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**Abstract:** In this paper, I have briefly discussed what I think to be the two most important questions surrounding the Supreme Court and judicial branch. First, I consider whether judicial review itself is a valid assertion of the Supreme Court’s power over elected branches of government in accordance with our Constitution. While I concede that judicial review has its defects (most importantly, its apparent incompatibly with democracy), I argue that it is a valid exertion of judicial authority. And, second, assuming that judicial review is a legitimate assertion over the legislative and executive branches, what mode of constitutional interpretation is best? That is, which constitutional principles are most important when attempting to devise a consistent method to interpreting the Constitution? In response, I use famed Professor Ronald Dworkin’s perspective, and suggest that because the Constitution is most essentially a compilation of moral claims against the government, the living-constitution doctrine is the most appropriate mode of judicial review. In order to shed some light on this highly complicated and controversial question, I respond to several objections made by the former Chief Justice of the Supreme Court, William Rehnquist, in opposition to the living-constitution doctrine.

This essay was initially written in response to a prompt for POL 315 Constitutional Interpretation on Judicial Supremacy. I think I took a unique (if not unique, then at least a broad) angle to the prompt and have chosen to discuss what I think to be the two most interesting questions that the course has covered thus far. I have adjusted this essay substantially from its original form, though, in hopes of gaining publication.

An examination on the extent of judicial power within our American government requires the careful consideration of two questions. First is the question of authority—does the Supreme Court have the authority to strike down laws that it believes are constitutionally impermissible? The second is a prescriptive question: if the Court can in fact exercise judicial review, how should it interpret the Constitution to secure individual rights and the democratic process?

In response to the first question, it has been argued that the very practice of judicial review is incompatible with democracy and inimical to the constitutional framework established by our founders, because the judiciary should not serve as a corrective mechanism for the elected branches. Elected officials are most responsible for carrying out reform and accommodating the evolving interests of the American people. Abraham Lincoln described the majority as “the only true sovereign of a free people.”[[1]](#footnote-1) But the essence of American republicanism is not limited to pure democratic majoritarianism; within the elected branches, there are constitutionally established safeguards, which protect against governmental abuse of fundamental rights and immunities. For instance, our bicameral system of legislature assigns distinct criteria for senators and congressmen, as a means of representing both the passion and reason of the people. In another example, our president can veto the actions of Congress. By contrast, judicial review is not an enumerated power that is clearly delegated to the judicial branch. In this vein, Thomas Jefferson advanced one of the most plausible constitutional arguments against the expansion of judicial authority by judicial review: if the Constitution permitted the judicial branch to invalidate the will of the elected branches of government, then, surely, the Supreme Court would have some means of compelling the legislative and executive branches to act.[[2]](#footnote-2)

However, despite that judicial review is not a delegated power, upon further consideration, we can begin to understand what initially appears to be a counterintuitive notion—not only is judicial review a reasonable extension of judicial power, but also, that it helps maintains the balance and distribution of federal power rather than distort it. With respect to the former claim, let us consider what specific aspects of the Constitution delegate and restrict power of the federal government. The Tenth Amendment, which states that the federal government is limited to its enumerated powers, also permits great latitude in carrying out those powers. The Tenth Amendment revises the Articles of Confederation by removing the word “expressly”; thus, the means by which the federal government is permitted to execute its enumerated powers are not limited to the mere text of the Constitution itself.[[3]](#footnote-3) In Article III, the judiciary is expressly granted the power to deal with “all cases in law and equity arising under this Constitution, the laws of the United States, … .”[[4]](#footnote-4) Therefore, if the Constitution does not assign the federal government specific means by which it can execute its enumerated powers, and the judicial branch is a coordinate branch of government, then the Constitution does not assign the judiciary the specific means by which it can deal with *all questions of law and equity* in the United States. If we accept this argument, we can concur that it is “emphatically the province and duty of the judicial department to say what the law is,” even if that requires judicial review.[[5]](#footnote-5)

In addition to its constitutional permissibility, judicial review is a necessary check on legislative and executive power, and a safeguard against tyranny. Insofar as the judiciary interprets the laws and is incapable of wielding the purse or the sword, it remains the least dangerous to the political rights established in the Constitution.[[6]](#footnote-6) If, instead, we reject the principles of judicial review, we then accept a government in which the judiciary is not a coordinate branch, but rather a subordinate government feature, allowing the elected branches of government to become their own arbiters of constitutional law: “The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.”[[7]](#footnote-7) While judicial review admittedly undermines pure democracy, asserting that an unchecked democracy or majoritarianism is among the most fundamental of our Constitutional ideals is wrong. Instead, the Constitution *most essentially* advances broad moral concepts of equity, individual rights, and justice, rather than specific conceptions of how our society ought to be.[[8]](#footnote-8)

Now that we have considered the question of judicial review, we can move on to the prescriptive question: how should the Supreme Court exercise its judicial authority? That is, we should consider what are the most important constitutional principles in order to devise a mode of constitutional interpretation that is least objectionable and most compatible with the republican framework our founders sought to establish. For instance, it might reasonably be argued that that the Constitution imposes safeguards and immunities to impede rather than facilitate change; if this is true, then the Constitution should “prevent the law from reflecting certain changes in original values that the society adopting the Constitution think fundamentally undesirable.”[[9]](#footnote-9) Under this originalist mode of thought, we might believe the preservation of federalism to be the most important constitutional principle. On the other hand, an expansive assertion of judicial authority might diverge from the strict text of the Constitution and the original intent of the framers, and assert a series of moral claims against the government grounded in “extra-constitutional principles,” the application of which transforms the Constitution into an evolving document, subject to the discretion of the Justices. In order to illustrate this comparison, let us consider the main points of argument between two of the most influential figures in constitutional law: Chief Justice William Rehnquist and Professor Ronald Dworkin. Specifically, the enumerated statements correspond with Rehnquist’s interpretivist critique on the living-constitution, and I have responded using Dworkin’s arguments.

1. The living-constitution doctrine misconceives the nature of the Constitution, which intended the elected branches to bring about change.[[10]](#footnote-10)

Alternatively, The question is not which precise powers and means the Constitution assigns to various branches of government, but rather, what is the best way of defending the essential nature of the document. The Constitution, most essentially, is not a mere blue print (if it was it would have been more specific in its delegated powers), but a compilation of moral claims against the state.[[11]](#footnote-11)

1. The application of the wrong extra-constitutional principles has had disastrous consequences.[[12]](#footnote-12)

To take this objection seriously, though, would require a very narrow view of fundamental rights. Subscribing to a theory of judicial restraint to avoid applying “the wrong extra-constitutional principle” is impractical. This mode of restraint is consistent only if we are willing to believe either that individuals have no fundamental moral claims against the state or that the only fundamental rights we have are those expressly written in the Constitution.[[13]](#footnote-13) Alternatively, if we believe that individuals have moral claims against the state that exist outside the Constitution, and the Constitution is a document essentially intended to defend moral claims, then the judiciary ought to use judicial review to protect fundamental rights when national and state laws may impinge upon them. In this way, the potential misapplication of extra-constitutional principles is a necessary risk of constitutional interpretation left up to the good faith of the judiciary.

1. Advancing extra-constitutional principles through the judiciary is unacceptable in a democracy.[[14]](#footnote-14)

Dworkin argues that the Constitution establishes broad concepts of just governance rather than specific conceptions of what just governance may look like.[[15]](#footnote-15) If this true, and the judiciary’s ability to strike down popularly enacted law is reasonably implicit in the Constitution, then Rehnquist’s third objection does not follow. If there are important moral claims to be made against the state that are found outside of the text of the Constitution and within the broad concepts of just governance and individual rights espoused by our Constitution, then they must be defended by the branch of government that is most removed from the institutions which stripped away their rights in the first place. Quite simply, it is nonsensical for the elected branches (which, in cases requiring judicial review, have already impinged upon fundamental rights of the individual) to act as self-regulating bodies with the power to authoritatively interpret the Constitution; instead, our democratic-republic should welcome the judiciary as an external safeguard for constitutional principles and the only justifiable interpreter of the laws.

In the latter half of this essay, I have briefly outlined this debate in order to provide an introduction to opposing methods of constitutional interpretation. Without definitively answering how the Court should exercise judicial review, we must return to the initial question of authority. Should the judgment of nine unelected judges be binding on the popularly elected branches? This seemingly undemocratic process of review becomes even more controversial when we acknowledge that the Court does not derive its power to review laws from the plain text of the Constitution. Thus, the fundamental problem with judicial review that departs from an original understanding of the Constitution and its text is its unconstrained nature: living-constitution judges face *few* limits on what they can and cannot declare unconstitutional. While the concept of unlimited judicial power is certainly incompatible with republican democracy, it doesn’t seem that our current government system grants the Court this much leeway.

First, even if the Supreme Court has the ultimate authority to interpret the Constitution, the judiciary remains “the least dangerous branch,” because it is incapable of using the “purse or sword” to threaten our constitutionally prescribed rights.[[16]](#footnote-16) Second, precisely because it has no means of compelling the other branches to adhere to its decisions, the Court is also constrained by its obligation to defend its institutional legitimacy. In other words, as unelected officials without purse or sword, the less credible their judgment, the more likely the other branches will disobey. Though I believe these constraints ensure that the Court will never expand to serve as an executive ruling tribunal that completely transforms our republican system, we must decide whether a broad method of constitutional interpretation or a narrow one is the best means of preserving individual rights, institutional values, and democratic process.

1. Lincoln, 314. [↑](#footnote-ref-1)
2. Jefferson, 305. [↑](#footnote-ref-2)
3. *McCulloch,* 558. [↑](#footnote-ref-3)
4. Constitution in Letters of Brutus, 282. [↑](#footnote-ref-4)
5. *Marbury v. Madison,* 301. [↑](#footnote-ref-5)
6. Hamilton, 284. [↑](#footnote-ref-6)
7. Marshall, 301. [↑](#footnote-ref-7)
8. Dworkin, 251. [↑](#footnote-ref-8)
9. Scalia, 234. [↑](#footnote-ref-9)
10. Paraphrased from Rehnquist, 247. [↑](#footnote-ref-10)
11. Dworkin, 256. [↑](#footnote-ref-11)
12. Paraphrased from Rehnquist, 247 [↑](#footnote-ref-12)
13. Dworkin, 252. [↑](#footnote-ref-13)
14. Ibid. [↑](#footnote-ref-14)
15. Dworkin, 251. [↑](#footnote-ref-15)
16. Hamilton, 286. [↑](#footnote-ref-16)