

A FUNDAMENTAL MISCONCEPTION OF SEPARATION OF  
POWERS: *BOUMEDIENE V. BUSH*

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## I. INTRODUCTION

Terrorists attacked the United States on September 11, 2001. Congress quickly authorized the President to respond with military force,<sup>1</sup> and the Bush Administration ordered the military detention of alien al Qaeda and Taliban fighters at Guantanamo Bay, Cuba.<sup>2</sup> When the Supreme Court signaled in June 2004 that it would not permit the military to hold these enemy combatants indefinitely,<sup>3</sup> Congress responded with § 7 of the Military Commissions Act (MCA).<sup>4</sup> The MCA deprived the Supreme Court of jurisdiction to hear claims, including habeas corpus petitions, from alien enemy combatants challenging their detention.<sup>5</sup> In *Boumediene v. Bush*,<sup>6</sup> the Supreme Court held that § 7 of the MCA unconstitutionally suspended the writ of habeas corpus and that the detainees thus had access to the federal courts through the writ.<sup>7</sup>

Undoubtedly, civil rights advocates will champion *Boumediene* as a triumph of the Constitution and the rule of law over political will.<sup>8</sup> It is not. It is instead the apex of the Supreme Court's monopoly power over constitutional interpretation. In passing the MCA, Congress challenged the Court's claim to exclusive authority over constitutional meaning. Congress used one of the few tools available under the Constitution to check

1. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

2. Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 9 C.F.R. 918 (2002), *reprinted in* 8 U.S.C. § 801 (2006).

3. *See Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004) (opining that being detained for over two years in territory controlled by the United States without counsel and without being charged with a crime amounted to unlawful detention).

4. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (codified at 28 U.S.C.A. § 2241(e) (Supp. 2009)).

5. *Id.* § 7(a).

6. 128 S. Ct. 2229 (2008).

7. *Id.* at 2275–76.

8. Many already have. *See, e.g.*, Ronald Dworkin, *Why It Was a Great Victory*, N.Y. REV. BOOKS, Aug. 14, 2008, at 18 (praising *Boumediene* as a successful attempt by the Court to prevent the President from escaping his constitutional responsibilities); Jack M. Balkin, *Two Takes: With Boumediene, the Court Reaffirmed a Basic Principle*, U.S. NEWS & WORLD REP., June 19, 2008, <http://www.usnews.com/articles/opinion/2008/06/19/two-takes-with-boumediene-the-court-reaffirmed-a-basic-principle.html> (arguing that the *Boumediene* Court saw through the Bush “[A]dministration’s ruse”).

the Supreme Court's usurpation of political power. The Constitution gives Congress authority to make "Exceptions" and "Regulations" to the Court's appellate jurisdiction,<sup>9</sup> and the MCA stripped the Supreme Court of jurisdiction over any and all cases involving the Guantanamo prisoners' detention.<sup>10</sup> Thus, the Court lacked any colorable claim to jurisdiction over any case involving the Guantanamo Bay detainees, and the political branches' constitutional interpretations of the detainees' due process rights should have been final. Nonetheless, without articulating a statute or constitutional provision purportedly granting it jurisdiction, the Supreme Court granted certiorari in *Boumediene v. Bush* and decided the case on the merits.<sup>11</sup> For the first time in American history, the Court had overturned a congressional act limiting its jurisdiction.<sup>12</sup>

*Boumediene* raises vexing questions regarding the limits of judicial review and judicial power. *Boumediene* was a 5–4 decision, with two lengthy and scathing dissents.<sup>13</sup> Yet every member of the Court seemed to agree on one crucial principle: Congress's constitutional check on Supreme Court power is not a plenary, unreviewable one. This Article's thesis is that the Court violated basic separation-of-powers principles when it refused to stay its hand in the face of jurisdiction-stripping legislation.<sup>14</sup> Although the Court has long exercised the power to "say what the law is," it consistently recognized, until *Boumediene*, that it *only* has that power when Congress grants the Court jurisdiction to "apply the rule to particular cases."<sup>15</sup> Only then, "of necessity," can the Court "expound and interpret" the law.<sup>16</sup>

This Article explores the evolution of judicial review into a Supreme Court monopoly over constitutional meaning and the effects of that evolution on separation-of-powers principles.

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9. U.S. CONST. art. III, § 2, cl. 2.

10. Military Commissions Act of 2006 § 7(a).

11. *Boumediene v. Bush*, 128 S. Ct. 2229, 2274–75 (2008).

12. *Id.* at 2275.

13. *Id.* at 2279–93 (Roberts, C.J., dissenting); *id.* at 2293–307 (Scalia, J., dissenting).

14. Others have sharply disagreed. See Gerald L. Neuman, *The Extraterritorial Constitution after Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 260–61 (2009) (arguing that the Supreme Court took a "functional approach" in *Boumediene* that balanced practical, historical, and political considerations with the Constitution).

15. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

16. *Id.*

While *Marbury v. Madison* established judicial review soon after this nation's founding,<sup>17</sup> the Judicial Branch continued to respect the separate spheres of constitutional authority committed to the political branches, until the mid-twentieth century. During that time, Congress and the President played leading roles in constitutional interpretation, judicial review was deferential, and the political question doctrine was strong. The Court regularly expressed its own lack of institutional competence to make policy decisions, especially on questions of military policy. The Court consistently opined that the structure and text of the Constitution vests the political branches with exclusive authority to render binding answers to constitutional questions regarding military affairs. This was not a matter of judicial grace. The Constitution itself demanded this division of power between the Judicial and political branches of government. As Chief Justice Marshall acknowledged in *Marbury*, some questions—“[q]uestions, in their nature political”—lie outside the judicial power.<sup>18</sup> This long period of judicial deference to the constitutionally allocated powers of coordinate branches is detailed in Part II.

Part III explores a shift in the Court's focus. Beginning in the 1930s, the Court became more active in defining and protecting individual liberties. From the 1930s to the 1990s, the Court slowly gained confidence and stature. Part III examines several related consequences of the Court's gradual accumulation of power. First, the Court began to deem individual liberties more important than other constitutional values and believed that only the Judicial Branch could protect unpopular groups from the majority. Second, the Court began to claim, then to believe, and finally to convince the nation that the Court had greater constitutional authority than the elected branches to interpret the Constitution. Third, the Court's view of its own competence as a policy-making body changed. Where the early Court doubted its ability to make decisions affecting the whole nation, the modern Court began to believe that it was the only branch of government that could create fair policies. The Court invalidated acts of Congress, which, in its view, took too much power away from the states. The Court reached a new high

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17. *See id.* at 177–78 (“It is emphatically the province and duty of the judicial department to say what the law is.”).

18. *Id.* at 170.

point in its power in 2000, when it effectively selected George Bush as the forty-third President.<sup>19</sup> Soon thereafter, he faced the security crisis that would define his two presidential terms.

Part IV explores the interbranch struggle over constitutional decision-making authority in connection with security measures following the terrorist attacks of September 11, 2001. The President ordered the military detention of enemy combatants<sup>20</sup> and Congress unambiguously stripped the Court of jurisdiction to hear the detainees' claims.<sup>21</sup> The Court decided them anyway, claiming that Congress violated separation-of-powers standards when it deprived the Court of jurisdiction.<sup>22</sup> The Court has lost its constitutional compass. It was the Court—not Congress—that violated basic separation-of-powers principles when it refused to respect Congress's jurisdiction-stripping legislation.

## II. THE FIRST TWO CENTURIES—A BALANCE OF POWER AMONG COORDINATE BRANCHES

### A. *The Constitutional Structure of Separated Powers*

Our founding generations held the firm conviction that concentrating sovereign power in a single branch of government would invariably harm the people's interests. As James Madison wrote in *The Federalist*, the Founding Fathers considered it an unassailable "political truth" that accumulating political power in a single branch was "the very definition of tyranny."<sup>23</sup> Separation of powers was an "essential precaution in favor of liberty."<sup>24</sup> The Constitution thus divided governmental power among three branches, each with separate spheres of authority.<sup>25</sup>

19. *Bush v. Gore*, 531 U.S. 98, 109–10 (2000) (per curiam).

20. Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 9 C.F.R. 918 (2002), *reprinted in* 8 U.S.C. § 801 (2006).

21. Military Commissions Act of 2006 § 7(a), 28 U.S.C. § 2241(e)(1) (2006).

22. *Boumediene v. Bush*, 128 S. Ct. 2229, 2275–76 (2008).

23. THE FEDERALIST NO. 47, at 303 (James Madison) (Isaac Kramnick ed., 1987).

24. *Id.* The Constitution created separate—but not *entirely* separate—spheres of authority in the three branches it established. The Constitution did not divide powers strictly but rather overlapped and comingled powers to create a revolutionary system of checks and balances. One example, especially pertinent here, is the power to wage war. That power was traditionally a function of the Executive Branch alone, but the Framers divided between the Executive and Legislative Branches, in order to better serve the people. See discussion *infra* Part II.A.

25. U.S. CONST. arts. I–III.

First was the Legislative Branch. Congress was made most accountable to the people, so it received the greatest quantum of powers, including—but certainly not limited to—the powers to regulate national and international commerce, to tax, to make appropriations, to raise armies, and to declare war.<sup>26</sup> Second was the Executive Branch. Still politically accountable but further removed from the people, the President was vested with the power to execute the nation’s laws.<sup>27</sup> The President was also named Commander in Chief of the military<sup>28</sup>—an awesome constitutional responsibility but one necessary to protect the people from threats to national security.

Last, and least powerful, was the Judicial Branch. Subject to congressional approval, the federal courts were authorized to adjudicate certain classes of disputes.<sup>29</sup> As Alexander Hamilton described it in *The Federalist*, the Judiciary would always be the “least dangerous” branch because of “the nature of its functions.”<sup>30</sup> He was not being ironic or disingenuous when he wrote those now-famous lines. He had never encountered, and could scarcely fathom, an excessively powerful court.<sup>31</sup> In the Founding Fathers’ experience, the courts were weak, and domineering state legislatures often overturned their decisions, leading to unjust results.<sup>32</sup> The Framers believed that the Judicial Branch would require significant protections from political pressure or it would be unable to apply the law fairly.<sup>33</sup> For that reason, the Constitution provided federal judges with life tenure and indiminishable salaries, assuming good behavior.<sup>34</sup>

Madison stressed that despite these vastly different levels of power, each branch was “perfectly co-ordinate,” meaning that each possessed equal stature within the constitutional structure.<sup>35</sup> No branch ranked higher than another, and so no branch could “pretend to an exclusive or superior right of

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26. *Id.* art. I, § 8.

27. *Id.* art. II, § 1.

28. *Id.* art. II, § 2.

29. *Id.* art. III, § 1.

30. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 23, at 437.

31. Isaac Kramnick, *Editors Introduction* to THE FEDERALIST 11, 24–27 (Isaac Kramnick ed., 1987).

32. *Id.*

33. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 23, at 440–41.

34. *Id.*; U.S. CONST. art. III, § 1.

35. THE FEDERALIST NO. 49 (James Madison), *supra* note 23, at 313.

settling the boundaries between their respective powers.”<sup>36</sup> Neither could any branch claim the sole and exclusive right to interpret the Constitution.<sup>37</sup> For Madison, the people were the source of constitutional power, and thus, “the people themselves . . . can alone declare its true meaning.”<sup>38</sup> The United States government was the first government founded on an innovative political theory: the people were sovereign and the government was the people’s servant.<sup>39</sup> Each branch of that government was given equal stature and equal rank so that no branch would rise to a position of supremacy over the people.<sup>40</sup> Under these guiding principles, the Founding Fathers could not grant any department of government the power to serve as ultimate referee of interbranch conflicts, or else that referee would be the nation’s highest authority.<sup>41</sup> They anticipated that, from time to time, one branch would encroach upon powers allocated to another branch or upon the rights and liberties retained by the people.<sup>42</sup> The solution lay in the constitutional structure, which gave the departments of government overlapping restraints on one another’s power.<sup>43</sup> As Madison put it, “the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”<sup>44</sup>

The Constitution mentions neither the authority to interpret the Constitution nor the power to review the constitutionality of another branch’s actions, but the Framers took it for granted that Congress must interpret constitutional meaning in the course of legislating, and that the President was not bound by Congress’s determination that the act was constitutional<sup>45</sup>—the President independently interpreted constitutional

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36. *Id.*

37. *See id.* (arguing that as coordinate branches, no one branch can set the boundaries of its own, or the others’, respective powers).

38. THE FEDERALIST NO. 49 (James Madison), *supra* note 23, at 313.

39. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1435–36 (1987).

40. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 245–52 (1994) (arguing that no branch can be the constitutional judge of its own power).

41. *Id.*

42. THE FEDERALIST NO. 51 (James Madison), *supra* note 23, at 319.

43. *Id.*

44. *Id.* at 319.

45. LARRY D. KRAMER, THE PEOPLE THEMSELVES 114–27 (2004).

requirements when determining whether to sign or veto an act of Congress.<sup>46</sup> In *Marbury v. Madison*, Chief Justice John Marshall claimed that the Judicial Branch also had the power and duty to interpret the Constitution.<sup>47</sup>

### B. *The Rise of Judicial Review*

The most famous line Chief Justice John Marshall ever penned appears near the end of *Marbury v. Madison*: “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>48</sup> According to many decisions issued in modern times, Chief Justice Marshall’s statement stands for the proposition that the Court—and no other branch of government—is supreme in the exposition of the Constitution’s meaning.<sup>49</sup> But the Chief Justice was making a more modest claim. He was not asserting that the political branches lacked the power of constitutional review but that the Court also had the power to interpret and act on its own interpretation of constitutional text.<sup>50</sup> To be sure, Chief Justice Marshall was seeking far greater power than the Court had ever before enjoyed, but he never claimed that the Court had greater authority than the political branches to interpret the Constitution. And yet, the idea that the Supreme Court alone determines constitutional meaning has now become commonplace among scholars and laypersons alike.<sup>51</sup> Any attempt by the political branches to enforce a contrary reading of the constitutional text is viewed as inviting lawlessness.<sup>52</sup> *Marbury* has been misapplied so often that it is worthwhile to

46. *See id.* at 106 (recounting that Thomas Jefferson was a proponent of the idea that each branch had independent authority to interpret the constitution without reliance upon the other branches’ interpretations).

47. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

48. *Id.*

49. *E.g.* *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

50. KRAMER, *supra* note 45, at 124–27.

51. *Id.* at 220–23. *See generally* MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 129 (1999) (opining that many people have “warm and fuzzy feelings about judicial review”).

52. *See generally* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377 (1997) (“The reasons for having laws and a constitution that is treated as law are accordingly also reasons for establishing one interpreter’s interpretation as authoritative.”).

tread again over its familiar ground and place the Court's power to "say what the law is"<sup>53</sup> in its proper context.

*Marbury v. Madison* arose from the first great political crisis following the Constitution's ratification: President John Adams, a Federalist, had been soundly defeated in his run for a second term of office in the presidential election of 1800.<sup>54</sup> Adams was determined to entrench the Federalist Party's influence within the government before Thomas Jefferson, the Republican candidate, took office.<sup>55</sup> To that end, in January of 1801, Adams named Secretary of State John Marshall, a man with no prior judicial experience, to serve as Chief Justice of the Supreme Court.<sup>56</sup> The next month, on February 27, 1801, with less than one week before the end of Adams's term, Congress passed an act creating forty-two justices of the peace for Washington, D.C.<sup>57</sup> On March 2, Adams nominated judges to fill those positions, and the Senate confirmed each nomination on March 3.<sup>58</sup> John Marshall signed the commissions—in his other role as Adams's Secretary of State—and sent his brother, James, to deliver them.<sup>59</sup> The following day, March 4, 1801, President Jefferson took office.<sup>60</sup> James Marshall had not delivered some of the commissions in time—including William Marbury's—and President Jefferson instructed his Secretary of State, James Madison, to withhold the undelivered commissions.<sup>61</sup> Marbury filed suit in the Supreme Court seeking a writ of mandamus, a judicial order compelling Madison to deliver his commission.<sup>62</sup>

Ask any group of law students what *Marbury v. Madison* is about, and they likely will say that it established judicial review—the proposition that the federal Judiciary may review the substance of an act of Congress and determine whether it violates the Constitution.<sup>63</sup> But *Marbury's* conclusion that the Judiciary could declare a statute unconstitutional was far less

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53. *Marbury*, 5 U.S. at 177.

54. William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 3 (1969).

55. *Id.* at 3–4.

56. *Id.* at 3.

57. *Id.* at 4.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 137 (1803).

63. 16 C.J.S. *Constitutional Law* § 150 (2009).

controversial at the time than the Court's assertion that it could order the President of the United States to install Mr. Marbury in his judicial office.<sup>64</sup> The Jefferson Administration would almost certainly have refused to obey the mandamus, thus undermining the Court's power at the beginning of America's history.<sup>65</sup> Knowing that there was no realistic chance of awarding Marbury his judicial post, the Chief Justice used the occasion to make his case for a significantly stronger Court.

The *Marbury* opinion is filled with majestic, if overly general, language. Chief Justice Marshall said, "The very essence of civil liberty certainly consists in the right of every individual to claim the protections of the laws . . ." <sup>66</sup> We have a government "of laws, not of men."<sup>67</sup>—in other words, the law binds even the President. But the Chief Justice nonetheless recognized that there is a sphere of activity in the political branches that cannot be questioned by any coordinate branch, and whether the executive action is unreviewable "must always depend on the nature of that act."<sup>68</sup> If the executive officer is acting at the direction of the President, in an area where the Constitution grants the President discretion, then it is a political act unreviewable by the Court.<sup>69</sup> If, on the other hand, a political-branch official fails to perform a ministerial task affecting another's individual rights, then that individual can sue to require its performance.<sup>70</sup> Chief Justice Marshall opined that the Judiciary had the power to issue orders that bound Executive Branch officials to perform these ministerial tasks—tasks that did not involve executive discretion.<sup>71</sup> Always a political mastermind, the Chief Justice announced this principle in a case where the Court did not actually order the Executive Branch to do anything.<sup>72</sup> He gave President Jefferson no opportunity to disobey a court order.

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64. Van Alstyne, *supra* note 54, at 4.

65. *Id.* at 11.

66. *Marbury*, 5 U.S. at 163.

67. *Id.*

68. *Id.* at 165.

69. *Id.* at 164.

70. *Id.* at 166.

71. *Id.*

72. *See id.* at 138 (holding that the Supreme Court does not have the power to issue a writ of mandamus to the Secretary of State in its original jurisdiction).

With equal cunning, Chief Justice Marshall established the principle of judicial review in a case that seemingly limited the power of the Judicial Branch. Mr. Marbury filed his mandamus action directly with the Supreme Court; it was not there on appeal.<sup>73</sup> The first question, then, was whether the Court had original jurisdiction over the dispute.<sup>74</sup> According to Chief Justice Marshall, the Judiciary Act of 1789 provided a statutory basis for the Supreme Court to exercise original jurisdiction in cases seeking mandamus.<sup>75</sup> The Chief Justice held, however, that the Constitution permitted the Court to exercise only appellate jurisdiction over such a case.<sup>76</sup> The first Judiciary Act thus attempted to give the Supreme Court more power than Article III permitted.<sup>77</sup> It was therefore “repugnant to the Constitution,” and the Supreme Court was required to follow the Constitution rather than the Judiciary Act.<sup>78</sup>

Countless scholars have criticized *Marbury* and the principle of judicial review that it established.<sup>79</sup> Nevertheless, judicial review has become an integral part of America’s constitutional culture.<sup>80</sup> It is too late to argue that the Supreme Court may not act on its own interpretations of the Constitution. The timelier question is this: What power do the coordinate branches have to assert and act on their own contrary interpretations of the Constitution?

*Marbury*’s position was that each coordinate branch of the federal government possesses this power.<sup>81</sup> Chief Justice Marshall used *Marbury* as a platform from which to seek greater power for the Court over constitutional interpretation. But he sought to share that power with the political branches, not to monopolize it. He acknowledged that not every substantive provision of the Constitution was open to judicial

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73. *Id.* at 174–76.

74. *Id.* at 174.

75. *Id.*

76. *Id.* at 175–76.

77. *Id.*

78. *Id.* at 176.

79. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH 2* (2d ed., Yale University Press 1986) (describing the *Marbury* opinion as “very vulnerable”); Van Alstyne, *supra* note 54, at 38 (arguing that it is surprising anyone could sensibly think that *Marbury* authoritatively established the doctrine of federal substantive judicial supremacy).

80. See *supra* note 51 and accompanying text.

81. *Marbury*, 5 U.S. at 170.

interpretation.<sup>82</sup> Some questions, according to Chief Justice Marshall—“[q]uestions, in their nature political,” lay outside the judicial power.<sup>83</sup>

This was not the first time that Chief Justice Marshall opined that the Constitution’s separation-of-powers structure limited the Judiciary’s role in constitutional interpretation. On March 7, 1800, then-Congressman Marshall gave a speech in the House of Representatives regarding the extradition of a man accused of committing murder aboard a British vessel.<sup>84</sup> The man claimed that he was an American citizen.<sup>85</sup> The federal district court judge before whom the case was pending disagreed; he believed that the man was a British subject named Thomas Nash.<sup>86</sup> Acting under the extradition provisions of the Jay Treaty, President John Adams delivered Nash to the British.<sup>87</sup> A House Resolution rebuked Adams for his action, calling it a “dangerous interference of the Executive with Judicial decisions.”<sup>88</sup> But Marshall defended Adams on separation-of-powers grounds. Marshall explained that not every question of constitutional law was for the Judiciary to entertain: “If the Judicial power extended to every question under the Constitution, it would involve almost every subject proper for Legislative discussion and decision . . . .”<sup>89</sup> If this were the case, then there would be no separation of powers: “The division of power . . . could exist no longer, and the other departments would be swallowed up by the Judiciary.”<sup>90</sup> Thus, contrary to popular belief, the author of *Marbury* was firmly committed to a limited judicial power.

If any doubts remain about John Marshall’s views on judicial supremacy, then his opinion in *McCulloch v. Maryland*<sup>91</sup> should put those doubts to rest. In that case, Congress chartered a national bank to help finance war debts; Maryland imposed a tax on the bank; and the bank refused to pay the tax.<sup>92</sup> Maryland sued the bank to collect the taxes, and, in the course of the

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82. *Id.*

83. *Id.*

84. 10 ANNALS OF CONG. 596–618 (1800).

85. *Id.* at 532.

86. *Id.*

87. *Id.* at 532–33.

88. *Id.* at 533.

89. *Id.* at 606.

90. *Id.*

91. 17 U.S. (4 Wheat.) 316 (1819).

92. *Id.* at 401–02.

litigation, Maryland raised a constitutional issue: Had Congress exceeded its Article I powers in creating the bank?<sup>93</sup> The Constitution does not by its terms authorize Congress to establish a bank, nor is a national bank strictly necessary to put any of Congress's enumerated powers into effect.<sup>94</sup> Maryland argued that the Necessary and Proper Clause<sup>95</sup> only allowed Congress to pass laws that were strictly necessary to its enumerated powers,<sup>96</sup> but Chief Justice Marshall took a much broader view of Congress's constitutional authority:

We admit . . . that the powers of the [federal] government are limited . . . . But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.<sup>97</sup>

Modern students of constitutional law, familiar with the Court's recent claims to monopoly power over constitutional interpretation, may be tempted to read *McCulloch* as saying that the Court is not strictly bound by the plain text when it interprets constitutional provisions. But Chief Justice Marshall actually said something quite different. It was not the Court but rather Congress that had wide discretion to interpret ambiguous constitutional provisions, and if the Constitution were open to a range of interpretations, then the Court was bound by Congress's choice within that range.<sup>98</sup>

For Chief Justice Marshall, the Constitution set the limits of congressional power, but it did not "partake of the prolixity of a legal code."<sup>99</sup> It did not describe the limits of congressional

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93. *Id.* at 406–07.

94. *Id.* at 407–10.

95. U.S. CONST. art. I, § 8, cl. 18.

96. *McCulloch*, 17 U.S. at 412.

97. *Id.* at 421.

98. *Id.*

99. *Id.* at 407.

power with precision but instead marked only the “great outlines” of that power, which Congress was to interpret in deciding whether or how to exercise its enumerated powers.<sup>100</sup> Congress had wide latitude in delineating those limits.<sup>101</sup> Judicial review consisted of determining whether the legislative ends were “legitimate” and the legislative means “appropriate”<sup>102</sup>—what we now think of as the highly deferential “rational basis scrutiny” of judicial review.<sup>103</sup>

It is important to note that rational basis scrutiny was a judicially crafted tool for enforcing separation of powers, not for enforcing substantive constitutional law.<sup>104</sup> When the Court declared a law “rational,” it was not thereby declaring it “constitutional.”<sup>105</sup> It was the political branches, not the Court, who determined whether the law was constitutional.<sup>106</sup> The Supreme Court did not offer its own independent judgment as to whether the statute was constitutional; instead, its review was limited to determining whether Congress could have rationally *believed* the statute was constitutional.<sup>107</sup> An imperfect analogy from the criminal law is the “not guilty” verdict. The jury that renders this verdict is not declaring that the defendant did not commit the crime, but rather only that the jury is not convinced beyond a reasonable doubt that the defendant did commit the crime.<sup>108</sup> So too, in exercising rational basis review, the Court that declared a law rational had not determined that the law was constitutional but only that it was not completely unsupportable or wholly beyond the pale.<sup>109</sup>

The Marshall Court recognized that the Constitution was intentionally structured to avoid too great an accumulation of power in any single branch. *Marbury* established the principle of judicial review, and judicial review plays an important role in

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100. *Id.*

101. *Id.* at 421.

102. *Id.*

103. *See generally* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (articulating the standard of rational basis review).

104. KRAMER, *supra* note 45, at 219.

105. *Id.*

106. *Id.*

107. *Id.*

108. Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 76 NOTRE DAME L. REV. 1165, 1182 (2003).

109. KRAMER, *supra* note 45, at 219.

maintaining the delicate balance of power among the coordinate branches. It helps to prevent Congress from imposing unconstitutional laws on the American people. At the same time, the Constitution's text is not precise; it does not "partake of the prolixity of a legal code," and thus it is open to a range of reasonable interpretations.<sup>110</sup> The Marshall Court established that it was for Congress, who was politically accountable to the people, to choose among those reasonable interpretations.<sup>111</sup> Only where Congress had gravely erred in its judgment would the Court intervene.<sup>112</sup> The early Court correctly believed that judicial review is so powerful and so subject to abuse that it demands this type of restraint.

### *C. Early Recognition of the Limits of Judicial Review*

The early Court recognized that if it betrayed separation-of-powers principles through overzealous judicial review, Congress held a constitutional trump card. The Constitution grants Congress plenary power to strip the Court of appellate jurisdiction.<sup>113</sup> The Supreme Court's jurisdiction is subject to "such Exceptions, and under such Regulations as the Congress shall make."<sup>114</sup> The Constitution also leaves to Congress the decision whether to create lower federal courts,<sup>115</sup> which exist only as a matter of legislative grace.<sup>116</sup> Article III identifies certain classes of "Cases" and "Controversies" that fall within the federal "judicial Power"<sup>117</sup> and vests that power in the Supreme Court and whatever lower federal courts Congress may "from time to time ordain and establish."<sup>118</sup> From the beginning, however, neither Congress nor the Court read Article III as

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110. *McCulloch v. Md.*, 17 U.S. (4 Wheat.) 316, 407 (1819).

111. *Id.* at 386–87.

112. *Id.*

113. U.S. CONST. art. III, § 2, cl. 2.

114. *Id.* The Constitution does grant the Supreme Court a modest amount of self-executing jurisdiction, where states or foreign ambassadors are parties. *Id.*

115. *Id.* § 1.

116. *See Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 329 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."); *Sheldon v. Sill*, 49 U.S. (8 How.) 411, 448–49 (1850) (concluding that "Congress, having the power to establish the [inferior] courts, must define their respective jurisdictions"); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 314–15 (1816) (emphasizing that Congress has an option, not an obligation, to create inferior courts).

117. U.S. CONST. art. III, § 2, cl. 1.

118. *Id.* § 1.

automatically vesting jurisdiction over these cases and controversies in any federal court.<sup>119</sup> Authorizing legislation was necessary, and Congress passed such authorizing legislation during its first term—the Judiciary Act of 1789.<sup>120</sup> This first Judiciary Act provided the federal courts with considerably less than the full amount of judicial power potentially available under the Constitution.<sup>121</sup>

The first important cases that recognized Congress’s plenary power over the Court’s jurisdiction arose in a legal and factual context highly relevant to *Boumediene*. The question presented was: Does the Constitution grant federal courts self-executing jurisdiction to issue writs of habeas corpus? Article I, Section Nine provides that “[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>122</sup> Does this mean that the federal Judiciary, without statutory authorization from Congress, possesses habeas jurisdiction?

In the 1807 case of *Ex parte Bollman*,<sup>123</sup> Chief Justice John Marshall’s answer was “no.”<sup>124</sup> *Bollman* involved consolidated habeas petitions by two prisoners, Swartwout and Bollman, convicted of treason against the United States.<sup>125</sup> The first issue was whether the Supreme Court had jurisdiction to issue writs of habeas corpus in their cases.<sup>126</sup> Swartwout’s attorney argued that the Court’s jurisdiction derived directly from Article III, Section Two, so “[n]o legislative act is necessary to give [habeas] powers to this court.”<sup>127</sup> Bollman’s attorney, on the other hand, contended that habeas jurisdiction was part of the Court’s “inherent powers” and “not given by the constitution, nor by statute, but flow[ing] from the common law.”<sup>128</sup> But the Chief

119. *See supra* notes 113–16 and accompanying text.

120. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (codified as amended in scattered sections of 28 U.S.C.). The 1789 Act lends important insights in interpreting Article III because the first Congress was made up of a great majority of the leaders who drafted and voted to ratify the Constitution itself just one year earlier. David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 *FORDHAM L. REV.* 71, 80 (2009). Thus, their interpretation of Article III’s requirements should carry great weight.

121. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 3.3, at 197 (5th ed. 2007).

122. U.S. CONST. art. I, § 9, cl. 2.

123. 8 U.S. (4 Cranch) 75 (1807).

124. *Id.* at 95.

125. *Id.* at 75–76.

126. *Id.* at 77.

127. *Id.*

128. *Id.* at 80.

Justice rejected both these views.<sup>129</sup> Unlike state judiciaries that derive their power from the common law, the federal Judiciary has only the jurisdiction “given by the constitution, or by the laws of the United States. . . . [Federal] courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.”<sup>130</sup>

The Chief Justice then determined that Congress had, in fact, granted the Court the power to issue habeas writs in the Judiciary Act of 1789.<sup>131</sup> In *Bollman*, as in *Marbury*, Chief Justice Marshall did not shy away from dicta. He again fought hard for greater power for the Judiciary, contending that Congress must have felt “with peculiar force” their “obligation” to grant the federal courts jurisdiction to issue the writ of habeas corpus—that “great constitutional privilege.”<sup>132</sup> But the Chief Justice conceded that if Congress had failed to perform this “obligation,” the Court could not enforce it.<sup>133</sup> If Congress had not passed the Judiciary Act granting the Supreme Court habeas jurisdiction, then “the means [would] be not in existence,” and so “the privilege [of the writ] itself would be lost.”<sup>134</sup>

The Judiciary Act of 1789 did not grant habeas review over all cases and controversies that could come before the Court on appeal.<sup>135</sup> Most notably, the federal courts could not issue habeas writs for state prisoners.<sup>136</sup> Congress did not broaden the federal courts’ habeas jurisdiction until the Reconstruction Era, when Southern state authorities began illegally imprisoning freed blacks, and whites sympathetic to Reconstruction efforts.<sup>137</sup> To remedy the situation, Congress passed a new habeas statute to allow federal courts to issue habeas writs where the prisoner

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129. *Id.* at 95.

130. *Id.* at 93.

131. *Id.* at 94–95.

132. *Id.* at 95.

133. *Id.*

134. *Id.*

135. See Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82 (codified as amended at 28 U.S.C. § 2241 (2006)) (“[W]rits of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.”).

136. The Judiciary Act of 1789 permitted the federal courts to issue habeas writs only for prisoners held “in custody, under or by colour of the authority of the United States.” *Id.*

137. William Van Alstyne, *A Critical Guide to Ex parte McCordle*, 15 ARIZ. L. REV. 229, 235–36 (1973).

challenged his custody as violating “the constitution, or . . . any treaty or law of the United States.”<sup>138</sup> It also allowed for appeal to the Supreme Court from lower federal court decisions on habeas petitions.<sup>139</sup> At the same time, the Reconstruction Congress passed the Military Reconstruction Act, which divided the South into different districts under military command.<sup>140</sup>

This was the way things stood in 1867 when *McCardle*, the editor of the *Vicksburg Times*, printed several articles criticizing the military occupation of Mississippi.<sup>141</sup> *McCardle* was arrested under the Military Reconstruction Act for disturbing the peace, inciting insurrection and disorder, libel, and impeding Reconstruction.<sup>142</sup> While held in military custody awaiting trial by military commission, *McCardle* filed a statutory habeas corpus petition challenging his confinement.<sup>143</sup> With *McCardle*’s petition pending before the Supreme Court, the Reconstruction Congress repealed the Court’s jurisdiction to entertain such habeas corpus petitions.<sup>144</sup> Without doubt, Congress sought to achieve a particular substantive result.<sup>145</sup> Congress believed that the Reconstruction Acts were necessary to protect a war-ravaged nation and believed further that the Supreme Court would declare the Reconstruction Acts unconstitutional if given the opportunity.<sup>146</sup>

When his petition reached the Court in *Ex parte McCardle*,<sup>147</sup> the Supreme Court refused to decide it; the Court stated, “The first question necessarily is that of jurisdiction . . . .”<sup>148</sup> Article III allows Congress to make exceptions to the Court’s appellate jurisdiction, and Congress had deprived the Court of

138. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385; Van Alstyne, *supra* note 137, at 234.

139. §1, 14 Stat. at 386; Van Alstyne, *supra* note 137, at 235.

140. Act of March 2, 1867, ch. 153, § 1, 14 Stat. 428, 428; Van Alstyne, *supra* note 137, at 236.

141. Van Alstyne, *supra* note 137, at 236.

142. *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 320–21 (1868).

143. See Van Alstyne, *supra* note 137, at 237 (stating that the federal circuit court denied *McCardle*’s habeas petition).

144. Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44, 44.

145. See Van Alstyne, *supra* note 137, at 239 (observing that § 2 was passed to “strike at *McCardle*’s pending case”).

146. *Id.* at 238.

147. 74 U.S. (7 Wall.) 506 (1868).

148. *Id.* at 512.

jurisdiction, therefore, “it [was] useless, if not improper, to enter into any discussion of other questions.”<sup>149</sup>

Although *McCardle* said the Court was “not at liberty to inquire into the motives of the legislature” in withdrawing habeas jurisdiction,<sup>150</sup> the Court did comment on Congress’s motives at length less than one year later.<sup>151</sup> The opportunity arose when another military prisoner sought habeas relief in the Supreme Court under a different jurisdictional statute.<sup>152</sup> In *Ex parte Yerger*, the Court noted that Congress had deliberately prevented Supreme Court review of *McCardle*’s habeas petition:

The effect of the act was to oust the court of its jurisdiction of the particular case then before it on appeal, and it is not to be doubted that such was the effect intended. Nor will it be questioned that legislation of this character is unusual and hardly to be justified except upon some imperious public exigency.

*It was, doubtless, within the constitutional discretion of Congress to determine whether such an exigency existed . . .*<sup>153</sup>

The Court clearly was not pleased that Congress had repealed its jurisdiction over *McCardle*’s case, but it had sufficient respect for the constitutional separation-of-powers structure to abide by Congress’s decision. The Court could “say what the law is”<sup>154</sup> only if Congress granted the Court jurisdiction to resolve a particular case or controversy.<sup>155</sup> Congress’s plenary power to regulate federal court jurisdiction was thus an important part of the constitutional scheme of checks and balances, which was intended to maintain an equilibrium of power among the coordinate branches of the federal government. If the Supreme Court were to overstep its proper sphere and misuse its power of judicial review to strike down acts of Congress that did not meet the policy preferences of the Justices, then Congress had the constitutional means to combat the Judiciary’s usurpation of political power.

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149. *Id.*

150. *Id.* at 514.

151. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 104–06 (1869).

152. *Id.*

153. *Id.* at 104 (emphasis added).

154. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

155. *Id.* at 148 (“It is competent for [C]ongress to prescribe the forms of process by which the [S]upreme [C]ourt shall exercise its appellate jurisdiction . . .”).

Congress has very rarely needed to exercise its Exceptions and Regulations check<sup>156</sup> because the Court has historically limited its own jurisdiction through the political question doctrine. The premise behind the classical political question doctrine is that the Judiciary could not resolve certain constitutional questions because the Constitution itself committed them to the political process.<sup>157</sup> Early Supreme Court decisions like *Luther v. Borden*<sup>158</sup> considered the political question doctrine to be a constitutionally mandated principle for enforcing separation of powers.<sup>159</sup> *Luther* arose out of the Dorr rebellion of the 1840s, in which Rhode Island's original charter government refused to recognize a new constitution adopted by a convention of Rhode Island's people.<sup>160</sup> The charter government declared it a crime to hold elections under the new constitution.<sup>161</sup> The people held the elections nonetheless, and the charter government responded by declaring martial law.<sup>162</sup> The sheriff, Borden, broke into Luther's home to search for evidence regarding the prohibited election.<sup>163</sup> Luther sued Borden in federal court for trespass.<sup>164</sup>

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156. U.S. CONST. art. III, § 2, cl. 2.

157. Rachel Barkow has carefully distinguished between the classical and prudential strands of the political question doctrine. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002). The classical strand of the political question doctrine is premised upon the idea that the Constitution itself forbids the Judiciary from entertaining certain policy questions. *Id.* at 246–53. The prudential strand of the political question doctrine, on the other hand, is more closely related to abstention doctrines. *Id.* at 253–64. In these situations, the Constitution does not forbid judicial review and Congress has granted statutory jurisdiction over the issues presented, but the Court nonetheless declines to adjudicate the case out of deference to the policy-making decisions of the political branches. *Id.* at 263–73. Barkow's article traces how the Court's failure to articulate clearly whether it was relying upon the classical or prudential strand led to a jurisprudential mess, and as a result, too-heavy reliance on the prudential strand has almost killed the constitutionally based classical strand. *Id.* Barkow advocates a return to the classical strand, in which the Judiciary only refrains from hearing cases where the subject matter presents a textually demonstrable commitment of constitutional decision-making authority to a coordinate branch. *Id.* at 319–35. This article focuses on military power, which is the clearest example of the classical political question doctrine, with a plethora of clear textually demonstrable commitments of authority outside the Judicial Branch. Thus, it is largely unnecessary to distinguish here between the classical and prudential strands of the doctrine.

158. 48 U.S. (7 How.) 1 (1849).

159. *Id.* at 46–47.

160. *Id.* at 34–37.

161. *Id.* at 36–38.

162. *Id.* at 37.

163. *Id.* at 34, 37.

164. *Id.* at 34.

Luther's civil rights were clearly at issue since a state official had invaded his home.<sup>165</sup> Luther had standing to assert the common law claim of trespass, but larger political questions were involved as well.<sup>166</sup> In order to decide whether Borden was liable for trespass, the Court would also have been forced to decide whether Luther was involved in a rebellion against the "true" Rhode Island government—giving Borden a defense to Luther's trespass claim—or whether Borden's group had unlawfully declared martial law in order to prevent the "true" state government from taking office.<sup>167</sup> The Supreme Court refused to address those questions, even though Luther's liberty and property rights had been harmed.<sup>168</sup> The Court found that the Constitution's text and separation-of-powers structure demanded that the political branches, not the Court, determine Rhode Island's legitimate government.<sup>169</sup> Article IV provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government,"<sup>170</sup> and the Court interpreted these words as vesting in Congress and the President unreviewable constitutional authority to decide what constituted the lawful government of a state.<sup>171</sup> Even more importantly for our purposes, the Constitution also vests the President with unreviewable power to decide who is an *enemy* of that government:

[T]he President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it . . . . After the President has acted and called out the militia, is a [federal court] authorized to inquire whether his decision was right? . . . . If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States

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165. *Id.*

166. *Id.* at 34–35. The court did not discuss the question of standing but went instead to the political question. *Id.*

167. *Id.* at 38–39.

168. *Id.* at 38–43.

169. *Id.* at 42–43.

170. U.S. CONST. art. IV, § 4.

171. *Luther*, 48 U.S. at 42 ("[T]he right to decide is placed there [in Congress], and not in the courts."); *id.* at 43 ("[T]he power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President.").

. . . . If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order.<sup>172</sup>

The Court rejected the notion that the Judiciary must have the power to entertain every case that affects an individual's civil rights:

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual.<sup>173</sup>

The *Luther* Court stressed that, in order to execute his constitutional functions, the President must decide what constitutes a rebellion against a state.<sup>174</sup> The President could not be "equally effectual" in performing that constitutional duty if the Judicial Branch could second-guess his decisions and nullify them after the fact.<sup>175</sup> Important civil rights of many individuals would undoubtedly be affected by the President's decision, but the Court emphasized that other constitutional values may take precedence over individual rights, such as the security of the community and the finality of political-branch decisions.<sup>176</sup> In the *Luther* Court's eyes, balancing those factors was a task that the Constitution assigned to Congress and the President.<sup>177</sup> The political branches were accountable to the people at the voting booth, and that political accountability provided "strong safeguards against a willful abuse of power."<sup>178</sup>

During the Civil War era, the Supreme Court repeatedly held that the political branches possessed unreviewable constitutional authority over wartime decision-making. In *The Prize Cases*, the Court explained that the President had constitutional authority

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172. *Id.* at 43.

173. *Id.* at 44.

174. *Id.* See generally *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) (holding that the question whether the President should institute a blockade against southern states was one "to be decided by him").

175. *Luther*, 48 U.S. at 44.

176. See *id.* at 44 (admitting that the President's power to recognize lawful state governments may be "dangerous to liberty" but confirming that that power is necessary) (citing *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29–31 (1827)).

177. *Id.* at 42–44.

178. *Id.* at 44.

to decide whether the Southern states had engaged in acts of war against the Union.<sup>179</sup> The Court lacked the power of judicial review over the President's decision:

Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.<sup>180</sup>

The Court further held that the Constitution assigns unreviewable decision-making authority to the political branches regarding how to administer justice to the enemy. In *Ex parte Vallandigham*,<sup>181</sup> the Supreme Court held that it lacked constitutional authority to review any challenge to a sentence imposed upon a member of the enemy's forces by a military commission.<sup>182</sup> But the Court drew a sharp distinction between enemy combatants and civilians. In *Ex parte Milligan*,<sup>183</sup> for example, the Court held that civilians who had not associated with the enemy must be tried in civilian courts so long as those courts were open and functioning.<sup>184</sup>

The jurisprudential contours of the Court's political question doctrine where military affairs were involved began to follow precisely the traditional legal categories of the international customary laws of war. The laws of war recognize that many behaviors considered depraved and criminal under normal circumstances are necessary and even desirable during armed conflict.<sup>185</sup> The most obvious example is the intentional killing of human beings.<sup>186</sup> In times of peace, this action could lead to criminal charges for murder, a criminal trial, and punishment; however, in times of war a soldier may be legally required to use

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179. *Prize Cases*, 67 U.S. at 670.

180. *Id.*

181. 68 U.S. (1 Wall.) 243 (1863).

182. *Id.* at 253.

183. 71 U.S. (4 Wall.) 2 (1866).

184. *Id.* at 118–24.

185. Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 692–95 (2004).

186. *Id.* at 692.

deadly force to incapacitate enemy forces.<sup>187</sup> No criminal charges may be brought against that soldier for that action, either during or after the hostilities.<sup>188</sup> Combatants who are taken prisoner during the conflict may be detained until the armed conflict ceases, but this detention is not intended as punishment.<sup>189</sup> As the Court recently put it, “[t]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again . . . ‘Captivity is neither a punishment nor an act of vengeance.’”<sup>190</sup>

The political branches alone were responsible for interpreting and enforcing constitutional due process rights afforded to enemies of the United States; the Judicial Branch exercised the power of judicial review only where the military sought to try civilians who had not associated with the enemy. *Ex parte Quirin*<sup>191</sup> is a key example. A group of eight Nazis, including two American citizens, came to America in 1942 with plans to sabotage American economic and transportation centers.<sup>192</sup> One of the saboteurs informed the FBI of the plot, and the group was arrested.<sup>193</sup> At FDR’s instruction, military commissions were established for their trials, and they were sentenced to death.<sup>194</sup> They filed habeas petitions, which the Court refused to entertain because the petitioners’ acts “constitute[d] an offense against the law of war which the Constitution authorizes to be tried by military commission.”<sup>195</sup>

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187. *Id.*

188. This is an overgeneralization. More accurately, military personnel may not be prosecuted for wartime activities taken in accordance with the laws of war; unnecessary violence and depraved acts against the enemy’s combatants or civilians are punishable as war crimes. Brooks, *supra* note 185, at 693. Much has been written about whether al Qaeda’s and the Taliban’s actions against the U.S. should be treated as acts of war, criminal acts, or war crimes. See John C. Yoo and James C. Ho, *The Status of Terrorists*, 44 VA. J. INT’L L. 207 (2003) (discussing the legal status of terrorists). This Article is concerned with a narrower question: Which governmental branch or branches have constitutional authority to determine the level of process these combatants are due?

189. See Brooks, *supra* note 185, at 692 (arguing both that opposing forces may be detained and that opposing forces may not be punished for their wartime behavior).

190. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (quoting W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 788 (rev. 2d ed. 1920)).

191. 317 U.S. 1 (1942).

192. *Id.* at 20–22.

193. G. Edward White, *Felix Frankfurter’s ‘Soliloquy’ in Ex Parte Quirin*, 5 GREEN BAG 423, 425 (2002).

194. *Id.* at 425–26.

195. *Quirin*, 317 U.S. at 46.

The laws of war, almost by definition, apply only during times of war and only to acts of war.<sup>196</sup> Other bodies of law apply in other circumstances. The applicability of the laws of war thus turned on a series of binary distinctions: Was the nation in a time of peace or a time of war?<sup>197</sup> Did the act constitute a crime or a matter of national security?<sup>198</sup> Domestic versus foreign?<sup>199</sup> Civilian versus combatant?<sup>200</sup> The Court has exercised judicial review only where the laws of war were not implicated. For example, in *Reid v. Covert*,<sup>201</sup> the wives of U.S. servicemen stationed abroad were tried for murder by court martial, without Fifth and Sixth Amendment protections.<sup>202</sup> These were crimes, not matters of national security, and civilians, not military personnel, committed the crimes.<sup>203</sup> Thus, the laws of war were inapplicable, and the Court granted their habeas petitions and held that U.S. civilians had a constitutional right to a jury trial.<sup>204</sup>

But where the laws of war applied, all constitutional decision-making was left to the political branches alone.<sup>205</sup> In *Johnson v. Eisentrager*,<sup>206</sup> the petitioners were German nationals who continued military pursuits on Japan's behalf after Germany's surrender in World War II.<sup>207</sup> A United States military commission convicted them of war crimes, and they were returned to occupied Germany to serve their sentences in an American military prison.<sup>208</sup> The *Eisentrager* Court refused to entertain their habeas petitions, recognizing that national

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196. Brooks, *supra* note 185, at 692.

197. *Id.* at 677.

198. *Id.*

199. *Id.*

200. *Id.*

201. 354 U.S. 1 (1957).

202. *Id.* at 3–5.

203. *Id.* at 19–20.

204. *Id.* at 5.

205. See *In re Yamashita*, 327 U.S. 1 (1946). There, General MacArthur ordered trial by military commission of the Japanese commander, who had allowed his troops to brutalize civilians in the Philippines. *Id.* at 1. The trial took place on U.S. territory in the Philippines. *Id.* at 5. The commander sought a writ of habeas corpus in the Supreme Court, and the Court had statutory jurisdiction to issue the writ but nonetheless refused on separation-of-powers grounds. *Id.* at 5–6. The Court followed the traditional rule that the President had unreviewable constitutional authority to establish the procedural rules for military commissions. *Id.* at 9–14.

206. 339 U.S. 763 (1950).

207. *Id.* at 765–66.

208. *Id.* at 766.

security would be compromised if such a broad right to habeas relief were recognized:

Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.<sup>209</sup>

The *Eisentrager* Court characterized its refusal to entertain the prisoners' habeas petitions as jurisdictional and constitutional—reviewing the political branches' wartime decisions lay outside the constitutional bounds of the judicial power.<sup>210</sup> *Eisentrager* thus followed a long line of precedent, unbroken from the nation's founding through the Second World War, where the Supreme Court maintained a sharp distinction between civilian and military matters. Constitutional separation-of-powers principles might permit judicial review over the former, but the latter were political questions entrusted to the political branches alone. As the next Part details, however, the Court had already begun to engage in more aggressive judicial review in civilian matters, and would soon claim that the Court alone held final interpretive authority over the Constitution.

### III. RECENT HISTORY—THE ASCENSION TO JUDICIAL SUPREMACY

#### A. *The Decline of Deference to Political-Branch Judgment*

The first sustained period of judicial non-deference to Congress's constitutional judgments over domestic affairs was the *Lochner* era, when a politically conservative Court struck

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209. *Id.* at 779.

210. *Id.* at 765.

down various New Deal statutes for violating individual economic liberties.<sup>211</sup> The Court's newly minted theory of "substantive due process" thwarted the will of the majority of the American people, who strongly supported the New Deal.<sup>212</sup> President Franklin D. Roosevelt responded with his threat to pack the Court with supporters of his administration's progressive agenda.<sup>213</sup>

The seeds of the Court's claim to final interpretive authority over the Constitution were planted, ironically enough, during this time when the Court was at its weakest.<sup>214</sup> In danger of losing its clout to an overwhelmingly popular President, the Court accepted a forced compromise with the two political branches.<sup>215</sup> The Court would not interfere with Congress's and the President's exercise of their enumerated constitutional powers, particularly in the spheres of social and economic legislation.<sup>216</sup> But the Court would play a more active role in defining and enforcing the individual rights articulated in the Bill of Rights and the Reconstruction Amendments.<sup>217</sup> The terms of the compromise were articulated in the famous *Carolene Products* footnote four.<sup>218</sup> More searching judicial review was appropriate, Justice Stone wrote, where specific constitutional protections of individual rights were at issue, where the political process itself was malfunctioning, or where the rights of "discrete and insular minorities" lacking political power were involved.<sup>219</sup>

The *Carolene Products* compromise allowed the Judicial Branch considerably greater power than the Marshall Court had exercised, but the working relationship among the coordinate

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211. See Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1391 (2001) (opining that the "real furor over the courts began in the 1890s and lasted until at least the middle of the 1920s").

212. *Id.* at 1428-47.

213. KRAMER, *supra* note 45, at 219-26.

214. *Id.*

215. *Id.*

216. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4; see, e.g., *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 30-31 (1937) (noting that the cardinal principal of statutory construction is to save rather than destroy, *United States v. Darby*, 312 U.S. 100, 115 (1941) (stating that regulations of commerce not infringing some constitutional prohibition are within the plenary power of Congress)).

217. *Carolene Prods.*, 304 U.S. at 152-53 n.4.

218. *Id.*

219. *Id.* See William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 179 (2001) (outlining the New Dealer "preferred position" idea from *Carolene Products* footnote four).

branches still served the Constitution's most essential goal—dispersing sovereign power among three separate branches.<sup>220</sup> No single branch accumulated a dangerous level of sovereign power. Each continued to play a meaningful role in interpreting the Constitution. They had agreed upon separate, relatively well-defined areas of constitutional “turf,” and where interpretive questions arose, the coordinate branches would generally defer to the interpretation of the branch within whose turf the issue lay.

Over the next several decades, the Court became increasingly activist, regularly striking down federal legislation, but it continued largely to abide by the *Carolene Products* compromise.<sup>221</sup> The Court played virtually no role in policing legislation Congress passed under its Article I powers. At the same time, the Court vastly increased its own sphere of authority by expanding the number and scope of individual rights as it changed the national landscape with its decisions on desegregation,<sup>222</sup> gender discrimination,<sup>223</sup> abortion,<sup>224</sup> and the rights of criminal defendants,<sup>225</sup> to name but a few.

The most important of these decisions was *Brown v. Board of Education*, which declared racial segregation in public schools unconstitutional.<sup>226</sup> *Brown* was, without doubt, the morally correct decision, and many commentators with radically divergent political views have argued that it was a legally correct decision as well.<sup>227</sup> The Fourteenth Amendment, which

220. THE FEDERALIST No. 49 (James Madison), *supra* note 23, at 313.

221. KRAMER, *supra* note 45, at 219–21.

222. *See, e.g.*, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that the District of Columbia segregated school system violated the Fifth Amendment's Due Process Clause); *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (holding that state segregated school systems violated the Fourteenth Amendment's Equal Protection Clause).

223. *See* *Craig v. Boren*, 429 U.S. 190, 210 (1976) (holding that an Oklahoma law that mandated a higher drinking age for males than for females violated the Fourteenth Amendment's Equal Protection Clause).

224. *See* *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that there is a constitutional right to privacy which covers abortion).

225. *See* *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that the state “may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the [Fifth Amendment's] privilege against self-incrimination”).

226. *Brown*, 347 U.S. at 495.

227. *See, e.g.*, Robert H. Bork, *The Judge's Role in Law and Culture*, 1 AVE MARIA L. REV. 19, 20–21 (2003) (opining that the end of legally required racial segregation in *Brown* was “correct both legally and morally”); Cass R. Sunstein, *In Defense of Liberal Education*,

guarantees equal protection of the laws,<sup>228</sup> reflects the fundamental truth that all people are created equal, and the vast majority of the American people at the time recognized that legally enforced racial separation was inherently unequal.<sup>229</sup> The American people wanted to end segregation, but their elected representatives in Congress could not end it because the democratic process had broken down.<sup>230</sup> Congress operated on the basis of seniority, and many Southern political leaders had been in Congress for a very long time.<sup>231</sup> Southern leaders held disproportionate political power, and they were determined to prevent the passage of anti-discrimination legislation.<sup>232</sup> In *Brown*, the Court stretched its constitutional authority so that the national consensus could prevail over an excessively powerful regional minority.<sup>233</sup>

The decision enjoyed wide support from President Eisenhower, the vast majority of congressmen, and the American people.<sup>234</sup> Nonetheless, a small but vocal group of Southern political leaders refused to desegregate. Lower federal courts had ordered the desegregation of schools in Little Rock, but Arkansas Governor Orval Faubus claimed that he was not bound to follow the Supreme Court's interpretation of the Constitution.<sup>235</sup> It was in this context that the Supreme Court

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43 J. LEGAL EDUC. 22, 23 (1993) (“[A]ny serious theory of constitutional interpretation must be able to explain why *Brown* was right.”).

228. U.S. CONST. amend. XIV, § 1.

229. See TUSHNET, *supra* note 51, at 145 (arguing that the Court's decision in *Brown* was consistent with the views of the national majority).

230. See *id.* (arguing that “Congress could not act”).

231. *Id.*

232. *Id.*

233. *Id.*

234. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part 5*, 112 YALE L.J. 153, 186–87 (2002). In the wake of *Brown*, President Eisenhower ordered that Washington, D.C. integrate its public schools and serve as a model for the rest of the nation. DAVID R. GOLDFELD, *BLACK, WHITE, AND SOUTHERN: RACE RELATIONS AND SOUTHERN CULTURE 1940 TO THE PRESENT* 78 (1990). President Eisenhower also presented to Congress the first significant civil rights acts passed since the Reconstruction Era, and he signed them into law. JAMES L. SUNDQUIST, *POLITICS AND POLICY: THE EISENHOWER, KENNEDY, AND JOHNSON YEARS* 238 (2d ed. 1968). All three federal branches were acting in concert toward the same goal of ending racial discrimination. It is all too common that commentators overestimate the Supreme Court's role in desegregation and underestimate the role played by the coordinate branches and the American people. KRAMER, *supra* note 45, at 229; see LINO GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* 46 (1976) (arguing that *Brown* was not effective until Congress enacted the Civil Rights Act of 1964).

235. TUSHNET, *supra* note 51, at 7–8.

first claimed final interpretive authority over the Constitution. In a well-known phrase from *Cooper v. Aaron*, a unanimous Court asserted that *Marbury* had “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution” and this principle “has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”<sup>236</sup>

*Marbury* said no such thing, of course. *Marbury* claimed that the federal Judiciary’s power to interpret the Constitution was equal to that of Congress and the President.<sup>237</sup> *Cooper v. Aaron*, in contrast, did not concern the power of either Congress or the President to interpret constitutional provisions.<sup>238</sup> Instead, it involved the balance of power between the state and federal governments, holding that state governors were bound to enforce federal court orders on desegregation.<sup>239</sup>

*Cooper* had no immediate effect on the balance of power among the federal branches of government; after *Cooper*, the Court continued to acknowledge that Congress had wide discretion in defining the individual rights secured by the Reconstruction Amendments. A key example is *Katzenbach v. Morgan*,<sup>240</sup> which involved a constitutional challenge to the Voting Rights Act of 1965.<sup>241</sup> Among other things, the Voting Rights Act prohibited states from using literacy tests as a condition for voting in state elections.<sup>242</sup> New York state law required that voters be able to read and write in English, and the Supreme Court had previously upheld English literacy requirements from an equal protection challenge.<sup>243</sup> New York argued that Congress had exceeded its power under Section Five of the Fourteenth Amendment when it prohibited the enforcement of those literacy requirements.<sup>244</sup> Section Five gives Congress the power to “enforce” the Fourteenth Amendment “by appropriate legislation,”<sup>245</sup> but the Supreme Court had never

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236. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

237. See *supra* notes 81–83 and accompanying text.

238. *Cooper*, 358 U.S. at 14–19.

239. *Id.* at 18–20.

240. 384 U.S. 641 (1966).

241. *Id.* at 643.

242. Voting Rights Act of 1965 § 4(e), 42 U.S.C. § 1973b(e) (2006).

243. *Lassiter v. Northampton County Bd. of Election*, 360 U.S. 45, 54 (1959).

244. *Katzenbach*, 384 U.S. at 648.

245. U.S. CONST. amend. XIV, § 5.

decided that an English literacy requirement violated the Equal Protection Clause and had indeed previously upheld literacy requirements.<sup>246</sup>

The Court rejected the State's argument soundly, emphasizing that Congress held independent constitutional authority to interpret the Fourteenth Amendment and to legislate in furtherance of its own interpretations—the “sponsors and supporters of the [Fourteenth] Amendment were primarily interested in augmenting the power of Congress, rather than the judiciary.”<sup>247</sup> It was immaterial that the Court had previously upheld literacy tests against equal protection challenges; the relevant question was not whether the Judiciary would independently have declared New York's literacy requirements unconstitutional but whether Congress had the power to do so.<sup>248</sup> Congress's powers under Section Five, the Court held, were “the same broad powers expressed in the Necessary and Proper Clause.”<sup>249</sup> Further, the Court continued:

[T]he *McCulloch v. Maryland* standard is the measure of what constitutes ‘appropriate legislation’ under Section Five of the Fourteenth Amendment. Correctly viewed, Section Five is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.<sup>250</sup>

In sum, *Cooper v. Aaron's* claim to a judicial monopoly over constitutional interpretation was a dictum and a fiction, and *Katzenbach v. Morgan* later expressly acknowledged that Congress was vested with constitutional authority and broad discretion to more specifically define ambiguous phrasings in the constitutional text.<sup>251</sup> The Court shared with the political

246. *Lassiter*, 360 U.S. at 54; *Cf. Guinn v. United States*, 238 U.S. 347, 366 (1915) (upholding the use of a literacy test in itself but also holding that such a test was made invalid by the use of a grandfather clause that absolved a person of a certain age and his linear descendants from the test).

247. *Katzenbach*, 384 U.S. at 648 n.7.

248. *See id.* at 649–51 (stating that the Court's “task is limited to determining whether such legislation is, as required by [Section Five], appropriate legislation to enforce the Equal Protection Clause” and whether the means employed by Congress satisfy the standard of *McCulloch v. Md.*, 17 U.S. (4 Wheat.) 316 (1819)).

249. *Id.*

250. *Id.* at 651.

251. *Id.* at 650–51.

branches the task of defining constitutional rights. And yet, *Cooper's* bare claim to judicial supremacy seemed to embolden the Supreme Court. Soon after *Cooper*, the Court began to whittle down the political branches' interpretive authority. It began by limiting the political question doctrine.

### B. *The Decline of the Political Question Doctrine*

The Court's restrictions on the political question doctrine began innocently enough. In *Baker v. Carr*,<sup>252</sup> the Court was called on to solve a problem that the political process was incapable of resolving because the problem was a breakdown in the democratic process itself. Congressional districts in Tennessee had become seriously malapportioned.<sup>253</sup> The populations of urban areas had grown quickly, but district lines had not been redrawn to account for the growth.<sup>254</sup> As a result, rural areas were substantially overrepresented and had disproportionately greater political power.<sup>255</sup> Rural politicians were unwilling to reconfigure their districts to ensure fairer representation because their interests lay in maintaining their constituents' greater power—not to mention their own jobs.<sup>256</sup> Justice Brennan, writing for the Court, departed from prior precedent holding that the drawing of political districts presented a nonjusticiable political question.<sup>257</sup>

*Baker* contained an extended discussion of political question cases to that date.<sup>258</sup> It synthesized the cases to identify six factors, weighted on a case-by-case basis, which would determine whether the political question doctrine applied:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate

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252. 369 U.S. 186 (1962).

253. *See id.* at 192–94 (reiterating the complaint's charge that Tennessee had reacted to rapid population growth by "arbitrarily and capriciously" apportioning representatives by using a statutory framework that had not been updated in sixty years).

254. *Id.*

255. *Id.* at 256 (Clark, J., concurring).

256. *See Note, An Interstate Perspective on Political Gerrymandering*, 119 HARV. L. REV. 1576, 1584 (2006) (noting that before the Court's reapportionment cases, rural legislators in many states blocked reapportionment efforts out of a desire to maintain their own jobs).

257. *Baker v. Carr*, 369 U.S. 186, 209 (1962).

258. *Id.* at 210–16.

political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>259</sup>

The touchstone of the political question doctrine was the constitutional separation-of-powers structure.<sup>260</sup> Justice Brennan pointed to the political branches' primary role in foreign policy and foreign relations as the paradigmatic political question.<sup>261</sup> If foreign policy matters are at the core of the political question doctrine, then wartime military decisions—by far the most sensitive and perilous of foreign policy matters—must lie at the very heart of that core.

The facts, issues, and outcome in *Baker v. Carr* fit neatly within the *Carolene Products* compromise. *Carolene Products* footnote four articulated an enhanced role for the Judiciary where the political process itself was not reasonably democratic,<sup>262</sup> and *Baker v. Carr* announced the one-person-one-vote rule, which opened the door for popular majorities to have a greater voice in government through more equitable representation.<sup>263</sup> As President Kennedy put it, “Quite obviously the right to fair representation, that each vote count equally is, . . . basic to the successful operation of a democracy.”<sup>264</sup> But the reasoning and broad dicta in *Baker v. Carr* built on the judicial supremacy rhetoric from *Cooper v. Aaron*.<sup>265</sup> Because *Baker v. Carr*'s outcome enjoyed broad popular support, the Court did not lose much political capital by once again declaring itself the “ultimate

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259. *Id.* at 217.

260. *Id.* at 210–11.

261. *Id.* at 210–12.

262. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4.

263. *Baker*, 69 U.S. at 244–50.

264. Friedman, *supra* note 234, at 208 (citing Alexander M. Bickel, *Reapportionment and Liberal Myths*, 35 COMMENT. 483, 487 (1963)).

265. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

interpreter of the Constitution.”<sup>266</sup> But in claiming judicial supremacy, *Baker v. Carr* turned the basic premise of the political question doctrine on its head.

The idea behind the classical political question doctrine is that the Constitution itself vests final interpretive authority over some constitutional provisions outside the Judiciary.<sup>267</sup> Unavoidably, the Court must engage in constitutional interpretation to decide, as a threshold matter, whether a particular constitutional provision has been committed to the exclusive interpretive discretion of a coordinate branch. The Constitution does not expressly mention judicial review, so the Constitution naturally does not explicitly forbid judicial review over a smaller subset of political branch decisions. The Court thus has no choice but to engage in constitutional interpretation, determining whether judicial review is permitted from the relevant constitutional text, the text’s location within the overall constitutional structure, and its historical usage. But once the Court determines that a political question is presented, the Court’s involvement in the matter must end.

In *Baker v. Carr*, however, Justice Brennan asserted that the Court’s role in applying the political question doctrine is not only to decide whether “a matter has in any measure been committed by the Constitution to another branch of government” but also to decide whether the political branch has “*exceed[ed] whatever authority has been committed*” in the Court’s role as “ultimate interpreter of the Constitution.”<sup>268</sup> Under this formulation, the political question doctrine is nearly meaningless. The whole point of the political question doctrine is to vest the final word on constitutional meaning outside the Judiciary in certain cases. The doctrine protects constitutional separation-of-powers principles by ensuring that the awesome power of constitutional interpretation remains dispersed among all branches, rather than concentrated within the Judicial Branch alone. If the Court always serves as the “ultimate interpreter”<sup>269</sup> that determines whether another branch has exceeded constitutional bounds, then there could never be any

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266. *Baker*, 369 U.S. at 211.

267. Barkow, *supra* note 157, at 246–53.

268. *Baker*, 369 U.S. at 211 (emphasis added).

269. *Id.*

circumstance under which a coordinate branch has sole interpretive power over a constitutional provision.

Even though the political question doctrine was clearly in decline, the Court continued to treat military matters differently than other constitutional questions. For example, in *Gilligan v. Morgan*,<sup>270</sup> decided more than a decade after *Baker v. Carr*, Kent State students alleged that protesters were killed due to negligent training by the National Guard.<sup>271</sup> The Court dismissed the suit on the grounds that Article I, Section Eight, Clause Sixteen vests in Congress the “responsibility for organizing, arming, and disciplining the Militia.”<sup>272</sup> Because training military forces required “complex, subtle, and professional decisions” by military leaders, it was subject “to civilian control of the Legislative and Executive Branches.”<sup>273</sup>

### C. The Rehnquist Era and the End of Deference

By the time William Rehnquist became Chief Justice, the Court’s operating assumption was that the Constitution created a hierarchical, as opposed to a coordinate, power structure.<sup>274</sup> The political branches could interpret the Constitution in the first instance while exercising their delegated powers to make and execute federal law.<sup>275</sup> But the political branches’ judgments about the scope of constitutional rights and privileges could never be final.<sup>276</sup> The Court was firmly convinced that it alone could give an authoritative interpretation of constitutional text.<sup>277</sup> The Court’s self-perception was incompatible with the fundamental premise of the classical political question doctrine, which posits that the Constitution itself commits some constitutional questions to a coordinate branch outside the judiciary.<sup>278</sup>

270. 413 U.S. 1 (1973).

271. *Id.* at 3.

272. *Id.* at 6 (quoting U.S. CONST. art. I, § 8, cl. 16).

273. *Id.* at 10.

274. Barkow, *supra* note 157, at 241.

275. *See id.* at 320 (arguing that the Constitution’s structure requires political actors “to decide constitutional questions in many instances”).

276. *See id.* at 317 (“[T]he Court no longer seems interested in analyzing as a threshold matter whether the Constitution gives an interpretive role to another branch.”).

277. *See id.* (concluding that the Rehnquist court did not trust the political branches to make constitutional determinations).

278. *Id.*

Consider Chief Justice Rehnquist's majority opinion in *Nixon v. United States*.<sup>279</sup> Walter Nixon was a crook<sup>280</sup>—a federal judge convicted of making false statements before a grand jury investigating him for accepting a bribe.<sup>281</sup> Nixon nonetheless refused to resign from the bench, so he continued to collect his indiminishable judicial salary.<sup>282</sup> Congress was forced to initiate impeachment proceedings.<sup>283</sup> Under the Senate's rules for impeachments, a committee heard evidence and made a recommendation to the full Senate, which voted to impeach.<sup>284</sup> Nixon sued, alleging that this process violated his constitutional rights.<sup>285</sup> Article I, Section Five, Clause Six provides that the "Senate shall have the sole Power to try all Impeachments."<sup>286</sup> Nixon argued that this provision required a trial before the whole Senate, and not by committee.<sup>287</sup>

Chief Justice Rehnquist eventually pronounced the issue nonjusticiable<sup>288</sup> but only after independently reviewing the merits of Nixon's claims by looking to the dictionary and to history to define for himself the meaning of the terms "try" and "trial."<sup>289</sup> The classical political question doctrine would dictate that the Court should look only to the constitutional text and structure—perhaps aided by history—to determine whether the Constitution vests in the Senate the final power to determine the constitutional requirements of an impeachment trial. The *Nixon* Court's conception of the political question doctrine required no deference to the Senate's judgments at all. *Nixon* merely confirmed that the Court agreed with the Senate's interpretation of the constitutional text.

While *Cooper v. Aaron* and *Baker v. Carr* had pronounced the Court the supreme interpreter of the Constitution, the Court had nonetheless remained true to the *Carolene Products*

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279. 506 U.S. 224, 226–38 (1993).

280. TUSHNET, *supra* note 51, at 104. I wish the pun were mine. I lifted it from Mark Tushnet's book.

281. *Nixon*, 506 U.S. at 226.

282. *Id.*

283. *Id.*

284. *Id.* at 227–28.

285. *See id.* at 228 (stating that Nixon alleged that the Senate's impeachment process violated the Article I grant of power to the Senate to try impeachments).

286. U.S. CONST. art. I, § 3, cl. 6.

287. *Nixon*, 506 U.S. at 229.

288. *Id.* at 238.

289. *Id.* at 229–38.

compromise—the Warren Court was undoubtedly activist, but its activism was not directed at the coordinate branches of the federal government. Instead, that Court gave substance to constitutional provisions guaranteeing individual civil rights, while giving wide berth to Congress’s and the President’s judgments regarding the limits of their own constitutional powers. In the Rehnquist Court, however, the *Carolene Products* compromise fell by the wayside. That division of authority was no longer consistent with the Court’s self-image as the supreme interpreter of constitutional meaning. Thus, the Court began to police the limits of Congress’s enumerated powers. For the first time in six decades, the Court began to strike down legislation passed under Congress’s Commerce Clause power, even though it ostensibly continued to apply only rational basis review.<sup>290</sup>

The Rehnquist Court also struck down legislation Congress passed under Section Five of the Fourteenth Amendment. In the 1960s, in *Katzenbach v. Morgan*, the Court had expressly held that Section Five vested Congress with the same broad authority to legislate under the Fourteenth Amendment as under its Article I powers.<sup>291</sup> But in the 1997 case of *City of Boerne v. Flores*,<sup>292</sup> the Court did an about face, restricting Congress’s role to remedying Fourteenth Amendment violations previously recognized by the Court.<sup>293</sup> The Court claimed that it alone had absolute interpretive authority over the rights guaranteed by the Fourteenth Amendment<sup>294</sup> and that Section Five did not permit Congress to define, expand, or create different rights.<sup>295</sup>

The controversy began when the Supreme Court unexpectedly changed in its interpretation of the First

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290. See, e.g., *United States v. Morrison*, 529 U.S. 598, 619 (2000) (striking down the Violence Against Women Act of 1994); *Printz v. United States*, 521 U.S. 898, 935 (1997) (striking down portions of the Brady Handgun Violence Prevention Act); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeds Congress’s Commerce Clause power); see also *Morrison*, 529 U.S. at 617 n.7 (claiming that “since *Marbury* this Court has remained the ultimate expositor of the constitutional text”).

291. *Katzenbach v. Morgan*, 384 U.S. 641, 650–51 (1966).

292. 521 U.S. 507 (1997).

293. See *id.* at 519 (holding that the Fourteenth Amendment’s design and text “are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States”).

294. See *id.* at 536 (stressing that the Supreme Court has the power to determine if Congress has exceeded its power under the Fourteenth Amendment).

295. See *id.* at 529 (explaining that Congress cannot alter the Fourteenth Amendment’s meaning).

Amendment's Free Exercise Clause in the 1990 decision, *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>296</sup> An Oregon statute prohibited the use of peyote, and an Indian tribe challenged the statute as infringing upon the free exercise of its religious rituals, which required the use of peyote.<sup>297</sup> Under prior Supreme Court precedent, Oregon's law burdening religious freedoms would have been upheld only if the law was necessary to achieve a compelling governmental purpose.<sup>298</sup> *Smith* held, however, that Oregon's law did not violate the Free Exercise Clause because it was a "neutral law of general applicability."<sup>299</sup> Congress passed the Religious Freedom Restoration Act (RFRA)<sup>300</sup> under its Section Five power specifically to overrule *Smith*.<sup>301</sup>

The Court, viewing itself as the highest constitutional authority, was no longer willing to allow Congress to define constitutional rights.<sup>302</sup> In *City of Boerne v. Flores*, the Court held that Congress lacked constitutional authority to enact RFRA.<sup>303</sup> Congress's power under Section Five, the Court opined, was limited to preventing or remedying acts that the Court had previously recognized as violating the Fourteenth Amendment.<sup>304</sup> The *Boerne* Court cited *Marbury v. Madison* for the proposition that only the Court has the power to give a definitive interpretation of the Constitution.<sup>305</sup> Otherwise, Justice Kennedy wrote, "it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process

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296. 494 U.S. 872, 884–85 (1990).

297. *Id.* at 874–75.

298. *See id.* at 883 (stating that the Indian tribe urged the Court to hold that all "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest").

299. *Id.* at 879.

300. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2006), *invalidated by* *City of Boerne v. Flores*, 521 U.S. 536 (1997).

301. *Boerne*, 521 U.S. at 512.

302. *See id.* at 529 ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

303. *Id.* at 536.

304. *See id.* at 519 (holding that the Fourteenth Amendment's design and text "are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States").

305. *Id.* at 529.

contained in Article V.”<sup>306</sup> *Boerne’s* claim to judicial supremacy in constitutional interpretation garnered the support of the full Court. *Boerne* had three dissenters, and they did not disagree with Justice Kennedy’s interpretation of Section Five.<sup>307</sup>

Under the banner of states’ rights and federalism, *Boerne* struck down important civil rights legislation and, in the process, undermined long-established principles of separation of powers among the coordinate branches of the federal government.<sup>308</sup> The Marshall Court recognized that the Constitution divided sovereign power among three branches of government to prevent the dangerous accumulation of power in a single branch.<sup>309</sup> *Marbury* claimed for the Court the awesome power to declare unconstitutional a law duly enacted by the people’s elected representatives,<sup>310</sup> but the early Court opined that it would only use that power in a very clear case.<sup>311</sup> The Constitution defined the broad outlines of Congress’s power, and the Court exercised real restraint when asked to determine whether Congress exceeded its delegated authority.<sup>312</sup> The early Court believed that the democratic process would constrain the political branches from exceeding constitutional limits on their authority. The Rehnquist Court, in contrast, showed remarkably little trust in or respect for the democratic process. There is no reason to doubt Justice Kennedy’s sincerity when he wrote in *Boerne* that it was “difficult to conceive of a principle that would limit congressional power” if the Court were not ready to strike down any statute that exceeded the limits of Congress’s power, as the Court defined those limits.<sup>313</sup>

306. *Id.* (citation omitted).

307. *Id.* at 546 (O’Connor, J., dissenting); *id.* at 565–66 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting). The Rehnquist Court also began to pronounce bright-line rules with no basis in constitutional text, structure, or history. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991) (holding that the Fourth Amendment requires that a criminal defendant be brought before a judge within 48 hours of arrest for a probable cause determination).

308. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (“*Boerne* also confirmed . . . that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees.”).

309. See *supra* Part II.B–C.

310. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

311. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 395 (1798) (“[I]f I ever exercise [judicial review], I will not decide any law to be void, but in a very clear case.”).

312. *McCulloch v. Md.*, 17 U.S. (4 Wheat.) 316, 405–06 (1819).

313. *Boerne*, 521 U.S. at 529. Indeed, the Court has even struck down congressional legislation without identifying the constitutional limits of Congress’s power. See *United States v. Lopez*, 514 U.S. 549, 566 (1995) (striking down the legislation passed under

Three years after *Boerne*, the Court dealt the political process an even more severe blow. It decided perhaps the most political of all political questions confronting the nation at the turn of the century—the 2000 presidential race between George W. Bush and Al Gore. Many viewed *Bush v. Gore*<sup>314</sup> as a partisan decision with the five politically conservative members of the Court taking the opportunity to select a Republican President without interference from the nation.<sup>315</sup> The likely truth is more subtle, but ultimately more destructive of democratic ideals. Five members of the Supreme Court selected Bush as the President because they believed the Court was more competent than Congress to decide important political questions.<sup>316</sup>

The presidential race of 2000 was an exceptionally close one. Whoever won Florida's electoral votes would become the forty-third President. On the day after the election, November 8, 2000, George Bush was the frontrunner by 1,784 votes<sup>317</sup> — a margin that, under state law, required a machine recount of the votes.<sup>318</sup> After the recount, a few completed hand counts, and the addition of late-arriving overseas ballots, Bush's lead was 930 votes.<sup>319</sup> At Gore's request, the Florida Supreme Court ordered a hand recount of all votes in four counties and Bush sought a writ of certiorari in the U.S. Supreme Court to prevent the hand recount.<sup>320</sup> Among other issues, Bush raised a question under Article II of the U.S. Constitution.<sup>321</sup>

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Congress's Commerce Clause power despite "legal uncertainty" about the limits of that power).

314. 531 U.S. 98.

315. See ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 3–4 (2001) (proposing that the five more conservative justices decided the case at least partly based on political affiliation).

316. A very well-respected federal judge has actually stated that Congress was "not a competent forum" for resolving the election controversy. RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 145 (2001).

317. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 73 (2000) (per curiam).

318. *Id.*

319. Richard A. Posner, *The 2000 Presidential Election: A Statistical and Legal Analysis*, 12 SUP. CT. ECON. REV. 1, 1 (2004). It came to light in the meantime that more than 19,000 Palm Beach County voters had recorded two different votes. Edmund S. Saver, "Arbitrary and Disparate" Obstacles to Democracy: *The Equal Protection Implications of Bush v. Gore on Election Administration*, 19 J.L. & POL. 299, 325 (2003). For an additional treatment of these issues, see generally SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* (rev. ed. 2001).

320. *Palm Beach County*, 531 U.S. at 73.

321. *Id.* at 76–77.

Article II, as amended by the Twelfth Amendment, specifies the process for selecting the President.<sup>322</sup> The Constitution vests authority in the legislatures of the several states to choose the electors who vote for the President.<sup>323</sup> One of the constitutional issues raised in the litigation surrounding the 2000 presidential election was whether, by ordering the hand recount, the Florida Supreme Court had interfered with the Florida legislature's directive regarding how its electors would be chosen.<sup>324</sup> The Supreme Court granted Bush's petition for certiorari and on December 12 ordered that the recount must end.<sup>325</sup> By ending the recount, the Supreme Court effectively decided that George W. Bush would be the nation's forty-third President.

Instead, the Supreme Court might have declined to hear the case because it presented a political question. The Constitution vests in Congress the final word on whether the state legislature's procedures for choosing electors were followed.<sup>326</sup> Article II, as amended by the Twelfth Amendment, contains a series of "textually demonstrable" commitments of authority to Congress to resolve contested elections.<sup>327</sup> The Twelfth Amendment specifies that if no candidate wins a majority of the electoral votes, the House of Representatives chooses the President from among the top three candidates.<sup>328</sup> The Amendment's drafters did not anticipate that two political parties would rise to power permanently, so they envisioned that the House would select the President more often than not.<sup>329</sup>

322. U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII.

323. *Id.* cl. 2 ("Each State shall appoint [its electors], in such Manner as the Legislature thereof may direct . . .") (emphasis added). See *McPherson v. Blacker*, 146 U.S. 1, 33–36 (1892) (discussing the enactment of the Twelfth Amendment and confirming that the States have the exclusive power to determine the appointment of electors).

324. *Palm Beach County*, 530 U.S. at 73–76.

325. *Bush v. Gore*, 531 U.S. 98, 109–10 (2000) (per curiam). The majority's rationale was that the recount violated equal protection. *Id.* The rationale seemed out of place, which the per curiam opinion appeared to acknowledge by announcing that the judgment was limited to its facts. See *id.* at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

326. See Barkow, *supra* note 157, at 276–95 (discussing how the classical political question doctrine can be applied to Article II claims and arguing that because Article II gives Congress power over presidential elections, it must also give Congress the power to decide whether state electors are properly selected).

327. *Id.* at 265.

328. U.S. CONST. amend. XII.

329. See Barkow, *supra* note 157, at 284 ("Significantly, the [Constitution's Framers] fully expected that, because 'nineteen times in twenty' no candidate would command a

In addition, Article II, Section One specifies that Congress has the power to “count” the states’ electoral votes,<sup>330</sup> which, throughout history, has included the power to determine a vote’s validity.<sup>331</sup> In the Hayes–Tilden election of 1876, three different states sent two separate slates of electors to Congress, and their electoral votes would decide the presidency.<sup>332</sup> Congress appointed an ad hoc electoral commission to resolve the disputes.<sup>333</sup> Soon thereafter, Congress passed the Electoral Count Act, a statutory scheme specifying how Congress would execute its constitutionally assigned task of counting electoral votes in the future.<sup>334</sup> The Electoral Count Act specifies that Congress will resolve any disputes surrounding the electoral votes in the event that the states are unable to settle the disputes for themselves.<sup>335</sup> The Act’s legislative history confirms that Congress intended that only Congress itself would resolve electoral disputes; the Supreme Court was intentionally excluded from the process.<sup>336</sup>

The *Marbury* Court believed that questions “in their nature political” were outside the Court’s institutional capacity and were constitutionally committed to the political branches.<sup>337</sup> The *Bush v. Gore* Court, in sharp contrast, did not trust the political process even to determine who would hold the nation’s highest political office. Far from doubting the Judicial Branch’s institutional capacity to decide political questions, the Justices believed that only they held the political clout to avert a

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majority, the House would frequently determine the winner of the election.”) (quoting THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 500 (Max Farrand ed., rev. ed. 1966)).

330. U.S. CONST. art. II, § 1, cl. 3.

331. Barkow, *supra* note 157, at 280.

332. *Id.*

333. Congress appointed five Senators, five Representatives, and five Supreme Court Justices to the commission, and the deciding vote fell to Justice Bradley, who was heavily criticized for not remaining impartial. See BICKEL, *supra* note 79, at 185.

334. Electoral Count Act of 1887, ch. 90, 24 Stat. 373 (current version at 3 U.S.C. § 15 (2006)).

335. *Id.* § 4.

336.

The two Houses are, by the Constitution, authorized to make the count of electoral votes. They can only count legal votes, and in doing so must determine, from the best evidence to be had, what are legal votes . . . . The power to determine rests with the two houses, and *there is no other constitutional tribunal.*

H.R. Rep. No. 49-1638, at 2 (1886) (emphasis added) (quoted in *Bush v. Gore*, 531 U.S. 98, 154 (2000) (per curiam) (Breyer, J., dissenting)).

337. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

constitutional crisis. Justices Kennedy and Thomas testified before Congress that they had a “responsibility” to take the case and would have avoided it if only “there was a way.”<sup>338</sup> But the Electoral Count Act’s provisions could have resolved the dispute peaceably, legitimately, and, most importantly, without the Court’s trampling of constitutional separation-of-powers principles in the process.

On January 20, 2001, President George W. Bush took office. Nine months later, international terrorists attacked the United States.

#### IV. *BOUMEDIENE V. BUSH*

On the morning of September 11, 2001, terrorists hijacked four commercial airplanes and aimed them at crucial governmental and financial centers within the United States. Two planes destroyed the Twin Towers of New York’s World Trade Center. Another crashed into the Pentagon near Washington, D.C. The fourth plane, which was apparently aimed for either the White House or the Capitol building,<sup>339</sup> crashed in a field in Pennsylvania after civilian passengers attempted to overpower the terrorists. More than 3,000 people died, and thousands more were injured.<sup>340</sup> The attacks were orchestrated by al Qaeda, an international terrorist organization implicated in a series of attacks on the United States and its interests beginning long before September 11, 2001.<sup>341</sup> Those attacks include the World Trade Center bombing of 1993, the attack on U.S. military housing in Saudi Arabia in 1996, the bombing of American embassies in Kenya and Tanzania in 1998, and the bombing of the U.S.S. Cole in Yemen in 2000.<sup>342</sup> The Taliban militia, which is not a recognized arm of Afghanistan’s government, but which nonetheless exercises military control

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338. Barkow, *supra* note 157, at 336 (quoting Charles Lane, *2 Justices Defend Court’s Intervention in Fla. Dispute*, WASH. POST, Mar. 30, 2001, at A13).

339. THE 9/11 COMMISSION REPORT 326 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf> (last visited Dec. 20, 2009).

340. *Rasul v. Bush*, 542 U.S. 466, 470 (2004).

341. See THE 9/11 COMMISSION REPORT, *supra* note 339, at 50–63, 231–41 (discussing, among other things, a series of fatwas and other calls to engage Americans in war made by Usama bin Laden and other senior members of al Qaeda and the role of that organization in the 9/11 attacks).

342. *Id.* at 50–73.

over portions of that country, supported al Qaeda’s training and activities.<sup>343</sup>

Congress swiftly authorized the President to use military force against “those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.”<sup>344</sup> The Bush Administration ordered the military detention at Guantanamo Bay, Cuba, of alien al Qaeda and Taliban fighters.<sup>345</sup> As the Supreme Court later acknowledged, detaining enemy fighters for the duration of the conflict was a “fundamental and accepted” principle of the customary laws of war.<sup>346</sup> But the Supreme Court held that the President would have to prove, as a matter of juridical fact, that the detainees had been involved in armed conflict against the United States.<sup>347</sup>

#### A. *The Initial Detainee Habeas Cases*

In 2001, Yaser Hamdi—an American citizen—was captured in a combat zone in Afghanistan by the Northern Alliance, a group fighting against the Taliban militia.<sup>348</sup> The U.S. military later detained him as an enemy combatant.<sup>349</sup> Hamdi challenged his military detention, but a majority of the Supreme Court held that enemy combatants could be detained for the duration of the armed conflict.<sup>350</sup> The plurality opinion in *Hamdi v. Rumsfeld*, written by Justice O’Connor and joined by Chief

343. *Id.* at 63–70.

344. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

345. See Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 9 C.F.R. 918 (2002), *reprinted in* 8 U.S.C. § 801 (2006) (granting authority to the Secretary of Defense to detain and try—subject to certain restrictions—international terrorists and other noncitizens).

346. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

347. *Id.* at 533.

348. *Id.* at 513.

349. *Id.* at 518.

350. *Id.* at 515. On the same day the Court entertained Mr. Hamdi’s habeas petition, it also considered the petition of Jose Padilla. Robert H. Freilich, Ryan M. Manies, & Corey J. Mertes, *The Freilich Report 2003–04: The Supreme Court in an Age of Secrecy and Fear*, 36 URB. LAW. 583, 591 (2004). Mr. Padilla was an American citizen captured within the United States who allegedly planned to detonate a radioactive bomb here. *Padilla v. Rumsfeld*, 352 F.3d 695, 701 (2d Cir. 2003). He was detained as an enemy combatant and held for a time in New York before being transferred to South Carolina. *Rumsfeld v. Padilla*, 542 U.S. 426, 441 (2004). The issue decided by the Supreme Court in *Rumsfeld v. Padilla* was a narrow one: whether the federal court in New York had jurisdiction over Padilla’s habeas petition after his transfer to South Carolina. *Id.* at 443, 447. Five members of the Court held the view that Padilla did have a right to habeas relief, even though New York was not the proper locale in which to press that right. *Id.* at 451.

Justice Rehnquist and Justices Kennedy and Breyer, held that the AUMF authorized the President to hold persons fighting against the United States until the conflict ended.<sup>351</sup> Justice Thomas, who provided a fifth vote, opined that the AUMF was unnecessary; the President had inherent authority as Commander in Chief to detain persons, including American citizens, who were deemed enemy combatants.<sup>352</sup>

The plurality asserted that Hamdi was entitled to some type of process to make a factual determination whether he was an enemy combatant.<sup>353</sup> At a constitutional minimum, an American citizen challenging his status as an enemy combatant was entitled to “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker.”<sup>354</sup> The plurality acknowledged that this decision maker need not necessarily be an Article III court but rather could be “an appropriately authorized and properly constituted military tribunal.”<sup>355</sup> Thereafter, the Deputy Secretary of Defense established Combatant Status Review Tribunals (CSRTs) to make factual determinations whether individuals detained at Guantanamo Bay were enemy combatants.<sup>356</sup>

The Court also considered *Rasul v. Bush*, where a number of noncitizens detained as enemy combatants at Guantanamo Bay sought habeas relief.<sup>357</sup> The Government moved to dismiss the habeas petitions on the grounds that the federal courts lacked authority to hear habeas petitions by noncitizens held at Guantanamo.<sup>358</sup> The *Rasul* majority nevertheless read 28 U.S.C. § 2241,<sup>359</sup> the federal habeas corpus statute, to authorize the Court to exercise jurisdiction over detainees held by the U.S. military in Cuba.<sup>360</sup>

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351. *Id.* at 533.

352. *Id.* at 589–90 (Thomas, J., dissenting).

353. *Id.* at 533 (plurality opinion).

354. *Id.*

355. *Id.* at 538.

356. Memorandum from Paul Wolfowitz, Deputy Sec’y, U.S. Dep’t of Def., to the Sec’y of the Navy (Jul. 7, 2004),

<http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

357. *Rasul v. Bush*, 542 U.S. 466, 470 (2004).

358. *Id.* at 484.

359. 28 U.S.C. § 2241 (2006).

360. *Rasul*, 542 U.S. at 484.

Congress quickly corrected the Court's misinterpretation of 28 U.S.C. § 2241 in the Detainee Treatment Act of 2005 (DTA),<sup>361</sup> which forbade all federal courts from exercising habeas jurisdiction over any detainee of Guantanamo Bay military prison.<sup>362</sup> The DTA vested in the United States Court of Appeals for the D.C. Circuit exclusive jurisdiction to review a determination by a CSRT that an alien is "properly detained as an enemy combatant."<sup>363</sup> The DTA authorized the D.C. Circuit to determine whether the CSRT's findings were "consistent with the standards and procedures specified by the Secretary of Defense" and whether those standards and procedures were "consistent with the Constitution and laws of the United States."<sup>364</sup>

The Supreme Court was not willing to accept Congress's constriction of its role in reviewing the legality of the detainees' incarceration. Giving the statute a tortured reading, the Court held that the DTA's jurisdiction-stripping provisions applied prospectively only, so the Court would continue to entertain the hundreds of pending habeas petitions filed by Guantanamo detainees.<sup>365</sup> Congress responded with the Military Commissions Act of 2006 (MCA), which even more clearly stripped the federal courts of jurisdiction over pending habeas petitions.<sup>366</sup> The MCA reconfirmed the D.C. Circuit's jurisdiction to review the CSRTs' determinations regarding enemy combatant status.<sup>367</sup>

In passing the MCA and stripping the Court of jurisdiction over the detainee's cases, Congress and the President stood firm in their conviction that the Supreme Court had no

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361. Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in scattered sections of 1, 5, 10, 15, 16, 28, 37, 41, 42, and 50 U.S.C.).

362. *Id.* at § 1005(e)(1). The DTA amended 28 U.S.C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction to . . . consider . . . an application for . . . habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo." 28 U.S.C. § 2241(e)(1) (2006).

363. DTA § 1005(e)(2)(B).

364. *Id.* at § 1005(e)(2)(C).

365. *Hamdan v. Rumsfeld*, 548 U.S. 557, 577 (2006).

366. Military Commissions Act of 2006 § 7(a), 28 U.S.C.A. § 2241(e)(1) (Supp. 2009):

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or *is awaiting such determination.*

(emphasis added).

367. *Id.*

constitutional claim to judicial review over military detentions in connection with the War on Terror. Then, in *Boumediene v. Bush*, the Court held that § 7 of the Military Commissions Act violated the Suspension Clause<sup>368</sup> by denying the federal courts jurisdiction to adjudicate habeas corpus petitions from military detainees at Guantanamo Bay.<sup>369</sup> For the first time in history, the Court refused to stand aside when Congress exercised its Exceptions and Regulations power to check the Court's overreaching its legitimate sphere of authority.

## B. *The Boumediene Decision*

### 1. The Majority Opinion

Justice Kennedy, writing for the majority of the Court, began by candidly acknowledging that “the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.”<sup>370</sup> Without pausing to articulate a statutory or constitutional provision that purportedly provided the jurisdiction to do so, the majority opinion then proceeded to analyze whether noncitizens detained outside the territory of the United States have a constitutional right to habeas corpus.<sup>371</sup> The *Boumediene* majority apparently assumed that the Suspension Clause created self-executing habeas jurisdiction in the Supreme Court in any case where the writ would have run in 1789—*apparently* because the Court did not expressly so state and *assumed* because the Court did not address this proposition's obvious tension with foundational cases like *Ex Parte McCordle*.

In the majority's view, if the writ of habeas corpus ran to aliens in foreign nations during the pre-constitutional period, then Article I, Section Nine would prevent Congress from making exceptions and regulations to its habeas jurisdiction over the Guantanamo detainees; therefore, the majority opinion focused heavily on the extraterritorial reach of the writ of habeas corpus in the British empire before 1789.<sup>372</sup> Justice Kennedy found historical inconsistencies regarding whether the writ was

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368. U.S. CONST. art. I, § 9, cl. 2.

369. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008).

370. *Id.* at 2244.

371. *Id.*

372. *Id.* at 2244–54.

available to foreign nationals or available in foreign lands.<sup>373</sup> The writ was unavailable to persons in Scotland, which lay within the King's territories, but the writ was available in Ireland, despite its status as an independent sovereign.<sup>374</sup> After a ten-page historical narrative, Justice Kennedy could draw "no certain conclusions" about whether a pre-1789 common law court would have granted a writ of habeas corpus brought by an enemy combatant detained outside the United States or would have refused to grant the writ for lack of jurisdiction.<sup>375</sup> For Justice Kennedy, the historical record did prove, however, that *de jure* sovereignty had not been the "touchstone" for habeas corpus jurisdiction.<sup>376</sup>

The Kennedy opinion's protracted exploration of the pre-constitutional history of habeas corpus contrasts sharply with the scant attention given the political question doctrine.<sup>377</sup> The only potential political question, in the Court's view, was whether Cuba or the United States held sovereign power at Guantanamo Bay.<sup>378</sup> The Court did not quibble with the obvious fact that Guantanamo Bay lies within Cuba's sovereign territory.<sup>379</sup> However, the Court said the political question doctrine did not forbid the Court from determining whether the United States held what Justice Kennedy called "*de facto* sovereignty"—that is, practical control—over Guantanamo.<sup>380</sup> "Were we to hold that the present cases turn on the political question doctrine, we would be required first to accept the Government's premise that *de jure* sovereignty is the touchstone of habeas corpus jurisdiction."<sup>381</sup> In three paragraphs, the majority opinion had rejected the notion that the political branches might be vested with unreviewable constitutional authority to determine whether the writ was available to the Guantanamo detainees.<sup>382</sup> For Justice Kennedy, the premise that the political branches, and not the Court, could determine whether to allow habeas

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373. *Id.*

374. *Id.* at 2246–52.

375. *Id.* at 2248.

376. *Id.* at 2253.

377. *Id.* at 2252–53.

378. *Id.*

379. *Id.*

380. *Id.* at 2253.

381. *Id.*

382. *Id.*

jurisdiction would be “contrary to fundamental separation-of-powers principles.”<sup>383</sup> Congress had the power to make laws, but it was the Court’s province “to say what the law is.”<sup>384</sup>

Kennedy’s opinion then reviewed a series of cases addressing, in his view, the geographic reach of the Constitution.<sup>385</sup> It focused on three decisions: The *Insular Cases*,<sup>386</sup> *Reid v. Covert*,<sup>387</sup> and *Johnson v. Eisentrager*.<sup>388</sup> In each case, Justice Kennedy wrote, the extent to which the petitioners were afforded constitutional rights did not turn solely on whether the geographic territory was formally part of the United States.<sup>389</sup> Instead, extraterritorial effect depended upon the “particular circumstances, the practical necessities, and the possible alternatives which Congress had before it’ and, in particular, whether judicial enforcement of the provision would be ‘impractical and anomalous.’”<sup>390</sup>

The *Insular Cases*, decided following the Spanish–American War, addressed whether the Constitution applied of its own force in the newly acquired Philippine Islands or whether the Constitution would apply only if Congress passed enabling legislation.<sup>391</sup> Although the Court held that the Constitution automatically applied in new territories, it noted that practical difficulties would result from full-scale importation of all constitutional requirements.<sup>392</sup> It would disrupt the existing, well-functioning legal culture, one that should be kept intact since the U.S. intended that the Philippine Islands would return

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383. *Id.*

384. *Id.* at 2259 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

385. *Id.* at 2254–60.

386. The *Insular Cases* were a series of cases. *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *De Lima v. Bidwell* 182 U.S. 1 (1901). See generally Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283, 300–12 (discussing generally the facts of and the decisions in the *Insular Cases*).

387. 354 U.S. 1 (1957).

388. 339 U.S. 763 (1950).

389. *Boumediene v. Bush*, 128 S. Ct. 2229, 2254–56 (2008).

390. *Id.* at 2255–56 (quoting *Reid*, 354 U.S. at 74–75 (Harlan, J., concurring)).

391. *Id.* at 2254.

392. *Id.*

to independence.<sup>393</sup> Thus, only “fundamental” constitutional protections would apply there.<sup>394</sup>

Justice Kennedy saw the same case-by-case, totality-of-the-circumstances analysis at work in *Reid*.<sup>395</sup> Civilian wives of military personnel had been tried by court martial for murders committed in England and Japan.<sup>396</sup> The Court held, however, that these American civilians were constitutionally entitled to trial by jury.<sup>397</sup> While Justice Kennedy conceded that their American citizenship was a “key factor” in the *Reid* Court’s conclusion that they were entitled to jury trials, practical considerations also played a part.<sup>398</sup>

Finally, Justice Kennedy addressed *Johnson v. Eisentrager*.<sup>399</sup> The *Eisentrager* Court had refused to grant a writ of habeas corpus and had noted that the prisoners “at no relevant time were within any territory over which the United States is sovereign.”<sup>400</sup> Justice Kennedy wrote that “because the United States lacked both *de jure* sovereignty and plenary control over Landsberg Prison, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility.”<sup>401</sup> Instead, Justice Kennedy contended, the *Eisentrager* opinion also focused on the practical difficulties involved in transporting prisoners and “damag[ing] the prestige of military commanders at a sensitive time.”<sup>402</sup>

The Kennedy opinion interpreted the writ’s history and the Court’s precedence in light of “fundamental separation-of-powers principles,”<sup>403</sup> which, in the majority’s view, demanded that the Guantanamo Bay detainees have access to habeas corpus review.<sup>404</sup> If the Court’s habeas power depended upon formal state sovereignty, then “it would be possible for the political branches to govern without legal constraint” in foreign

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393. *Id.*

394. *Id.*

395. *Id.* at 2255–56.

396. *Id.* at 2255.

397. *Id.*

398. *Id.* at 2256.

399. *Id.* at 2257.

400. *Id.* at 2257 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950)).

401. *Id.* at 2257 (citation omitted).

402. *Id.* at 2257 (citing *Eisentrager*, 339 U.S. at 779).

403. *Id.* at 2253.

404. *Id.* at 2262.

territory.<sup>405</sup> In the Court's view, permitting the political branches to operate without the possibility of habeas review in federal court would mean that "the political branches have the power to switch the Constitution on or off at will."<sup>406</sup>

The majority listed three factors that would determine whether the Suspension Clause vests the Court with power to issue habeas writs to an alien held outside U.S. borders: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."<sup>407</sup> Applying the first factor, the Court pointed to *Eisenstrager's* trial by military commission as the ideal level of process for determining whether the Guantanamo detainees were in fact enemy combatants.<sup>408</sup> The prisoners in *Eisenstrager* had received a full trial by military commission for war crimes, with a bill of particulars and detailed factual allegations against them.<sup>409</sup> They were afforded legal counsel and the right to cross-examine witnesses.<sup>410</sup> In comparison, CSRT hearings provided the detainee with a "Personal Representative," rather than legal counsel.<sup>411</sup> The Government's evidence was presumptively valid, and the detainee was permitted to present only "reasonably available" evidence.<sup>412</sup> The CSRT process, Justice Kennedy wrote, fell "well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."<sup>413</sup> Regarding the second factor, the Court opined that the military held a higher level of control over the Guantanamo military base than over Landsberg prison in Germany following World War II.<sup>414</sup>

As for the third factor, the "practical obstacles," the majority was "sensitive" to the fact that affording habeas petitions to

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405. *Id.* at 2258–59.

406. *Id.* at 2258.

407. *Id.* at 2259.

408. *Id.*

409. *Id.* at 2260.

410. *Id.* at 2260.

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.* at 2261.

detainees in federal court costs money and “may divert the attention of military personnel from other pressing tasks.”<sup>415</sup> The majority did not, however, find these facts “dispositive.”<sup>416</sup> The Executive Branch, in their view, presented “no credible arguments that the military mission at Guantanamo would be compromised” by the federal courts’ exercise of habeas corpus jurisdiction.<sup>417</sup>

In the end, the majority held that its habeas jurisdiction could not be constricted through the MCA’s jurisdiction-stripping provision.<sup>418</sup> Congress could limit the Court’s jurisdiction only through a “formal” suspension of the writ.<sup>419</sup> The Court neither cited authority for the proposition that a suspension of habeas must be “formal” nor did it explain what a “formal” suspension might entail.<sup>420</sup>

## 2. The Dissenting Opinions

Chief Justice Roberts and Justices Scalia, Thomas, and Alito signed onto two separate dissents.<sup>421</sup> Both dissents were highly critical of the majority’s decision, which upended the CSRT review process and provided the detainees with constitutional rights to habeas corpus review of the CSRT decisions in federal court. But the dissenters did not dispute certain fundamental assumptions underlying the majority opinion. In the Justices’ unanimous view, the Supreme Court’s role in the constitutional enterprise was to declare the true meaning of the Constitution;<sup>422</sup> it was for the Court, not the political branches, to give an authoritative interpretation of the Suspension Clause’s cryptic language and the writ’s uncertain history.<sup>423</sup> Moreover, Congress was apparently powerless to strip the Court of jurisdiction to make those determinations, despite Congress’s unqualified constitutional authority to limit the Court’s

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415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.* at 2262.

419. *Id.*

420. The *Boumediene* majority enigmatically opined that “[n]othing in [Hamdan v. Rumsfeld, 548 U.S. 557 (2006)] can be construed as an invitation for Congress to suspend the writ.” *Id.* at 2242.

421. *Id.* at 2279–93 (Roberts, C.J., dissenting); *id.* at 2293–307 (Scalia, J., dissenting).

422. *Id.* at 2304 (Scalia, J., dissenting).

423. *Id.*

jurisdiction.<sup>424</sup> Every Justice on the *Boumediene* Court held the opinion that Congress's enumerated power to make exceptions to the Court's jurisdiction was limited, not plenary. As Justice Scalia's dissent phrased it, "[a]s a court of law operating under a written Constitution, our role is to determine whether there is a conflict between [the Suspension] Clause and the Military Commissions Act."<sup>425</sup> The dissenters, like the majority, did not explain where the Court acquired jurisdiction to entertain that question even after the MCA stripped its jurisdiction to hear any case involving the detainees. Did the Court believe that the Suspension Clause provided self-executing habeas corpus jurisdiction to the federal courts? Perhaps the Court believed that the Suspension Clause restricted Congress from ever diminishing the courts' habeas jurisdiction once Congress granted that jurisdiction in the first instance. The dissenting opinions did not explore these questions, and they did not dispute the majority's implicit conclusion that these were not political questions.

The thrust of Justice Roberts's dissent was that the DTA's statutory processes for making enemy combatant determinations satisfied due process.<sup>426</sup> Congress had modeled the combatant-status-determination upon Army Regulation 190-8, which the *Hamdi* plurality presented as a model of the level of procedural protections an enemy combatant would receive from a habeas court.<sup>427</sup> Under the DTA, the Combatant Status Review Tribunals reviewed initial battlefield determinations of combatant status.<sup>428</sup> CSRTs "operate much as habeas courts . . . [t]hey gather evidence, call witnesses, take testimony, and render a decision on the legality of the Government's detention."<sup>429</sup> The *Hamdi* plurality had opined that this first level of review would satisfy constitutional due process standards for American citizens challenging their enemy combatant status.<sup>430</sup> However, Congress went much further than the constitutional minimum and extended the CSRT review process

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424. See *supra* notes 113–16 and accompanying text.

425. *Boumediene*, 128 S. Ct. at 2296 (Scalia, J., dissenting).

426. *Id.* at 2279 (Roberts, C.J., dissenting).

427. *Id.* at 2284 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004)).

428. *Id.*

429. *Id.*

430. *Id.*

to all detainees, American and alien alike.<sup>431</sup> Congress also provided for an additional layer of review by an Article III court.<sup>432</sup> The DTA authorized the D.C. Circuit to determine not only whether the CSRT's finding in a particular detainee's case "was consistent with the standards and procedures specified by the Secretary of Defense" but also "whether the use of such standards and procedures to make the determination [was] consistent with the Constitution and laws of the United States."<sup>433</sup> The *Boumediene* petitioners had never made use of these statutory remedies.<sup>434</sup>

Justice Scalia wrote separately to emphasize a point he considered "more fundamental still," which was that the writ of habeas corpus had never been available to noncitizens in foreign lands.<sup>435</sup> The Suspension Clause thus did not provide the detainees with habeas rights.<sup>436</sup> Justice Scalia began from the proposition that the Court owes deference to Congress's judgments.<sup>437</sup> Its statutes are entitled to a presumption of constitutionality, and this is especially true in foreign and military affairs.<sup>438</sup> Indeed, Justice Kennedy's majority opinion admitted that, despite his careful examination of pre-constitutional history, he could not come to a certain conclusion regarding whether the writ would have run to aliens outside our borders.<sup>439</sup> For Justice Scalia, this meant that the Court had no basis for striking down the MCA.<sup>440</sup> The Court must defer to Congress's judgment.<sup>441</sup> Justice Scalia nonetheless contended that the majority had incorrectly judged the historical evidence regarding the geographical reach of the writ of habeas corpus.<sup>442</sup> In his view, pre-constitutional and early post-1789 precedents plainly demonstrated that the writ was not available to noncitizens abroad.<sup>443</sup>

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431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.* at 2294 (Scalia, J., dissenting).

436. *Id.*

437. *Id.* at 2296.

438. *Id.* at 2296–97.

439. *Id.* at 2251 (majority opinion).

440. *Id.* at 2297 (Scalia, J., dissenting).

441. *Id.*

442. *Id.* at 2298–302.

443. *Id.*

### C. Separation of Powers After *Boumediene*

Both the majority and dissenting opinions in *Boumediene* gave remarkably short shrift to two critical issues. The first was the political question doctrine. The second was Congress's power under Article III, Section Two to make exceptions to the Court's appellate jurisdiction.<sup>444</sup> The issues stand in close relationship to one another, since both allocate final constitutional decision-making authority away from the Judicial Branch and place that power within the political branches. Jurisdiction stripping is one of Congress's expressly granted constitutional means for checking the Judicial Branch from abusing sovereign power.<sup>445</sup> The political question doctrine, on the other hand, is a sort of check on the Judicial Branch imposed by the Court itself. It is a judicially crafted doctrine meant to ensure that the Judicial Branch does not usurp legislative or executive power.<sup>446</sup>

The early Court did not view jurisdiction regulation or the political question doctrine as conflicting with the judicial role because the early Court did not view itself as the sole interpreter of the Constitution.<sup>447</sup> That is no longer the case. The modern Court views the political branches' constitutional interpretations as only second-best guesses of "true" constitutional meaning, which the Court may fine-tune or reject as it sees fit. Neither the political question doctrine nor jurisdiction stripping can coexist with the Court's new conception of itself as supreme interpreter of the Constitution.

#### 1. The Political Question Doctrine in *Boumediene*

The *Boumediene* decision, which spans seventy-seven pages in the Supreme Court Reporter, devotes three paragraphs to the political question doctrine.<sup>448</sup> The only potential political question any member of the Court could identify was an inconsequential one: the Court did "not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the

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444. U.S. CONST. art. III, § 2, cl. 2.

445. *Id.*

446. *See supra* note 157 and accompanying text.

447. *See supra* Part II.

448. *Boumediene*, 128 S. Ct. at 2253.

term, over Guantanamo Bay.”<sup>449</sup> The majority opinion did not pause for even a moment to consider whether the political branches possessed all constitutional authority to interpret their own and the others’ war powers.

*Boumediene* marks a clear break with precedent. Until September 11, 2001, the Court had consistently taken the position that any constitutional questions arising from the military detention or prosecution of enemy combatants were political questions to be answered by the political branches alone.<sup>450</sup> The classic political question doctrine posits that the Constitution itself, by virtue of vesting an extraordinary level of discretionary power in one of the political branches, leaves all constitutional questions regarding the limits of that power in that single branch.<sup>451</sup> This doctrine finds its roots in *Marbury v. Madison*, the case that declared the power of judicial review itself, and the two doctrines are inextricably intertwined. Both judicial review and the political question doctrine are judicially crafted instruments for protecting the people’s interests by ensuring that sovereign power remains dispersed in accordance with the constitutional plan.<sup>452</sup> In *Marbury*, Chief Justice Marshall made the claim, radical at the time, that the Judicial Branch could issue writs of mandamus to high-order Executive Branch officials.<sup>453</sup> However, the Chief Justice also said that the Court could only order the Executive Branch to perform ministerial duties—those unambiguous legal obligations which left no room for discretion.<sup>454</sup> Where the Executive was vested with discretionary decision-making authority, even deferential judicial review would go too far.<sup>455</sup> It would trespass on a core constitutional function solely dedicated to a coordinate branch, violating separation-of-powers precepts.<sup>456</sup>

The political branches’ powers to wage war have historically been viewed as the paradigmatic political question.<sup>457</sup> War

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449. *Id.* at 2252.

450. *See supra* Part II.C.

451. *See supra* note 157.

452. *See* discussion *supra* Part II.C.

453. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 149–50 (1803).

454. *Id.* at 149–50.

455. *Id.* at 166.

456. *Id.* at 166.

457. *Boudemiene* presented a second set of political questions that should have been resolved in Congress alone: questions involving Article III, Section Two, which vests in Congress the unconditional power to control the federal courts’ jurisdiction, and the

powers are the Constitution's clearest "textually demonstrable constitutional commitment" of authority to the political branches.<sup>458</sup> The constitutional text is far more detailed in describing Congress's range of authority over the military than other congressional powers. The sheer number of provisions is striking: Congress has the power to "provide for the common Defence and general Welfare of the United States;"<sup>459</sup> "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;"<sup>460</sup> "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;"<sup>461</sup> "raise and support Armies;"<sup>462</sup> "provide and maintain a Navy;"<sup>463</sup> "make Rules for the Government and Regulation of the land and naval Forces;"<sup>464</sup> "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;"<sup>465</sup> and "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."<sup>466</sup>

The Constitution also vests significant war power in the Executive Branch by declaring the President to be the "Commander in Chief of the Army and Navy of the United States."<sup>467</sup> The Constitution makes no attempt to specify how the President shall go about performing this function. It is instead a matter left to the President's discretion, so the Judicial Branch has no "judicially discoverable standards" upon which to judge whether the President exercised that discretion within constitutional bounds.<sup>468</sup> All powers over war were granted to the political branches, without specifying a precise dividing line

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Suspension Clause, which vests in Congress the power to suspend habeas corpus jurisdiction "when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. III, § 2, cl. 2; *id.* art. I, § 9, cl. 2. These constitutional provisions vest in Congress two checks on the Court's power. If the Court holds the power of judicial review over another branch's constitutional check on the Court's own abuses, then that check is no check at all.

458. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

459. U.S. CONST. art. I, § 8, cl. 1.

460. *Id.* cl. 10.

461. *Id.* cl. 11.

462. *Id.* cl. 12.

463. *Id.* cl. 13.

464. *Id.* cl. 14.

465. *Id.* cl. 15.

466. *Id.* cl. 16.

467. *Id.* art. II, § 2, cl. 1.

468. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

between them. The Framers blended and overlapped military powers in two separate branches to create an “intentional gray area, or zone of shared powers, requiring the legislative and executive branches to work out the allocation of power and responsibility.”<sup>469</sup> This blending of powers created a strong system of checks and balances.<sup>470</sup> Congress and the President might cooperate or might conflict over military policy, but neither had exclusive control over standing armies.<sup>471</sup> Each political branch would stand ready to check any unconstitutional action by the other.<sup>472</sup>

Soon after the September 11th terrorist attacks and consistent with the customary laws of war, the Bush Administration took the position that the military could detain enemy combatants until the cessation of hostilities, and that no formal juridical process was necessary to determine who was an enemy combatant.<sup>473</sup> But the War on Terror was like no other war before it. Its temporal boundaries were uncertain, with the potential to last for decades or beyond. The battlefield had no geographic boundaries. The enemy wore no uniform. Combatants might live in Afghanistan or in Brooklyn. Under these conditions, the potential for erroneously detaining a non-enemy civilian was exponentially higher than in previous wars where military personnel could generally separate civilians from combatants with relative ease.<sup>474</sup>

Given these facts, the Supreme Court broke with the established tradition of non-involvement in military matters and entertained *Hamdi v. Rumsfeld* on a writ of habeas corpus. *Hamdi* acknowledged that the customary laws of war allow the detainment of combatants captured in the course of battle until the conflict ceases.<sup>475</sup> But the plurality was concerned about the

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469. Geoffrey Corn & Eric T. Jensen, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, The President, and Congress*, 44 HOUS. L. REV. 553, 563 (2007).

470. *Id.*

471. *Id.* at 564.

472. *Id.* at 565.

473. Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, to Daniel J. Bryant, Assistant Attorney Gen., Office of Legis. Affairs, U.S. Dep’t of Justice (June 27, 2002),

<http://www.justice.gov/olc/docs/memodetentionuscitizens06272002.pdf>.

474. See generally Brooks, *supra* note 185, at 104–06 (discussing one’s status under the Geneva Convention as hinging on questions of form and not on one’s substantive actions).

475. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

possibility that humanitarian aid workers and journalists could be captured, mistaken for enemy combatants, and incarcerated in a war on terror that could last two generations.<sup>476</sup> At the same time, the *Hamdi* plurality recognized the “weighty and sensitive governmental interests” in detaining enemies who have fought against the United States.<sup>477</sup> Further, *Hamdi* acknowledged that the political branches, not the Court, were responsible for wartime decision making: “Without doubt, our Constitution recognizes that core strategic matters of war making belong in the hands of those who are best positioned and most politically accountable for making them.”<sup>478</sup> Weighing these competing concerns, *Hamdi* held that an American citizen detained as an enemy combatant had a constitutional right to “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker.”<sup>479</sup>

*Hamdi* might thus be viewed as opening a dialogue with the political branches regarding the proper interpretation of constitutional norms.<sup>480</sup> The plurality’s tone was diplomatic and collaborative. Although it held that some level of process was owed to the detainees before they could be indefinitely detained, *Hamdi* did not attempt to dictate precisely what that process must entail. The military could choose a process that permitted hearsay and gave a rebuttable presumption in favor of the Government’s evidence.<sup>481</sup> *Hamdi* conceded that Article III courts might have no role to play in the detainees’ cases.<sup>482</sup>

The Court’s tone quickly changed when Congress revoked its jurisdiction to consider additional habeas cases from alien enemy combatants. *Boumediene* apparently considered the MCA’s jurisdiction-stripping provisions to be an affront to the Court’s place in the constitutional chain of command. The

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476. *Id.* at 530–31.

477. *Id.* at 531.

478. *Id.*

479. *Id.* at 533.

480. See Robert C. Post & Reva B. Siegel, *Protecting the Constitution From the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 3 (2003) (arguing constitutional structure of separated coequal branches was intended to encourage compromise and dialogue among governmental branches).

481. *Hamdi*, 542 U.S. at 533–34.

482. See *id.* at 538 (“There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.”).

Court proclaimed that the CSRT procedures did not comply with due process, without identifying any particular shortcomings.<sup>483</sup> *Boumediene* then delegated to the district courts the task of devising new procedures that would meet the detainees' constitutional rights of due process.<sup>484</sup> In response to the Government's concern that vital classified information presented in those habeas proceedings would find its way into enemy hands, *Boumediene* refused to "attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise" in the district courts.<sup>485</sup> Those were questions "within the expertise and competence of the District Court to address in the first instance."<sup>486</sup>

The *Boumediene* Court had lost sight of the limits of the judiciary's institutional capacity. The legitimacy of a judicial decision depends upon an even-handed application of the law. The Court must determine whether the law protects one party's security against his opponent's actions or whether the law instead leaves the opponent at liberty to continue those actions. In an ordinary case, statutory or common law will usually provide a relatively straightforward answer to that legal question. The open-textured language of the Constitution, on the other hand, protects *both* of these values—liberty and security—which often stand in direct opposition to one another. The Constitution secures individual liberties and provides for the common defense and domestic tranquility.<sup>487</sup> The early Court largely left balancing between the two values to the political branches through the complementary principles of deferential judicial review and the political question doctrine.<sup>488</sup> From the 1930s to the 1990s, the Court took an active role in defining and enforcing individual liberties but continued to defer to the political branches' constitutional interpretations in foreign-policy matters in general and wartime policy decisions in particular.<sup>489</sup> Each arrangement was a more acceptable balancing of sovereign power among the coordinate branches. These tacit settlement agreements each achieved a chief aim of

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483. *Boumediene v. Bush*, 128 S. Ct. 2229, 2258–61 (2008).

484. *Id.* at 2276.

485. *Id.*

486. *Id.*

487. U.S. CONST. amends. I–VIII; *id.* pmb1.

488. *See supra* Part II.C.

489. *See supra* Part III.

the Constitution: to disperse governmental power so as to protect the people's own sovereignty and influence over their government.<sup>490</sup>

However, the modern Court has abandoned the Framers' vision of separation of powers. *Boumediene* exemplifies a new vision of "fundamental separation-of-powers principles,"<sup>491</sup> different not just in degree but in kind from historical understandings of that phrase. The Court is the keeper of the Constitution; the political branches are to concern themselves only with politics—in the most derogatory sense of the term. The Court distrusts the political branches and the political process. Where the early Court considered it beyond the capacity of the judiciary to balance constitutional rights that implicate larger issues of policy vitally affecting the nation, the modern Court views itself as not only capable of balancing competing constitutional rights but also as the *only* branch capable of doing so.

## 2. The End of Congress's Power to Control the Court's Jurisdiction?

*Boumediene* began with the Court's acknowledgement that "the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us."<sup>492</sup> The opinion should have ended with that admission. Article III provides that Congress may make "Exceptions" from and "Regulations" to the Court's jurisdiction.<sup>493</sup> The Constitution places no limitations on Congress's discretion.<sup>494</sup> With the exception of a small class of cases within its original jurisdiction,<sup>495</sup> the Supreme Court may adjudicate a case only where Congress has, by statute, granted it jurisdiction to do so.<sup>496</sup> Congress did not grant the federal courts jurisdiction to hear habeas petitions from the Guantanamo detainees but, to the contrary, enacted a series of

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490. See *supra* notes 39–41 and accompanying text.

491. *Boumediene*, 128 S. Ct. at 2253.

492. *Id.* at 2244.

493. U.S. CONST. art. III, § 1, cl. 2.

494. See *Palmore v. United States*, 411 U.S. 389, 400–01 (1973) (holding that, per its constitutional power to legislate for the District of Columbia, Congress may establish laws to try local criminal cases before judges who are not accorded life tenure or an indiminishable salary).

495. U.S. Const. art. III, § 2, cl. 2.

496. *Id.*

statutes stripping the Court of habeas jurisdiction in no uncertain terms.<sup>497</sup>

Neither the *Boumediene* majority nor the dissenters mentioned the landmark cases that acknowledged Congress's plenary power and unreviewable discretion to prevent the Court from exercising habeas jurisdiction. In *Ex parte Bollman*, Chief Justice Marshall explained that if Congress chose not to provide the Court with statutory jurisdiction to issue writs of habeas corpus, then "the privilege [of the writ] itself would be lost."<sup>498</sup> *Bollman* thus belied any suggestion that the Suspension Clause vests self-executing habeas jurisdiction in the federal Judiciary.<sup>499</sup> *Boumediene* also failed to acknowledge *Ex parte McCardle*, where Congress stripped the Court of jurisdiction to consider a then-pending habeas petition.<sup>500</sup> "The first question necessarily is that of jurisdiction," said *McCardle*, and once it was determined that Congress had revoked the Court's jurisdiction, it was "useless, if not improper, to enter into any discussion of other questions."<sup>501</sup> The *McCardle* Court was undoubtedly perturbed that Congress had prevented it from exercising influence over the course of Reconstruction, and yet, even a year later in *Ex parte Yerger*, the Court acknowledged that the Constitution had squarely committed to Congress the unreviewable discretion to determine whether the Court should exercise habeas

497. Military Commissions Act of 2006 § 7(a), 28 U.S.C.A. § 2241(e)(1) (Supp. 2009)); Detainee Treatment Act of 2005 § 1005(e)(1), 28 U.S.C. § 2241(e)(1) (2006).

498. *Ex parte Bollman* 8 U.S. (4 Cranch.) 75, 95 (1807).

499. No party in *Bollman* actually made such a suggestion. Neither prisoner's attorney argued that Article I, Section Nine gave the Supreme Court self-executing habeas jurisdiction. This is consistent with William Duker's leading text on the subject, which explains that the Suspension Clause did not create an individual right to habeas corpus in any person. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 133–36 (1980). It instead protected *state courts'* habeas jurisdiction from congressional interference because the Framers intended that the state courts would issue writs of habeas corpus to ensure the legality of federal detention. *Id.* The language of Article I, Section Nine, which forbids Congress from *suspending* habeas, presupposes the existence of habeas relief. At the time that language was drafted, state courts had jurisdiction (in varying degrees) to issue writs of habeas corpus. *Id.* at 111–15, 129–30. But there was no federal habeas relief because there were no federal courts. The Articles of Confederation made no provision for federal courts, and the Constitution had not yet been ratified. *Id.* at 131. Even after ratification created the Supreme Court, the Constitution left to Congress the decision whether to create lower federal courts and whether to grant jurisdiction to any federal court. *Id.* at 133–36.

500. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512 (1868).

501. *Id.*

jurisdiction in any case, including cases alleging constitutional violations and deprivations of liberty.<sup>502</sup>

*McCordle* and *Bollman* were a consequence of the early Court's conception of the Constitution's separation-of-powers structure and the political theory that drove the Framers to settle upon that structure. The Framers divided power among three branches because they knew to a moral certainty that power corrupts.<sup>503</sup> No one branch could be trusted with absolute dominion over constitutional interpretation, or else the Constitution would cease to perform its chief function, which was to protect the people from overweening governmental power.<sup>504</sup> The Constitution delegated various enumerated powers to each branch, but the Constitution did not expressly grant the power of constitutional review to any single institution.<sup>505</sup> The power and duty of constitutional review was instead an implied power, shared by all the coordinate branches.<sup>506</sup> It derived from the Supremacy Clause, which declares the Constitution the supreme law of the land,<sup>507</sup> and from the Constitution's requirement that each branch swear a solemn oath to uphold the Constitution.<sup>508</sup>

The Constitution would almost certainly not have been ratified if the people had believed that the politically unaccountable Judiciary would have ultimate control over constitutional meaning.<sup>509</sup> Anti-Federalists had opposed ratification on the grounds that an unelected and unaccountable Court would have "the supreme and uncontrollable power, to determine, in all cases that come before them, what the constitution means."<sup>510</sup> The constitutional structure was flawed, they argued, because "[t]he

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502. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 103–06 (1869).

503. *See supra* Part II.A.

504. *See supra* Part II.A.

505. *See supra* Part II.A.

506. *See supra* Part II.A.

507. U.S. Const. art. VI, cl. 2.

508. *Id.* cl. 3.

509. *See* Paulsen, *supra* note 40, at 245–52 (reviewing the concerns of Anti-Federalists that "unelected, unaccountable judges" would become the effective lawgivers and Alexander Hamilton's counterarguments to these concerns).

510. Brutus, *No. 12*, in 2 THE COMPLETE ANTI-FEDERALIST 9.148 (Herbert J. Storing ed., Univ. of Chi. Press 1981); *see* Shlomo Slonim, *Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy*, 23 CONST. COMMENT. 7, 10 (2006) (expanding on Brutus' view that the "judgment of the judicial [branch] . . . will become the rule to guide the legislature in their construction of their powers").

opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications.”<sup>511</sup>

Hamilton forcefully denied these charges in *The Federalist No. 78*.<sup>512</sup> He began by showing that the Judiciary was an inherently weak institution. In comparison with the Legislative Branch, which “commands the purse” and enacts the laws, and the Executive Branch, which “holds the sword of the community,” the Judicial Branch’s influence was limited to issuing persuasive decisions in individual cases.<sup>513</sup> The Judiciary was so weak, in fact, that it could not even enforce its own judgments but was instead dependent upon the Executive Branch.<sup>514</sup> Life tenure—during good behavior—and salary protections were therefore necessary to ensure that the Judicial Branch would not be “overpowered, awed, or influenced by its co-ordinate branches.”<sup>515</sup>

Hamilton then turned to the first principles animating the constitutional structure: The Constitution was supreme law, and “every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.”<sup>516</sup> If the Legislature enacted a statute that conflicted with the Constitution, then the Judiciary had a constitutional duty to prefer the Constitution over the act.<sup>517</sup> This implied power of judicial review did not, however, “by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both.”<sup>518</sup> If Congress were “themselves the constitutional judges of their own powers” and could issue constitutional interpretations “conclusive upon the other departments,” then the Constitution could be disregarded at will.<sup>519</sup> This, Hamilton said, “cannot be

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511. Slonim, *supra* note 510, at 10 (citing Brutus, *supra* note 510, at 9.148).

512. *Id.*

513. THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 23, at 438.

514. *Id.*

515. *Id.*

516. *Id.*

517. *Id.*

518. *Id.* at 439.

519. *Id.* at 438.

the natural presumption where it is not to be collected from any particular provisions in the Constitution.”<sup>520</sup>

Precisely the same principles apply to the Judicial Branch. “[E]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.”<sup>521</sup> The Court, no less than the political branches, is obliged to obey the supreme law of the Constitution. Should it abuse its delegated authority and substitute its own policy preferences for Congress’s—rewriting the Constitution under the guise of interpreting it—then the Court’s actions are void. There are no “particular provisions in the Constitution” naming the Supreme Court “the constitutional judges of [its] own powers” or stating that “the construction [it] put[s] upon them is conclusive upon the other departments.”<sup>522</sup> Since the Judicial Branch was dependent upon the Executive to enforce its judgments, and since the Judiciary’s constitutional interpretations were not conclusive upon the Executive, the Executive could refuse to enforce its judgments in the event—wholly unlikely, in Hamilton’s view—that the weakest branch usurped another branch’s rightful authority.<sup>523</sup>

Judicial supremacy is directly contrary to the Founding Fathers’ intention that “each department should have a will of its own.”<sup>524</sup> To prevent “a gradual concentration of the several powers in the same department,” the Constitution gave “each department the necessary constitutional means and personal motives to resist encroachments of the others.”<sup>525</sup> In *Bollman* and *McCardle*, the Court acknowledged one of the key constitutional checks on encroachments by the Judicial Branch:

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520. *Id.*

521. *Id.* at 438 (emphasis added); see also Paulsen, *supra* note 40, at 248–52 (examining Hamilton’s views on judicial review and Chief Justice Marshall’s similarly reasoned understanding that “an act of the legislature, repugnant to the constitution, is void” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

522. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 23, at 438.

523. Paulsen, *supra* note 40, at 252. Professor Paulsen explains that Hamilton did not dwell on the fact that the Executive was not bound to enforce the Judiciary’s unconstitutional acts because the Framers did not believe that the Judiciary would ever gain sufficient power to encroach on other branches’ authority. *Id.* Moreover, the Anti-Federalists were already far more wary of a strong executive than an independent judiciary. *Id.*

524. THE FEDERALIST No. 51 (James Madison), *supra* note 23, at 319.

525. *Id.*

the power of Congress given by Article III, Section Two to make exceptions and regulations to the Court's jurisdiction.<sup>526</sup>

These foundational premises—that the Judicial and political branches possess equal authority to interpret the Constitution and that Congress may check the Court's violations of separation-of-powers principles—are no longer acceptable to the modern Court. *Boumediene* seemed to find it intolerable that Congress could remove the Court from the enemy combatant review process. The Court believed itself the only arm of government constituted to act on principle and imagined that Congress and the President were willing to sacrifice the deepest values embodied in the Constitution. The Court believed that rights to due process are something that it respects but that the other political branches violate to satisfy the base preferences of their constituents. In the Court's view, Congress and the President would subjugate the Constitution were it not for strict judicial oversight.

With these as its underlying assumptions, the *Boumediene* Court treated constitutional review as if it were an enumerated and delegated power expressly given to the Judicial Branch and to the Judicial Branch alone. The Court acted as if it viewed itself as the ultimate referee of constitutional-boundary disputes, even where its *own* errors in constitutional interpretation and abuses of constitutional power were at issue. In Congress's independent judgment, the Court had seriously misinterpreted its own constitutional power in declaring its intention to hear habeas claims filed by Guantanamo detainees. Congress used its constitutional Exceptions and Regulations check on the Court to enforce a contrary interpretation.<sup>527</sup> But *Boumediene* deemed Congress and the President unqualified to judge whether the Court had overreached its legitimate sphere of constitutional authority. It would be a “striking anomaly,” Justice Kennedy

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526. *Ex parte McCordle*, 74 U.S. (7 Wall.) 505, 512–14 (1868); 8 U.S. (4 Cranch) 75, 116 (1807).

527. *See* Military Commissions Act of 2006 § 7(a), 28 U.S.C.A. § 2241(e)(1) (Supp. 2009)

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

wrote, if “Congress and the President, not this Court, [could] say ‘what the law is.’”<sup>528</sup>

*Boumediene* treated Congress’s Exceptions and Regulations power as a narrow and limited one, which could not prevent the Court from exercising its paramount power of judicial review. The writ of habeas corpus was “an indispensable mechanism for monitoring the separation of powers,” Justice Kennedy wrote, and the Suspension Clause “must not be subject to manipulation by those whose power it is designed to restrain.”<sup>529</sup> Justice Scalia’s dissent soundly criticized Justice Kennedy’s argument on the grounds that the Court, not Congress, had manipulated the writ’s historical reach.<sup>530</sup> But even the dissenters, like the majority, still believed that only the Court could give an authoritative interpretation of the Suspension Clause and further believed that Congress could not prevent the Court from adjudicating that issue. Congress’s constitutional Exceptions and Regulations check on the Court is no check at all if the Court has the power to decide whether Congress can use it.<sup>531</sup>

The Court viewed the MCA’s jurisdiction-stripping provisions as a sinister and illegitimate attempt “to switch the Constitution on or off at will.”<sup>532</sup> This is the way many commentators view jurisdiction regulation, as well. Consider this passage from Professor Henry Hart’s famous article, written in the form of Socratic dialogue:

Q: [Suppose Congress stripped all courts of jurisdiction to entertain a constitutional question.] Why wouldn’t the executive department then be free to go ahead and violate fundamental rights at will? . . . . The problem can easily arise by deliberate action directed to an unpopular group, or even by inadvertence. Suppose Congress says flatly that no court shall have jurisdiction in such and such a situation, even in habeas corpus?

528. *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

529. *Id.*

530. *Id.* at 2296–98 (Scalia, J., dissenting).

531. What remedy is left if Congress got serious about separation of powers, other than impeachment of Justices? If Congress took that step, would the Court claim the ultimate constitutional power to interpret Article III’s provision that federal judges shall “hold their Offices during good Behaviour”? U.S. CONST. art. III, § 1.

532. *Boumediene*, 128 S. Ct. at 2259.

A: The habeas corpus part of it would be in direct violation of the Constitution. Article I, Section [Nine], Clause [Two].<sup>533</sup>

Professor Hart, like the *Boumediene* Court, believes that the political branches would “violate fundamental rights at will” if the Judicial Branch were not keeping them in check.<sup>534</sup> He is not alone.<sup>535</sup> The legal elite often “takes for granted various unflattering stereotypes respecting the irrationality and manipulability of ordinary people and their susceptibility to committing acts of injustice.”<sup>536</sup> Those who advocate judicial supremacy tend to view the Court as a beneficent guardian of constitutional rights and to believe that the political branches would disregard those rights were it not for the Court’s oversight.

History belies these claims. Military history provides a particularly apt example because until September 11, 2001, only the political branches were responsible for crafting the rules by which the military conducted warfare.<sup>537</sup> The Court, without exception, declared that matters of wartime military policy were political questions, and the Court lacked jurisdiction to entertain them.<sup>538</sup> The political branches alone were responsible for reviewing the constitutionality of the nation’s military actions.<sup>539</sup> Throughout the nation’s history, the President, in consultation with Congress and concert with the international community, created the rules for waging warfare, and the customary laws of war have become increasingly more humane

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533. Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1396–97 (1953).

534. *Id.* at 1397.

535. Many academics share this view. See, e.g., Leonard Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 929–30 (1982) (criticizing the ability of Congress to limit courts’ jurisdiction); Lawrence Sager, *Forward: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 21–22 (1981) (challenging Congress’s ability to limit courts’ jurisdiction); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 130 (1981) (arguing that restricting the Court’s jurisdiction is not a defensible response to Court rulings to which the political branches disagree); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 498 (1974) (arguing that Congress cannot abolish lower federal courts).

536. KRAMER, *supra* note 45, at 244.

537. See *supra* Part II–III.

538. See *supra* Part II.C.

539. See *supra* Part II.C.

throughout history.<sup>540</sup> In 1864, the First Geneva Convention laid out basic rules for caring for wounded soldiers.<sup>541</sup> International peace conferences in 1899 and 1907 led to various Hague Conventions, which codified and expanded the protections of the customary laws of war.<sup>542</sup> In 1945, the United Nations Charter sought to insure that international disputes would be settled peacefully.<sup>543</sup> Later Geneva Conventions codified additional rules to restrain warfare and protect prisoners of war, civilians, and wounded or sick members of the military.<sup>544</sup> Pursuant to these rules, anyone taken prisoner during war must be fed, clothed, provided medical treatment, and protected from physical harm.<sup>545</sup> Common Article 3 of the Geneva Conventions provides protections for noncombatants.<sup>546</sup> All of these principles of international law, designed to avoid unnecessary suffering and violence to combatants and civilians alike, occurred without input from the Judicial Branch.

Those who support judicial supremacy do not necessarily contend that the Court is more competent at interpreting the Constitution than the political branches, but instead desire a single interpretation that binds every branch.<sup>547</sup> These commentators feel uncomfortable with the open-endedness of a plurality of voices interpreting the Constitution, they want an authoritative voice.<sup>548</sup> In their article, Larry Alexander and Frederick Schauer argue in favor of judicial supremacy on the grounds that the function of law in general—and the Constitution in particular—is to stabilize society and declare the rights and duties of societal actors consistently and across time.<sup>549</sup> But judicial supremacy would not realize these goals.

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540. See Brooks, *supra* note 185, at 687–96 (laying out the role of the Executive in declaring war and establishing national security law).

541. *Id.* at 689.

542. *Id.* (citing Hague Convention IV—Laws & Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277).

543. *Id.* (citing U.N. Charter art. 2, paras. 3–4).

544. *Id.*

545. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

546. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

547. See, e.g., Alexander & Schauer, *supra* note 52, at 1377 (“The reasons for having laws and a constitution that is treated as law are accordingly also reasons for establishing one interpreter’s interpretation as authoritative.”).

548. *Id.*

549. *Id.* at 1371–77.

Even if the Supreme Court were the final authority on constitutional meaning, the Court has altered that meaning time and again by overruling or distinguishing clearly applicable constitutional decisions.<sup>550</sup> Thus, the Court has proved that precedent and stare decisis are insufficient restraints on judicial activism to realize these commentators' desired level of stability.

What is more, there is no reason to believe that the Judicial Branch's constitutional interpretations would likely provide greater stability in the law than the political branches' interpretations. The political branches' readings of constitutional norms have, if anything, remained more consistent over time. Again, military law provides an excellent example, not only because it is directly at issue in *Boumediene* but also because military matters have historically been cordoned off from judicial oversight. The Uniform Code of Military Justice and the Geneva and Hague conventions have provided stable and predictable rules governing armed conflict.<sup>551</sup> They have not lead to the "interpretive anarchy" that Alexander and Schauer fear.<sup>552</sup>

This Article does not advocate putting an end to judicial review.<sup>553</sup> Quite the contrary, judicial review plays an important

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550. *Compare* Johnson v. Eisentrager, 339 U.S. 763, 790 (1950). (refusing to extend jurisdiction to German nationals convicted of carrying out military activities in China against the United States) and *Ex Parte McCardle*, 74 U.S. (7 Wall) 505, 515 (1868) (relying on Article III, Section Two to uphold congressional withdrawal of the Court's jurisdiction) with *Boumediene v. Bush*, 128 S. Ct. 2229, 2251-62 (2008) (extending habeas jurisdiction to detainees at Guantanamo Bay, Cuba). *Compare* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (upholding congressional power to regulate access to the polls under the Fourteenth Amendment) with *Boerne*, *City of Boerne v. Flores*, 521 U.S. 531-36 (1997). (striking down the Religious Freedom Restoration Act as an unconstitutional use of congressional power).

551. *See generally* Corn and Jensen, *supra* 469, at 569 (discussing the constraints that the Uniform Code of Military Justice and the Geneva and Hague Conventions have placed on the government).

552. Alexander and Schauer, *supra* note 52, at 1379.

553. But others have. Mark Tushnet and Robert Bork, who stand at opposite ends of the political spectrum, both advocate that judicial review should end. Professor Tushnet has suggested this constitutional amendment: "The provisions of this Constitution shall not be cognizable by any court." TUSHNET, *supra* note 51, at 175. Robert Bork suggests something less extreme. He would permit judicial review and the Court's constitutional interpretation would bind the particular parties who appeared before the Court, but Congress could by majority vote overturn the Court's interpretation of the particular constitutional provision. ROBERT H. BORK, SLOUCHING TOWARD GOMORRAH 117 (1996). This author remains committed to the premise that the people are best protected where all three branches contribute their various perspectives and institutional strengths to constitutional interpretation. But how to retain judicial review while eliminating judicial supremacy? That is a problem outside the scope of this already lengthy article.

role in protecting constitutional norms. But the judicial power, like any other power, can be abused. The Constitution was designed to provide other branches the means to resist judicial manipulations of authority. The most flexible and effective constitutional check on the Judiciary is Congress's Article III power to regulate and make exceptions to the jurisdiction of the federal courts.<sup>554</sup> The constitutional system of checks and balances, designed to protect the people from governmental abuse of power, is more essential to the people's liberty interests than is federal habeas jurisdiction. Where Congress is convinced that the Court has attempted to alter the Constitution under the guise of interpreting it, Congress has an oath-sworn duty to uphold the Constitution and resist the abuse. The Constitution gave Congress the means by which to resist the Court's overreaching, by stripping it of jurisdiction.<sup>555</sup> In *Boumediene*, however, the Court refused to defer to Congress's check on its power. The Judicial Branch has claimed total dominion over constitutional interpretation, which is contrary to the Framers' best efforts to divide that awesome power among all the branches.

#### V. CONCLUSION

Justice Kennedy ended his *Boumediene* opinion with this thought: "Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law."<sup>556</sup> His statement was correct. The individual's liberty and the community's security are precious constitutional values, each deeply worthy of protection, and where those values come into conflict, they must be reconciled within the constitutional framework. But Justice Kennedy's statement begs the real question: *Who* must reconcile them? For the *Boumediene* Court, it was the Court and the Court alone—the Court must "say what the law is"<sup>557</sup>—and Congress's attempt to deprive the Court of

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554. U.S. CONST. art. III., § 2, cl. 2.

555. *Id.*

556. *Boumediene v. Bush*, 128 S. Ct. 2229, 2274–75 (2008).

557. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

jurisdiction to do so was a violation of “fundamental separation-of-powers principles.”<sup>558</sup>

*Boumediene’s* understanding of the Court’s role is sharply at odds with the Framers’ vision—and the early Court’s vision—of how the coordinate branches would operate within the constitutional system. The Framers designed the constitutional structure to ensure that no single branch would accumulate too much power. Thus, the Constitution created three perfectly coordinate branches of national government and delegated power, in widely varying amounts, to each. The Constitution did not grant any branch of government the final or exclusive right to declare constitutional meaning. It was instead an implied power, divided and shared among all branches. Because each enjoyed equal stature and rank, no branch could “pretend to an exclusive or superior right of settling the boundaries between their respective powers.”<sup>559</sup>

Habeas corpus was indeed an important part of that constitutional framework, as Justice Kennedy said. It does not, however, give the Court license to overturn well-reasoned constitutional interpretations and policy decisions of the coordinate branches. When it became clear that the Court intended to issue habeas writs not to enforce but rather to radically alter settled constitutional understandings, Congress used its delegated and enumerated constitutional check on what it perceived to be the Court’s abuses.

The Court’s jurisdiction is not self-executing. Congress may grant it, and Congress may take it away. That power is Congress’s most effective and flexible check to prevent the Court from overreaching its rightful sphere of influence, and in the MCA, Congress unambiguously stripped the Court’s jurisdiction to entertain any claims, including petitions for habeas relief, from the Guantanamo detainees. The Court refused to be deterred. The Court claimed the power to review the constitutionality of Congress’s check on the Court’s *own* departures from constitutional norms and usurpations of coordinate branches’ constitutional powers. The Court claimed irreducible jurisdiction, through the mechanism of habeas corpus review, to proclaim final answers to constitutional

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558. *Boumediene*, 128 S. Ct. at 2253.

559. THE FEDERALIST No. 49 (James Madison), *supra* note 23, at 313.

questions. The Foundering Fathers would find it troubling that *Boumediene* did so in the name of separation of powers.