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## "It Is Emphatically the Province and Duty of the Judicial Department to Say" Who the President Is?

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“It is emphatically the province and duty of the judicial department to say” who the President is?<sup>1</sup>

*Honorable David H. Coar*\*

## I. INTRODUCTION

I addressed the Loyola University Chicago School of Law’s *Bush v. Gore*<sup>2</sup> conference on February 15, 2002. In my speech, I opined that the Supreme Court reached the merits in *Bush v. Gore* because the political question doctrine is all but comatose in the Supreme Court. I stated that *Bush v. Gore* is the latest in a series of cases in which the Supreme Court has assumed the mantle of supreme interpreter of the Constitution, unimpaired by structural allocations of responsibility or prudential concerns about deference to the other branches of government on issues of interpretation. Since that time, the *Columbia Law Review* has published an article entitled *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy* by Rachel E. Barkow.<sup>3</sup> Barkow’s article traces the history of the political question doctrine and provides an extensive analysis of the doctrine’s applicability to the Article II question in the 2000 presidential election.<sup>4</sup> In an effort not to rehash Barkow’s analysis, I will instead explain why I experienced such a visceral reaction to *Bush v. Gore*.<sup>5</sup> Then, I will briefly set forth the political question doctrine analysis and explain the way in which the Supreme

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

\* Judge, United States District Court for the Northern District of Illinois. The author would like to thank his law clerk, Katrice L. Bridges, for her assistance in the research and preparation of this article.

2. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

3. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002). Barkow’s article examines the political question doctrine over time, including an extensive analysis of the Article II question doctrine as part of a larger trend in which the Supreme Court has embraced the view that it alone among the three branches of government has the power and competency to provide the full substantive meaning of all constitutional provisions.

4. *See id.*

5. *See infra* Part II (discussing the author’s personal experience with the election process in Macon County, Alabama).

Court has gradually taken away power from the other branches while simultaneously expanding its own power.<sup>6</sup>

## II. BACKGROUND

One of the ironies of *Bush v. Gore*<sup>7</sup> is that the opinion is couched in terms of voting rights.<sup>8</sup> Now, I am a product of my experiences, and it is difficult for me to view the events of November 2000 as involving voting rights in the sense that I consider them. I grew up in Birmingham, Alabama, and attended school there through high school. My family must have gotten its first television set in the mid-1950s because I recall watching the presidential conventions in 1956. I also remember watching the hearings of the United States Civil Rights Commission on voting rights when the Commission was investigating why, in Macon County, Alabama, so many African-Americans were failing the literacy test.

Between college and law school, I spent a year in rural Macon County, which was the home of the then all black Tuskegee Institute (now Tuskegee University) and the Tuskegee Veterans' Administration Hospital. The VA, as it was called, was where the government sent most of the infirm African-American veterans from the southern and western states where hospitals, even government hospitals, were still segregated. Because of the VA and the college, Macon County had one of the highest concentrations of college-educated African-Americans in the country. Nonetheless, African-Americans did not have voting roles, despite the fact that Macon County was overwhelmingly black. How could that be? The reason: African-American physicians, nurses, and Ph.D.'s were failing the literacy test.

Today, the notion of literacy tests must seem alien to most people, but they were a not-so-distant fact of life in portions of this country.<sup>9</sup> I

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6. See *infra* Part III (discussing the Supreme Court's process of limiting the powers of the other branches of government while expanding its own powers).

7. *Bush*, 531 U.S. at 104-10 (per curiam) (holding that Florida's recount of ballots in a presidential election violated equal protection because of its failure to use clear and uniform standards).

8. See *id.* at 104-05 (per curiam) (explaining that the right to vote is fundamental in that equal weight must be accorded to each vote and formulating the issue in the case as "whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of members of the electorate").

9. In *South Carolina v. Katzenbach*, the Supreme Court explained that, beginning in 1890, the states of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests that were specifically designed to prevent African-Americans from voting. *South Carolina v. Katzenbach*, 383 U.S. 301, 310 (1966). The tests typically made the ability to read and write a registration qualification, in addition to the required completion of a registration form. *Id.* at 310-11. "These laws were based on the fact that as of 1890 in each of the named States,

graduated from college in 1964, just months before my twenty-first birthday and the 1964 presidential election. When I went to register to vote, I learned that I had to take a literacy test. Registration required about ten minutes of completing forms, and then I was brought to a desk and seated across from a deputy registrar. On his desk was a large rolodex-like contraption, but instead of contact information, each card on the wheel had a passage from the United States Constitution. When I was seated, the deputy registrar selected a card, told me to read the passage, and then directed me to write on a piece of paper what the passage meant. Back then, I considered myself as knowledgeable about the Constitution as any non-lawyer could be, but it was not until I got to law school that I ever read the Constitution from beginning to end. The passage that was assigned was some obscure provision that I do not remember, but I explained it as best I could. The procedure was that you would be notified by mail as to whether you were registered or not. That evening at dinner, my father asked if I had gone down to register, and I said yes. He then asked whether I passed the literacy portion, and I answered truthfully that I was not sure. He gave me a look that would have melted steel and said, "I'm in debt up to my eyeballs to pay for your college education, and you don't know whether you're literate?" I did in fact pass the literacy test and was able to vote in the 1964 presidential election.

I recounted my personal experience with voting in order to show that voting and the right to vote are very important to me, not as an abstract political principle but rather as a real, concrete incident of citizenship and freedom. Indeed, I am not alone in assigning such value to the right to vote. For instance, before starting law school, I worked for a year in rural Alabama. While there, I saw a huge tent city in Lowndes County that housed people who had been evicted from their sharecroppers' shacks because they had the temerity to attempt to register to vote. Hence, it is with that baggage that I followed the events leading up to the Supreme Court's decision in *Bush v. Gore*.<sup>10</sup>

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more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write." *Id.* at 311. All of the named states, however, had alternate tests to assure that white illiterates would not be deprived of their right to vote. *Id.* For example, "[t]hese [alternate tests] included grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matter." *Id.*

10. It is also because of that baggage that I read the Supreme Court opinion in disbelief. In the past, the Supreme Court has stated that all "qualified voters" have a constitutionally protected right to vote, *Ex parte Yarbrough*, 110 U.S. 651, 665-66 (1884), as well as the right to have their votes counted, *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (citing *United States v. Mosley*, 238 U.S. 383, 386 (1915)). In *Harper v. Virginia State Board of Elections*, the Supreme Court stated, "Once the franchise is granted to the electorate, lines may not be drawn that are inconsistent with

### III. *BUSH V. GORE*: THE POLITICAL QUESTION

Like millions of our fellow Americans, I watched television on election night 2000 with rapt attention. My spirits rose and fell with every erroneous prediction of the network mystics. Never in my wildest dreams, however, had I expected to live through a presidential election that would go down to the wire based upon a few votes in a single state. Over the next few days, as the blue suits descended on Florida, strategies developed and unraveled as papers were filed in what seemed like dozens of courts at the same time, and we were voyeurs again. We all listened to talk about chads and electors, Article II, Section 1, Clause 2, equal protection, and due process with the same obsessiveness with which we had watched infrared lighted, laser guided bombs descend to their targets in eerie slow motion during the Gulf War. By the time the focus shifted from Florida to the United States Supreme Court, we could identify the justices of the Florida Supreme Court by sight and political affiliation, if not by name. And when all of the dust had settled, life as we knew it returned to normal; the sun rose and set, the children went to school and played, the lawyers went home, and a president took office. We are now gathered a year later to try to sort out what it all meant.

After the excitement of the election and the drama surrounding the events in Florida have died down, I doubt that history will much care about who won the 2000 presidential election. It occurred to me, however, that the manner in which the election was decided may have long-term significance. *Bush v. Gore* shed light on how the pieces of the government fit together, and that is what I would like to explore.

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the Equal Protection Clause of the Fourteenth Amendment.” *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966). In *Bush v. Gore*, the Supreme Court, for the first time, called into question the substantive standard by which a state determines whether a vote was legally cast. *Bush*, 531 U.S. at 105 (per curiam). The Court found an equal protection violation as a result of the various counties’ methods of interpreting the “intent of the voter” standard. *Id.* at 106–07 (per curiam). According to the Court, the lack of standards to ensure equal application of the “intent of the voter” standard led to the arbitrary and disparate treatment of members of the electorate. *Id.* at 109 (per curiam). But which members of the electorate? Past equal protection cases required arbitrary or disparate treatment that disenfranchised or diluted the voting strength of a class of voters like a racial minority. *See, e.g., Harmon v. Forssenius*, 380 U.S. 528, 533–34, 543 (1965) (holding unconstitutional a poll tax that “was born of a desire to disenfranchise” a racial minority). *Bush v. Gore*, unlike traditional equal protection cases, focused on the disparity in the manual recount rather than the voter’s opportunity to cast a ballot that is counted. *See Pamela S. Karlan, Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1364–66 (2001) (explaining that the Supreme Court ignored the fact that systems that disproportionately reject votes, like punch cards, have a racially disparate impact and are most often found where minority voters are concentrated).

The powers of the federal government are divided among the three branches, where each has its own constitutionally created duties. It should come as no surprise that the various branches sometimes disagree as to what the Constitution means. So, one of the earliest questions that the parents of our nation had to consider was whether any particular branch's interpretation of the Constitution was entitled to greater weight than the others. *Marbury v. Madison*<sup>11</sup> resolved the question, to some extent, by affirming the concept of judicial review and declaring that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>12</sup> Nothing in the judicial review doctrine, however, inherently gives the federal courts the right to trump the constitutional interpretations in every area.<sup>13</sup> Judicial review applies only in the court's sphere of authority: cases and controversies.<sup>14</sup> Those words are words of art in constitutional parlance. Not every complaint that lands on the desk of the intake clerk meets the definition of case or controversy. Some matters are not "justiciable" because they are not ripe, they are moot, the party bringing the action lacks standing, an opinion on the issue would be merely advisory, or the matter involves a political question.<sup>15</sup> None of those terms are written in the Constitution, but the limitations on the power of the courts that they compel are implicit in the structure of the document.

I would like to focus on the political question doctrine. Although the political question doctrine did not originate with the Supreme Court's decision in *Baker v. Carr*,<sup>16</sup> it contains the most often quoted formulation of the doctrine. In *Baker*, the Supreme Court described the doctrine as follows:

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

12. *Id.* at 177. In *Marbury v. Madison*, the Supreme Court explained that an act of the United States Congress that is repugnant to the Constitution cannot become a law. *Id.* at 180. The constitutional basis for Supreme Court review of state court decisions was later established in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 333–34 (1816).

13. Even in *Marbury* the Supreme Court recognized limits to its power of judicial review. The Court explained that where heads of departments are political and confidential agents of executives, their acts in cases in which the executive possesses a constitutional or legal discretion are only politically examinable. *Id.* at 166.

14. U.S. CONST. art. III, § 2, cl. 1. The case and controversy requirement arises from the limits imposed on federal jurisdiction in Article III, Section 2 of the Constitution. *Id.*

15. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 46–49 (Richard A. Epstein et al. eds., 1997). Chemerinsky explains that the justiciability doctrines help conserve the balance between judicial restraint and the need for review. The policies underlying the justiciability requirements include (1) separation of powers, (2) conservation of judicial resources, and (3) improving judicial decision-making by providing the federal courts with concrete controversies best suited for judicial review. *Id.*

16. *Baker v. Carr*, 369 U.S. 186, 210 (1961).

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>17</sup>

Now, let me set the stage for why I believe that *Bush v. Gore* involved a political question. After the polls closed on election night, election officials in Florida began to count the votes. Some interested citizens of Florida believed that their votes for President were not counted when they should have been, while others believed that votes were counted that should not have been.<sup>18</sup> Partisans representing the two major candidates were confident that if there were a recount applying their view of the standards for determining the validity of ballots, the outcome would favor the candidate of their party.<sup>19</sup> Conversely, if the standards urged by the other party prevailed, the outcome would likely be different.<sup>20</sup> In the early morning on the day after Election Day, it was unclear whether anyone had really focused on the Electoral College and how that might add another level of complexity. It did not take long, however, for the obscure provisions of Article II, Section 1 of the Constitution to surface as important factors.<sup>21</sup> Nor did it take long for the lawsuits to begin. As we all know, the ultimate issues found their way to the United States Supreme Court by way of the Florida Supreme Court.<sup>22</sup>

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17. *Id.* at 217.

18. See David H. Hackworth, Editorial, *Don't Trash Votes of Our Soldiers*, SUN-SENTINEL (S. Fla.), Nov. 30, 2000, at 29A, available at 2000 WL 28993644; Shana Gruskin, *Gore Gains 188 Votes in Recount*, SUN-SENTINEL (S. Fla.), Nov. 30, 2000, at 1A, available at 2000 WL 28993775.

19. See *And the Winner Is? Presidential Winner Hinges on Outcome of Florida Recount*, CHARLESTON GAZETTE (W.V.), Nov. 8, 2000, at 1A, available at 2000 WL 2635630 [hereinafter *And the Winner Is?*]; Joel Engelhardt et al., *Next Stop for Ballots: Tallahassee Counting Is Over, Unless Judge Orders Still Another One*, PALM BEACH POST, Nov. 30, 2000, at 1A, available at 2000 WL 29545719.

20. See *And the Winner Is?*, *supra* note 19; Engelhardt et al., *supra* note 19.

21. See U.S. CONST. art. II, § 1.

22. See *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla.) (per curiam), *rev'd per curiam sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

Federal courts are courts of limited jurisdiction, so the first thing that a federal court must determine is its jurisdictional basis for the case before it.<sup>23</sup> If a dispute involves a political question, there is no “case or controversy” and, therefore, no jurisdiction.<sup>24</sup> So, the threshold question that the Supreme Court had to decide was whether it had jurisdiction. No one raised the political question issue. But we all know that the Court had an obligation to determine its jurisdiction, whether or not a party raised the issue. However, what did the Supreme Court say? Nothing!

Was this a political question? Remember that the first factor in the formulation from *Baker v. Carr* is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”<sup>25</sup> Article II, Section 1 provides, in relevant part: “Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .”,<sup>26</sup> and Amendment XII provides in pertinent part:

The Electors shall meet in their respective states and vote by ballot for President and Vice President . . . and they shall make distinct lists of all persons voted for . . . which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate . . . [who] shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.<sup>27</sup>

This language commits to the states and Congress, to the exclusion of the courts, the power to administer the Electoral College.

Obviously, Congress held the same belief because the United States Code sets forth a detailed procedure for how the votes of the electors are counted and registered in the joint session of Congress referred to in Amendment XII, including a very elaborate procedure for receiving and resolving objections to the state certified electors.<sup>28</sup> Under the

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23. See U.S. CONST. art. III, § 2, cl. 1.

24. See *Baker v. Carr*, 369 U.S. 186, 217 (1961).

25. *Id.* at 217; see also *supra* note 17 and accompanying text (quoting the political question doctrine as set forth in *Baker*).

26. U.S. CONST. art. II, § 1, cl. 2.

27. U.S. CONST. amend. XII.

28. See 3 U.S.C. § 15 (2000).

procedure, each House separately considers and resolves objections.<sup>29</sup> If the supporters of Bush or Gore objected to the slate of electors certified by Florida officials, they had to resort to the processes set forth in the Constitution and the statute.

The political question doctrine is not only about a textually demonstrable commitment to another branch of government, it is also about “respect due coordinate branches of government.”<sup>30</sup> The Supreme Court, however, showed a complete lack of respect for Florida’s and Congress’s ability to resolve the issue when it intervened in an area in which it lacked jurisdiction. Separation of powers and federalism required resolution of the presidential election of 2000 by the political process, not by a politically unaccountable branch of government. This is not the first time, however, that the Supreme Court has trampled on Congress’s duties in an effort to increase its own power. For instance, in cases such as *City of Boerne v. Flores*,<sup>31</sup> *United States v. Lopez*,<sup>32</sup> and *United States v. Morrison*,<sup>33</sup> the Supreme Court found acts passed by Congress unconstitutional because they exceeded the scope of Congress’s authority. The *Boerne* Court paid mere lip service to the notions that “[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make

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29. *See id.*

30. *Baker*, 369 U.S. at 217; *see also supra* note 17 and accompanying text (quoting the political question doctrine as set forth in *Baker*).

31. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). In *Boerne*, the Supreme Court found the Religious Freedom Restoration Act (“RFRA”) unconstitutional because it exceeded the scope of Congress’s enforcement power under Section 5 of the Fourteenth Amendment. *Id.* RFRA was enacted in direct response to *Employment Division, Department of Human Resources v. Smith*, in which the Supreme Court upheld, against a free exercise challenge, a state law of general applicability criminalizing peyote use, as applied to deny unemployment benefits to Native American Church members who lost their jobs because of such use. *See Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 890 (1990). RFRA required the state to show a compelling government interest for a law if it substantially burdens an individual’s exercise of religion. *Boerne*, 521 U.S. at 533–34. In *Boerne*, the Supreme Court found that Congress’s Section 5 power was remedial, not substantive, and that because there were no findings of generally applicable laws passed as a result of religious bigotry in the past forty years, RFRA was not remedial. *Id.* at 531–32. The effect was to show little deference to Congress’s determination, even where no individual claimed that the statute under review burdened his or her rights.

32. *United States v. Lopez*, 514 U.S. 549, 568 (1995). In *Lopez*, the Supreme Court held the Gun-Free School Zones Act of 1990, which made it a federal crime to knowingly possess a firearm in a school zone, unconstitutional because it exceeded the scope of Congress’s authority under the Commerce Clause. *Id.* at 561–62.

33. *United States v. Morrison*, 529 U.S. 598, 627 (2000). In *Morrison*, the Supreme Court found the Violence Against Women Act (“VAWA”) unconstitutional because Congress exceeded the scope of its authority under both Section 5 of the Fourteenth Amendment and the Commerce Clause. *Id.* at 615–19. The VAWA provided a federal civil remedy for the victims of gender-motivated violence. *Id.* at 601–02.

its own informed judgment on the meaning and force of the Constitution” and that “the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of other branches.”<sup>34</sup> In *Boerne*, the Supreme Court found Congress’s power under Section 5 of the Fourteenth Amendment to be remedial, not substantive.<sup>35</sup> Thus, according to the Court, Congress may use its Section 5 enforcement powers only in areas where the Court has previously found a constitutional violation.<sup>36</sup> The Court reasoned that the design and text of Section 5 are “inconsistent” with the idea that Congress has the power to determine the substance of the Fourteenth Amendment’s restrictions on the states.<sup>37</sup>

In *Lopez* and *Morrison*, the Supreme Court found that Congress exceeded its authority under the Commerce Clause.<sup>38</sup> The Court stated that the mere fact that Congress may conclude that a particular activity substantially affects interstate commerce does not make it so, even when supported by factual findings.<sup>39</sup> Instead, “whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.”<sup>40</sup>

Now, in *Bush v. Gore*, rather than discrediting Congress’s ability to make constitutional determinations by finding a congressional act unconstitutional, the Court completely usurped Congress’s duty as set forth in Article II, Section 1.<sup>41</sup> While it is beyond question that within its sphere, it is the duty of the Supreme Court to determine the constitutionality of laws passed by Congress, the Supreme Court is not

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34. *Boerne*, 521 U.S. at 535–36.

35. *Id.* at 519–20. The Fourteenth Amendment prohibits the states from making or enforcing any laws that deprive any person of life, liberty, or property, without due process of law, or that deny any person within their jurisdictions the equal protection of their laws. *Id.* at 516–17. The enforcement provision, Section 5, provides, in relevant part: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.

36. *Boerne*, 521 U.S. at 519.

37. *Id.*

38. *Morrison*, 529 U.S. at 627; *United States v. Lopez*, 514 U.S. 549, 568 (1995).

39. *Morrison*, 529 U.S. at 614 (quoting *Lopez*, 514 U.S. at 557 n.2). In *Morrison*, as opposed to *Lopez*, Congress made numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. *Id.* at 614. In *Lopez*, the lack of congressional findings linking the prohibited activity to interstate commerce was one of the factors the Court used to find the Gun-Free School Zones Act of 1990 unconstitutional. *Lopez*, 514 U.S. at 557.

40. *Lopez*, 514 U.S. at 557 n.2 (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 273 (1964)).

41. See *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

the only branch of government entrusted with the power to interpret the Constitution. The Court was far beyond the command of *Marbury v. Madison*.<sup>42</sup> In *Marbury*, the Supreme Court spoke of its duty in terms of cases where a legislative act and the Constitution both apply: “[T]he courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.”<sup>43</sup> The Constitution must also govern when it expressly entrusts a duty to Congress and the states, to the exclusion of the courts. Unless, of course, “[i]t is emphatically the province and duty of the judicial department to say”<sup>44</sup> who the President is.

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42. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803); see also *supra* notes 12–15 and accompanying text (discussing the command of *Marbury v. Madison*).

43. *Marbury*, 5 U.S. (1 Cranch) at 178.

44. *Id.* at 177.