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SPLITTING THE ATOM OF MARSHALL'S WISDOM

SUSAN HERMAN*

I very much appreciate being invited to participate in the panel here today. I have been teaching constitutional law for a number of years, and although I frequently interact with the Supreme Court, both by court watching and observing, and also by, as Phil said, sometimes writing amicus briefs, I have really welcomed the opportunity to learn more about Justice Marshall, the person behind the opinions which we all cite so often, both from my stellar co-panelists who have given us a lot to think about, and from some of the reading I did in preparation for today.

The remarks that I want to make today very much follow up on what Judge Gibbons was just saying because in talking about the ideas that Justice Marshall and his contemporaries had about how to, as Justice Kennedy put it, split the atom of sovereignty, how to decide what the federal government gets to do and what the states get to do,¹ Judge Gibbons was focusing mostly on Marshall's understanding of the proper spheres of operation for the federal and state governments. He also talked at the end a little bit about the process question that I want to address, which is, who is going to make the decision about what is a proper national question, and what powers should be left to the states?

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¹ See *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (stating "The Framers split the atom of sovereignty"). See generally Judith Olans Brown & Peter D. Enrich, *Nostalgic Federalism*, 28 HASTINGS CONST. L.Q. 1, 17 (2000) (describing Justice Kennedy's use of this metaphor as a command to Congress to accord states esteem as joint participants in federal system); Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1671 (2000) (noting "Justice Kennedy is fond of saying, '[t]he Framers split the atom of sovereignty.'").

Now, although the Constitution clearly does skim some power off the top for the federal government, the Constitution does not address the question of how to decide when the federal government dips too deeply, if ever.

One thing that Marshall brought to this debate was his commentary in *McCulloch v. Maryland*,² an opinion that contains that so many fascinating thoughts as applicable today as in his own time. First, Justice Marshall was very clear about the fact that it is not the states that should decide what the national government gets to do.³ As Judge Gibbons described, Maryland wanted to decide that there should not be a United States bank and that if there was to be a bank, they should be able to tax it.⁴ Justice Marshall very clearly said no, a state cannot decide what the federal government gets to do because not all the people who will be affected by that decision are represented in that state.⁵

Therefore, it was clear to Justice Marshall that the decision about what the federal government was to do and how it was going to apply its enumerated powers had to be made at the federal level. But that does not answer the question of how to split the atom of federal power. Can Congress just decide for itself what it should do? To what extent does the Executive Branch have a role in this policy decision? And, our central question of judicial review, to what extent can the courts say to Congress no, you are wrong, you have exceeded your powers under the Constitution?

As a number of people have said today before me, it was in *Marbury v. Madison*,⁶ of course, that Justice Marshall took the position that it is emphatically the province of the courts to say what the law is,⁷ and as you have heard, interpreted the

² 17 U.S. 316 (1819).

³ See *id.* at 432 (stating "The American people . . . did not design to make their government dependent on the states.").

⁴ See *McCulloch*, 17 U.S. at 317-18 (discussing Maryland's law that imposed tax on all banks in state not chartered by state legislature).

⁵ See *Id.* at 431 (noting "The legislature of the Union alone . . . can be trusted by the people with the power of controlling measures which concern all . . ."); Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1269 (1989) (stating that Maryland legislature was forbidden to tax federal instrumentality because such tax extends to people who are not represented in Maryland's state legislature).

⁶ 5 U.S. 137 (1803).

⁷ See *id.* at 177 (stating "It is emphatically the province and duty of the judicial department to say what the law is."); David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L. J. 279, 326 (1992) (quoting Chief Justice

Constitution to be a part of "the law."⁸ The current majority of the Supreme Court, the Federalism Five,⁹ as they are sometimes called, in decision after decision invoke *Marbury v. Madison* when they want to invalidate Congressional acts, which they have wanted to do increasingly often in recent years.¹⁰ According to one survey I read, since the days of *Marbury v. Madison*, the Supreme Court has invalidated 150 acts of Congress.¹¹ That is less than one per year if you do the division.

During the last six years, however, just taking the 1994 to 1999 Terms, since the 2000 Term is not yet over, the court invalidated twenty-five acts of Congress.¹² That is quadruple the rate of overruling. In every one of these cases, the Court tells us that the Constitution is made up of words, and that these words set inherent limits on what the federal government can do.¹³ Therefore, as a part of its mandate to interpret the Constitution, it is up to the Court to decide how far the powers of Congress

Marshall's famous words endorsing the concept of judicial review).

⁸ See *Marbury*, 5 U.S. at 177 (finding "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation . . ."); David L. Faigman, "Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541, 556-57 (1991) (stating "According to Chief Justice Marshall, the Constitution forms 'the fundamental and paramount law of the nation.'"); see also Sylvia Snowiss, *Text and Principle in John Marshall's Constitutional Law: The Cases of Marbury and McCulloch*, 33 J. MARSHALL L. REV. 973, 973 (2000) (discussing Marshall's view a written Constitution is to be enforced in courts like law).

⁹ See Mark A. Miller, Note, *The Clean Air Act Amendments of 1990 and an Unbridled Spending Power: Will They Survive on the Supreme Court's Road to Substantive Federalism?*, 46 CLEV. ST. L. REV. 159, 169 n.72 (1998) (stating that "pro-federalism five" comprises Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas).

¹⁰ See, e.g., *Printz v. United States*, 521 U.S. 898, 936-37 (1997) (Thomas, J., concurring) (invoking *Marbury* to explain that federal government has limited powers and may not enlist state officials to carry out federal policies); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (invalidating right under Indian Gaming Regulatory Act to override State's sovereign immunity); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that Gun-Free Zones Act of 1990 exceeds Congress' commerce clause power).

¹¹ See Leon Friedman, *Symposium, The Supreme Court and State and Local Government Law the 1998-99 Term*, 16 TOURO L. REV. 265, 265 (1999). See generally *Seminole Tribe*, 517 U.S. at 47 (quashing right under Indian Gaming Regulatory Act to override State's sovereign immunity); *Lopez*, 514 U.S. at 551 (nullifying Gun-Free Zones Act of 1990).

¹² See, e.g., *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (holding that Trademark Remedy Clarification Act did not validly abrogate Florida's sovereign immunity); *Printz*, 521 U.S. at 934 (1997) (invalidating Brady Act in that federal government may not enlist state officials to carry out federal policies).

¹³ See *Lopez*, 514 U.S. at 584 (Thomas J., concurring) (stating that there are real limits to federal power); *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 847 (1995) (Thomas J., O'Connor J. & Scalia J., dissenting) (stating federal powers are limited by Constitution).

extend and how far the national powers extend, and by process of exclusion, what powers are left to the states. That is how *Marbury v. Madison* is consistently being invoked.¹⁴

I think that what the current Court is missing is that Justice Marshall believed that there was an essential corollary to the proposition of judicial review, the one that Judge Gibbons just articulated. The corollary is about the essential role of the political branches of the federal government in making these decisions.¹⁵

It is not surprising that Marshall had a lot of insight into how the federal government's three branches would interact, because he had had the unique opportunity, as you have heard from Charles Hobson, to serve in all three branches.¹⁶ He had been a member of Congress;¹⁷ he had been Secretary of State;¹⁸ and he ended up being Chief Justice of the Supreme Court.¹⁹ Therefore he had a very strong understanding of what he perceived of as the necessary relationship between law and politics.

In *McCulloch v. Maryland*, Justice Marshall told us, in several different ways, that the decision about whether or not establishing a bank of the United States was a "necessary and proper" thing for Congress to do, whether it was an appropriate exercise of Congress' constitutional powers, was not a decision for

¹⁴ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997) (invoking *Marbury* to divide federal and state powers); *Printz*, 521 U.S. at 937 (Thomas, J., concurring) (invoking *Marbury* as means of limiting federal government); *Lopez*, 514 U.S. at 566 (relying on *Marbury* to limit Congress' commerce clause powers).

¹⁵ See *McCulloch*, 17 U.S. at 421 ("the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it conferred 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.").

¹⁶ See Walter Dellinger & H. Jefferson Powell, *Marshall's Question*, 2 GREEN BAG 2D 367, 367 (1999) (analyzing Marshall's experience in the executive and legislative branches in exploring Marshall's definition of "political law"); Jean Edward Smith, *Marshall Misconstrued: Activist? Partisan? Reactionary?*, 33 J. MARSHALL L. REV. 1109, 1109 (2000) (stating Chief Justice Marshall brought his experience as Secretary of State and in House of Representatives to the bench).

¹⁷ See Samuel R. Olken, *Chief Justice Marshall and the Course of American Constitutional History*, 33 J. MARSHALL L. REV. 743, 754 (2000) (stating that in 1798 John Marshall became member of Congress); Samuel R. Olken, *Chief Justice Marshall in Historical Perspective*, 31 J. MARSHALL L. REV. 137, 147 (1997) (recognizing Marshall's service as member of Congress); Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CALIF. L. REV. 671, 690 (1998) (acknowledging John Marshall's service in Congress).

¹⁸ See Smith, *supra* note 16, at 1109 (noting Marshall's service as Secretary of State).

¹⁹ See *id.* at 1109 (2000) (discussing characteristics Marshall brought to bench when he was appointed Chief Justice).

the courts to make.²⁰ To the snickers of generations of law students ever since, Marshall did some extremely fast footwork in interpreting the meaning of the words "necessary and proper," and concluded, as he said, that the question of what is necessary and proper is to be addressed "in another place."²¹

He might have said something that would sound a lot more like the current Court's opinions. He might have said that if the Constitution provides that Congress can only do what is "necessary" and "proper," then the Court, deciding what the law is, must decide what is "necessary" and "proper" and therefore should tell Congress when they are out of bounds. "Necessary and proper," as a term in the Constitution, could have been treated as an opportunity for the Court to "say what the law is."²² Marshall did not take that approach because he understood that the important, essential corollary to judicial review was judicial self-restraint.²³ He knew that if the Court did not defer on occasion to Congress's determinations, that rather than being the co-equal branch that Charles Hobson described, the Court would start to become more than equal;²⁴ the Supreme Court would truly become supreme.

So in several of his opinions, particularly in *McCulloch* and in *Gibbons v. Ogden*,²⁵ Justice Marshall observes that what is "necessary and proper" is to be decided by Congress.²⁶ He tells us

²⁰ See *McCulloch v. Maryland*, 17 U.S. 316, 412–14, 418, 420, 422 (1819) (employing phrase "necessary and proper").

²¹ *Id.* at 423 ("But, were [a federal bank's necessity less apparent, none can deny it being an appropriate measure; and if it is, the degree of necessity, as has been very justly observed, is to be discussed in another place.>").

²² See *Marbury*, 5 U.S. 137, 178 (1803) (stating that it is "essence of judicial duty" to determine what law governs case).

²³ But see Richard A. Posner, *The Meaning of Judicial Restraint*, 59 IND. L.J. 1, 14 (1983) (declaring that Marshall did not exercise judicial self-restraint).

²⁴ See Charles F. Hobson, *Editing Marshall*, 33 J. MARSHALL L. REV. 823, 853 (2000) [*hereinafter* *Editing Marshall*] (stating that Marshall was aware of possible attacks by legislature and walked "a fine line between activism and restraint"); Charles F. Hobson, *The Origins of Judicial Review*, 56 WASH. & LEE L. REV. 811, 816 (1999) [*hereinafter* *Origins*] (pointing out that Marshall limited judicial power, enabling judiciary to maintain judicial review); see also *Fletcher v. Peck*, 10 U.S. 87, 130 (1810) (Marshall using restraint in delivering decision of Court).

²⁵ 22 U.S. 1 (1824) (dealing with clause and conflict between States and Federal government).

²⁶ See *Gibbons*, 22 U.S. at 187 (understanding that "Congress is authorized 'to make all laws which shall be necessary and proper for the purpose.'"); *McCulloch*, 17 U.S. at 422 (stating that if judicial department determined law's necessity, it would tread on legislative ground); see also *Wayman v. Southard*, 23 U.S. 1, 22 (1825) (stating that Congress is to make all laws that are "necessary and proper").

in *Gibbons v. Ogden* that the only real limitation on the national Congress in deciding the range of its actions is a political limit.²⁷ As he says, "the wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments."²⁸

In a speech that Marshall had given before the House of Representatives in 1800, Marshall, who was himself a Representative at that point, made some very interesting remarks about the role of Congress in deciding the meaning of the Constitution.²⁹ In describing the concept of what I think we would have to call "political law," Marshall suggested that there is no sharp distinction between "law" and "politics."³⁰ He wanted to leave appropriate space for the co-equal branches of the federal government, particularly for Congress, to participate in decisions about what the role of the national government would be.³¹

²⁷ See *Gibbons*, 27 U.S. at 197 (stating that "influence which [Congress] constituents possess at elections are sole restraints on which they have relied, to them secure from its abuse").

²⁸ *Id.* at 197 ("The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse").

²⁹ See THE PAPERS OF JOHN MARSHALL 82 (Charles T. Cullen, ed., 1984) (providing text of Congressman Marshall's speech before House of Representatives on controversy surrounding extradition of Jonathan Robbins); see also *Editing Marshall*, *supra* note 27, at 872 (describing renewed interest in Marshall's speech among legal scholars because in addition to being "seminal document" concerning president's authority over foreign affairs, it also "clarifies the meaning of Marshall's famous distinction between law and politics uttered in *Marbury*"). See generally Dellinger & Powell, *supra* note 16, at 370 (claiming that notion that judiciary has exclusive authority to interpret Constitution is refuted by power vested in Congress to pass legislation, which requires that Congress make judgments about constitutionality of proposed legislation).

³⁰ See THE PAPERS OF MARSHALL, *supra* note 29, at 103 (stating that questions of political law are not to be decided by courts); see also Dellinger & Powell, *supra* note 16, at 373 (arguing that Marshall believed resolution of some issues involving interpretation of law required discretionary judgment commonplace in politics and, although those issues still involved application of legal norms, such political law questions were properly committed to Congress or president and not courts).

³¹ See THE PAPERS OF JOHN MARSHALL, *supra* note 29, at 95 (arguing that legislative and executive branches of government would be swallowed up by courts if judicial power were extended to every question under Constitution or laws and treaties of United States); see also David E. Marion, *The State of the Canon in Constitutional Law: Lessons from the Jurisprudence of John Marshall*, 9 WM. & MARY BILL RTS. J. 385, 408-09 (2001) (arguing that Marshall never went so far as to argue that Court could examine any

That is the part of Marshall's legacy that I think today's Supreme Court has forgotten. We could say that the current Court has split the atom of Marshall's wisdom. The majority in virtually every case, the same five person majority in the dozen cases that Marty Flaherty mentioned plus a number of others, consistently cites *Marbury v. Madison*.³² It is the Court's power and obligation to say what the law is, regardless of what Congress wishes to do.

The dissenters, the same four dissenters in almost all of those opinions cite *McCulloch v. Maryland*. They cite *Gibbons v. Ogden*. They cite the need for the Court to be partners with Congress and to sometimes defer to Congress's political determinations about how to use their power.³³

There are many different respects in which the current Court has been far from deferential to Congress. I will give you a few examples, assuming that you are probably familiar with the recent cases, at least to some extent.

First, with respect to fact-finding, the low water mark of judicial deference to Congress' fact-finding, I think, came earlier this term in the case of *University of Alabama v. Garrett*.³⁴ That was the case in which the Court decided that Congress was not permitted to allow individuals to sue the states under the Americans with Disabilities Act³⁵ because of the Eleventh

matter that appeared to be constitutional).

³² See, e.g., *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (holding that Congress lacks authority to override Supreme Courts rulings by legislating); *Miller v. Johnson*, 515 U.S. 900, 922 (1995) (citing its duty under *Marbury* to say what law is, Court explained that it could not surrender its role in enforcing constitutional limits on race-based state action to executive branch).

³³ See *United States v. Morrison*, 529 U.S. 598, 628 (2000) (Souter, J., dissenting) (stating that "[b]y passing legislation, Congress indicates its belief that there is factual support for its exercise of commerce power and courts may only review such factual findings for rationality, not for soundness); *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Bd.*, 527 U.S. 666, 701-02 (1999) (Breyer, J., dissenting) (claiming that Supreme Court's protection of state sovereign immunity prohibits Congress from achieving one of basic goals of federalism, because such protection deprives Congress of legislative flexibility necessary to decentralize governmental decision making and to provide local citizens with variety of enforcement powers, thereby making it more difficult to protect individual liberty); *Seminole Tribe v. Florida*, 517 U.S. 44, 77 (1996) (Stevens, J., dissenting) (describing Court's holding that Congress may not create private federal cause of action against state as narrow and illogical because it prevents Congress from providing citizens with federal forum for wide range of actions against states).

³⁴ 531 U.S. 356 (2001).

³⁵ Equal Opportunity For Individuals With Disabilities Employment 42 U.S.C. §§ 12111-12117 (2001).

Amendment.³⁶ In looking to see whether or not Congress was responding to a constitutionally cognizable problem, the Court scrutinized the rather extensive hearings that Congress had conducted and concluded that Congress simply did not have enough evidence that the states themselves had been discriminating against disabled people.³⁷

Now, the dissenters, of course, looked at the same evidence and felt there was plenty of evidence on the basis of which Congress could have concluded that there was a problem with respect to the states denying disabled people equal treatment.³⁸

The four dissenters consistently, since the *Lopez*³⁹ case, have been asking, why are we second-guessing Congress? Why are we asking what *we* think the facts show? Why do we not ask the more removed question, did Congress have a rational basis for their conclusion?⁴⁰ Why do not we show Congress some deference in their process of deciding what they think about the state of the facts, as found according to their legislative, political power, and whether there is a problem requiring national attention.

So the Court has not been very deferential with respect to legislative fact-finding. And it is ironic that in some of the significant cases that the Supreme Court has decided recently, the record that Congress had compiled to justify its own actions was with respect to legislation that was drafted before Congress could have known the Court's current rules.

³⁶ U.S. CONST. amend. XI; see *Garrett*, 531 U.S. at 360 (holding that suits by state employees to recover money damages from state for its failure to comply with Title I of Americans with Disabilities Act are barred by Eleventh Amendment).

³⁷ See *Garrett*, 531 U.S. at 368 (stating that Congress could not identify pattern and history of unconstitutional employment discrimination by states because majority of incidences describing discrimination against disabled individuals contained in Congress' record did not deal with activities of states).

³⁸ See *id.* at 970 (Breyer, J., dissenting) (arguing that Congress compiled vast legislative record that documented society-wide discrimination against disabled persons and that such powerful evidence of societal discrimination implicated not only private persons and local governments, but state governments as well).

³⁹ 514 U.S. 549, 603, 608, 615 (1995). (noting four dissenters were Justices Stevens, Souter, Breyer and Ginsburg).

⁴⁰ See *Lopez*, 514 U.S. at 618 (Breyer, J., dissenting) (asserting that correct question to ask is "whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce"). See generally *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 192 (2001) (Stevens, J., dissenting) (stating that majority's "miserly" construction of Clean Air Act incorrectly narrows power of Congress under Commerce Clause); *Printz v. United States*, 521 U.S. 898, 939 (1997) (Stevens, J., dissenting) (disagreeing with majority's holding that provisions of Brady Act were infringement on state sovereignty and unconstitutional).

In the *Lopez* case in 1995, the Supreme Court held that Congress did not have enough power under the Commerce Clause to enact the Gun-Free School Zones Act.⁴¹ Congress essentially had held no hearings regarding that legislation because they did not think they needed to.⁴² It had been many decades since the Supreme Court had even questioned Congress' use of its authority under the Commerce Clause.⁴³ And so Congress did not feel the need to have show hearings so they held none.

Lopez was considered by some to be a shot across the bow, and many people thought that the holding of the case would not really go anywhere.⁴⁴ However, Chief Justice Rehnquist, just before deciding *Lopez*, urged in Congress not to pass the Violence Against Women Act ("VAWA").⁴⁵ Congress enacted VAWA despite Justice Rehnquist's concern that the statute gave the federal courts too great a role in trying to protect the civil rights, as Congress thought, of women who were subjected to domestic and other forms of violence.⁴⁶

Last term in *United States v. Morrison*,⁴⁷ the Supreme Court went back, looked at the Violence Against Women Act and held that Congress did not have sufficient power either under the

⁴¹ 18 U.S.C. § 922 (q) (2001) (providing in pertinent part, "it shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."); see *Lopez*, 514 U.S. at 559 (finding that Gun Free School Zones Act does not regulate activity that "substantially affects" interstate commerce).

⁴² See *Perez v. United States*, 402 U.S. 146, 156 (1971) (stating that "Congress need not make particularized findings in order to legislate"); Jennifer R. Hagan, Notes and Comments: *Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence after the Death of Title III of the Violence Against Women Act*, 50 DEPAUL L. REV. 919, 924 n.30 (2001) (stating "Before the United States Supreme Court's decision in *U.S. v. Lopez*, it would have seemed that legislative findings connecting an action to interstate commerce would be enough").

⁴³ See *Schechter v. United States*, 295 U.S. 723 (1935) (finding that section 3 of National Industrial Recovery Act exceeded power of Congress to regulate interstate commerce); see also Vicki C. Jackson, *Cautioning Congress to Pull Back*, N.J. L.J., Aug. 28, 1995, at 14 (noting that *Lopez* was first time since New Deal that Court had struck down federal statute for exceeding Congress' Commerce Clause power).

⁴⁴ See Jackson, *supra* note 43, at 14 (contending that because *Lopez* was 5-4 decision, it would be difficult to predict its future effect).

⁴⁵ 42 U.S.C. § 13981 (2001). See 138 Cong. Rec. E746-01, E747 (1992).

⁴⁶ See Margo L. Ely, *Federal Law Protecting Women Begets a House Divided*, CHI. DAILY L. BULLETIN, April 12, 1999 (noting that in 1992, before VAWA was passed, Rehnquist complained that it would involve federal courts in numerous domestic disputes); see also 42 U.S.C. § 13981 (2001) (stating that purpose of act is to "protect the civil rights of victims of gender-motivated violence and to promote public safety, health and activities affecting interstate commerce").

⁴⁷ 529 U.S. 598 (2000).

Commerce Clause or under the Fourteenth Amendment⁴⁸ to enact that statute.⁴⁹ As I just mentioned, Chief Justice Rehnquist views about VAWA were conveyed to Congress just before *Lopez* was decided, so Congress could not have known at the time that they passed VAWA that *Lopez*, with its more demanding standards, was coming. Thus, Congress did not know how much of a record they would have needed to put together. Nevertheless, their record was fairly extensive. They compiled a great deal of information about the impact of domestic violence on interstate commerce and the impact on the nation's economy.⁵⁰ The Court, however, was not convinced that the problem justified the solution Congress had chosen.⁵¹

In addition to looking skeptically at Congress' findings of fact, the second way in which the current Supreme Court has declined to defer to Congress is in deciding the appropriate scope of Congress's "necessary and proper" actions. In *Morrison*, the Supreme Court does not actually question Congress' conclusion that victims of violence will miss work and require medical treatment, substantially impacting the national economy, and therefore, impacting interstate commerce.⁵² Instead, the majority reasons that we can not let Congress regulate in this area, because if they can regulate here just because there is an impact, where is their power to stop?⁵³ It is a slippery slope. What will be

⁴⁸ U.S. CONST. amend. XIV.

⁴⁹ See *Morrison*, 529 U.S. at 612-19, 626-27 (applying framework in *Lopez*, Court held that Congress did not have power to regulate violent criminal conduct based on its aggregate effect on interstate commerce and that State Action requirement of Fourteenth Amendment precludes that Congress from providing remedies against private individuals for discriminatory conduct).

⁵⁰ See e.g., H.R. REP. NO. 103-711, at 385 (1994); S. REP. NO. 103-138, at 41 (1993); S. REP. NO. 101-545, at 33 (1990); see also Vicki C. Jackson, *Article: Federalism and the Court: Congress as the Audience?*, 575 ANNALS 145, 151 (2001) (suggesting that Congress should develop record of facts supporting proposed legislation).

⁵¹ See *Morrison*, 529 U.S. at 615 (stating that holding otherwise would "allow Congress to regulate any crime so long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption . . ."); see *Lopez*, 514 U.S. at 564 (acknowledging that government theories in support of statute would give Congress power to regulate everything).

⁵² See *Morrison*, 529 U.S. at 614 (acknowledging that § 13981 "is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families."); see also Lisanne Newell Leasure, *Commerce Clause Challenges Spawned by United States v. Lopez are Doing Violence Against the Violence against Women's Act (VAWA): A Survey of Cases and the Ongoing Debate Over How the VAWA will Fare in the Wake of Lopez*, 50 ME. L. REV. 409, 416-17 (1998) (discussing congressional findings with regard to Violence Against Women Act).

⁵³ See *Morrison*, 529 U.S. at 615; see *United States v. Lopez*, 514 U.S. 549, 564

left for the states to do? This is not an economic activity that Congress is regulating, says the Court, so the impact of the activity does not provide a proper basis for federal action.⁵⁴

That second manner of reviewing the work of Congress would not have looked familiar to Justice Marshall. In *Gibbons v. Ogden*, and in *McCulloch v. Maryland*, he concluded that it is up to Congress not the Court, to decide what is "necessary and proper."⁵⁵

The third way in which the current Supreme Court exhibits a lack of deference to Congress is reflected in the Eleventh Amendment cases that Judge Gibbons was discussing. There are many cases where the current Supreme Court holds that Congress cannot have access to a particular remedy to solve an admittedly national problem.⁵⁶ Congress cannot always subject the states to suit because of the Eleventh Amendment, for example, and thus in the *Garrett* case, which I mentioned before, Congress was told that they cannot allow individuals to sue states under the Americans With Disabilities Act.⁵⁷

In the previous term the Supreme Court had also held that Congress did not have a sufficient basis to allow the states to be subject to suit under the Age Discrimination In Employment Act,⁵⁸ in a case called *Kimel*,⁵⁹ because Congress had not made a

(reasoning that government theories in support of statute would give Congress power to regulate everything).

⁵⁴ See *Morrison*, 529 U.S. at 617. See Marianne Moody Jennings & Nim Razook, *United States v. Morrison: Where the Commerce Clause Meets Civil Rights and Reasonable Minds Part Ways: A Point and Counterpoint from a Constitutional and Social Perspective*, 35 NEW ENG. L. REV. 23, 43-55 (2000) (presenting opposing viewpoints as to whether the how "economic/non-economic distinction is "an unworkable distinction and an invitation to return to ad hoc and uncertain commerce clause jurisprudence.").

⁵⁵ See *Gibbons v. Ogden*, 22 U.S. 1, 47 (1824) (finding "[P]owers implied as necessary and proper to carry into effect an exclusive power, are themselves exclusive."); *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (stating that national legislature must be given discretion so that it could perform its duties "in a manner most beneficial to the people."); see also U.S. CONST. art. I, § 8, cl. 17 (granting Congress power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .").

⁵⁶ See *Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996) (holding that Congress may not abrogate states' Eleventh Amendment immunity); see also *Alden v. Maine*, 527 U.S. 706, 754 (1999) (extending state sovereignty bar announced in *Seminole Tribe* from lawsuits against states in federal court to lawsuits against states in state court); *Florida Prepaid Post Secondary Educ. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627, 665 (1999).

⁵⁷ See *Bd. of Trustees v. Garrett*, 531 U.S. 356, 363-66 (2001).

⁵⁸ 29 U.S.C. § 623 (1994) (making it unlawful for employer, including a State, to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual, because of such individual's age).

⁵⁹ *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62 (2000).

sufficient showing to satisfy the Court that national intervention was appropriate or necessary.⁶⁰ In those cases, the Court interposed the brick wall of the Eleventh Amendment between Congress and its goal.

Similarly, a few years ago in *Printz v. United States*,⁶¹ the Court reviewed the Brady Act,⁶² where Congress was trying to increase federal involvement in gun control.⁶³ Congress attempted to do what the Supreme Court characterized as "commandeering" state officials to help do background checks when people apply for guns.⁶⁴ The Supreme Court told Congress that they were not permitted to implement gun control laws in that way.⁶⁵ The federalism principles at stake, according to the Court, prohibited Congress from employing local officials to do a federal job.⁶⁶ The means Congress had chosen, in other words, were inappropriate, even though the propriety of federal action itself went unquestioned.⁶⁷

The final manner in which the Supreme Court is not at all deferential to Congress concerns what Judge Gibbons has been calling "pure constitutional law." The meaning of *Marbury v. Madison* to the current Court is that once the Constitution says what the law is, and the Supreme Court says what the Constitution means, Congress has nothing more to say.⁶⁸

⁶⁰ See *id.* at 88-92 (specifically noting at 91: "In light of the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment.").

⁶¹ 521 U.S. 898 (1997).

⁶² 18 U.S.C. § 922(s) (1994) (mandating waiting period and background check prior to handgun purchase).

⁶³ See *Printz*, 521 U.S. 898, 902 (finding "The Act requires the Attorney General to establish a national instant background check system by November 30, 1998. . .").

⁶⁴ See *id.* at 914 (noting "[T]he Federal Government would in some circumstances do well 'to employ the State officers as much as possible, and to attach them to the Union by an accumulation of their emoluments'—which surely suggests inducing state officers to come aboard by paying them, rather than merely *commandeering* their official services." (citing THE FEDERALIST NO. 36 (Alexander Hamilton)) (emphasis added)).

⁶⁵ See *id.* at 925 (stating "[O]pinions of ours have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.").

⁶⁶ See *id.* at 932 (finding "[T]he whole object of the law is to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty. . .").

⁶⁷ See *id.* (noting "It is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.").

⁶⁸ See Ann Althouse, *Inside the Federalism Cases: Concern about the Federal Courts*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 140 (2001) (finding "In *Boerne*, the Supreme

Congress, of course, is not permitted to contract what the Constitution means. A recent example of this principle was *Dickerson v. United States*,⁶⁹ the Supreme Court case holding unconstitutional the federal statute that attempted to revise the legacy of *Miranda v. Arizona*.⁷⁰ There the Supreme Court said that Congress improperly tried to reduce protection for individual liberties.⁷¹ They tried to change what the Supreme Court said the Constitution means, by lessening protections; that is not permissible.

However, the Supreme Court has also been disallowing Congress from saying what the Constitution means in situations where what Congress was trying to do was to increase protection for individual rights.⁷² In 1993, reacting to a Supreme Court decision that they regarded as not sufficiently protective of individual religious rights, Congress enacted what they called the Religious Freedom Restoration Act⁷³ and tried to restore some First Amendment protection for people exercising their religions. The Supreme Court in *City of Boerne v. Flores*⁷⁴ looked at what Congress had done and said no, Congress cannot say what the Constitution means.⁷⁵ We have already told you what the Constitution means and Congress may not increase constitutional protection any more than they may reduce constitutional protection.

So in reviewing all these ways, this entire platter of ways in

Court responded with a strong statement of its intent to preserve the judicial grip on the lawsaying [sic] function. The courts, not Congress, would control the interpretation of constitutional rights.”).

⁶⁹ 530 U.S. 428 (2000).

⁷⁰ 384 U.S. 436 (1969).

⁷¹ See *Dickerson*, 530 U.S. at 432 (holding that *Miranda* may not be overruled by Act of Congress).

⁷² See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (stating that Congress' power is remedial rather than decreeing substance of Constitution); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (suggesting that framers of the Fifteenth Amendment “indicated that Congress was to be chiefly responsible for implementing the rights created by that amendment Constitution”); Evan H. Caminker, *Shifting the Balance of Power? The Supreme Court, Federalism, & State Sovereign Immunity: “Appropriate” Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1176 (2001) (stating “To be sure, one might counter that Section 5 should be interpreted as containing one-way ratchet, such that Congress can act to ‘correct’ judicial under protection but not overprotection of Section 1 rights.”). see generally *infra* text accompanying notes 78-80.

⁷³ 42 U.S.C. § 2000bb-1 (2001).

⁷⁴ 521 U.S. 507 (1997).

⁷⁵ See *id.* at 519 (stating that Congress has power to enforce these rights, not to determine what constitutes violation of those rights).

which the current Court refuses to give any deference to Congress, I am tempted to do the terrible anachronistic thing that no real historian would ever do, which is to ask, what would Justice Marshall make of all this? If we could get him back here today, what would he say about what the current Court has done with his legacy? Judge Gibbons had some suggestions of what Marshall might say about the Eleventh Amendment jurisprudence.

I would suggest that Marshall would be extremely surprised by how the Court has been treating the Commerce Clause. It is more difficult to evaluate what his response might be to some of the Court's other decisions. *City of Boerne* and some of the other recent cases involve judicial review of Congress' exercise of its enforcement power under the Fourteenth Amendment,⁷⁶ which of course, did not exist in Marshall's day. A hypothetical critic might argue that Justice Marshall would not have understood what we have been through in the past two hundred years, he would not have understood that the federal government is no longer a newborn fragile flower, and he would not have understood that maybe the states need some protection from the courts to help them fight back and equalize their role.

Even if I were attracted to that hypothetical argument, I would show Justice Marshall the Fourteenth Amendment and explain that the Fourteenth Amendment was intended precisely to change the relationship between the federal and state governments, and to further enhance federal power.⁷⁷ So when Congress is acting under its Fourteenth Amendment enforcement power, Justice Marshall might well conclude that his comments about the proper deference to be given to Congress are even more to the point when Congress is trying to enact and enforce civil rights legislation.

Amazingly, one case that has not yet been mentioned today is *Bush v. Gore*.⁷⁸ In that case, lurking in the background, if Florida had not been able to select a slate of electors, was Congress. Congress could have decided who the electors from Florida would be if a controversy had arisen. But the Court would not leave it for Congress to decide. So, it is certainly not

⁷⁶ U.S. CONST. amend. XIV, § 5.

⁷⁷ See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

⁷⁸ 531 U.S. 98 (2000).

news to a contemporary audience that the current Court has not been deferential to Congress, but is making its own "political law" decisions.

There is one more area that I would like to discuss briefly. I have been talking about the separation of powers in the federal government and the question of who should make the decisions about what is a national question and what is a state question. Certainly, I cannot claim that there is any novelty to my perception that the current Supreme Court is not being particularly deferential to Congress.

What I have not actually been hearing or reading much about is the role of the Executive Branch in all of this. If you look at what has happened in a number of different areas, particularly with respect to civil rights enforcement, there are opportunities for the Executive Branch to be doing a lot more to define the national role.

For example, there were two kinds of cases that I was mentioning where Congress has been told that certain remedies were unavailable. First, they cannot have the Americans With Disabilities Act or the Age Discrimination In Employment Act apply to the states to the extent of allowing individual people to sue the state for damages.⁷⁹ If the state denies people their rights under these federal acts, the Department of Justice can bring suit.⁸⁰ The federal government suing the state is an exception to the Eleventh Amendment. So what ends up happening, given the Court's current maximalist interpretation of the *Marbury v. Madison* power and their current very minimalist interpretation of their duty of deference to Congress, is that Congress cannot provide that individual people can bring litigation against the states, but they can, if they wish, provide enough money for a

⁷⁹ See *University of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (holding Congress did not validly abrogate states' sovereign immunity from suit by private individuals for money damages under Title I of American Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 92 (2000) (holding Congress exceeded its authority under the enforcement provision of the Fourteenth Amendment and therefore did not validly abrogate states' sovereign immunity to suits by private individuals in Age Discrimination in Employment Act).

⁸⁰ See 29 U.S.C.S. §626 (Law. Co-op. 2001) (making remedies available for victims of violations); 42 U.S.C.S. § 12117 (Law. Co-op. 2001) (giving authority to Attorney General to enforce the statute); see also Ann C. Hodges, *Article: Dispute Resolution under the Americans with Disabilities Act: A Report to the Administrative Conference of the United States*, 9 ADMIN L.J. AM. U. 1007, 1028-29 (1996) (discussing how Department of Justice is overwhelmed with its enforcement responsibilities under ADA).

bloated federal bureaucracy to achieve their goals by bringing suit on behalf of those individuals.

Printz tells us that Congress cannot use state officers to help to enforce gun control laws.⁸¹ What can Congress do? They can create a bloated federal bureaucracy and have federal agents running all around the country doing background checks instead.

This is something that has not actually happened a whole lot, either under the current or the last Administrations. But it is a theoretical possibility.

In terms of the Executive's role in making national decisions, here too we have to go back to *Marbury v. Madison* where, again, Justice Marshall balanced an on-the-one-hand, with an on-the-other-hand. Justice Marshall in *Marbury* did hold that President Jefferson could be subject to a writ of mandamus if he violated the law, and that the Court would decide what that law was.⁸² But at the same time, Justice Marshall also tried to provide an ample realm of discretion for the President to make political discretionary decisions.⁸³ Here, too, Marshall may not have seen so sharp a line between what is a political decision and what is not.

The current Court is not very deferential to the Executive Branch either, unless they want to be. There are a few recent examples of federal statutory interpretation where this comes up. One major case earlier this term, the Solid Waste Agency case,⁸⁴ concerned the enforcement of the federal Clean Water Act.⁸⁵ That was the case where the migratory birds wanted to stop in Illinois and other people wanted to build over their hotel. Then the birds would not have been able to travel interstate because they would not have had lodging

⁸¹ See *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Federal Government may neither issue directives requiring states to address particular problems, nor command the states' officers, or those of their political subdivisions, to administer or enforce federal regulatory program).

⁸² See *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

⁸³ See generally Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 55-56 (1994) (noting Marshall's view that President is invested with certain important political powers, in exercise of which he is to use his own discretion); see also Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. 396, 417 (1987) (stating that for Marshall, "discretionary acts" and "political acts" were synonymous.).

⁸⁴ *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

⁸⁵ 33 U.S.C.S § 1344(a) (Law. Co-op. 2001) (regarding permits for dumping in navigable waters).

One of the questions that the Supreme Court might have decided in this case was whether or not applying the Clean Water Act to a body of water that is totally within a single state and is not particularly navigable, except by birds, exceeded the Commerce Clause power. Instead, what the Court said was that the federal agency in question, the U.S. Army Corps of Engineers⁸⁶ had incorrectly interpreted their enabling statute,⁸⁷ that they did not know what it meant, and that they were applying their power too broadly. One reason, the Court said, why they were sure that the Executive Branch was misinterpreting their statutory mandate was the rule of constitutional doubt.⁸⁸ If, in fact, the statute went as far as the agency believed, it might be considered unconstitutional.⁸⁹ So there is one example where the Executive Branch got no deference.

The Voting Rights Act⁹⁰ cases are another significant area where the Executive Branch, specifically the Department of Justice, has gotten very little deference in their interpretation of what the federal statutes mean.⁹¹

Finally, in another case from last term, the Food and Drug Administration case of *Brown and Williamson*,⁹² where the FDA claimed the right to regulate tobacco as a drug, the Supreme Court told the FDA that was not Congress' intent.⁹³ The Court also sometimes defers to Executive Branch decisions. Last term in *Geier v. American Honda*,⁹⁴ for example, the question was whether or not federal law about airbags pre-empted the right of individuals to bring a common law tort suit in their state.⁹⁵ The

⁸⁶ See *Solid Waste Agency*, 531 U.S. at 162 (discussing U.S. Army Corps of Engineers interpretation of §404(a) of Clean Water Act).

⁸⁷ See *Solid Waste Agency*, 531 U.S. at 167-73.

⁸⁸ See *Solid Waste Agency*, 531 U.S. at 174 (stating that under such misinterpretation, states' rights reserved to the states by the Constitution would be infringed upon).

⁸⁹ See *id.* (stating that if respondents were allowed their interpretation, states rights' under Constitution would be jeopardized).

⁹⁰ 42 U.S.C.S. §1973.

⁹¹ See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 341 (2000) (finding that section 5 of Voting Rights Act does not prohibit pre-clearance of redistricting plan, as was thought by Attorney General).

⁹² *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

⁹³ See *id.* at 132.

⁹⁴ 529 U.S. 861 (2000).

⁹⁵ See *id.* at 865.

Supreme Court said, five to four (although not the usual five and the usual four), that there is federal pre-emption here, prohibiting state tort actions.⁹⁶ Was Congress clear about wanting to pre-empt state law? Not a bit.

The Department of Transportation, however, in briefs written during the course of litigation, after the fact, had taken the position that it might be a good idea if the federal standards were the only ones in town. And maybe it was a good idea to tell the states, including New York, whose Court of Appeals had held that airbag suits under state law were not pre-empted, that they could not allow such suits.⁹⁷ So in *Geier*, a strong federal hand came down to limit state policy, and the Court used the excuse of deferring to the Executive Branch interpretation of the statute in question.

Now, all of this, I think, raises a very fair question about the possibility of separating law and politics. How political is the Court being? People after *Bush v. Gore* have been concluding that at some point you do have to start looking at the results, and not just the process of "saying what the law is." And you have to start looking at what ends this supreme judicial power is serving. Is it a coincidence that the laws that the current Court has struck down in *Lopez* and in *Printz* are gun control laws, where the deciding vote, Clarence Thomas, thinks that those laws probably violate the Second Amendment⁹⁸ anyway?

Is it a coincidence that one of the few cases, the *Geier* case about the airbags, where the Supreme Court went out of its way to defer to the agency in question in holding that federal power pre-empts local power, is a case involving tort reform and not civil rights enforcement? Justice Stevens, writing for four dissenting members of the Court in the *Geier* case, pointedly remarked, "this is a case about federalism"⁹⁹ - the same thing

⁹⁶ See *id.* at 867.

⁹⁷ See *Drattel v. Toyota*, 92 N.Y.2d 35 (1998).

⁹⁸ U.S. CONST. amend. II (finding "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."); See *Printz v. United States* 521 U.S. 898, 938 (1997) (Thomas, J., concurring) (reasoning that challenged provisions of Brady Act may violate Second Amendment right to bear arms); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (stating that Court "always ha[s] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power").

⁹⁹ 529 U.S. at 887 ("This is a case about federalism,' (citation omitted) that is, about respect for 'the constitutional role of the States as sovereign entities.' (citation omitted)")

that the dissenters said in *Bush v. Gore*.¹⁰⁰ It is not as if the Court is even being consistent in redirecting power to the states. *Bush v. Gore* and *Geier* did the opposite. At some point you do have to look to what Justice Marshall understood to be the unseverable connection between law and politics – a connection playing out more within the Court itself than among the three branches of the federal government.

Larry Kramer, who was mentioned before, has begun to talk about how the political branches could and should start fighting back.¹⁰¹ Although writing new legislation, as the cases discussed earlier show, is not always successful because of the Court's looming power of invalidation, other forms of reprisal can be more effective and more final.

The idea that the area of state and national relations is one where the Supreme Court needs to be circumspect for its own protection would not have been news to Justice Marshall. After all, while Marshall was new to the Court, Congress decided to suspend the 1802 term of the Supreme Court¹⁰² because they did not think they would like the results the Court would have reached had it been sitting. After *McCulloch*, there was a proposal floated to create a whole separate court to review things happening in the states.¹⁰³ People did not like the decision in *Martin v. Hunter's Lessee*.¹⁰⁴ So Justice Marshall certainly knew

¹⁰⁰ 531 U.S. 98, 142 (2000) (Ginsburg, J., dissenting) (noting that state and federal courts exist as separate and sovereign entities, as provided for by Framers).

¹⁰¹ See Larry D. Kramer, *The Supreme Court v. Balance of Powers*, N.Y. Times, March 3, 2001, at A13; See also Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1552-53 (1994) (noting that state government lobbying groups are effective in voicing states' concerns and interests in national political arena); Larry D. Kramer, *Putting the Politics back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 281-86 (2000) (arguing that modern political parties and administrative bureaucracy have combined to form new political safeguards and help ensure that states' interests are heard in national politics).

¹⁰² See David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 WAKE FOREST L. REV. 219, 223-25 (1998) (discussing "furious" debate over constitutionality of proposed repeal of Judiciary Act of 1801); David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 318 (1992) (examining "extended and heated debate . . . regarding 'judicial review' " after Court's 1801 term); Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 79 (1998) (noting that repeal became priority for both Republicans and President Jefferson).

¹⁰³ See *McCulloch v. Maryland*, 17 U.S. 316, 436-37 (striking down Maryland law imposing tax on Bank of United States); R. Kent Newmyer, *John Marshall, McCulloch v. Maryland, and the Southern States' Rights Tradition*, 33 J. MARSHALL L. REV. 875, 876 (2000) (noting amongst more radical proposals, one for separate court to address issues of federalism).

¹⁰⁴ 14 U.S. 304, 352-53 (1816) (holding that Supreme Court has authority to review

that extreme reactions from the political branches were a possibility.

Kramer is beginning to ask questions like, what if the current Congress were to suspend a Supreme Court term? Would not that be interesting? In recent years, particularly during 1996, most of the political reactions that we have had from Congress have moved the ratchet in the wrong direction. Congress has been stripping the federal courts of power to decide cases that the states might not favor in areas like habeas corpus, immigration and prison litigation.¹⁰⁵

And Congress has not yet found a way, or a will, to fight back in response to the cases I have been describing. Because the Supreme Court's decisions are considered to be pure constitutional law, Congress is simply not permitted to overrule or modify what the Supreme Court has said.¹⁰⁶ There are alternatives. In some areas, perhaps Congress could muster a stronger factual record and reenact some of the invalidated statutes. Congress could also empower the Executive Branch to bring more suits instead of trying to provide for individual litigation.

And finally, as to inserting the political judgment of the other branches into judicial process, one area that should be very interesting to watch in the coming few years is the area of senatorial control of appointments, particularly judicial appointments. What will happen in the Senate when there is a Supreme Court appointment on the table? What will happen when President Bush starts proposing, as he is about to, a slate

state court decisions interpreting federal law); see David P. Currie, *The Constitution and the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 681 (1982) (noting that in *Martin*, Virginia court believed Congress lacked authority to enable Supreme Court to review state court decisions); Mark L. Movesian, *Sovereignty, Compliance, and the World Trade Organization: Lessons from the History of Supreme Court Review*, 20 MICH. J. INT'L L. 775, 797-98 (1999) (discussing procedural aspects of *Martin* and Virginia court's refusal to respond to Supreme Court's writ of error after *Martin*'s second appeal).

¹⁰⁵ See, e.g., 8 U.S.C.S. § 1326(d) (Law. Co-op. 2001) (denying judicial review for aliens in criminal proceedings except under certain circumstances); 28 U.S.C.S. § 2254(b) (Law. Co-op. 2001) (allowing federal court to entertain application for writ of habeas corpus only after state remedies are exhausted); 42 U.S.C.S. § 1997e(a) (Law. Co-op. 2001) (requiring administrative remedies to be exhausted before action may be brought by prisoner with respect to prison conditions).

¹⁰⁶ See generally Steven Puro, *Symposium Congress: Does It Abdicate Its Power?: Congress-Supreme Court Relations: Strategies of Power*, 19 ST. LOUIS U. PUB. L. REV. 117, 118-21 (2000) (discussing power Congress and Supreme Court have over each other).

of judges for the federal judiciary? The question of the relation of law and politics, and the relation of Congress to the Court, is one on which Justice Marshall had many thoughts, and I would have to agree with Judge Gibbons, that his thoughts were wiser and more sophisticated than the thoughts we are hearing from the Court today. Thank you.

