together. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[122] A dedication to one requires dedication to the other, and more important for our purposes, judicial cognizance of one demands that both be upheld to insure that the Constitution's framework is implemented in an accurate and responsible fashion.

III. JUDICIAL REVIEW AND THE STRUCTURAL CONSTITUTION

So far, we have looked at the immense importance of the Constitution's structures for the proper working of government and protection of the people. For this article's purpose, that is only half the story. Judicial review, the greatest countermajoritarian structure in the whole constitutional scheme must be examined in detail to see when its exercise is justified. The dogmatic Anti-Federalist, Brutus, describing the Supreme Court, said:

> It is, moreover, of great importance, to examine with care the nature and extent of the judicial power, because those who are to be vested with it, are to be placed in a situation altogether unprecedented in a free country. They are to be rendered totally independent, both of the people and the legislature, both with respect to their offices and their salaries. No errors they commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications.[123]

Brutus may be guilty of some hyperbole, but makes a sound point: no other judicial body in the world had the power that is invested in the Supreme Court through the Constitution. Once again, the Founders turned political theory on its head; the common wisdom was that the people always knew best and ought not be questioned. The Founders

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[119] Buckley v. Valeo, 424 U.S. 1 (1976).

[120] INS v. Chadha, 462 U.S. 919 (1983).

[121] *New York*, 505 U.S. at 182.

[122] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[123] *"Brutus" XI*, N.Y. J., Jan. 31, 1788, *reprinted in* 2 DEBATES, *supra* note 26, at 129, 129. We shall visit with Brutus a few more times before the end of this section because his observations prove telling, even if exaggerated.

agreed with this to a great extent, but not in its entirety. They believed that certain principles of the government needed firmer grounding than a simple reliance on the passions of the people. This belief sprang from the principle discussed in Section II, *Part A*, that people were fallible and often succumbed to their darker passions. The Founders maintained that "it is the reason of the public alone that ought to controul and regulate the government. The passions ought to be controuled and regulated by the government."[124]

This was one reason for a written constitution that was difficult to amend: people's darker passions must be kept from changing the Constitution each time something excited them. Our written Constitution intentionally placed certain principles beyond the ordinary reach of the people. After all, the point of a written constitution is diminished, if not obliterated, if it is constantly changed.[125] The Constitution was not intended to be entirely democratic.[126] Controlling the public's passions was also a reason behind creating an independent judicial branch with appointments that last during good behavior and untouchable salaries for the judges. The Founders wanted a branch that would handle constitutional questions in a dispassionate and reasoned way, one that would not be afraid of challenging the will of the people when extraordinary circumstances called for it. The Articles of Confederation did not provide for a judicial branch, so no venue existed to settle federal questions. No constitutional challenge to legislation could be made at the federal level. The Founders attempted to remedy these things through the creation of a body with an *unprecedented* power: judicial review.

There is doubt, but not an immense amount of it, that the Founders intended judicial review to exist. Alexander Hamilton observes in Federalist 78, "[I]n a government in which [the different departments] 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."[127] People may chuckle when they read this, assuming that Hamilton must not have taken into account, or conceived of, the power of judicial review when he wrote this now famous text. The facts are the opposite. In the same paper, Hamilton expressed the first rationale for

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[124] THE FEDERALIST NO. 49 (James Madison), *reprinted in* 2 DEBATES, *supra* note 26, at 146.

[125] Just look at France, with its experience of the Revolution of 1789 and the ensuing Terror of 1793-1794.

[126] J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 2 (1981).

[127] THE FEDERALIST, NO. 78 (Alexander Hamilton), *reprinted in* 2 DEBATES, *supra* note 26, at 468.

judicial review, one that John Marshall would copy later in his *Marbury v. Madison*[128] opinion.

> The complete independence of the courts of justice is peculiarly essential in a limited constitution. . . . Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.[129]

The argument for judicial review given here is purely structural: judicial review exists because of the fact of a written constitution and the need to keep a limited government within its proscribed boundaries. Hamilton carries the structural importance of the judiciary even further. "[T]he courts," Hamilton says, "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."[130] Hamilton was not the only Founder to explicitly argue for judicial review,[131] and each made the appeal on structural and institutional grounds, taking care to emphasize the independence of the judiciary.

Brutus also predicted the existence of judicial review, but, unlike his adversaries, he did not look upon the innovation as a cause for celebration. He charged that

> in their decisions [the Supreme Court] will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. . . . This

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[128] Marbury v. Madison, 5 U.S. 137 (1803).

[129] THE FEDERALIST NO. 78 (James Madison), *reprinted in* 2 DEBATES, *supra* note 26, at 469.

[130] *Id.* at 470.

[131] James Wilson, second only to Madison in influence on the crafting of the Constitution, and later a justice of the Supreme Court, remarked in the Pennsylvania ratifying convention that "when [congressional legislation] comes to be discussed, before the judges—when they consider its principles, and find it to be incompatible with the superior power of the constitution, it is their duty to pronounce it void." *James Wilson Replies to Findley* (1787), *reprinted in* 1 DEBATES, *supra* note 26, at 820, 823.

Oliver Ellsworth, a staunch Federalist and later Chief Justice of the Supreme Court for four years, described his view of the courts under the proposed constitution in the Connecticut ratifying convention:

> This constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the constitution does not authorise, it is void; and the judicial power, the national judges, who to secure their impartiality are made independent, will declare it void.

Oliver Ellsworth Defends the Taxing Power and Comments on Dual Sovereignties and Judicial Review (1788), *reprinted in* 1 DEBATES, *supra* note 26, at 887, 883; *see also, "Americanus" [John Stevens, Jr.] VII*, DAILY ADVERTISER (N.Y.), (Jan. 21, 1788), *reprinted in* 2 DEBATES, *supra* note 26, at 60.

> power in the judicial, will enable them to mould the government, into almost any shape they please.[132]

Though some may think that this is exactly what happened, and there is ample cause to think as such, it is not what the Founders intended. "In its inception, judicial review was a limited and legalistic concept, a product of logic designed to serve a carefully defined purpose."[133] The "legalistic concept" was for the Court to serve as one of the checks on the other branches powers. As Hamilton responded to the charge,

> The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequences would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved any thing, would prove that there ought be no judges distinct from that body [Congress].[134]

Forming a government without a judiciary had already been tried under the Articles of Confederation, an abysmal failure, and so the Founders (and even more importantly the People, who ratified the Constitution) were not about to make the same mistake twice. Hamilton and other supporters of the Constitution truly believed that the judiciary would possess "neither Force nor Will, but merely judgment; and must ultimately depend on the aid of the executive arm even for the efficacy of its judgments."[135] In other words, the powers vested in the judiciary were the least susceptible to despotism, because the courts could do little or nothing without the acquiescence of at least one of the other two branches to carry out their decisions.

Regardless of what the Founders intended, because of the absence of an explicit rendering in the text and its ostensible operation as an anti-democratic device, judicial review is "a deviant institution in the American democracy."[136] Judicial review is not celebrated (outside

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[132] *"Brutus" XI,* N.Y. J. (Jan. 31, 1788), *reprinted in* 2 DEBATES, *supra* note 26, at 129, 132, 135.

[133] EATON, *supra* note 9, at 13.

[134] THE FEDERALIST NO. 78 (James Madison), *reprinted in* 2 DEBATES, *supra* note 26, at 471.

[135] *Id.* at 468. Hamilton's point is buttressed by the findings of Forrest McDonald, who writes:

> The delegates devoted less time to forming the judiciary—and less attention to careful craftsmanship—than they had expended on the legislative and executive branches. In part the judiciary received minimal consideration because it was regarded as the least powerful and least active branch of government. In part, too . . . the delegates were in general agreement as to the principles that should be embodied in forming it.

MCDONALD, *supra* note 82, at 253.

[136] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18 (1962). It should be noted that not everyone agrees that the Court, properly understood, is a countermajoritarian device. It can be argued that when

narrow legal circles) for its wonderful contributions to the American political system. "The root difficulty is that judicial review is a counter-majoritarian force in our system."[137] This observation by the late Professor Alexander Bickel is the chief criticism of judicial review in general and judicial activism in particular. The "counter-majoritarian difficulty"[138] is that, in general, decisions in our society are supposed to be made by the elective branches of our government. When a judge declares an act of Congress or the President void, he short-circuits the democratic process, and at the Supreme Court level, places the issue out of the reach of ordinary debate.[139] This practice can damage the very system it is designed to maintain, namely rule by the People through a government of laws.[140] Judge Bork presents the problem in a slightly different way:

> The central problem for constitutional courts is the resolution of the "Madisonian Dilemma." The United States was founded as a Madisonian system, which means that it contains two opposing principles that must be continually reconciled. The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule. The dilemma is that neither majorities nor minorities can be trusted to define the proper spheres of democratic authority and individual liberty. To place that power in one or the other would risk either tyranny by the majority or tyranny by the minority.[141]

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the Court strikes down a law as void against the Constitution, it is simply finding in favor of the supermajority that approves of the Constitution.

[137] *Id.* at 16.

[138] *Id.*

[139] Overturning a decision by the Supreme Court requires either an Amendment to the Constitution or a changing of the guard on the Bench, neither of which happens easily or often.

[140] The great constitutional scholar James Bradley Thayer puts it thus:

> It should be remembered that the exercise of [the power of judicial review], even when unavoidable, is always attended with a serious evil, namely that the correction of legislative mistakes comes from the outside, and the people lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function . . . is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.

THAYER, JOHN MARSHALL 106-07 (1920).

[141] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 139 (1990).

Bork's analysis leaves something to be desired,[142] but the major point survives: how do we adhere to rule by the People while maintaining the supremacy of the law of the Constitution? Maintaining constitutional supremacy is, after all, the chief purpose of judicial review; the government must be kept within its constituted bounds to insure that the system works properly and that the people's rights are protected.

This dilemma/difficulty is chiefly solved through structural judicial activism.[143] This type of activism promotes majorities, judicial self-restraint, and fidelity to the Constitution. The way that structural activism promotes majorities is simply through the design of the system.

> In federalism cases, such a judiciary chooses which majority should govern as between national majorities and state majorities . . . . In separation of powers cases, the federal judiciary chooses which majority should govern as between the national majority which elects the President every four years through the medium of the Electoral College and the very different national majority which selects the Congress over a six year cycle in races that go on district by district and state by state.[144]

In essence, where structural cases are concerned, the counter-majoritarian difficulty is mitigated, if not completely resolved, because the judiciary is not choosing between a majority and a minority per se. It is choosing between two different types of majorities within our system. Both state majorities and national majorities exist in our federalist system; likewise, congressional majorities and presidential majorities exist in our separation of powers scheme.[145] Choosing one or the other is not an intolerable subversion of our system; it is precisely the way the system was intended to work, *provided the Court's decision is based upon fidelity to the Constitution*. Thus, structural activism singularly limits problems arising from the counter-majoritarian difficulty.

Structural activism also promotes judicial self-restraint. Judicial restraint means that to avoid "usurping the policymaking role of the democratically elected bodies and officials, a judge should always be

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[142] Bork overemphasizes both the influence of Madison in creating the system and the amount of tension that actually exists in our system. Moreover, the reason we do not allow majorities to decide everything is not simply because of a fear of tyranny of the minority or majority. It is also because the nature of humanity is such that the people may not always be vigilant in protecting their freedoms. Thus, some structures are necessary to supplement the people's vigilance; this protection is part of the system as well. For a telling but not wholly accurate critique of Bork, see Jaffa, *supra* note 2, at 291.

[143] It will never fully be solved: that is the nature of the imperfect institutions we must live with; *see supra* note 113 and surrounding text.

[144] Calabresi, *supra* note 21, at 1383.

[145] This explains why we end up with "split tickets" many times at the national level, with Congress being held by one political party, and the other party holding the Presidency.

hesitant to declare statues or governmental actions unconstitutional."[146] Restraint is a beneficial trait in our judicial system because it "preserves fundamental constitutional precepts. It encourages the separation of powers, protects our democratic processes, and preserves our fundamental rights."[147] It does these things by keeping judicial hands out of the "cookie jar" of policymaking. Courts are ill-equipped to make policy for several reasons, ranging from a lack of necessary information to an inability to change its decisions in a timely fashion.[148] More pointedly, the Founders already argued about whether the Supreme Court should have a role in policymaking. At the Convention, some proposed a "Council of Revision" for legislative purposes, which would have consisted of the President, some of his Cabinet, and the Supreme Court, reviewing congressional legislation on policy grounds. The idea was rejected soundly.[149] The system kept policymaking out of the courts' hands. Given these things, the courts need to practice judicial restraint much of the time - the system assumes as much through the separation of powers, as the statements of Hamilton and others indicate.[150]

Self-restraint is the only real check on the judiciary, given its independent nature.[151] As the twelfth Chief Justice of the Supreme Court, Harlan Fiske Stone said, "While the unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint,[152] the only check upon our own exercise of power is our own sense of self-restraint."[153] Since this is the case, and given the precarious role judicial review holds in our system, it makes sense that an active judiciary should have a proper place only on rare occasions. When the Court acts on structural bases, it is practicing restraint in the sense that it is not imputing its own preferences over those of the People; rather it is placing constitutional constraints over the preferences of the particular majoritarian institution that committed the voided act.

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146 Wallace, *supra* note 127, at 8.

147 *Id.* at 16.

148 *Id.* at 6. These are some of the very reasons that Congress is responsible for policymaking in the first place. *See also*, Edwin Meese III, *Putting the Federal Judiciary Back on the Constitutional Track*, 14 GA. ST. U. L. REV. 781, 784 (1998).

149 MCDONALD, *supra* note 82, at 242.

150 Wallace, *supra* note 127, at 8 ("The constitutional trade-off for independence is that judges must restrain themselves from the areas reserved to the other[] separate branches.").

151 Senator Charles E. Grassley, *Foreword* to EATON, *supra* note 9, at xiv. It is true that judges can be impeached, but this occurs so little as to be almost no check at all. There are also the structural checks of the "case and controversy" and standing requirements, but history has shown that these can be easily manipulated by judges with little self-restraint.

152 And electoral restraint.

153 United States v. Butler, 297 U.S. 1, 78-79 (1936) (Stone, J., dissenting).

This is not a conventional way of looking at restraint versus activism. Judge Justice[154] provides the traditional view of the legal establishment: "Proponents of judicial self-restraint can also be defined in contrast to those jurists and scholars who view the court as the legitimate counter-majoritarian force in our democracy."[155] Judge Justice's view is precisely the kind of categorization I wish to refute. Believing that judicial review (of a certain kind) and self-restraint are at odds is an incorrect juxtaposition. A judge who believes in structural judicial activism still follows the standards of proper statutory interpretation. The structural activist "respects the process of democratic decisionmaking embodied in legislative enactments,"[156] takes care not to embroil himself "*unnecessarily* in the turbulent waters of political controversy,"[157] and practices what Charles Lamb calls the "maxims of restraint."[158] The structural activist does these things because, above all, the judge respects the principles upon which the Constitution is founded and the People for whom he adjudicates. For structural activists, several laws that they consider unwise or downright stupid will nonetheless be upheld as constitutional.[159] "We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained."[160] The concern is not the substantive wisdom of the legislation, but the structural impact of its provisions.

Ultimately, the main concern of judicial activism should be fidelity to the Constitution, because judicial review is a legal tool so fraught with dangers in our tradition that it ought to be used in only the most justifiable, least dangerous way. "The process is justified only if it is as deliberate and conscious as men can make it."[161] Structural activism is preferable because it comports best with the text and history of the Constitution. It is the least dangerous because it simply rules in favor of one majority over another, thus lessening the criticism of judicial review's counter-majoritarian nature. More importantly, structural activism finds its decisions in the foundation of the Constitution, rather

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[154] *See supra* notes 16 and 17 and accompanying text.

[155] William Wayne Justice, *The New Awakening: Judicial Activism in a Conservative Age*, 43 SW. L.J. 657, 671 (1989).

[156] Anderson, *supra* note 3, at 1561.

[157] ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 28 (1976).

[158] Anderson, *supra* note 3, at 1560.

[159] Baker v. Carr, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting) ("[T]here is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused to so enthrone the judiciary.").

[160] INS v. Chadha, 462 U.S. 919, 944 (1983).

[161] BICKEL, *supra* note 137, at 96.

than the ideas of the judge. With the practice of improper judicial activism, the Constitution becomes "an authoritative occasion for, rather than a norm of, judicial interpretation."[162] Proper judicial activism aims for the latter course. It recognizes that "the Constitution *is* form; an appeal to 'function' is a claim that something else would be *better* than the Constitution, which may be true but nevertheless isn't an admissible argument about interpretation of the structure we have."[163] This formalism makes structural activism more conducive to drawing bright lines.

There are three general arguments for judicial activism: (a) personal preferences; (b) natural or higher law; and (c) the nature of the regime (also known as the argument from democracy or republic). As we have seen, some judges, such as William Justice or Skelly Wright believe in the first justification, one that this article rejects as improper judicial activism. The second finds its grounding in "a belief in natural law," a sense judges have been appealing to ever since *Calder v. Bull*.[164] The third argument rests its force on the Constitution itself, on the concept that "American democracy is not simply majority rule; rather, it is a constitutional democracy. The majority rules within the bounds of the Constitution, and the limits of the Constitution only have meaning if there is somebody there to enforce those limits."[165] The difficulty among these arguments arises when attempting to tell the difference between when a judge is relying on personal preferences, which is not justified, and when he is relying on natural or higher law, which is more justified. The line is so precarious as to be almost indiscernible.[166] Given this tendency of judicial review, the only safe course is the one that is clearly the most justified: the argument from structure. Since judicial review carries with it this inherent problem, it makes sense to concentrate on the cases that present the proper role of the judiciary as jurisdictional policemen.

The *sense* of structural judicial activism rests, as I have said, on the precarious nature of judicial review as a legal device. Thus, the power of the Court is premised on the legitimacy of judicial review. "Lacking power of the purse or the sword, the Court must rely upon the power of legitimacy - upon the capacity to evoke uncoerced assent and strong

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[162] Russell Hittinger, *A Crisis of Legitimacy*, *in* THE END OF DEMOCRACY? THE JUDICIAL USURPATION OF POLITICS 18 (1997).

[163] Easterbrook, *supra* note 23, at 15.

[164] Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

[165] Chemerinsky, *supra* note 8, at 30.

[166] Justice Iredell observed in *Calder*, "The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject . . ." Calder v. Bull, 3 U.S. at 399.

public support."[167] Such is the reason that appeals to natural law have been so prevalent by the Court over the years: it speaks to the hearts of the public. The sense of public support is bred by the belief that the Court's decisions are made based upon the law, something about which the judges presumably have special insight, as opposed to being based on simple policy preferences, on which judges possess no more expertise than the proverbial man on the street.

> In order to acquiesce in court decisions, and to comply with their requirements, the people must believe that the court system, and the Supreme Court especially, is governed by a rule of law, not a rule of men. We must believe that the judicial system insulates us from the whims of individual judges, from the prejudices, and from their areas of ignorance.[168]

Here the rule of law blends with the separation of powers. Courts are designed to be insulated from politics to a great degree because their decisions should be concretely grounded in the law. The other branches handle the politics; the judiciary interprets the law.[169] If it were otherwise, the warning by President Lincoln in his First Inaugural Address could come to fruition:

> [T]he 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.[170]

The People must respect judicial decisions to obey them. That respect and legitimacy come most readily when decisions are grounded in the founding document of our Government: the Constitution. Such is why nearly every opinion written in Supreme Court history dealing with a constitutional issue pays at least face-value homage to the Constitution, with each justice claiming that his or her opinion comports best with the sense of the document. "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[171] To preserve its power and legitimacy, the Court ought to focus mainly on structure, where judicial activism is

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[167] Cox, *supra* note 15, at 122. *See also* Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.").

[168] EATON, *supra* note 9, at 7.

[169] This is not, of course, to say that legal decisions have no political ramifications; they clearly do. It simply means that so far as possible, the politics of the situation should be separated from the legal question before the court.

[170] Abraham Lincoln, *First Inaugural Address* (Mar. 4 1861), *in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES: FROM GEORGE WASHINGTON 1789 TO GEORGE BUSH 1989 at 133 (U.S. G.P.O. 1989).

[171] Bowers v. Hardwick, 478 U.S. 186, 194 (1986).

concerned. The Court gains its power of judicial review from the design of the Constitution and as such should not practice that tool of last resort outside of its confines. The system's preferences for majorities, the separation of powers, judicial restraint, and the rule of law all point to practicing activism in one main way: as a jurisdictional policeman patrolling the structural boundaries of the Constitution.

IV. THE CRITICS RESPOND AND ARE REJOINED

Alternatives to the approach advocated in this paper vary in degree of difference and span the ideological spectrum. Perhaps the starkest contrast comes from the "political safeguards" theory of federalism. First argued by Professor Herbert Wechsler[172] in the 1950s and given its strongest voice by Professor Jesse Choper[173] in the 1980s, it argues that "the states do not need judicial protection from expansive federal legislation, because their role in the makeup and the operation of the national government provides them with sufficient means to protect their rights."[174] Wechsler and Choper's main reason for making this argument is that they believe the Court should "conserve judicial legitimacy for what really counts: the protection of individual rights."[175] Choper in particular argues that the Court possesses only limited authoritative capital, and that capital ought to be spent adjudicating individual rights cases. The position assumes that states are adequately represented in the national political process, so "any exercise of power by the federal government at the expense of the states therefore was ipso facto constitutional because the states . . . had given their political assent."[176] The theory found its Supreme Court voice in *Garcia v. San Antonio Metropolitan Transit Authority*.[177] Additionally, although its main focus is federalism, the "political safeguards" theory includes also the "separation proposal," which holds that all questions involving allocations of power between Congress and the President ought to be

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[172] Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,* 54 COLUM. L. REV. 543 (1954).

[173] JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).

[174] Yoo, *supra* note 46, at 1312. Along essentially the same lines is Professor Herbert Hovenkamp's recent assertion that "history has made abundantly clear that the political process is quite effective at *reducing* federal assertions of power in favor of state prerogatives." Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2221 (1996).

[175] Yoo, *supra* note 46, at 1319.

[176] *Id.* at 1325.

[177] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), *overruled in part by* United States v. Lopez, 514 U.S. 549 (1995).

non-justiciable "because of the political branches' abilities to use other tools at their disposal to resolve their differences."[178]

In essence, Choper's theory represents an approximately opposite view to the one presented here. Choper believes individual rights cases to be the most important on the Court's docket and thus they should receive its full attention. Federalism and separation of powers issues basically take care of themselves and so do not necessitate the Court's intervention. This theory seems reasonable, but it abounds with problems. Even assuming *arguendo* that political safeguards were adequate protection for the states when Weschler first proposed his theory, the situation has altered dramatically since then. Cloture is now available in the Senate by a three-fifths vote on most matters, rather than two-thirds. Rural districts are no longer "over-represented" in the House of Representatives because of the one person, one vote rule. Redistricting now is done just as much by the courts as it is by the state legislatures. Television has nationalized Senate elections. Federal grants for highways and other programs are used by Congress as carrots to pass national laws on drinking, seat belts, speeding, and so forth.[179] Even reaching back before the 1950s the state/federal equation had swung decisively over to the federal side. The state legislatures no longer select Senate members; instead, the people elect them by popular vote, eliminating what the Founders' believed to be the most important representative protection of the states in the federal government.[180] The New Deal nationalized farm relief, retirement, and poverty programs.[181] All of these factors add up to the conclusion that "[b]oth analytically and impressionistically, the Wechsler-Choper view seems at least a little odd in the political world of today - an historical anomaly that no longer quite seems to fit."[182]

Looking past the national level to the states, the Choper theory fails to account for the possibility that state officials have several incentives to welcome federal intervention rather than protect state interests. Justice O'Connor makes this point in *New York*[183] when discussing locations for radioactive waste disposal centers:

> If a state official is faced with the same set of alternatives—choosing a location or having Congress direct the choice of a location—the state official may prefer the latter, as it may permit the avoidance of personal responsibility. The interests of public officials thus may not

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[178] Yoo, *supra* note 46, at 1318-19.

[179] Calabresi, *supra* note 5, at 792-93.

[180] THE FEDERALIST NO. 45 (James Madison), *reprinted in* 2 DEBATES, *supra* note 26, at 103.

[181] Yoo, *supra* note 46, at 1321.

[182] Calabresi, *supra* note 5, at 793.

[183] New York v. United States, 505 U.S. 144 (1992).

> coincide with the Constitution's intergovernmental allocation of authority. Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.[184]

Richard Neely observes that the "states are more interested in spending federal bucks than they are in preserving state sovereignty. To my knowledge no state (except, possibly, Arizona in one instance) has turned down federal money to stand on federalist principle!"[185] Neely believes this to be a positive turn of events; regardless, it demonstrates that political safeguards are inadequate to protect the structure of federalism.

More important than the fact that the Weschler-Choper theory fails on functional grounds, is that it fails on formal constitutional grounds. Choper's approach is unable even to detect "whether or not separation of powers has been maintained because it makes no attempt to define or examine it. He solves the problem of interbranch disputes by simply assuming they do not require resolution (at least not by the judiciary)."[186] The same criticism applies to his federalism proposal. In essence, Choper ignores the structures of the Constitution because he assumes that, functionally, things will work out to their most efficient end.

Worse, and even more dangerous, is Choper's separation of individual rights from the Constitution's structure. As this article has discussed, the whole point of the structures of the Constitution is the protection of the People's liberty against tyranny. Choper's position is "a highly anachronistic view because the Bill of Rights did not appear in the Constitution when Article III first vested in the judiciary the power to adjudicate cases arising under the Constitution."[187] Finally, Choper's theory is premised on the belief that the Court can pick and choose the constitutional provisions it wants to enforce. "Nothing in the nature of the judiciary's role authorizes it effectively to repeal provisions of the Constitution."[188] In fact, the independence of the judiciary makes it especially suited to handle disputes between different levels and different branches of government. Few reasons exist to ignore completely either the structure of the Constitution or the provisions in the Bill of Rights.[189]

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184 *Id.* at 183.

185 Neely, *supra* note 94, at 90.

186 Redish & Cisar, *supra* note 29, at 493.

187 *Id.*

188 *Id.*

189 I have not and am not saying that substantive violations of the Constitution should not be invalidated by the Supreme Court. Thus, a statute preventing anarchists from espousing their views could and should be struck down as an obvious violation of the First Amendment. What I am saying is that these decisions by the Court should only be made in the rare cases of clear mistake or the other established rules of statutory construction. On structural issues, the Court ought to be less reticent.

Richard Neely takes a different functional approach toward essentially the same end as Choper. He asks, "[I]f the states themselves aren't interested in [the] principle [of federalism], why should we be?"[190] He contends that federalism is now simply a matter of administrative convenience, and where it interferes with governmental efficiency, its principles ought to be set aside.[191] Professor Douglas Laycock goes one step further and contends that "[f]ederalism no longer divides power in any meaningful way. Instead, federalism duplicates and multiplies power."[192]

This view ignores some vital points. In the first place, according to Justice O'Connor's opinion in *New York*, the fact that state officials may not care about their sovereignty does not mean that the Court or the country should not care about it. Moreover, concentrating on what federalism does for the states, just as concentrating on what the separation of powers does for each of the branches, misses the larger point. "[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself."[193] So, whether the states are interested in protecting themselves or not, individual freedoms still deserve to be protected by government structure. Perhaps delegated power has become more "a matter of administrative convenience than an element of sovereignty."[194] However, either the principle of delegation stands, or the Constitution falls; there is no other way around it. It defeats the whole purpose of a written Constitution to assign meaning solely on the basis of convenience or efficiency.

Efficiency is emphatically not central to our Constitution; ordered liberty is the main point. "The Constitution's structure requires a stability which transcends the convenience of the moment."[195] Efficiency is not the acid test for constitutionality. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives - or the hallmarks - of democratic government."[196] The famous saying that "at least Mussolini made the trains run on time" was not intended as a compliment: a government can be an efficient tyrant. "The choices we discern as having been made in the Constitutional Convention impose

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[190] Neely, *supra* note 94, at 90.

[191] *Id.*

[192] Douglas Laycock, *Federalism as a Structural Threat to Liberty*, 22 HARV. J.L. & PUB. POL'Y 67, 80-81 (1998).

[193] New York v. United States, 505 U.S. 144, 189 (1992).

[194] Neely, *supra* note 94, at 90.

[195] Clinton v. City of New York, 524 U.S. at 448 (Kennedy, J., concurring).

[196] INS v. Chadha, 462 U.S. 919, 944 (1983).

burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked."[197] If it is efficiency we want, we ought to forego the right to vote altogether: the information, campaigning, and time involved make for highly inefficient government. "With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."[198] Those restraints include a Court that patrols the boundaries of delegated government power.

Proponents of Choper's theory argue that defining sharp lines between executive and legislative functions or between national and local functions is too difficult for the courts.[199] This argument fails, however, because determining which fundamental rights are "implicit in the concept of ordered liberty,"[200] or which rights comport with the "mystery of human life"[201] is not an easy task either. Even speaking more generically, "the line-drawing and fact-finding problems here are no more difficult than they are in the context of determining what constitutes an impermissible endorsement of religion or when . . . unprotected obscenity becomes protected pornography."[202] Professor Choper admitted as much: "A great many of the personal liberties questions that the Court decides . . . similarly subsume large policy issues with complex and debatable factual considerations."[203] To admit this in structural areas of constitutional adjudication is simply to acknowledge that several issues are not cut and dried; if they were, we would not need a court system at all. The Court should not shy away from an issue because it is difficult; rather, it should shy away if the Constitution offers no guidance. Federalism and separation of powers issues, however, are clearly within the import of the Constitution. A supporter of structural activism need not prove that all delegation of power questions will be decided correctly. What he must do is attempt to remain dedicated to the first principles of the Constitution.

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197 *Id.* at 959.

198 *Id.*; *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952).

199 Hovenkamp, *supra* note 174, at 2220.

200 Palko v. Connecticut, 302 U.S. 319, 325 (1937).

201 Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (For the record, the actual quote is: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life.") *Id.* Structural cases simply are not conducive to such open language.

202 Calabresi, *supra* note 5, at 804.

203 CHOPER, *supra* note 173, at 203.

> Dedicated pursuit of an ideal is a legitimating reality, even though the reach exceeds the grasp, provided that the people know that the effort is undertaken. And the value of the ideal is not diminished by acknowledging that its conscientious pursuit serves the utilitarian function of giving legitimacy to constitutional decisions.[204]

Criticism of the viewpoint espoused in this article could conceivably also come from the right side of the political spectrum, because of its traditionally staunch support of judicial restraint, as we have seen with President Reagan, Judge Bork, and Professor Graglia. Perhaps the strongest criticism of judicial activism came in a 1996 symposium entitled: *"The End of Democracy? The Judicial Usurpation of Politics,"*[205] by *First Things*, a conservative religious journal. It is an appeal that serves as a valuable wake-up call concerning the dangers inherent in judicial review. However, it goes overboard in establishing its case. For instance, the editors of *First Things* write that the "government of the United States of America no longer governs by the consent of the governed. With respect to the American people, the judiciary has in effect declared that the most important questions about how we ought to order our life together are outside the purview of 'things of their knowledge.'"[206] This article does not contend for a moment that substantive judicial activism has been good for this country.[207] But to say that the People no longer govern on any issues of importance borders on hyperbole. "The courts have not, and perhaps cannot, restrain themselves, and it may be that in the present regime no other effective restraints are available. If so, we are witnessing the end of democracy."[208]

Problems abound with that statement. In the first place, as this article reiterates, we do not have a democracy; we have a system of constitutionalism: the People rule within bounds designed to inhibit their darker passions. Secondly, the restraints on the courts are available and exist within the system. To declare the system a dismal failure after over two hundred years simply because the Supreme Court has taken on the role of "knight errant"[209] on some occasions throws the

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[204] Cox, *supra* note 15, at 138.

[205] Robert H. Bork et. al, Symposium, *The End of Democracy? The Judicial Usurpation of Politics*, FIRST THINGS 18, Nov. 1996, *reprinted in* THE END OF DEMOCRACY? THE JUDICIAL USURPATION OF POLITICS (1997).

[206] *Id.* at 5.

[207] Professor Graglia puts it rather humorously when he asks, "[W]hat part of the Constitution do you think Justice Harry Blackmun was interpreting in *Roe v. Wade*, when he held that state restrictions on abortion violate the Due Process Clause of the Fourteenth Amendment—was it the word 'due' or the word 'process?'" Graglia, *supra* note 14, at 297.

[208] Bork, *Our Judicial Oligarchy*, *supra* note 205, at 6.

[209] United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 218 (1979) (quoting Justice Cardozo).

baby out with the bath water. The contributors to the *First Things* debate decry the evils of judicial activism, but they enthusiastically support the idea of natural law.[210] As we saw in *Part III*, as well as in *Part I* while defining judicial activism, natural law is open to the same abuses that judicial activism engenders. In fact, several of the decisions about which *First Things* complains, such as *Roe*, ground their opinions in a kind of natural law jurisprudence. The point here is not that the editors of *First Things* must either support *Roe v. Wade* or renounce natural law - clearly their version of natural law can be different from the Court's in *Roe*; the point is to understand that judging inherently involves the kinds of problems that the editors declare represent the "end of democracy." The solution to those problems is not to declare the system broken, but to demand adherence to true fidelity to that system (i.e., the Constitution). And it is perfectly within the power of the People to demand this, because, as we have learned, the power of the Supreme Court is wholly dependent on its legitimacy.[211]

Obviously, several other theories of constitutional jurisprudence exist that have not been addressed. Only those that speak most directly to the position being advocated in this article have been rejoined. Structural activism is but one piece of the constitutional fabric, but it is a very important piece. It is time for advocates of both jurisprudential activism and judicial restraint to consider its validity.

> Having preached the virtues of judicial restraint for several generations, conservatives will have to reevaluate their position. As they did in the late 1930's, liberals and conservatives in the late 1990's will debate about whether the courts or the political process are better equipped to police the boundaries of federalism and the separation of powers.[212]

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[210] Bork, *Our Judicial Oligarchy*, *supra* note 205, at 6 ("Among the most elementary principles of Western Civilization is the truth that laws which violate the moral law are null and void and must in conscience be disobeyed.").

[211] Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

> The fact is . . . that the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States. Consequently it would be most unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a lawmaking majority.

Id.

> Of course, sadly this is part of the problem to begin with—that the Court follows policy preferences at all, when it ought to be following the Constitution. But the point here is that the Court can only get away with what we let it get away with, given a certain amount of time.

[212] Jeffrey Rosen, *Nine Votes for Judicial Restraint*, N.Y. TIMES, June 29, 1997, at E15.

V. CONCLUSION

In evaluating the role of the federal judiciary in our system and, more specifically, the proper place for judicial activism in the courts, it must be remembered that, with the passage of the Constitution, the Founders implemented a *novus ordo seclorum*: a new order for the ages.[213] The Founders turned the political ideas of the world on their head. Virtually everyone believed that sovereignty must reside in only one governmental body, but the Founders divided it between the Federal and State levels. Most said that the separation of powers required that the branches of government must be completely separate, but the Founders split them while providing checks and balances. Conventional wisdom held that the legislature had to have the final say in what the laws would be, but the Founders made the People the final arbiters of the law, through the Constitution. This was not a republic in any of the ordinary senses of the term.[214] Judicial review was part of this new order, because of the Founder's emphasis on a written Constitution. So, if it seems that judicial review is a unique tool, it is because it truly is, and like any of our tools, in the hands of corrupt man it can be misused. The Founders knew these things, and knew that if this new order was to succeed, it would require the ongoing vigilance of the government by the governed. This is why "[w]hen Americans stop arguing about legitimacy, about just government derived from the consent of the governed, and about the relationship between laws and higher law, this country will have turned out to be something very different from what the Founders intended."[215]

"Limiting the federal judiciary, including the Supreme Court, to its proper Constitutional role thus is a vital liberty issue."[216] This article has sought to describe some of that proper role, where it concerns the dangerous but necessary duty of judicial activism. The premise has been that the structure of the Constitution deserves and demands the main focus of the Supreme Court, because its fundamental role in our system

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[213] MCDONALD, *supra* note 82, at 262.

[214] *Id.* at 287.

> That government defied categorization by any existing nomenclature: it was not a monarchy, nor an aristocracy, nor a democracy, neither yet was it a mixed form of government, nor yet a confederated republic. It was what it was, and if Madison was presumptuous in appropriating the word *republic* to describe it, he was also a prophet, for thenceforth *republic* would mean precisely what Madison said it meant.

Id.

[215] Richard John Neuhaus, *Preface* to THE END OF DEMOCRACY, *supra* note 162, at ix.

[216] Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Lawmaking* , 40 N.Y.L. SCH. L. REV. 925, 932-33 (1996).

represents a primary way that judicial review can be legitimate. Excessive activism, as we have seen, produces grave consequences.

> First, there is concern that the Court may sacrifice the power of legitimacy that attaches to decisions within the traditional judicial sphere rendered on the basis of conventional legal criteria, and so may disable itself from performing the narrower but none the less vital constitutional role that all assign to it. Second, there is fear that excessive reliance on the courts instead of self-government through democratic processes may deaden a people's sense of moral and political responsibility for their own future, especially in matters of liberty, and may stunt the growth of political capacity that results from the exercise of the ultimate power of decision.[217]

This article does not seek to push judicial activism to the point that these concerns will come to fruition. Rather, it proposes a partial antidote to these problems. First, by starting with the founding principles of this republic: man is fallen; this is a government of laws, not of men; we have a written constitution; no man is allowed to be the judge in his own cause; concentration of political power means tyranny; and the recognition that no dichotomy exists between structure and our sacred rights, any temptation to place excessive reliance on the courts instead of self-government is overcome. Second, by recognition of an adherence to what are the key structures in our system: separation of powers and federalism. Adherence to these key structures prevents the courts from whittling away their legitimacy, and focuses their powers on the narrower, but vital, constitutional role assigned to them.

Proper judicial activism does not threaten the republic; it emboldens it. When activism leaches into an improper sphere, as it is bound to do, it remains for us to pull it back, and to remind the judiciary that we are a government of laws, not of men. While judges may interpret the law, they are not the law themselves; and when they attempt to equate themselves to the law, as they do when basing decisions upon their consciences rather than the Constitution, it is up to us to call them on the carpet, and point them back to the Text. Respect for the system and a desire to protect liberty demand no less of us, and proper judicial activism demands no less a fidelity from judges.

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[217] COX, *supra* note 157, at 103.