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# Support and Defend: How Congress Can Save the Constitution from the Supreme Court

*by Matthew J. Franck*

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# Support and Defend: How Congress Can Save the Constitution from the Supreme Court

*Matthew J. Franck*

When I was a boy, the comic books I devoured regularly featured an advertisement promising that Charles Atlas could turn any scrawny boy into a manly, muscled fellow. The ad usually contained a story of its own in comic-strip form, with a "98-pound weakling," sitting on the beach with a pretty girl, getting sand kicked in his face by a large bully who then taunts him for his inability to retaliate—and, if I remember correctly, walks off with the girl. Charles Atlas, of course, promised that under his tutelage, that weakling could be sure this would never happen to him again.

Now imagine if the story had been told somewhat differently: Suppose the 98-pound weakling came along, having suffered previous humiliations, and kicked sand in the large bully's face while the latter sat on the beach with the pretty girl. The next panel would have shown the foolhardy weakling in a full body cast in a hospital bed, wondering why he hadn't contacted Charles Atlas sooner. But would he now do so? Or, now that he had suffered injury as well as humiliation, would he simply nurse his wounds and resign himself to life as a weakling?

That alternate version of the Atlas body-building ad is what comes to mind when I think of the current posture of the Congress vis-à-vis the Supreme Court. Congress today seems to be the 98-pound weakling, and the Supreme Court the large bully, in the constitutional politics of America. (Never mind that for the allegory to be complete, the Constitution must be the pretty girl.) Every so often, the Court kicks a goodly quantity of sand in Congress's face—taking time off, that is, from its even more frequent assaults on the states and localities. Congress, more often than not, does nothing but meekly submit, or at most mutter to itself darkly about the affront to its authority as the legislature of the nation. Once in a great while, whether on its own behalf or that of others, the Congress crafts an actual response. But its most recent effort to do so was an exercise in mere sand-kicking, unfortified by appropriate calisthenics, and it got itself quite soundly thrashed by the bully as a result.

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I allude to the fate of the Religious Freedom Restoration Act of 1993 (RFRA), overturned on June 25 of this year in the case of *City of Boerne v. Flores*. In response to a perceived threat to the free exercise of religion in the Court's 1990 *Smith* decision,[1] Congress in RFRA sought, through the use of its power to enforce the terms of the Fourteenth Amendment, to overturn that ruling and restore, as against every agency of government in the land, the "compelling interest" test for judging the validity of incidental burdens on free exercise resulting from generally applicable laws. RFRA had overwhelming support from all points on the political spectrum, and passed in the Congress nearly unanimously. Among conservatives, the reaction to the Act's invalidation has been varied.[2] But to veteran Court-watchers, the *Boerne* decision was entirely predictable, inasmuch as the justices of the Court do not take kindly to legislative instruction in how to decide constitutional cases.

But the Act's failure went far deeper: It was, in fact, not a serious enough challenge to the Court's authority, for it conceded too much to the current regime of judicial supremacy. Allow me to enumerate the multiple ironies of the clash between Congress and the Court that culminated in *Boerne*.

## 1. Congress assumed that the Court is properly the enforcer of the First Amendment.

This is by now a very old error, and one so venerable that to speak in correction of it is to raise questions about one's sanity in most circles. So deep runs the popular myth that the Supreme Court is properly the final authority in enforcing virtually every provision of the Constitution that a digression is necessary here into the more general question of judicial review. As Professor Robert Clinton has shown, the judicial power to invalidate the actions of other branches of the national government was widely understood at the founding to be "departmental" or "coordinate," a power he calls "functional review" enabling the judiciary to pronounce authoritatively on the constitutionality of laws touching on the integrity of the courts' own functions—for instance, where a case concerns jurisdictional issues, standards of evidence, or the provision of simple due process.

This limited version of judicial review was all that was either exercised or claimed for the Court by John Marshall in the 1803 case of *Marbury v. Madison*.[3] On the other hand, the legislative and executive branches have a like authority to have the "last word" on those constitutional questions bearing on the exercise of their own powers, arising from the provisions of the Constitution addressed to themselves. Thus, that same John Marshall, for instance, held that the reach of Congress's power over commerce among the states was to be controlled authoritatively not by the judiciary, but by the people through democratic processes: Such are "the restraints on which the people must often rely solely, in all representative governments."[4]

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1 *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).

2 See, e.g., the contributions to "The Supreme Court 1997: A Symposium," *First Things*, October 1997, pp. 20–37; Wilfred M. McClay, "The Worst Decision Since 'Dred Scott'?" *Commentary*, October 1997, pp. 52–54; Dennis Teti, "The Ten Commandments and the Constitution," *The Weekly Standard*, July 21, 1997, pp. 21–24.

3 1 Cranch (5 U.S.) 137 (1803). See Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (Lawrence: University Press of Kansas, 1989), *passim*. See also Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996), pp. 47–71, and Matthew J. Franck, *Against the Imperial Judiciary: The Supreme Court vs. the Sovereignty of the People* (Lawrence: University Press of Kansas, 1996), pp. 65–105.

Now, obviously, the terms of the First Amendment address themselves to the Congress and not to the judiciary, and in no way would an infringement of one of the rights therein have an adverse effect on the proper functioning of judicial processes. Moreover, if the First Amendment had been expected to be the subject of routine judicial enforcement, we would expect the subject to have come up frequently in the First Congress that debated and drafted the Bill of Rights. Yet, in his brilliant account of how the Bill of Rights came to be added to the Constitution, Professor Robert Goldwin manages to tell the whole story in complete detail without ever once mentioning that the subject of judicial enforcement of the Bill arose at all. The point of the Bill of Rights was not to trigger judicial review, but to weave a love of liberty into the American political culture. Here "is how it works," Goldwin tells us in his recent book:

> [T]o the extent that these principles of free government [in the Bill of Rights] have become a part of our "national sentiment," they do, indeed, often enable us, the majority, to restrain ourselves, the majority, from oppressive actions. That is the import of the first five words of the Bill of Rights: "Congress shall make no law" that attempts to accomplish certain prohibited things. It means that even if a majority in Congress, representing a majority of us, the people, wants to make a law that the Constitution forbids it to make, we, all of us, superior to any majority, say it must not be done, because the Constitution is the will of all of us, not just a majority of us.[5]

So as not to be misunderstood, I should add that certain provisions in the Bill of Rights do address themselves to the courts, and so are fit subjects for judicial review—obviously, Amendments Five through Seven, arguably Four through Eight—but the First Amendment is not one of them. It is only in this century, with the expansion of judicial authority in every direction, that we have come to think otherwise. And RFRA played right into that modern myth, insisting that a clause of the First Amendment be enforced by courts in a certain way when, at the very least, clear doubt exists that it was meant to be judicially enforced at all.

## 2. Congress assumed the validity of the "incorporation" doctrine.

Whatever uncertainty there might be about whether the First Amendment is gathered into the scope of judicial review, there is none whatever about the proposition that, along with the rest of the Bill of Rights, it was intended to restrain only the national government and not the states or their subdivisions. And, among scholars who do not hold a prior commitment to judicial activism, a second proposition is virtually settled as well: that the Fourteenth Amendment changed nothing about that fact.[6]

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4 *Gibbons v. Ogden*, 9 Wheaton (22 U.S.) 1 (1824), at 197.

5 Robert A. Goldwin, *From Parchment to Power: How James Madison Used the Bill of Rights to Save the Constitution* (Washington, D.C.: AEI Press, 1997), p. 100. See also Franck, *Against the Imperial Judiciary*, pp. 83–87.

6 See Richard G. Stevens, "Due Process of Law," in Stevens, *The American Constitution and Its Provenance* (Lanham, Md.: Rowman & Littlefield, 1997), pp. 123–142; Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment*, 2nd ed. (Indianapolis: Liberty Fund, 1997), pp. 155–189; and Raoul Berger, *The Fourteenth Amendment and the Bill of Rights* (Norman: University of Oklahoma Press, 1989).

Of course, on the Court the debate has gone all the other way, so that Justices Scalia and Thomas no less than their more liberal brethren act unquestioningly on the basis of 20th-century precedents that declared that much of the Bill of Rights is selectively "absorbed" or "incorporated" into the terms of the Due Process Clause of the Fourteenth Amendment. But these precedents are worse than doubtful: They represent a plain usurpation of power by the Court, and they ought not to be respected, on or off the Court, by anyone who regards the Constitution as superior to "constitutional law."

Yet the Congress, in passing RFRA, paid its respects to this judicial usurpation. The Act prescribed a judicial test of constitutionality to be applied to the laws and policies of all levels of government, including acts of Congress,[7] but clearly the legislation was motivated chiefly by fears for religious liberty's fate at the state and local level. Thus, the Senate report on the Act cited, as part of the authority for its passage, the "incorporation" precedent of *Cantwell v. Connecticut*, a 1940 case in which the Free Exercise Clause of the First Amendment was applied to the actions of states in a casual four sentences carrying no historical analysis whatsoever.[8]

Whatever one's worries about the fate of religious liberty after the *Smith* case—and Archbishop Flores of San Antonio was hardly being ground beneath the heel of oppression—whatever one's politics in these matters, the proper position of a *constitutional* conservative is to wonder what on earth the Supreme Court is doing enforcing the terms of the First Amendment against state and local governments. Wisely or unwisely—and I think the former—the Framers of the Bill of Rights *and* the Framers of the Fourteenth Amendment left the subject of religious liberty in relation to state and local policy to be sorted out by state constitutions, state legislatures, and state courts. How a Republican Party ostensibly committed to federalism could overlook this is a source of some wonder. Why it does not wish to restore that federalism from the ashes in which the Court has left it is cause for amazement.

## 3. Congress assumed the soundness of the "compelling interest" test.

Even if we assume both that the Supreme Court is the proper enforcer of the First Amendment and that it may act against the states under that banner, there remains the fact that the *Smith* ruling was no innovation, but a return to a previous generation of decisions under the Free Exercise Clause. The "compelling interest" test, having originated in other areas of constitutional law, was carried over to the adjudication of free exercise cases only as recently as 1963 (in *Sherbert v. Verner*), with its full import being discernible only in 1972 (in *Wisconsin v. Yoder*).[9] The effect of the test is to carve out exemptions to generally applicable laws, otherwise held valid, for those with religious scruples about obeying them. From the date of the very first religion case under the First Amendment until 1963, it was not thought that such exemptions are affirmatively required of government by the provision against "prohibiting the free exercise" of religion. As Chief Justice Morrison Waite put it in 1879, "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." To hold

7 How the Court could have applied RFRA to nullify any subsequent act of Congress is a mystery, since any such contradictory act would naturally be considered an implicit repeal of RFRA's terms, at least in part.

8 Senate Report 103-111, at 14, n. 40. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940), at 303.

9 *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

otherwise, he continued, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[10] Precisely so did the Court begin to hold in the 1960s and 1970s.

In the 1990 *Smith* case, the Court did not overrule the *Sherbert* and *Yoder* precedents, but distinguished them away so that they would have practically no value for the guidance of future decisions. In RFRA, Congress explicitly identified *Sherbert* and *Yoder* as the precedents it wished the Court to follow instead of *Smith*. Much disagreement persists on and off the Court about just how the Free Exercise Clause ought to be applied (given *Smith* and *Yoder* as the only choices, I would choose *Smith*). But I would offer one fairly mild judgment about this matter: that *Sherbert* and *Yoder* are the progeny of judicial activism, and *Smith* a return to judicial restraint. One may like *Sherbert* and *Yoder* and dislike *Smith*, but it seems clear that if that is one's preference, one is (here at least) on the side of judicial activism.

Thus, the Religious Freedom Restoration Act presented the ironic spectacle of the Congress complaining that the Supreme Court was not being activist enough in its interpretation of the Constitution. "Stop us all before we legislate again!" was the rallying cry of the Act's partisans as it swept virtually unhindered through both houses of Congress. In the final irony, the Court in the *Boerne* case rebuffed the demand, standing on its dignity and defending its newfound judicial restraint respecting this clause of the Constitution.

In a way, *Boerne* presented a case in which judicial activism was at war with itself. Congress, as I have said, demanded of the Court more activism than the Court was prepared to provide. But the Court could only refuse the demand by turning to its own well-worn precepts of judicial supremacy in the interpretation of the Constitution. Mistakenly citing *Marbury v. Madison* for support of judicial authority to have the last word,[11] Justice Kennedy's opinion for the Court concluded that Congress overreached with its power to enforce the Fourteenth Amendment:

> Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.[12]

These being the words of Justice Anthony Kennedy, we are obliged to conclude that they were written without a trace of self-consciousness or tongue-in-cheek humor. For what everyone but Justice Kennedy must surely notice is that he is, in effect, saying that only the Supreme Court enforces constitutional rights by changing what they are (and sometimes by making them up out of whole cloth), and that it will not tolerate the Congress kicking sand in its face as it goes about its business.

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10 *Reynolds v. United States*, 98 U.S. 145 (1879), at 166, 167. Justice Scalia partially quoted these words in *Smith*, 494 U.S. at 885. See also Walter Berns, *The First Amendment and the Future of American Democracy* (New York: Basic Books, 1976; reprint, Chicago: Regnery Gateway, 1985), pp. 35–55.

11 See *City of Boerne v. Flores*, ___ U.S. ___ (1997), slip opinion at 6 (Kennedy, J., for the Court).

12 *Ibid.*, at 9.

The *Boerne* case, in the end, presents the friend of the Constitution's original meaning and of judicial restraint with one of those rare instances when he does not know which side to choose, and must instead say "a pox on both your houses." On the one hand, the Court continued on its accustomed course of asserting its supreme position in the decision of all questions of constitutional politics, even where a clause of the Constitution (Section 5 of the Fourteenth Amendment) arguably gives Congress a legitimate role to play in such questions. On the other hand, Congress, rather than truly challenge judicial supremacy, had written legislation that embraced it: accepting the Court's role as final enforcer of the First Amendment, accepting the application of that amendment to the states, and importunately demanding that the Court return to its activist habits in the interpretation of the Free Exercise Clause. Little wonder that the judicial bully beat the stuffing out of the 98-pound weakling. In many respects, the weakling had it coming.

The "judicial usurpation of politics," as *First Things* referred to our present straits a year ago, remains the most pressing problem confronting the American experiment in republicanism. If RFRA is a failed model for congressional challenges to that usurpation, what is to be done instead?

## 1. Challenge judicial supremacy directly.

Eleven years ago, then-Attorney General Meese got a lot of attention for saying, in an address at Tulane University, that "the Constitution cannot be reduced to constitutional law," and that in its notorious dicta in *Cooper v. Aaron* in 1958,[13] the Supreme Court had misread both the Constitution and *Marbury v. Madison* in describing its own authority to determine the content of the supreme law of the land.[14] He was much excoriated on op-ed pages and by many legal scholars, but he stuck to his guns and began a debate that continues to this day, and in which he continues to play an active role, on Capitol Hill and in the public prints.

It is time to translate words into action, to move from rhetoric to a more concrete approach, as I am sure Mr. Meese would agree. If we are serious about the proposition that all the branches of the national government share a coordinate authority to interpret the Constitution, with none of them commanding the obedience of the others as to every sort of constitutional question, then it is past time the Congress began to assert its co-equal authority in practical ways. This reassertion of congressional responsibility can begin with the breaking of some comfortable habits.

First, during Senate confirmation hearings on nominations to the federal bench at all levels, Senators should cease requiring nominees to declare their allegiance to the "*Marbury* myth" that the Supreme Court has the last word on constitutional questions. The Senate should instead demand just the opposite—a clear statement from every nominee that he or she recognizes the difference between judicial review (properly understood) and judicial supremacy. This may require the removal of Senator Arlen Specter from the Senate Judiciary Committee—or his reëducation—since he has made a fetish over the last decade of asking nominees to repudiate the views of Mr. Meese and affirm the superiority of the

13 358 U.S. 1 (1958).

14 The speech was later printed as Edwin Meese III, "The Law of the Constitution," *Tulane Law Review*, Vol. 61 (1987), pp. 979–990.

Court over all rivals in these matters.[15] Other matters of what is infelicitously called "judicial philosophy" should also be central to confirmation hearings, but this is a good place to start.

Second, the Congress should stop bowing in the direction of the Court's presumed final authority when it legislates, and should instead consider repealing, or at least exempting some legislation from, the standard mechanisms by which it currently does so—such as the injunctive and class action provisions of the 1938 Rules of Civil Procedure.

Consider the recent fate of the Communications Decency Act (CDA) of 1996. No one was ever prosecuted under the Act's provisions. Instead, under federal rules of procedure that are within the power of Congress to change, politically interested parties led by the ACLU brought suit against the government, secured a hearing before a three-judge panel of a district court as required by the CDA itself, and won a preliminary injunction from that panel against the government's enforcement of the law against anyone whatsoever. Then, under a "special review provision" of the CDA itself, a rapid appeal was taken to the Supreme Court. The resulting affirmance of the district court's injunction means that a writ that cannot be gainsaid runs against every U.S. attorney barring enforcement of the Act, presumably on pain of contempt proceedings if any federal prosecutor seeks to enforce it anywhere. The CDA was thus rendered a dead letter.[16]

This method of broadly striking down laws by injunction short-circuits the kind of response to judicial error that Lincoln exemplified. In criticizing the *Dred Scott* ruling, Lincoln insisted that the Missouri Compromise was not to be considered unconstitutional just because the Court had held it so in one case concerning individual parties. If the other branches of the government did not agree with the ruling, the law could continue to be enforced as to other parties by the Executive, and it could continue to be supported by Congress, with supplementary legislation if need be. It would have been a different matter for Lincoln and for the fate of self-government if an injunction extending to the whole of the government had accompanied the Court's pronouncement on the law's constitutionality.

It must be said that the CDA was designed to be struck down; it was passed with an engraved invitation to the courts to do so. Had Congress, in passing the CDA, been confident of its own position as a true equal of the Court in interpreting the Constitution, it not only would have refrained from the timidity of the special review provisions in the Act. It would have included instead a provision shielding the Act from the injunctive procedure by which the courts declared it unconstitutional. Then we would have seen some criminal trials under the Act's provisions, and if on appeal of any convictions the Supreme Court had held the Act unconstitutional, it would still be open to Congress to legislate support for the Act's continued enforcement against others, and for the Executive to prosecute under it. What would happen next could get very interesting indeed.

15 See Clinton, *Marbury and Judicial Review*, 11–15; Franck, *Against the Imperial Judiciary*, 5–9.

16 See *Reno v. ACLU*, ___ U.S. ___ (decided June 26, 1997).

Story agreed with Hamilton's characterization of impeachment's application to judges in his *Commentaries on the Constitution.*

What seems to stand in the way of this method of controlling the judiciary is not the Constitution or the Framers' intent but history. A handful of lower federal judges have been removed who were not found guilty of any criminal offense in the narrow sense, but only one Supreme Court justice has ever been impeached, and he was acquitted: Justice Samuel Chase in 1805. A common misconception, however, is that the Chase trial settled the issue whether "political" impeachments may be pursued against judges with a firm "no." Our present chief justice has so concluded, in a book and in a well-publicized 1996 speech. But more careful scholars than Chief Justice Rehnquist (who can hardly be considered disinterested in this question) have concluded that the Chase trial was inconclusive on the constitutional issues—that it settled nothing regarding the breadth of Congress's power to impeach judges.

Should impeachment proceedings be launched regarding any federal judge, most particularly against any Supreme Court justice, the greatest care must be taken to pitch the issues at the highest possible level. Beginning in the House Judiciary Committee, and continuing on the floor of the House and in the Senate, Members of Congress must reëducate themselves about the separation of powers and judicial review—about their own role and that of the judges under the Constitution. The focus must be not one or two unpopular rulings, but (in Hamilton's words again) a "series of deliberate usurpations" of authority not belonging properly to the judiciary. The cause being defended by congressional removal efforts must be, and be seen to be, not a narrowly partisan one, but the integrity of the Constitution.

It will be impossible to convince everyone of this. But with adequate preparation of the public mind to receive the idea that self-government itself is at stake, and with the freest possible opportunity for open and fair-minded colloquy with any judge placed on trial in the Senate, an impeachment proceeding can become a great seminar for the whole nation regarding the political arrangements under which we choose to live.

It is possible that even a trial resulting in acquittal could be instructive for the polity and chastening for the judiciary. But prosecutors do not like to take cases to trial that they think they will lose; hence, the first defendant judge in particular must be one against whom an impeachment case can be made absolutely compelling. And remember that a two-thirds majority is necessary to convict in the Senate. The Framers set the bar high with good reason, and under present circumstances in the Senate, the politics of impeachment will have to be clearly distinguished from the politics of partisan ideology and scorekeeping.

## 4. Leave the Constitution alone.

By no means have we exhausted the possibilities for controlling the judiciary under the terms of the Constitution, but I should like to mention one other that is generally a bad idea: succumbing to the urge to amend the Constitution. This year alone, several amendments have been introduced, for example, to limit the judicial term of office to eight years in the lower courts (H. J. Res. 74), or to ten years at all levels including the Supreme Court (S. J. Res. 26 and H. J. Res. 77), or to 12 years for all (H. J. Res. 63). The amendments that absolutely limit judicial terms would do little to address our difficulties, as judges would be free to act as they please during their term of office. And those that provide for reappoint-

ment for successive terms might endanger the independence of the judiciary that Hamilton and his fellow Framers were intent on securing.

For all the branches of government, the courts included, it was the aspiration of the Framers to create a balance of strength and limitation—with officeholders powerful in their own right and free to act on their convictions, yet restrainable by the others when power becomes tyranny and the freedom to act becomes mere license. I have argued today that the Constitution as it already stands provides us with the principles that reveal judicial usurpation for what it is, and with the tools necessary to fashion remedies for that usurpation. The abuses of the judiciary run deep in the body of 20th-century case law, and it will not be the work of a moment to undo the damage. But patient toil, and a renewed attention in Congress to the high politics of constitutionalism, can begin to move us away from government by judges and back to genuine republican government.

My opposition to amending the Constitution to deal with our difficulties is not rooted in mere reverence for the Framers' handiwork if evidence shows its insufficiency in some respect. But this is a Russell Kirk Lecture, after all, and I am reminded of Kirk's great phrase about "the permanent things" to which we should pay heed. No institutions crafted by human beings can be truly permanent, of course. Yet the Constitution, as Joseph Story said, was "reared for immortality, if the work of man may justly aspire to such a title." Before we take risks with a structure whose "foundations are solid" and whose "compartments are beautiful, as well as useful" (again Story's words),[24] we should explore the building thoroughly and be certain we have not overlooked any of the useful features it already contains.

Or, to return to the metaphor with which we began: Before sending in for that body-building course that promises "new and improved" methods for strengthening a Congress grown weak and sickly in its confrontations with the judiciary, we should look about us for some old, perhaps dusty and neglected, but still useful exercise equipment that is and always has been within our grasp. Only use it, and the bully will have met his match.

## CONCLUSION

All the suggestions I have made today will come to nought until members of both houses of Congress recover for themselves what the Framers had in mind when creating truly co-equal branches of government under the Constitution. Only in this century did it begin to become commonplace to regard the justices of the Supreme Court as the "guardians" of the Constitution, as though only they, and no one else, had this charge by virtue of their oath of office.

The Framers knew better. For them, the fate of republicanism, and of constitutionalism itself, rested with "the extent and proper structure of the Union," and with institutions that "divide and arrange the several offices in such a manner as that each may be a check on the other." They knew that men are not angels, nor are they governed by angels—that we have a government "administered by men over men," and that judges are no more angelic than legislators.[25]

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24 *Story's Commentaries*, quoted in Franck, *Against the Imperial Judiciary*, p. 213.

25 *Federalist* No. 10, p. 84; No. 51, p. 322.

Thus, they charged all public officials, indeed all citizens, with the duty to preserve the Constitution, fully expecting us to persuade, to argue, to clash over what that preservation means. To forget that, to believe complacently that that highest task of our shared political existence is somebody else's business in which we will not interfere, is to let the cause of republican self-government slip through our fingers and to dishonor the memory of the men from whom we inherited that cause.