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JUDICIAL SUPREMACY RE-EXAMINED: A PROPOSED ALTERNATIVE

G. Sidney Buchanan*

I. INTRODUCTION

A citizen critic recently expressed to me his bitter opposition to the Warren Court's decisions on school prayer and school desegregation.¹ If this critic were elected governor of a state or placed in some other position of governmental authority, he would almost certainly use his power to block public school desegregation and to encourage prayer reading in the public schools. Conceding that our critic would be acting controversially in so using his power, would he be acting unconstitutionally? This is the question which this Article will attempt to answer. More generally, this Article will consider the extent to which a Supreme Court constitutional construction legally binds the rest of the nation.

This question becomes particularly pertinent with the advent of the Burger Court and a potential change in the Court's judicial philosophy.² When we like what the Court is doing, we are more prone to hail the Court's decisions as "the supreme law of the land" and to urge instant compliance with them. Generally, such urgings are wrapped in the verbal cellophane of morality: unless the rest of the nation immediately shapes its conduct in accordance with the Court's construction of the Constitution, we will become a nation of immoral lawbreakers. A casual glance at history reveals the relativity of this argument. From Lincoln's attack on the *Dred Scott* decision³ to Roosevelt's battle with the Court in the early years of the

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For invaluable critical aid in relation to all major aspects of this article, I express appreciation to Professors John Mixon and A. A. White of the University of Houston Law School.

1. Most notably, in the school prayer area, *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963), and *Engel v. Vitale*, 370 U.S. 421 (1962), and, in the school desegregation area, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and its progeny.

2. Thus far President Nixon has made four appointments to the Supreme Court. Recent decisions suggest that the Court will take a more conservative approach in many areas of constitutional law than did the Warren Court. In the area of criminal procedure, see, e.g., *Kastigar v. United States*, 40 U.S.L.W. 4550 (U.S. May 22, 1972) (a witness who invokes his fifth amendment privilege against self-incrimination can be compelled to testify if he is granted immunity from prosecutorial use of his testimony and evidence derived therefrom); *Apodaca v. Oregon*, 40 U.S.L.W. 4528 (U.S. May 22, 1972) (states can convict a defendant of a noncapital crime by a less than unanimous jury verdict); *Harris v. New York*, 401 U.S. 222 (1971) (a statement inadmissible as part of the prosecution's case in chief because of a violation of the *Miranda* requirements can nevertheless be used to impeach the defendant's credibility on cross-examination).

3. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). See note 77 *infra*.

New Deal,⁴ assaults upon the Court came primarily from those linked by political philosophy to the Warren Court's most vigorous supporters. Thus, a shift in the pattern of Court decisions will often modify a person's commitment to the doctrine of judicial supremacy. This truism warns against an absolutist approach in defining the Court's role in the federal system.

Sooner or later, the course of judicial events will compel the Court to decide whether the fourteenth amendment's equal protection clause requires a public school district to overcome racial imbalance resulting from segregated residential patterns, a condition normally called "de facto" segregation.⁵ Should the Court hold that the Constitution requires school districts to eliminate de facto segregation in the public schools, integrationists would rejoice in the wisdom of the Court's decision, and segregationist hostility to the Court would intensify. A contrary holding would, of course, initiate a reversal of these attitudes. More to the point of this Article, either holding by the Court would have a pervasive impact on the nation. Such a case would illustrate graphically the current relevance of asking: Now that the Court has spoken, what next?

In answering the question of "what next," this Article will first describe two competing models for determining the legal effect of a Supreme Court decision upon the rest of the nation. These models will then be applied to each of the remaining parts of the federal system: the lower federal courts, the state courts, the executive and legislative branches of the federal government, the executive and legislative branches of the state governments, and, finally, the private citizen holding no public office. In each application, this Article will consider which of the two competing models is most consonant with the political system established by the Constitution. Thus, analysis of the competing models will be in terms of what the Constitution requires within the system it has created and not in terms of what a different constitution ought to have required. Even with the scope of inquiry thus limited, it is hard to avoid a certain Olympian concern with "oughtness." Unavoidably, a person's belief concerning

4. In a radio address delivered on March 9, 1937, at the height of his battle with the Senate over the Court-packing plan, President Roosevelt stated:

We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our courts we want a government of laws and not of men.
81 CONG. REC. APP. pt. 9, 470 (1937).

5. Recently the Court expressly avoided this issue in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 403 U.S. 1 (1971), a case dealing with the desegregation of "dual" school districts.

what the Constitution ought to require will influence his description of what the Constitution does in fact require. This is particularly true when we are probing the binding force of a Supreme Court decision, a question affecting so fundamentally the operation of the federal system. In this area, a quest for descriptive accuracy slips ineluctably into an exposition of oughtness. For in probing the binding force of a Supreme Court decision, we reach the seminal question of jurisprudence: What makes a legal system obligatory in the first place?⁶

A final introductory problem remains. What does it mean to say that a person is "acting unconstitutionally" in relation to a Supreme Court constitutional construction? For purposes of this Article, a person so acts when he violates a legal duty imposed by the federal system to comply with the Court's construction. Quite clearly, this definition focuses discussion upon a person's legal obligation within the federal system and largely excludes consideration of moral obligations unrecognized by law. Moreover, to define "acting unconstitutionally" in terms of legal duty permits this Article's central question to be rephrased: To what extent is the nation under a legal duty to comply with a Supreme Court constitutional construction?

II. TWO COMPETING MODELS: JUDICIAL SUPREMACY AND VIABLE TENSION

Two models emerge for determining the binding force of a Supreme Court constitutional construction: the "judicial supremacy" model and the "viable tension" model.

A. *The Judicial Supremacy Model*

Under the judicial supremacy model, the Supreme Court assumes the role of final arbiter within the federal system. In both a literal and substantive sense, the Constitution means what the Supreme Court says it means. A Supreme Court decision is equated to a law of the United States passed "pursuant" to the Constitution and, therefore, becomes truly the supreme law of the land.⁷

6. In the context of international law, James L. Brierly has offered a thoughtful answer to this question:

If we are to explain why any kind of law is binding, we cannot avoid some such assumption as that which the Middle Ages made, and which Greece and Rome had made before them, when they spoke of natural law. The ultimate explanation of the binding force of all law is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live.

J. BRIERLY, *THE LAW OF NATIONS* 55-56 (6th ed. 1963).

7. France has adopted a judicial supremacy model under the Fifth Republic requir-

As applied to another branch of the federal system, the judicial supremacy model would impose on that branch a constitutional obligation to comply with a Supreme Court decision, not only with respect to the particular case before the Court, but also with respect to all future fact situations raising the same legal issue. Illustratively, if, as in *Powell v. McCormack*,⁸ the Supreme Court holds that the power of Congress to judge the qualification of its elected members is limited to the qualifications of age, citizenship, and residence expressly set forth in the Constitution, then Congress is obligated to accept the Court's holding in the *Powell* case itself and to apply the *Powell* holding in all future fact situations involving congressional exclusion of members. Again, if, as in *School District of Abington Township v. Schempp*,⁹ the Supreme Court holds that a state cannot require prayer reading in the public schools, then every public school district in the nation is obligated to accept the Court's holding in *Schempp* as the supreme law of the land and to remove state-prescribed prayer reading from the public schools as promptly as possible. Thus, under the judicial supremacy model, a Supreme Court decision, by its own force alone, operates as a rule of law which immediately binds the entire nation.

Predictability is a basic component of justice.¹⁰ In shaping his conduct, a person needs to know that the legal system will react to similar fact situations with reasonable consistency. If the legal system is erratic and capricious, justice suffers. Advocates of judicial supremacy can argue fairly that their model would instill predictability into the federal system. As applied to any fact situation raising a constitutional issue already decided by the Supreme Court, the judicial supremacy model would provide a reliable rule for determining what the Constitution means. Moreover, all public officials, and private citizens as well, would know that they are obligated instantly to shape their conduct in accordance with the Supreme Court's construction of the Constitution. Viewed prospectively, the Court's construction of the Constitution could be changed only by a subsequent Court decision or constitutional amendment. This would reduce to a minimum the legal avenues for challenging a Court decision, thereby

ing that the constitutionality of "organic laws" and "regulations of Parliamentary assemblies" must be determined by a constitutional Council before they become effective. See CONSTITUTION DU 4 OCTOBRE, art. 61 & 62 (1958).

8. 395 U.S. 486 (1969).

9. 374 U.S. 203 (1963).

10. See Justice Harlan's dissent in *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704-07 (1968), for an expression of concern over the loss of predictability in the law in the area of obscenity.

contributing to the decision's longevity. To the extent, therefore, that predictability within the federal system is a desideratum, the judicial supremacy model is calculated ideally to promote it.

If predictability is a strength of the judicial supremacy model, its weakness is partiality. It gives to a Supreme Court decision a legal efficacy that no action by any other branch of the federal system can claim. All other branches of the federal system can have their actions declared unconstitutional by a simple majority of the Supreme Court. By contrast, a Court decision parades through the federal system with almost total constitutional immunity; no other branch of the federal system can, acting alone, declare the decision unconstitutional. In short, the rest of the federal system is responsible to the Supreme Court, but the Court is responsible only to itself and a subsequent constitutional amendment.

Judicial supremacy advocates would argue that various constitutional options exist for challenging a Supreme Court decision and that these options blunt sufficiently the vice of partiality. In addition to the obvious option of a constitutional amendment,¹¹ the passage of time coupled with the election of a new President can produce a dramatic change in Court personnel and a concomitant reversal of prior Court decisions. Franklin Roosevelt knew this fact well in the early years of the New Deal, and Richard Nixon knows it well today. Although a change in Court personnel is usually incident to death or normal retirement of a Justice, impeachment, or, more accurately, its threat, also has a definite role to play in creating Court vacancies.¹² Furthermore, under its power to regulate the Court's appellate jurisdiction, Congress can influence significantly the types of cases that reach the Court.¹³ Thus, the argument runs, the judicial supremacy model itself provides ample measures to correct a harmful Supreme Court decision. However, none of these measures can reach fruition through a simple majority vote of a single branch of government; their accomplishment requires substantial time and the action of two or more governmental branches. More fundamentally, as to the parties before the Court, none of these measures can affect the validity of a Court decision already rendered. Conceptually, therefore, the

11. U.S. CONST., art. V. A historical example of the constitutional amendment approach is the eleventh amendment, which was expressly adopted to overrule the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). And, although the causal link is less direct, certainly the adoption of the thirteenth and fourteenth amendments was motivated partly by a desire to eradicate the Court's holding in *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

12. See U.S. CONST., art. I, §§ 2, 3.

13. U.S. CONST., art. III, § 2.

judicial supremacy model does confer on the Court a preferred status in the federal system. The extent to which this status is justified is, of course, the central inquiry of this Article.

Pressed to its outer limits, the judicial supremacy model could create a national climate inimical to political expression regarding issues decided by the Court. Assume, for example, that a Supreme Court decision was held in such extreme awe that a moral stigma would attach to any criticism of the decision or to initiation of any political process designed to block the decision's continuing effect. Such a climate would emasculate the first amendment guarantees of free speech, press, assembly, and petition, in relation to the issues resolved by the Court. In opposition to this argument, others might contend that judicial supremacy promotes first amendment guarantees as they relate to the broader spectrum of political expression, including the multitude of issues not resolved by the Court decision. In addition, it appears that moral stigma attaches to criticism of few, if any, decisions by the Court.

Conceding that judicial supremacy should not emasculate first amendment guarantees, a more benign application of the model can still dull the cutting edge of political expression. If the Supreme Court is the final arbiter of what the Constitution means, a Court construction of the Constitution becomes more than an act by one branch of the federal government; instead, it carries the oughtness potency of the Constitution itself. Thus, under the judicial supremacy model, a Court decision construing the Constitution carries a moral suasion not present in acts by other branches of the federal system. In a very real sense, to the general public, the Court's decision is the Constitution.

If the general public does equate a Supreme Court decision with the Constitution, this places those who wish to challenge the decision at a tactical disadvantage. Proponents of the Court's decision can label any attempt to block its continuing effect as an attack on rights which "the Constitution" now confers. Wrapped in the mantle of the Constitution, the Court's decision is presumed rebuttably to be "good." It is impossible to assess the extent to which this halo of oughtness inhibits criticism of a Court decision and, more importantly, the use of the political process to blunt the decision's continuing effect.¹⁴ In some instances, the inhibitory impact is palpable; in

14. L. Brent Bozell has suggested:

If it is true that a construction of the Constitution by the Supreme Court, no matter how spurious or absurd, no matter how damaging to the organic life of the country, is *eo ipso* "the law of the land," unchallengeable even by a law made by the people's representatives; if it is true that a "constitutional right" can come

others, it is minimal.¹⁵ Whatever the degree of inhibition, its existence should be incorporated as a negative factor into any evaluation of the judicial supremacy model.

Historically, the Supreme Court has made only infrequent pronouncements on the binding effect of its own decisions; generally, its concerns have lain elsewhere. Thus, in *Marbury v. Madison*,¹⁶ the Court's main concern was to establish its right to exercise the power of judicial review, the power to judge the constitutionality of acts by other branches of the federal system. In contrast to its dicta, the *Marbury* holding was calculated precisely to avoid a confrontation with the Jeffersonian Republicans and said nothing about the legal impact of a Supreme Court decision upon the rest of the nation. In effect, Chief Justice Marshall in *Marbury* told the nation only this: No other branch of the federal system can thrust upon the federal judiciary an act which this Court declares unconstitutional. Without demeaning the importance of this pronouncement, it does not attempt to fix the nation's obligation to comply with a Supreme Court decision. Viewed accurately, *Marbury* did nothing more than create the issue that this Article will attempt to resolve.

In the 1958 case of *Cooper v. Aaron*,¹⁷ the Supreme Court disagreed with the preceding analysis of *Marbury*. In *Cooper*, violence and disorder generated by actions of the Arkansas governor and legislature impeded implementation of a public school desegregation program in Little Rock, Arkansas; the program had been formulated by the Little Rock school board and approved by the lower federal courts. The Supreme Court held that the state-generated violence and disorder did not justify postponement of the desegregation program. On these facts, the Court's holding is unexceptionable, involving only the proposition that state governments cannot interfere

into being merely on the Court's say, so that every corrective constitutional amendment can plausibly be represented as an attempt to deprive the people of their previously vested constitutional rights (and thus easily defeated)—then, where, in all candor, are we? If a judicial interpretation of the Constitution is, by definition, the *Constitution*, why then we are in the grips of a judicial despotism. That is the meaning of despotism. An unchallengeable authority can be benign, or malevolent, but it is a despotism if the rest of the commonwealth has no practical alternative to succumbing to its will.

L. BOZELL, *THE WARREN REVOLUTION* 111-12 (1966). While not subscribing to Bozell's use of the term "judicial despotism" as characterizing the normal application of the judicial supremacy model, I believe his language does illustrate forcibly the dangers flowing from the model's unrestrained application.

15. See Stumpf, *The Political Efficacy of Judicial Symbolism*, in *THE IMPACT OF SUPREME COURT DECISIONS* 58-59 (T. Becker ed. 1969), for a discussion of potential effects of the Court's prestige on reversal attempts by Congress.

16. 5 U.S. (1 Cranch) 137 (1803).

17. 358 U.S. 1 (1958).

with the enforcement of specific federal court decisions.¹⁸ As will be detailed later, any other holding would produce intolerable chaos in the federal system. Much more challenging is the Court's dicta concerning *Marbury*. Responding to the contention that the Arkansas governor and legislature were not bound by the Court's holding in *Brown v. Board of Education*,¹⁹ the Court in *Cooper* stated:

Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison*, . . . that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."²⁰

Clearly, the Court here is equating its construction of the Constitution to the supreme law of the land. In so doing, the Court is advocating the judicial supremacy model. It is not unnatural for the Court to select the model that most strengthens its position in the federal system. But it is hoped that the Court's preference for judicial supremacy does not foreclose further inquiry into the matter. More seriously, the Court's dicta in *Cooper* imputes to *Marbury* a holding on a question that Marshall studiously avoided: the extent to which a Court decision binds the nation. To place this question in

18. The Court cited *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809), for the proposition that a state legislator or executive may not constitutionally annul the judgment of a federal court, and *Sterling v. Constantin*, 287 U.S. 378 (1932), for the same principle in respect to state governors.

19. 347 U.S. 483 (1954).

20. 358 U.S. 1, 18 (1958). See also *Welsh v. United States*, 398 U.S. 333, 360 n.12 (1970) (Justice Harlan, concurring):

I cannot, moreover, accept the view, implicit in the dissent, that Congress has any ultimate responsibility for construing the Constitution. It, like all other branches of government, is constricted by the Constitution and must conform its action to it. It is this Court, however, and not the Congress that is ultimately charged with the difficult responsibility of construing the First Amendment.

At least in the first amendment area, Justice Harlan supported the judicial supremacy model. While according to Congress greater power in the conscientious objector area than Justice Harlan was willing to grant, Justice White, dissenting in *Welsh*, 398 U.S. at 371, concludes: "This involves no surrender of the Court's function as ultimate arbiter in disputes over interpretation of the Constitution." Thus, like Justice Harlan, Justice White supports the judicial supremacy model as advanced by the Court in *Cooper*.

sharper focus requires a description and analysis of the viable tension model.

B. *The Viable Tension Model*

In its pristine state, the viable tension model²¹ accords no binding force to a Supreme Court decision; standing alone, a Court decision obligates no one. The decision may command respect. It may even be followed by the rest of the nation. But until supported by another branch of the federal system, the decision has no legal effect. It remains a weighty, but nonobligatory, pronouncement by one branch of the federal government.

As applied to another branch of the federal system, the viable tension model would impose on that branch no constitutional obligation to comply with a Supreme Court decision. This lack of obligation would extend to the particular case before the Court and, a fortiori, to all future fact situations raising the same legal issue. It would extend even to a case in which the branch itself is substantively a party to the proceedings before the Court. Referring again to *Powell v. McCormack*,²² assume that the Court, in a subsequent proceeding, holds that Powell is entitled to receive the compensation withheld from him during the two years he was excluded from Congress. Under the viable tension model, Congress would have no obligation to implement this decision. More defiantly, Congress would have the right to act affirmatively to prevent its fiscal agents from paying Powell. As to future fact situations involving congressional exclusion, Congress would have the right to ignore the Court's construction of the Constitution in *Powell* and to judge the qualifications of its elected members on bases other than age, citizenship, and residence.

Applying the viable tension model to state-prescribed prayer in the public schools, the Supreme Court's decision in *School District of Abington Township v. Schempp*²³ would, standing alone, impose no constitutional obligation on any school district not a party to *Schempp* and related cases. In its purest form, the logic of viable

21. The idea of things existing in a state of viable tension is not new. In describing the world view of the Greek philosopher Heraclitus, Bertrand Russell notes: "[He] develops a new theory from these ingredients, and this is his signal discovery and contribution to philosophy: the real world consists in a balanced adjustment of opposing tendencies. Behind the strife between opposites, according to measures, there lies a hidden harmony or attunement which is the world." B. RUSSELL, *WISDOM OF THE WEST* 24 (P. Foulkes ed. 1959).

22. 395 U.S. 486 (1969).

23. 374 U.S. 203 (1963).

tension would shield even the Abington School District itself. This latter extension would, of course, wreck the federal system; realistically, therefore, attention should center on the nicer problem of the nonparty school districts. Here the viable tension model would allow these districts to continue state-prescribed prayer in the public schools until enjoined specifically by court order. Technically, the very nature of judicial power²⁴ would suggest that only the parties to a lawsuit are bound by the Court's decree. For reasons to be advanced later, however, this view of the effect of a judicial pronouncement, as applied to the legislative and executive branches of the state governments, should yield to the countervailing postulate of federal supremacy. For present descriptive purposes, it is enough to say only this: With respect to a Supreme Court constitutional construction that stands alone, the viable tension model would authorize each remaining branch of the federal system to adopt its own version of the Constitution.

Different reasons exist for rejecting a Supreme Court decision. A person may accept the decision as a correct interpretation of the Constitution but reject it as unwise; he may claim that the decision involves erroneous statutory construction or improper conclusions of fact. The viable tension model is not concerned with these reasons for rejection. Concretely, the viable tension model authorizes Congress to interfere with a specific Court decision only if Congress believes that the decision is based on an incorrect construction of the Constitution. If Congress accepts the Court's construction of the Constitution and believes merely that the decision is unwise, Congress has no right to interfere with the decision's implementation in the particular case. These principles would also apply to all other branches of the federal system. As to future fact situations raising the same legal issue, the same limitation applies: The right of Congress or any other branch of the federal system to reject a Court construction of the Constitution would be conditioned on belief that the Court's construction is wrong. Here, however, the limitation is, in the case of congressional rejection, more technical than real. If, for example, Congress believes that a Court decision is based solely on erroneous construction of a federal statute, the viable tension

24. In *Muskra v. United States*, 219 U.S. 346, 356 (1911), the Court quoted Justice Miller's *LECTURES ON THE CONSTITUTION OF THE UNITED STATES* 314 (1891) for the proposition that "'Judicial Power . . . is the power of a court to decide and pronounce a judgment and carry it into effect *between persons and parties who bring a case before it for decision.*'" (Emphasis added.) Although not directly on point, this definition suggests by negative inference that judicial power has no legal effect on persons and entities not parties to the litigation.

model would not be operative, but Congress need only amend the statute to mold future fact situations in accordance with its will.²⁵ Thus, the model's triggering condition of disagreement on constitutional construction has meaning largely as a limitation on the nation's right to interfere with the implementation of a Supreme Court decision already rendered.

Even with respect to implementation of a decision already rendered, how meaningful is the limitation? The skeptic would argue that there is no magic in words; that, for example, if Congress wants to block implementation of a specific Court decision, Congress need only mask its true reason for so doing in the guise of a disagreement on constitutional construction; that there is no realistic check on the power of Congress to characterize deceptively its reason for rejecting a Court decision.²⁶ The skeptic's argument is superficial if it ignores the role of oughtness in shaping human conduct. A nation's conception of oughtness does make a difference. Ultimately, it is the very thing that makes a legal system work.²⁷ If the bulk of Americans believed that laws in general ought to be disobeyed, the legal system would collapse. Viewed accurately, therefore, a nation's conception of oughtness may well influence the flow of power within a political system more profoundly than any other factor. Returning to the congressional example, if nearly all Congressmen believe that Congress ought to reject a Court decision only on the basis of a disagreement on constitutional construction, this particular conception of oughtness will become the prevailing reality;²⁸

25. While not precisely on point, congressional enactment of Title I of the Civil Rights Act of 1968, 18 U.S.C. § 245 (1970), may have been partially motivated by Supreme Court criticism of an earlier civil rights statute, 18 U.S.C. § 241 (1970). This earlier statute, in general terms only, protected federally created rights against private conspiracies. In his concurring opinion in *United States v. Guest*, 383 U.S. 745, 785-86 (1966), Justice Brennan commented: "Section 241 is certainly not model legislation for punishing private conspiracies to interfere with the exercise of the right of equal utilization of state facilities. . . . [I]f Congress desires to give the statute more definite scope, it may find ways of doing so." In Title I of the 1968 Act, Congress did "find ways" "to give the statute more definite scope" by specifically listing those federally created rights which are protected against both governmental and private interference. This illustrates the interplay that often occurs between Congress and the Court in the formulation and construction of statutes.

26. As a counterthrust to such action by Congress, the Court can also play the game of deceptive characterization. To avoid the operation of viable tension, the Court could cast its decision in terms of statutory construction or fact resolution instead of constitutional construction. In the final analysis, only the good sense of Congress and the Court can prevent the technique of deceptive characterization from being carried to ludicrous extremes.

27. See note 6 *supra*.

28. Whether in fact nearly all Congressmen do accept this belief is a question that I do not attempt to answer. My analysis attempts only to show the impact of this belief if it were the prevailing norm. Shifting to the federal executive, my rebuttal

Congress will eschew a rejection based on other reasons. Nor does it weaken this analysis to admit readily that in times of stress one conception of oughtness may yield to a different and more compelling conception of oughtness. That revolution, for example, may overthrow a legal system in its entirety does not enfeeble a national belief that laws in general ought to be obeyed. Accordingly, this paragraph's basic proposition still holds: A national belief that implementation of a Court decision should be blocked only for a specified reason would far transcend the possibility of deceptive characterization; the belief would generate in time a potent conformity in practice.

Turning to another facet of viable tension, the model is concerned primarily with the nation's obligation to comply with a Supreme Court decision that stands alone, unsupported by any other branch of the federal system. If one or more of the system's remaining branches, particularly Congress or the federal executive, support the decision, the question of the decision's binding effect assumes a new dimension. For in this setting, opposition to the decision is more than opposition to a single branch of the federal government; rather, it is opposition to the decision as re-enforced by other parts of the federal system. This distinction becomes especially important in considering the extent to which a Court decision binds the executive and legislative branches of the state governments. Here, as will be developed later, if both Congress and the federal executive support the Court decision, a strong federal supremacy argument, unavailable while the decision stands alone, enters the fray.²⁹ For the present, it is enough to stress generally the distinction between a Court decision that stands alone and a decision supported by some other part of the federal system, a distinction that this Article will use to reconcile the clashing policy vectors of the viable tension and judicial supremacy models.

In relation to a Supreme Court decision, the viable tension model provides generous opportunity for political expression. Quite obviously, if a Court decision, standing alone, binds no one, criticism of the decision can flourish, uninhibited by any substantial risk of moral stigma. Equally important, a vigorous adherence to viable tension would encourage the unfettered use of the political process

of the skeptic's argument may be less persuasive in that a single "renegade" President is not subject to the same group controls as a maverick Congressman. Conversely, supporting my rebuttal is the fact that a sensible Congress and federal executive are as capable as the Court of exercising the restraint necessary to avoid needless friction over issues of constitutional construction.

29. See text accompanying notes 98-108 *infra*.

to thwart the decision's command. Thus, the model would further "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ."³⁰ Moreover, by promoting freedom of expression in relation to Court decisions, viable tension would remove these decisions from the pedestal occupied by the Constitution; the confusing blur between a Court decision and the Constitution would vanish. Whatever its faults, the viable tension model would be at least a sure defense against judicial idolatry.

The viable tension model also avoids the vice of partiality among the various branches of the federal system. Although the model does not affect the Supreme Court's right to declare acts by other branches of the federal system unconstitutional, it gives to each of these other branches a reciprocal right to declare acts by the Supreme Court unconstitutional. To the extent, therefore, that justice comprehends equality, viable tension is just. Admittedly, this stated virtue of equality somewhat begs the question, for the central inquiry of this Article is precisely the extent to which such equality is required by the Constitution. Perhaps the only true virtue of viable tension's impartiality is that it re-enforces freedom of expression in relation to Court decisions and a concomitant attitude of healthy skepticism toward the myth of Court infallibility.³¹

If viable tension advances freedom of expression in relation to a Supreme Court construction of the Constitution, it correspondingly creates a pervasive uncertainty within the federal system. For, should each remaining branch of the system exercise its "viable tension right" to adopt a constitutional construction differing from the Court's, the resultant clash of competing constructions would obliterate the Constitution's functional meaning. Battered by conflicting "ought" statements, the citizen would have no reliable guide for conforming his conduct to constitutional commands. Thus, viable tension would remove from the federal system the predictability that judicial supremacy would preserve. Not the Supreme Court, but the vicissitudes of political power would determine the

30. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

31.

. . . [T]he Supreme Court in American society, which Arnold terms "our most important symbol of government," continues to be regarded as the font of impartiality and legitimacy, of near-infallibility amidst the chaos of conflicting notions of legality. And even among those writers who are fond of emphasizing the policymaking or "political" role of the Court (often along with a description of its historical foibles) one is still likely to find references to the awe and reverence in which the Court is held—to the magic or sacrosanctity of the Court and its personnel.

Stumpf, *supra* note 15, at 48.

prevailing constitutional construction; a type of constitutional Darwinism would suffuse the nation.

Would this suffusion be necessarily bad? Viable tension advocates would argue that their model reflects accurately the flow of power within the federal system. They would stress that each of us has initially the power to disobey a Supreme Court decision, a congressional act, or any other governmental command. Accordingly, a Court decision, like an act of Congress, has efficacy only to the extent that we are compelled by superior force to obey it. Why not, therefore, let obligation follow power? Less abstractly, why not say that a person is obligated to comply with a Court construction of the Constitution only if compelled to do so? By thus wedding obligation to power, viable tension avoids the anomaly of an obligation hanging impotently in limbo.

The wedding of obligation to power also produces harmful results. To reject totally the role of oughtness within a legal system is to make compulsion the determinant of individual commitment to law. This is the great danger of the pure viable tension model. By promoting a nationwide belief that individuals may legally ignore Supreme Court decisions until compelled to obey them, the model would generate toward these decisions an attitude of inertia, waxing through increasingly ominous stages of disrespect and open defiance. Moreover, if individuals must be dragged en masse into sullen compliance with Court decisions, an erosion of the nation's law enforcement energies would follow. And, looming behind that practical consequence is the jugular threat of anarchy. If unrestrained, viable tension invites inexorably a societal condition where "[t]hings fall apart; the centre cannot hold."³²

III. THE MODELS APPLIED TO THE FEDERAL SYSTEM

Judicial supremacy and viable tension are each a mixed blessing. Both models contain strengths and weaknesses; if applied absolutely, each model becomes untenable. Accordingly, an operable federal system requires some degree of reconciliation between the competing models. To determine the degree of reconciliation required, this section will apply the competing models to the several parts of the federal system.

As this application is made, a number of policy considerations will affect the choice between the competing models. The wording

32. W. B. Yeats, *The Second Coming*, in *THE COLLECTED POEMS OF W. B. YEATS* 184 (3d ed. 1956).

of the Constitution is a policy consideration of paramount importance. If the constitutional mandate is clear and specific, it creates expectations in the nation that should not be ignored. To distort a constitutional provision of patent clarity invites the growth of cynicism among those subject to the Constitution's commands. Although many constitutional provisions lack patent clarity, the search for a "textually demonstrable constitutional"³³ mandate must still be made. The Constitution may indeed be a living document whose commands are shaped by the exigencies of society, but this concept of organic growth has not displaced totally the need for constitutional exegesis. Ascertaining the meaning of the Constitution requires more than taking a Gallup poll of the nation's current desires.

A second policy consideration involves predictability. A person needs to know where he stands legally in relation to the system that governs him.³⁴ This need is urgent with respect to the government decision-maker who must react to a pronouncement by another branch of government; it is even more urgent with respect to those whose lives are affected directly by the decision-maker's reaction. Accordingly, as the judicial supremacy and viable tension models are applied to the federal system, an "urgency of predictability" factor will also be considered in determining the obligation of each governmental branch to comply with a Supreme Court decision. The greater the need for predictability, the more readily should an immediate obligation to comply be found to exist.³⁵

A third policy consideration involves opportunity for political endeavor. A political system should encourage orderly change through legitimate channels. This requires a system that is responsive and that contains within its framework a wide diversity of means for accomplishing orderly change. A narrow, rigid system stifles individual and collective initiative; within such a system, creative political reform becomes very difficult. Thus, as the competing models are applied to the several parts of the federal system, they must be judged in each application on the basis of their tendency to expand or constrict legitimate avenues of political endeavor.

33. This phrase appears in the Court's opinion in *Baker v. Carr*, 369 U.S. 186, 217 (1962).

34. See note 10 *supra* and accompanying text.

35. Related to the policy factor of predictability is the argument that the Supreme Court is in a better position than any other branch of the federal system to function as the final arbiter on questions of constitutional construction. This argument is considered more fully in my discussion of the application of the competing models to the legislative and executive branches of the federal government. See text accompanying note 66 *infra*.

There may be a compelling need to preserve a particular governmental branch as a free agent in relation to a Supreme Court decision, as an unfettered avenue for political effort designed to blunt the decision's continuing effect. Such a need would militate against an obligation to comply instantly with the decision.³⁶

A final policy consideration involves the relationship between obligation and power. Although power realities within the federal system should not determine conclusively the boundaries of legal obligation, these realities affect legal obligation significantly. If obligation and power clash continually, "it is evident, the machine is working in a way the framers of it did not intend."³⁷ Nor can any political system long endure a gaping divergence between obligation and power. With the passage of time, the definition of legal obligation will yield to the realities of power, or the realities of power will conform to the definition of legal obligation. Contrarily, a persisting divergence between obligation and power can destroy the conception of oughtness that holds a nation together. Hence, the competing models of judicial supremacy and viable tension must not be applied in a manner which stretches the divergence between obligation and power to the breaking point; the analytical task is reconciliation.³⁸

A. *The Lower Federal Courts*

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.³⁹

The judge of a lower federal court should be obligated to comply instantly with a Supreme Court construction of the Constitution.

36. Related to the policy factor of opportunity for political endeavor is the argument that judicial supremacy is anti-democratic in nature in that it operates contrary to the principle of majority rule. See note 74 and the accompanying text *infra*. In rebuttal, many jurists and writers have contended that in a democratic society, the Supreme Court has a special role to play in the protection of minority rights against the passions of the majority. See the oft-quoted footnote 4 in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938), in which Justice Stone stated that "prejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry."

37. *Eakin v. Raub*, 12 S. & R. 330, 350 (Pa. Sup. Ct. 1825) (Gibson, J., dissenting). Justice Gibson's dissent contains an elaborate attack on the doctrine of judicial review. While his arguments have been overwhelmed by the experience of history, the quoted phrase aptly describes the dangers for a political system of a persisting divergence between obligation and power.

38. The four policy factors listed in this section are probably not exhaustive of the policy factors relevant to the choice between judicial supremacy and viable tension. Hopefully, however, nearly all factors bearing upon this choice can be related reasonably to one or more of these four factors.

39. U.S. CONST., art. III, § 1.

Here, if nowhere else in the federal system, the judicial supremacy model should be applied vigorously. In this area, any weakening of judicial supremacy would undermine irreparably the Supreme Court's appellate power over the lower federal courts.

At this level, all policy considerations point strongly toward judicial supremacy. The Constitution states clearly that the lower federal courts are to be "inferior"⁴⁰ to the Supreme Court; such inferiority clashes syntactically with the right to reject a Supreme Court decision. Thus, the wording of the Constitution creates the expectation that lower federal courts will not engage in internecine war with the Supreme Court.

Moreover, in relation to a Supreme Court decision, the need for a predictable reaction by the lower federal courts is urgent. Persons affected by the federal judiciary need to know that lower federal court judges will attempt fairly and conscientiously to apply Supreme Court decisions. Thus, it would be anomalous for a federal district court judge to reject the holding in *Brown v. Board of Education*⁴¹ because he prefers the "separate but equal" doctrine of *Plessy v. Ferguson*.⁴² For such an attitude to pervade the federal courts would produce judicial chaos; its unsettling effect on federal court litigants and the federal system in general would be intolerable. Whatever difficulties are involved in construing and applying what the Supreme Court has said, lower federal court judges should regard themselves as obligated to make the attempt,⁴³ and this obligation should extend, upon remand, to the particular case before the Supreme Court and to all future cases raising the same legal issue.

As a further consideration, there is no particular urgency that lower federal courts serve as a vehicle for political endeavor designed to blunt the continuing effect of a Supreme Court decision. If there is to be such a vehicle, other branches of the federal system can perform this function better. Traditionally, the nation has looked to the legislative and executive branches of government as more appropriate conduits for battling the Supreme Court. To enlist

40. U.S. CONST., art. I, § 8.

41. 347 U.S. 483 (1954).

42. 163 U.S. 537 (1896).

43. To what extent may lower federal courts anticipate in their decisions that the Supreme Court will overrule a former precedent? See *Spector Motor Serv. Inc. v. Walsh*, 139 F.2d 809 (2d Cir.), *vacated sub nom.* *Spector Motor Serv. Inc. v. McLaughlin*, 323 U.S. 101 (1944), for the contrasting views of Judges Clark at 814 and Hand (dissenting) at 823 on this issue. See *Barnette v. West Virginia State Bd. of Educ.*, 47 F. Supp. 251, 252-53 (S.D. W. Va. 1942), *affd.*, 319 U.S. 624 (1943) for an example of a lower federal court decision which expressly anticipates that the Supreme Court will overrule a former precedent.

lower federal courts for this purpose would promote only political redundancy.

Finally, to accord lower federal courts a "viable tension" right to reject Supreme Court decisions would strain unduly the relationship between obligation and power within the federal system. Rebellious federal judges would continually necessitate the application of federal legislative and executive power to insure the fair enforcement of Supreme Court decisions in the lower federal courts. No countervailing policy is of such strength as to justify this wasteful use of federal enforcement energies. If applied to the federal judiciary, the viable tension model would involve lower federal courts in acts of unseemly futility or, more ominously, would make a shambles of the federal judicial system envisioned by the Constitution.

B. *The State Courts*

In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, . . .⁴⁴

Ever since *Martin v. Hunter's Lessee*,⁴⁵ decided at an early date in the nation's history, the view has prevailed that the state courts do have concurrent jurisdiction with the federal courts over cases involving a "federal question"⁴⁶ or, more technically, cases "arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority."⁴⁷

As a concomitant of state court jurisdiction over federal question cases, the Supreme Court held in *Martin v. Hunter's Lessee*⁴⁸ that Congress had the power to grant to the Supreme Court appellate jurisdiction over federal question cases originating in the state courts. Building on the arguments advanced by Alexander Hamilton in *The Federalist No. 82*, Justice Story found textual support for this holding in the article III clause that grants to the Supreme Court appellate jurisdiction "in all the other Cases before mentioned."⁴⁹ If these "other Cases" include federal question cases, and if the state courts have concurrent jurisdiction over federal question cases, then, reasoned Story, the appellate jurisdiction of the Supreme Court can be extended constitutionally to federal question cases originating in the state courts. In the words of Hamilton: "The objects of appeal,

44. U.S. CONST., art. III, § 2.

45. 14 U.S. (1 Wheat.) 304 (1816).

46. 14 U.S. (1 Wheat.) at 339-41.

47. U.S. CONST., art. III, § 2.

48. 14 U.S. (1 Wheat.) 304 (1816).

49. 14 U.S. (1 Wheat.) at 338-39, quoting U.S. CONST., art. III, § 2.

not the tribunals from which it is to be made, are alone contemplated."⁵⁰

That the Supreme Court has appellate jurisdiction over federal question cases originating in the state courts is thus a premise rooted firmly in history, the wording of the Constitution, and in judicial authority. Indeed, the premise continues today as a crucial linchpin of the federal system. Accepting the premise, the state courts then become an integral part of the federal judicial system precisely to the extent that they entertain federal question cases.⁵¹ More relevantly, in federal question cases the state courts are in precisely the same position relative to the Supreme Court as the lower federal courts. Accordingly, every policy argument used to support an application of the judicial supremacy model to the lower federal courts can be used with equal efficacy to support the application of the same model to the state courts.

The judicial supremacy model should, therefore, be applied to the state courts in full strength. To concede to the state courts a viable tension right to reject a Supreme Court construction of the Constitution would, as in the case of the lower federal courts, conflict dramatically with the Supreme Court's appellate power. In Justice Story's words, the federal judicial system should be free of "jarring and discordant judgments."⁵² As concerns the state courts, only a robust application of judicial supremacy will enable the Supreme Court, in the resolution of federal questions, to achieve an approximate uniformity throughout the federal judicial system. State court judges should be obligated to comply instantly with a Supreme Court construction of the Constitution. Within the framework of the federal judicial system, the Supreme Court should be indeed supreme.

C. *The Legislative and Executive Branches of the Federal Government*

Well: John Marshall has made his decision: now let him enforce it!⁵³

50. THE FEDERALIST No. 82, at 536 (Modern Library Ed. 1937) (Hamilton).

51. The role of the state courts as a part of the federal judicial system is highlighted in article VI of the Constitution: "and the Judges in every State shall be bound thereby [the Constitution, laws, and treaties of the United States], any thing in the Constitution or Laws of any State to the contrary notwithstanding."

52. 14 U.S. (1 Wheat.) at 348.

53. Statement attributed to President Jackson by George N. Briggs of Massachusetts. Briggs was serving as a member of Congress at the time Jackson allegedly made the statement in response to the Supreme Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). H. GREELEY, THE AMERICAN CONFLICT 106 n.27 (1864).

In 1830, the state of Georgia passed a law making it a crime for any white person to reside "within the limits of the Cherokee nation" without the consent of the governor of Georgia.⁵⁴ Shortly thereafter, in 1831, Samuel A. Worcester engaged in missionary activities among the Cherokees without the Georgia governor's consent. Accordingly, Worcester was arrested by Georgia officials, tried in a Georgia state court, and convicted of violating the 1830 act; as provided by the act, he was then sentenced to "hard labor" in the state penitentiary for a term of four years.⁵⁵

In *Worcester v. Georgia*,⁵⁶ Worcester appealed his conviction to the United States Supreme Court. In 1832, in an opinion by Chief Justice Marshall, the Court reversed Worcester's conviction, holding that the 1830 Georgia act and hence Worcester's conviction were unconstitutional because they conflicted with then existing treaties between the United States and the Cherokee nation. Pursuant to this holding, the Supreme Court ordered

that all proceedings on the said indictment [of Worcester] do for ever surcease; and that the said Samuel A. Worcester be and hereby is henceforth dismissed therefrom, and that he go thereof quit, without day [*sic*]. And that a special mandate do go from this court, to the said [Georgia] superior court, to carry this judgment into execution.⁵⁷

When the attorneys for Worcester sought enforcement of the Supreme Court's judgment, President Jackson refused to execute it. According to Horace Greeley, it is then that Jackson challenged Marshall in the words quoted at the beginning of this subsection. And so, Greeley concluded, Worcester "languished years in prison . . . in defiance of the mandate of our highest judicial tribunal."⁵⁸

Worcester illustrates dramatically the Supreme Court's dependence upon the federal executive for the execution of its judgments. More generally, without the support of the co-ordinate branches of the federal government, a Supreme Court decision is impotent, a mere pronouncement and nothing more. Concededly, a series of Court decisions may generate political pressures which eventually influence Congress and the federal executive in the Court's direction; but unless these two branches conform promptly to a Court decision,

54. *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 523.

55. 31 U.S. (6 Pet.) at 532.

56. 31 U.S. (6 Pet.) 515.

57. 31 U.S. (6 Pet.) at 597.

58. H. GREELEY, *supra* note 53, at 106. See Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969), for a recent discussion of *Worcester*.

a wide divergence between power—as exercised by Congress and the federal executive, and obligation—as defined by the Court decision, will persist for a substantial period of time. This divergence does not preclude application of the judicial supremacy model to the co-ordinate branches of the federal government, nor does it dictate automatic application of the viable tension model. It does mean that here the choice between the competing models is more difficult to make than in the case of the federal and state judiciaries.

The Constitution does not expressly grant to the Supreme Court the power of judicial review.⁵⁹ To support the exercise of judicial review in *Marbury v. Madison*,⁶⁰ Marshall had to reason by implication. Even less does the Constitution define the extent to which a Supreme Court decision binds the nation. This is particularly true in regard to the decision's binding effect on Congress and the federal executive. Here, the most diligent search will yield no hint of any constitutional mandate; on this issue, the Constitution is superbly silent. Its wording equally supports the application of judicial supremacy or viable tension to the co-ordinate branches of the federal government. Moreover, why not select Congress or the federal executive as the ultimate decision-maker among the three branches of the federal government?⁶¹ Nothing in the Constitution attaches greater potency to a Supreme Court decision than to a decision of Congress or the federal executive. Viewed from any perspective, the appeal to constitutional exegesis is inconclusive.⁶²

Indeed, any inference drawn from the Constitution's wording would favor viable tension among the three branches of the federal

59. Concerning the intent of the framers of the Constitution on the issue of judicial review, Leonard W. Levy quotes Edward S. Corwin:

... in blunt language he declared, "The people who say the framers intended it are talking nonsense"—to which he hastily added, "and the people who say they did not intend it are talking nonsense." In the same vein he remarked, there is "great uncertainty." A close textual and contextual examination of the evidence will not result in an improvement on these propositions.

Levy, *Judicial Review, History, and Democracy: An Introduction*, in *JUDICIAL REVIEW AND THE SUPREME COURT* 4 (L. Levy ed. 1967).

60. 5 U.S. (1 Cranch) 137 (1803). Marshall's reasoning relied heavily on arguments advanced by Hamilton in *THE FEDERALIST* No. 78.

61. Indeed, Great Britain exemplifies a governmental system operating under a model of parliamentary supremacy. If the choice lay only between legislative or executive supremacy, British history strongly supports the former. In a representative form of government, legislative supremacy would appear to be the surer shield against totalitarian government. For reasons advanced in the text accompanying note 66 *infra*, on matters of constitutional construction, I would choose judicial supremacy over legislative or executive supremacy.

62. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 5-6 (1962), for a discussion of the ambiguity of the Constitution concerning the function of the Supreme Court in the federal system.

government. If anything, the Constitution's first three articles connote equality among the three branches. Such equality is more consistent with a viable tension right in each branch to construe the Constitution independently than with an obligation on the part of two branches to comply instantly with a constitutional construction by the third branch. Nor can judicial supremacy draw support from the allocation of powers among the three branches. Viewed thusly, Hamilton's description of the judiciary as the "least dangerous"⁶³ branch is apt. Syntactically, Congress and the federal executive boast far greater powers. If judicial supremacy is to prevail among the three branches of the federal government, it must find support elsewhere than in the express wording of the Constitution.

The judicial supremacy model would require Congress and the federal executive to comply instantly with a Supreme Court decision. Under this model, the reaction of Congress and the federal executive to a Court decision would be highly predictable. If this meets an urgent need, on that basis alone judicial supremacy might well carry the day. But how urgent is the need? In some respects, predictability of reaction to a Court decision would be a strongly harmonizing factor among the three branches of the federal government. For example, when the Court speaks, the individual Congressman or federal executive officer would know what reaction is expected of him in his official capacity. Additionally, persons affected directly by the reaction of Congress and the federal executive to a Court decision would know what that reaction ought to entail. More particularly, litigants asserting rights established by a Court decision would know that Congress and the federal executive should fairly enforce those rights. Undoubtedly, these several conceptions of oughtness would instill greater stability into the federal system. But the crucial question recurs. Is this greater stability indispensable? Can the federal system function without it?

Some observers have stated that in relation to the co-ordinate branches of the federal government, not even the power of judicial review is an indispensable part of the federal system. This thought is compressed neatly into Justice Holmes' well-known statement: "I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think that the Union would be imperiled if we could not make that declaration as to the laws of the several states."⁶⁴ On the issue of judicial review,

63. THE FEDERALIST No. 78 at 504 (Modern Library Ed. 1937) (Hamilton). In other words, if supremacy turned upon the scope and potency of powers granted under the Constitution, Congress and the executive branch would clearly prevail over the Court.

64. O. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295-96 (1920).

Holmes' statement recognizes a hierarchy of urgency among the several parts of the federal system. By analogy, the same hierarchy of urgency would exist on the issue of a Supreme Court decision's binding effect. One who can envision a federal system without judicial review should have no difficulty in envisioning a system in which a Supreme Court decision, while binding on the federal judiciary, has no binding effect on Congress and the federal executive.

Paradoxically, the existence of judicial review supports the application of viable tension to the co-ordinate branches of the federal government. Judicial review enables the Supreme Court to protect its own sphere of action, to act as master of its house. More technically, judicial review empowers the Court to determine which acts by the remaining parts of the federal system will be recognized within the framework of the federal judiciary. This, arguably, is judicial review's primary function.⁶⁵ So viewed, why is there not an equal need for "congressional review" and "presidential review"? As co-equal branches of the federal government, Congress and the federal executive should have the power to protect their respective spheres of action from what they regard as unconstitutional encroachment by the Supreme Court. In this game of clashing spheres, why is the urgency any greater for Congress and the federal executive to bow before the Supreme Court than for the bows to be reversed? Every argument using predictability as a basis for adopting judicial supremacy can be used equally to support congressional or presidential supremacy; the triangle of competing urgencies lies flat on a horizontal plane.

If, on the issue of constitutional construction, we must stand the triangle upright, the Supreme Court should be placed at the apex. Precisely because it is the "least dangerous" branch and the branch most removed from the transient passions of the day, the Supreme Court is in a better position than Congress and the federal executive to deliberate calmly and impartially the enduring implications of a particular constitutional construction. The Court can more readily engage in action that is "genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."⁶⁶ These truths argue persuasively for the application of judicial su-

65. See W. GROSSKEY, 2 *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1002-07 (1953), for an argument that the Constitution was intended to limit judicial review of congressional acts to those which interfere with judicial operations.

66. Wechsler, *The Courts and the Constitution*, 65 *COLUM. L. REV.* 1001, 1011 (1965).

premacY to the co-ordinate branches of the federal government, for standing the triangle upright with the Supreme Court at the apex. For me, however, they do not outweigh the need for preserving intact the power of congressional and presidential review, the ability of Congress and the federal executive to protect their respective spheres of action. I would leave the triangle flat and cease searching for a champion among the three branches.

Why this concern for preserving congressional and presidential review? Even if they must operate under judicial supremacy, Congress and the federal executive have a potent array of weapons with which to battle the Supreme Court.⁶⁷ These weapons, however, are suited better for extended warfare than for the immediate skirmish. They lack efficacy when Congress or the federal executive wishes to challenge a constitutional construction in a particular case before the Court. More concretely, if the Supreme Court renders a decision on the basis of a constitutional construction with which Congress disagrees, it may be precisely that decision which Congress does not wish to implement. Although such instances will occur rarely, there may be an urgent need for the ability of Congress to reject the Court's constitutional construction in the particular case without incurring the legal opprobrium of the nation. Under the judicial supremacy model, congressional refusal to implement a specific Court decision would be an "unconstitutional act," a breach of a legal duty imposed by the federal system.

Potential offshoots from the recent case of *Powell v. McCormack*⁶⁸ illustrate vividly the need for preserving the right of congressional review with respect to a particular case before the Supreme Court. In many ways, *Powell* is a modern day counterpart of *Marbury v. Madison*. As in *Marbury*, the Court in *Powell* exercised the power of judicial review in a controversial setting and in a way which avoided direct confrontation with the remaining branches of the federal government. Through the declaratory judgment device, the *Powell* Court was able to claim new ground for judicial review, while at the same time withholding relief which would have invited formal congressional repudiation. For example, the Court neatly sidestepped Powell's petition for a writ of mandamus ordering the Sergeant-at-Arms of the House of Representatives to release Powell's congressional salary for the two years during which Powell was excluded from Congress. Instead, the Court rested content with

67. See notes 11-13 *supra* and accompanying text.

68. 395 U.S. 486 (1969).

its declaratory judgment that the exclusion was unconstitutional.⁶⁹ As to the other forms of relief sought by Powell, the Court conveniently remanded the case "to the United States District Court for the District of Columbia with instructions to enter a declaratory judgment and for further proceedings consistent with this opinion."⁷⁰ Thus, Congress was left to fulminate against a phantom holding which created no compelling call to arms.

Suppose, however, that the Supreme Court had ordered the House Sergeant-at-Arms to release Powell's back pay. Here the confrontation between the Court and Congress would be direct and dramatic.⁷¹ Under judicial supremacy, Congress would be obligated to implement instantly the Court's decision by authorizing the Sergeant-at-Arms to pay Powell. Quite possibly, a strong majority of Congress would disagree with the Court's construction of the Constitution and would argue that the Court had invaded an area committed by the Constitution to Congress' sole discretion.⁷² In this setting, should the federal system obligate Congress to implement the Court's decision? How far would the Court have to penetrate into Congress' internal procedures before the advocates of judicial supremacy would say, "Enough"? If the concept of co-equal branches retains any vitality, the federal system should grant to Congress not only the raw power, but the legal right to protect its sphere of action. We grant readily to Congress the right to resist presidential encroachments in the "particular case"; this right is the tacit premise undergirding the current debate between Congress and the President over our nation's military involvement in Indochina. Why should we be less ready to grant to Congress a parallel right to resist judicial encroachments? The potential ramifications of *Powell* show that the need for congressional review can be equally as urgent in the one case as in the other.

To solve the problem created by *Powell*, the right of Congress and the President to reject a Supreme Court constitutional construc-

69. 395 U.S. at 550.

70. 395 U.S. at 550.

71. Concerning the likelihood of a clash between the Court and Congress, the *Powell* Court commented "the Court has noted that it is an 'inadmissible suggestion' that action might be taken in disregard of a judicial determination. *McPherson v. Blacker*, 146 U.S. 1, 24 (1892)." 395 U.S. at 549 n.86.

72. See the revealing series of letters from counsel for plaintiff and defendant to the United States District Court for the District of Columbia upon remand of *Powell*, debating the propriety of suggesting to the court that the House of Representatives might well disobey any affirmative order directed to its agents. The letters are set forth in McKay, *Comments on Powell v. McCormack*, 17 UCLA L. REV. 117, 126-29 nn.42-44 (1969).

tion could be limited to Court constructions which interfere with the procedural machinery of Congress or the federal executive. This "internal procedure" model of viable tension would leave unscathed most of the Court's constructions and would enhance predictability within the federal system. It would fail, however, to provide legal protection against constructions by the Court which, while not affecting the internal procedure of the legislative or the executive branches, might cause great damage to the nation. For example, *Plessy v. Ferguson*⁷³ gave legal sanction to segregated public facilities and did much to foster a belief in the morality of racial segregation throughout the nation, and particularly in the South. We are still paying the price of this legacy today.

The *Powell* case is just one example of a policy consideration which permeates the federal system: preserving generous opportunity for political endeavor.⁷⁴ For reasons already discussed, the federal system should offer an ample array of legitimate means for seeking orderly change. And the need for orderly change may relate, albeit infrequently, to modification or rejection of a Supreme Court constitutional construction in the particular case before the Court. Here, judicial supremacy would provide no legitimate means for seeking relief. Acquiescence or illegal assertion of power would be the only available options. Conversely, viable tension, if applied to Congress and the federal executive, would make those two branches unencumbered vehicles for political endeavor designed to block implementation of a specific Court decision. Precisely at the time of need, Congress and the federal executive would then serve as federal system safety valves for legitimate action against Supreme Court foolishness or usurpation.

Viable tension is not a novel concept. Respected Presidents have argued for some degree of viable tension among the three branches of the federal government. In the statements and writings of Jefferson,⁷⁵ Jackson,⁷⁶ Lincoln,⁷⁷ and Franklin Roosevelt,⁷⁸ there is at least

73. 163 U.S. 537 (1896).

74. Writing prior to the Warren Court era, Henry Steele Commager expressed strong hostility to judicial review as a "drag upon democracy" and concluded that "Congress, and not the courts, emerges as the instrument for the realization of the guarantees of the Bill of Rights." Commager, *Judicial Review and Democracy*, in JUDICIAL REVIEW AND THE SUPREME COURT 64, 73 (L. Levy ed. 1967). For a more recent and more favorable approach toward judicial review, see Rostow, *The Democratic Character of Judicial Review*, in JUDICIAL REVIEW AND THE SUPREME COURT 74 (L. Levy ed. 1967).

75. . . . You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and

imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. That instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch.

Letter from Thomas Jefferson to Abigail Adams, Sept. 11, 1804, in 8 *THE WRITINGS OF THOMAS JEFFERSON* 311 (P. Ford ed. 1897). See also Letter from Thomas Jefferson to Judge Spencer Roane, Sept. 6, 1819, and Letter from Thomas Jefferson to William C. Jarvis, Sept. 28, 1820, in 10 *THE WRITINGS OF THOMAS JEFFERSON* 140-41, 160-61 (P. Ford ed. 1899). Clearly, Jefferson is here claiming that Congress and the federal executive can legally reject a Supreme Court constitutional construction in the particular case before the Court, as well as in future fact situations raising the same legal issue.

76. . . . It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent.

. . . . The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. . . . It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

Message of Andrew Jackson vetoing the bill to recharter the Bank of the United States, July 10, 1832, 2 *MESSAGES AND PAPERS OF THE PRESIDENTS* 576, 581-82 (J. Richardson ed. 1897). Jackson plainly states that Congress and the federal executive can legally reject a Supreme Court constitutional construction in future fact situations raising the same legal issue. His language also supports a right of rejection in the particular case before the Court. Any doubt on this latter point should be resolved by his failure to enforce the Court's mandate in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). See text accompanying notes 53-58 *supra*.

77. In a speech delivered during the Lincoln-Douglas senatorial campaign of 1858, Lincoln commented in regard to *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857):

. . . We do not propose that when Dred Scott has been decided to be a slave by the court, we as a mob will decide him to be free [B]ut we nevertheless do oppose that decision as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision. We do not propose to be bound by it as a political rule in that way, because we think it lays the foundation not merely of enlarging and spreading out what we consider an evil, but it lays the foundation for spreading that evil into the States themselves. We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject. . . .

Sixth Debate between Abraham Lincoln and Stephen Douglas, Quincy, Ill., Oct. 13, 1858, in 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 245, 255 (R. Basler ed. 1953).

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. . . . [I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

First Inaugural Address of Abraham Lincoln, March 4, 1861, 7 *MESSAGES AND PAPERS OF*

this common denominator of agreement: In relation to a Supreme Court constitutional construction, Congress and the federal executive should have a viable tension right to reject the Court's construction in future fact situations raising the same legal issue; that is, the right to exert continuing pressure on the Court by generating a series of cases testing the Court's willingness to persist in its construction. In the Lincoln-Douglas debates, Lincoln expressed this view succinctly in relation to the *Dred Scott* decision: "If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that *Dred Scott* decision, I would vote that it should."⁷⁹ Here, Lincoln is saying plainly that Congress and the federal executive are not obligated to conform their future conduct to a Supreme Court construction of the Constitution. They are not obligated, again in Lincoln's words, to adopt the Court's construction as "a rule of political action for the people and all the departments of the government."⁸⁰ On this issue, Jefferson, Jackson, and Roosevelt agreed clearly with Lincoln.⁸¹

Concerning rejection of a Supreme Court constitutional construction in the particular case before the Court, the four Presidents are

THE PRESIDENTS 3210-11 (J. Richardson ed. 1897). See also Addresses of Abraham Lincoln, July 10, 1858, Chicago, Ill., July 17, 1858, Springfield, Ill., in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 484, 494-95, 504, 516 (R. Basler ed. 1953).

78. The following is an excerpt from a draft of a speech which President Roosevelt planned to deliver had the Supreme Court decided against the Government on the constitutionality of abrogating "gold clauses" in federal obligations. In fact, in a 5-to-4 decision, the Court upheld the Government's position in *Perry v. United States*, 294 U.S. 330 (1935).

It is the duty of the Congress and the President to protect the people of the United States to the best of their ability. It is necessary to protect them from the unintended construction of voluntary acts, as well as from intolerable burdens involuntarily imposed. To stand idly by and to permit the decision of the Supreme Court to be carried through to its logical, inescapable conclusion would so imperil the economic and political security of this nation that the legislative and executive officers of the Government must look beyond the narrow letter of contractual obligations, so that they may sustain the substance of the promise originally made in accord with the actual intention of the parties.

... I shall immediately take such steps as may be necessary, by proclamation and by message to the Congress of the United States.

3 F.D.R.: HIS PERSONAL LETTERS, 1928-1945, 456, 459-60 (E. Roosevelt ed. 1950). Although the precise import of these remarks is unclear, Roosevelt seemingly is here asserting a legal right to block the continuing effect of the Court's decision in the particular case before the Court. Beyond cavil, he is asserting with Jefferson, Jackson, and Lincoln a legal right to reject the Court's decision in future fact situations raising the same legal issue. In this same draft, Roosevelt quoted with approval from the portion of Lincoln's First Inaugural Address reproduced in note 77 *supra*.

79. Address of Abraham Lincoln, Chicago, Ill., July 10, 1858, 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 484, 494-95 (R. Basler ed. 1953).

80. Address of Abraham Lincoln, Springfield, Ill., July 17, 1858, 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 504, 516 (R. Basler ed. 1953).

81. See notes 75, 76 & 78 *supra*.

not in agreement. In his First Inaugural Address, Lincoln conceded that in this instance the Court's construction should be implemented:

And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice.⁸²

In contrast, Jefferson, Jackson, and Roosevelt, with varying degrees of clarity, seem to argue for a right in Congress and the federal executive to reject the Court's construction even in the particular case before the Court.⁸³ The tenor of the presidential remarks, especially Roosevelt's,⁸⁴ suggests that the right should be exercised sparingly and only in instances of great need, but for purposes of this analysis, the crucial fact is the apparent recognition of the right.

More generally, all four Presidents were concerned with preserving within the federal system generous opportunity for political endeavor, and with preserving Congress and the federal executive as legitimate avenues for political action designed to blunt the continuing effect of a Supreme Court constitutional construction. While articulating their concern primarily in relation to future fact situations raising the same legal issue, the four Presidents also stressed the more generic need for protecting congressional and presidential prerogatives against judicial encroachments. And with respect to the particular case before the Court, only the viable tension model affords this needed protection. Here, more than anywhere else in the federal system, opportunity for political endeavor becomes a compelling policy consideration.

Would chaos result from application of viable tension to the coordinate branches of the federal government? As stressed earlier, the

82. First Inaugural Address of Abraham Lincoln, March 4, 1861, 7 MESSAGES AND PAPERS OF THE PRESIDENTS 3210-11 (J. Richardson ed. 1897). Fairly construed, this statement suggests that Lincoln would regard the entire federal system as obligated to comply with a Supreme Court constitutional construction in the particular case before the Court. Earlier in the Address (*see* note 77 *supra*) Lincoln does refer to the Court's decision as "binding in any case upon the parties to a suit as to the object of that suit." Technically, this leaves open the question of the decision's binding effect on governmental departments which are not parties to the litigation.

83. *See* notes 75, 76 & 78 *supra*.

84. Viewed as the assertion of a legal right to block the Court in the particular case, the draft of Roosevelt's speech concerning the "gold clause" cases (*see* note 78 *supra*) vividly illustrates the type of Supreme Court construction that can have a dramatic impact on the nation. Roosevelt clearly believed that an adverse Court holding would have created a national economic crisis. In this context, should the federal system leave the President only the options of acquiescence or illegal assertion of power? In such an instance the viable tension model provides a legal safety-valve for the federal system, a means of enabling the President to generate legally a countervailing political pressure against the Court's constitutional construction in the particular case.

viable tension model requires a disagreement on constitutional construction.⁸⁵ Specifically, Congress and the federal executive can reject implementation of a Supreme Court decision only when they disagree with the constitutional construction upon which the decision is based. Mere belief that the decision is unwise, ill-timed, or based on erroneous statutory construction will not trigger the viable tension right of rejection. Thus restricted, how often would this right of rejection be asserted? Recent history is instructive. From 1953 to 1969, the Warren Court issued a wide range of decisions affecting fundamentally the political and social patterns of the nation.⁸⁶ Many of these decisions were highly controversial. If ever a period was ripe for congressional or presidential repudiation of the Court, this would seem to have been that period. And yet, with one arguable exception,⁸⁷ the record is barren of any congressional or presidential action formally repudiating a Warren Court constitutional construction. Grumblings and verbal protests abounded, occasionally coalescing into abortive attempts at formal repudiation or modification.⁸⁸

85. See text accompanying notes 26-27 *supra*.

86. Among these decisions were *Miranda v. Arizona*, 384 U.S. 436 (1966) (expanding the rights of the accused subjected to "custodial interrogation" in a criminal proceeding); *Reynolds v. Sims*, 377 U.S. 533 (1964) (requiring that both houses of a state legislature be apportioned on a population basis); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (prohibiting state-prescribed prayer reading in the public schools); and *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (prohibiting state-supported racial segregation in the public schools).

87. Arguably, Title II of the Crime Control Act of 1968, particularly 18 U.S.C. § 3501(b) (1970), constitutes a congressional and presidential repudiation of the Court's constitutional construction in *Miranda*. Even here, however, the federal executive purported to be acting in compliance with existing law and did not formally reject the *Miranda* holding. On signing the Crime Control Act into law on June 19, 1968, President Johnson commented that "the provisions of Title II, vague and ambiguous as they are, can, I am advised by the Attorney General, be interpreted in harmony with the Constitution." N.Y. Times, June 20, 1968, at 23, col. 5.

88. See McKay, *Court, Congress and Reapportionment*, 63 MICH. L. REV. 255 (1964), for a discussion of unsuccessful congressional efforts to curtail federal court jurisdiction in legislative apportionment cases. These efforts were a reaction to the Supreme Court's decisions in *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Baker v. Carr*, 369 U.S. 186 (1962). See W. Beaney and E. Beiser, *Prayer and Politics: The Impact of Engel and Schempp on the Political Process*, in *THE IMPACT OF SUPREME COURT DECISIONS* 20 (T. Becker ed. 1969), for a similar discussion of unsuccessful congressional efforts to blunt the Court's school prayer decisions in *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963), and *Engel v. Vitale*, 370 U.S. 421 (1962). For still more recent developments on the prayer issue, see 117 CONG. REC. H. 10590-658 (daily ed. Nov. 8, 1971) reporting the defeat by the House of Representatives of H.R.J. Res. 191, 92d Cong., 1st Sess. (1971), a proposed constitutional amendment which would authorize "voluntary prayer or meditation" in "any public building which is supported in whole or in part through expenditure of public funds." The proposed amendment failed by twenty-eight votes to obtain the two-thirds majority required for passage of the amendment. Arguably, this amendment attempt represents a congressional repudiation of viable tension in that Congress has here recognized that only a constitutional amendment can overcome the Court's prayer decisions. However, it is possible that Congress chose the amendment route because it was not ready to create the stronger friction that would result from a formal repudiation of the Court by a simple majority vote.

But, no official challenge ever emerged. This history of restraint suggests that Congress and the federal executive would exercise responsibly a viable tension right of rejection; at this level, viable tension would not invite caprice.⁸⁹

Judicial supremacy advocates would argue that "this history of restraint" stems largely from the belief of Congress and the federal executive that they are obligated legally to comply with the Court's constitutional constructions, that this is an area where a nation's conception of oughtness, as nurtured by the experience of history, has made a difference. Indeed, the increased political endeavor contemplated under the viable tension model may undercut reliance upon the past history of restraint. I cannot refute this argument completely. I can suggest that two other factors have contributed to the restraint: First, even under viable tension, a Supreme Court constitutional construction would, in Lincoln's phrase, be "entitled to very high respect and consideration"⁹⁰ among Congress and the federal executive. Desire to avoid the friction resulting from a clash among the branches of the federal government would operate as a check against casual rejection of the Court. Second, in the Warren Court era under discussion, Congress and the federal executive, on the whole, have probably agreed with the Court's major constitutional innovations. And, under viable tension, such would generally be the case. Congress and the federal executive would follow the Court, not only to shun the risk of conflict, but more often because the Court's constitutional construction would commend itself to reason and would be regarded as "right" on the merits. It takes a *Powell* case to push Congress to the brink; and if a *Powell* case does occur, congressional resentment at "judicial encroachment" is apt to overwhelm whatever presumption of oughtness the Court's construction may carry.

Reviewing this subsection, the policy factor of opportunity for political endeavor points strongly toward adoption of viable tension among the three branches of the federal government. With roughly equal strength, the policy factor of predictability points toward judicial supremacy. Standing in the middle, the wording of the Constitution is a neutral policy factor, discernibly favoring neither

89. This election year has produced intense pressure in Congress for "anti-busing" legislation. In light of this pressure, the congressional response to the busing issue in the Education Amendments of 1972 can be characterized as remarkably mild. See N.Y. Times, June 9, 1972, at 21, cols. 1-8, for a summary of the busing provisions adopted by Congress. This restrained reaction by Congress can be cited as further evidence that application of the viable tension model to the other federal branches would not lead to the "constitutional construction by public poll" that some fear.

90. See note 77 *supra*.

model. Judged alone by these three factors, the policy arguments for the competing models are in approximate balance. Thus, the decisive factor favoring viable tension becomes the relationship between obligation and power. As before noted, if applied to Congress and the federal executive, judicial supremacy could create situations in which the definition of legal obligation diverges widely from the realities of power.⁹¹ Unless the cumulative impact of other policy factors strongly favors judicial supremacy, there is no compelling reason to risk this wide divergence. Accordingly, I would apply the viable tension model to Congress and the federal executive. At this level, viable tension harmonizes power and obligation by recognizing that Supreme Court decisions depend for their efficacy upon congressional and presidential support. History shows that a President Jackson can challenge successfully a Chief Justice Marshall;⁹² applied to Congress and the federal executive, viable tension but reflects the experience of history.

If Congress or the federal executive disagrees with a Supreme Court constitutional construction, the viable tension model should require that disagreement to be stated expressly. Although this requirement is mechanical only, it would bring home more forcibly to the dissenting branch the serious nature of its action. Moreover, it would protect against ambiguous congressional or presidential reaction to a Supreme Court decision; if viable tension is to be triggered, it would at least be triggered openly and forthrightly. Absent an express rejection of the Court's constitutional construction, Congress and the federal executive should regard themselves as obligated to comply with the Court's decision. Thus, each Court decision would carry a rebuttable presumption of oughtness, placing upon Congress and the federal executive the burden of formulating an express repudiation. While not depriving viable tension of its sting, such a burden would make the model more acceptable.

91. See text accompanying notes 53-58 *supra*. Perhaps in recognition of this fact, the Supreme Court, in *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867), held that it lacked the power to enjoin directly either the President or Congress. Emphasizing enforcement problems, the Court stated that if the President disobeyed an injunction, . . . it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the Executive and Legislative Departments of the Government . . . ? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President?

71 U.S. (4 Wall.) at 500-01. By way of contrast, the Court has held that it has the power to issue a writ of mandamus against lesser executive officials to compel the performance of ministerial acts. *Kendall v. United States on the Relation of Stokes*, 37 U.S. (12 Pet.) 524 (1838).

92. See text accompanying notes 53-58 *supra*.

Professor Wechsler has suggested an alternative approach for determining the binding effect of a Supreme Court decision. In *The Courts and the Constitution*,⁹³ Wechsler quotes the passage from Lincoln's First Inaugural Address⁹⁴ analyzing the Supreme Court's role in the federal system. Regarding Lincoln's analysis, Wechsler comments:

A doctrine that is valid for the President and Congress surely must be valid also for the State and its officials. But note the purpose of the limitation stated: to allow for the "chance" that the decision "may be overruled and never become a precedent for other cases." When that chance has been exploited and has run its course, with reaffirmation rather than reversal of decision, has not the time arrived when its acceptance is demanded, without insisting on repeated litigation?⁹⁵

Wechsler's approach contemplates a second swing at bat for any governmental branch which disagrees with a Supreme Court constitutional construction. If, however, the Court reaffirms its prior construction, this apparently ends the matter. Among the three branches of the federal government, Wechsler's model of "secondary judicial supremacy" blunts the potency of congressional and presidential review. It merely postpones by one step the point in time at which Congress and the federal executive are required to accept the Court's construction of the Constitution. It disables Congress and the federal executive from providing the federal system with adequate protection against Supreme Court blunders in the particular case before the Court. More fundamentally, the Wechsler model fails to discriminate among the various parts of the federal system. While favoring the Supreme Court too strongly in relation to Congress and the federal executive, it favors the states too strongly in relation to the Supreme Court. The legislative and executive branches of the state governments, as well as the state judiciaries, require a more vigorous form of judicial supremacy than that offered by the Wechsler model. Here, secondary judicial supremacy would weave too thin a veil of oughtness.

The final problem of this subsection concerns conflict resolution among the three branches of the federal government. Even if limited to Congress and the federal executive, viable tension would still create for the federal system a potential oughtness limbo. This consequence is unavoidable once we grant to Congress and the federal

93. 65 COLUM. L. REV. 1001 (1965).

94. See note 77 *supra*.

95. 65 COLUM. L. REV. at 1008.

executive a viable tension right to reject a Supreme Court constitutional construction. While theoretically the period of limbo could continue indefinitely, as a practical matter the federal system would not tolerate such an indefinite state. Assuming a conflict between the Congress and the Court on a question of constitutional construction, the conflict would, in the course of time, work itself out through the political process. Congress and the Court would each have available for combat the same array of weapons as under the judicial supremacy model. The crucial distinction between the competing models is in the conception of oughtness which would prevail while the combat continues. Until resolution of the conflict, Congress, under judicial supremacy, would be acting illegally each time it rejected the Court's constitutional construction; under viable tension, the congressional rejections would be legal. Under either model, the conflict would move eventually to resolution. Thus, neither model immunizes the federal system against political conflict among the three branches of the federal government. Judicial supremacy would label the non-Court contestant a wrongdoer;⁹⁶ reflecting more closely the realities of power, viable tension would remove the label.

Instead of Congress, assume that the President is in conflict with the Court. Because of the Court's dependence on the federal executive for the enforcement of its orders, the initial advantage in this conflict would almost certainly lie with the President. Against the President's control of the federal government's enforcement machinery, the Court's weapon of moral suasion would, at the outset, have little practical effect. If, however, Congress, supported strongly by public opinion, entered the arena on the side of the Court, the realities of political power would probably shift to the Court's advantage. Absent megalomania, no President would be likely to persist, for any extended period of time, in a position that arouses the intense hostility of the Court, Congress, and the general public. Viable tension would not lead inevitably to presidential supremacy.

In conflict resolution among the federal branches, the preceding

96. On the propriety of labeling Congress a wrongdoer in this situation, a quote from Justice Holmes is apt: "... it must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Ry. v. May*, 194 U.S. 267, 270 (1904).

Concerning the responsibility of Congress to determine independently the constitutionality of legislation before its enactment, see *Hearings on S. 1732* (the public accommodations section of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000a-b (1970)) *Before the Senate Comm. on Commerce*, 88th Cong., 1st Sess., pt. 1, at 431-32 (1963) (colloquy between Senator Warren G. Magnuson, Chairman of the U.S. Senate Comm. on Commerce and James J. Kilpatrick, former editor of the *Richmond News-Leader*).

paragraph suggests that any one branch would normally have a difficult time prevailing over the united opposition of the remaining two branches. If this is so, why not construct a model that reflects this reality, a model of "prevailing-majority viable tension"? Under this model, if two branches of the federal government agree expressly on a question of constitutional construction, the third branch would be legally obligated to accept that construction. Because it attempts to match obligation closely to power, such a model has some pragmatic appeal. But lacking the historical support that viable tension can claim,⁹⁷ such a principle appears somewhat artificial and contrived. Rather than constituting a separate model for defining the binding effect of a Supreme Court constitutional construction, the prevailing-majority analysis seems more accurately to constitute a description of how conflict among the federal branches would generally be resolved. I would recur to viable tension in its purer form as the more appropriate model for defining the legal obligation of Congress and the federal executive to comply with a Supreme Court constitutional construction.

D. *The Legislative and Executive Branches of the State Governments*

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; . . .⁹⁸

Sweeping broadly, this subsection includes within "the legislative and executive branches of the state governments" all legislative and executive branches functioning within political subdivisions created under state authority. More technically, this subsection comprehends any legislative and executive action which constitutes "state action"⁹⁹ within the meaning of the fourteenth amendment. For ease of discussion throughout this subsection, the phrase "legislative and executive branches of the state governments" will be compressed to "state governments." Any state action primarily judicial in nature

97. See notes 75-84 *supra* and accompanying text.

98. U.S. CONST., art. VI.

99. The unfolding saga of the state action concept is beyond the scope of this article. The literature on the subject is voluminous. See Henkin, *Shelley v. Kramer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 CALIF. L. REV. 208 (1957); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1069-72 (1969).

would be covered by the earlier analysis of state courts¹⁰⁰ and is not considered here.

I would apply to the state governments a slightly modified form of judicial supremacy. With one exception, state governments should be obligated to comply instantly with a Supreme Court constitutional construction, both in the particular case before the Court and in all future fact situations raising the same legal issue. The one exception is tied to action by Congress or the federal executive. If either Congress or the federal executive expressly rejects the Court's constitutional construction, the state governments, at their discretion, would be free to do likewise. However, absent an express rejection by Congress or the federal executive, the state governments would be obligated to follow the Court's construction until changed by the Court itself or by constitutional amendment. Phrased practically, state governments can escape judicial supremacy only through the action of Congress or the federal executive.

Why concede this escape hatch to state governments? The concession flows irresistibly from the application of viable tension to Congress and the federal executive. As long as the three branches of the federal government agree on a question of constitutional construction, federal supremacy dictates state government compliance. When the federal government speaks as a unit, state governments cannot feign ignorance of the federal government's command. When, however, the federal government does not speak as a unit, the state governments may ask legitimately, "Which branch of the federal government should we obey?" Concretely, if Congress expressly rejects a Supreme Court constitutional construction, Congress, as much as the Court, represents the federal government to the states. Here, the federal government's trumpet bears an uncertain sound. As long as the contest continues between Congress and the Court, the state governments should be free to choose their champion in the lists. They should be free to influence the contest through support of the constitutional construction they deem correct. Once the contest is resolved at the federal government level, the prevailing constitutional construction would again become binding upon the state governments. And, as in the contest just resolved, only a subsequent rejection by Congress or the federal executive could spark a new contest with the Court.

In applying modified judicial supremacy to state governments, the school prayer issue is the paradigm. In *School District of Abington Township v. Schempp*,¹⁰¹ the Supreme Court held that a state

100. See text accompanying notes 44-52 *supra*.

101. 374 U.S. 203 (1963).

cannot require prayer reading in the public schools. Modified judicial supremacy would make the Court's constitutional construction instantly binding on all public school districts in the land. More broadly, all state governments would be obligated immediately to conform their future conduct to the *Schempp* requirements. The obligation imposed on state governments and the school districts operating under their authority would extend, not only to the formal parties in *Schempp*, but to all fact situations fairly covered by the *Schempp* holding. Only an express rejection of *Schempp* by Congress or the federal executive would release state governments and their school districts from the obligation defined in this paragraph. Until such a rejection occurred, the Court's constitutional construction in *Schempp* would be truly the supreme law of the land for state governments. In actuality, neither Congress nor the federal executive has rejected *Schempp*, a highly controversial decision.¹⁰² This fact illustrates that modified judicial supremacy has a practical potency for state governments which will be affected only rarely by the congressional or presidential escape hatch.¹⁰³

The wording of the Constitution strongly supports the application of modified judicial supremacy to the state governments. The supremacy clause connotes federal government supremacy over state governments in the areas of authority delegated to the federal government under the Constitution. This was the interpretation given to the clause in *McCulloch v. Maryland*,¹⁰⁴ and history has made this interpretation an integral part of the federal system.¹⁰⁵ Although *McCulloch* involved state government defiance of a congressional act, the application of federal supremacy should not be limited to acts initiated by Congress. It should apply with equal force to acts initiated by the federal executive or the Supreme Court. So viewed, federal supremacy does not depend upon which branch of the federal government initiates the act in question; rather, it depends upon the unity of the federal government in relation to the act.¹⁰⁶ As long as the federal government speaks as a unit in support of the act, federal

102. See Beaney and Beiser, *supra* note 88.

103. See text accompanying notes 86-89 *supra*.

104. 17 U.S. (4 Wheat.) at 424 (1819).

105. See, e.g., *Maryland v. Wirtz*, 392 U.S. 183 (1968) (upholding the extension of the Fair Labor Standards Act to employees of state schools and hospitals); *United States v. Oregon*, 366 U.S. 643 (1961) (upholding against the conflicting provisions of Oregon probate law a federal statute regulating, under specified circumstances, the distribution at death of a veteran's personal property).

106. The discussion of this paragraph assumes always that the federal government, in the opinion of all three of its branches, is acting in an area of authority delegated to it under the Constitution. Obviously, under the viable tension model, this assumption itself could be the object of disagreement among the three branches.

supremacy should preclude state government repudiation of the act. Moreover, the continuing presumption should be in favor of federal government unity in the absence of express disagreement among its three branches. Specifically, a Supreme Court constitutional construction occurs often without prior action by Congress or the federal executive;¹⁰⁷ in other instances, such prior action galvanizes the Court response.¹⁰⁸ In either event, the Court's construction is an act by one branch of the federal government. Until repudiated expressly by Congress or the federal executive, this act of construction should carry an immediate and continuing presumption of validity as against the state governments. The constitutional mandate of federal supremacy requires nothing less.

Equally with the wording of the Constitution, predictability becomes a second policy factor strongly supporting the application of modified judicial supremacy to the state governments. Consider again the second sentence of Justice Holmes' statement concerning judicial review: "I do think that the Union would be imperiled if we could not make that declaration [of unconstitutionality] as to the laws of the several states."¹⁰⁹ As noted earlier, this statement recognizes, on the issue of judicial review, a hierarchy of urgency among the several parts of the federal system. On the related issue of a Supreme Court decision's binding effect, the hierarchy of urgency is even more dramatic. It is one thing to grant Congress and the federal executive a viable tension right to reject a Supreme Court constitutional construction. Here, the right is confined narrowly, and history indicates that it may be rarely asserted. It is a drastically different thing to grant this same right of rejection to fifty state governments and their multitudinous political subdivisions. Here, history evidences amply that state governments would exercise their right of rejection frequently, sometimes defiantly, and often with little concern for the national interest.¹¹⁰ On many issues

107. Typical of this situation are cases in which the Court reviews the constitutionality of prior state action. *E.g.*, *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (review of a state statute requiring the reading in public schools of a state-prescribed prayer); and *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (review of state statutes requiring or authorizing racial segregation in public schools).

108. Typical of this situation are cases in which the Court reviews the constitutionality of prior congressional or presidential action. *E.g.*, *Powell v. McCormack*, 395 U.S. 486 (1969) (review of Adam Clayton Powell's exclusion from membership in the House of Representatives).

109. O. HOLMES, *supra* note 64, at 296.

110. For instance, Governor Wallace's resistance of a court desegregation order by standing in the gateway of a public school is brought to mind. *See* N.Y. Times, June 12, 1963, at 1, col. 8. More broadly, one can readily predict the result of according to public school districts a viable tension right to reject the Supreme Court's constitu-

of constitutional construction, regional defiance of the Court would become the prevailing norm. The resulting constitutional fratricide would make a shambles of the federal system. Wearing different garb, the discredited doctrine of interposition would win a belated victory.¹¹¹

Even more fundamentally, pure viable tension ignores the person affected adversely by state government defiance of the Supreme Court. Here, the urgency of predictability is acute. If, at their own volition, state governments can legally reject Court decisions, persons affected by these decisions must operate in a maze of uncertainty. The constitutional rights secured by these decisions would exist at state government sufferance. Nor is it sufficient to say that state governments must accept the Court's constitutional construction only in the particular case before the Court. This meets only partially the needs of predictability. While it is true technically that a court decision binds only the parties before the court,¹¹² as applied to state governments the federal system requires a more generous conception of judicial power. To give a Supreme Court constitutional construction its proper scope, it must be held to bind instantly the state governments in all fact situations to which the construction is fairly applicable. Even with its scope thus extended, the construction will often require piecemeal litigation for its effective implementation. But, to restrict the construction's binding effect to the particular case before the Court is to invest state delay tactics with the aura of legality. The school prayer and school desegregation decisions illustrate the difficulty of implementing a Supreme Court constitutional construction against a recalcitrant state government. At the very least, the federal system should saddle that recalcitrance with the burden of legal opprobrium. In this context, the Court's construction, not the state government's dissent, should reap the benefits of oughtness.

tional constructions in *Brown* and *Schempp*. See Blaustein and Ferguson, *Avoidance, Evasion and Delay*, Birkby, *The Supreme Court and the Bible Belt: Tennessee Reaction to the "Schempp" Decision*, Johnson, *Compliance and Supreme Court Decision Making*, in *THE IMPACT OF SUPREME COURT DECISIONS* (T. Becker ed. 1969).

111. Under this doctrine, state governments, at various points in history, have asserted the right to "interpose" their own construction of the Constitution against federal action. In *Bush v. Orleans Parish School Bd.*, 364 U.S. 500 (1960), the Supreme Court bluntly rejected the doctrine, observing that "'interposition is not a constitutional doctrine. If taken seriously, it is illegal defiance of constitutional authority.'" 364 U.S. at 501, quoting from the three-judge federal district court opinion in *Bush*, 188 F. Supp. 916, 926 (E.D. La. 1960). See also Reference Note, *Interposition vs. Judicial Power—A Study of Ultimate Authority in Constitutional Questions*, 1 Race Rel. L. Rep. 465 (1956).

112. See note 24 *supra*.

The abstractions of the preceding paragraph need concrete illustration. Turning again to the school prayer issue, why should the *Schempp* constitutional construction instantly bind all school districts in the land? Why not limit the decision's binding effect to the parties before the Court? It is a central thesis of this Article that a nation's conception of oughtness does make a difference. If school districts regard themselves as obligated to comply instantly with *Schempp*, they will be more likely to comply promptly, without awaiting legal compulsion. Conversely, if school districts regard their legal obligation as beginning only with their specific inclusion in a court order, they will be more likely to delay compliance until that court order arrives. The same phenomenon operates at a school district's community level. The community's conception of oughtness will influence the degree of compliance-pressure which the community is willing to exert on the school district officials. Thus, to limit the binding effect of *Schempp* to the parties before the Court gives legal sanction to inertia; it forces inexorably a resort to piecemeal litigation as the only means of extending the legal effect of the holding to nonparty school districts. To place a mantle of oughtness on this tedious process largely deprives the Court's constitutional construction of any immediate efficacy. In practical terms, it authorizes a school district to say to the federal government, "Catch me, if you can." Here, the federal system's conception of oughtness "should be made of sterner stuff."¹¹³

Applied to state governments, modified judicial supremacy would diminish opportunity for political endeavor. Although serious, this disadvantage loses urgency through application of viable tension to the co-ordinate branches of the federal government. If Congress and the federal executive are each conceded a viable tension right to reject a Supreme Court constitutional construction, this concession provides an ample safety valve for political pressure within the federal system. There is no need to gild the lily by granting a similar right to state governments. In effect, because it can flourish elsewhere in the federal system, opportunity for political endeavor becomes a policy factor supporting viable tension only modestly at the state government level.

Nor would modified judicial supremacy divorce obligation from power. A state government's obligation to follow the Court would continue until express repudiation of the Court by Congress or the federal executive. Absent such repudiation, Congress and the federal

113. W. Shakespeare, *JULIUS CAESAR*, Act III, ii, line 94, in *THE COMPLETE WORKS OF SHAKESPEARE* 648 (Wright ed. 1936).

executive would, by definition, support the Court. For example, enforcement of the Court's holding in the particular case would signal federal executive support of the Court in future cases raising the same constitutional issue.¹¹⁴ Accordingly, the full panoply of federal power would always be available to enforce against state governments precisely the obligation which modified judicial supremacy requires. Conversely, at precisely the time when congressional or presidential repudiation of the Court would divide and weaken federal power, the compliance obligation of state governments would cease to exist. Obligation and power would largely coalesce. Moreover, under modified judicial supremacy, only a regional grouping of state power approaching the magnitude of the Confederacy in the Civil War could cause a substantial divergence between obligation and power. And even there, federal power eventually held sway. Concededly, state governments, through various tactics of active and passive resistance, can obstruct significantly the enforcement of Supreme Court decisions. If, however, the federal government remains unified in its support of a Supreme Court constitutional construction, the power reality is that the Court's construction will prevail ultimately over conflicting state action.

Where does this leave the public school principal who disagrees with the Supreme Court's constitutional construction in *Schempp*? Like the school children in *Tinker v. Des Moines School District*,¹¹⁵ it can be said of a school principal that he does not "shed [his] constitutional rights to freedom of speech or expression at the school-house gate."¹¹⁶ Accordingly, the principal would have a constitutional right to criticize *Schempp* robustly. More precisely, if the principal's speech falls short of advocacy which "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action,"¹¹⁷ his speech would be protected constitutionally under the current Supreme Court standards. The principal, however, would have an equally clear constitutional duty to implement *Schempp* immediately in his own school and to support its requirements affirmatively with the power of his office without awaiting the compulsion of a specific court order.

114. See Titles III and IV of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(b)-(c)(9) (1970), for an example of congressional support of the Court's constitutional construction in *Brown*. Here, Congress enacted legislation which has enhanced the ability of private citizens and the United States Attorney General to secure the desegregation of public facilities and of public education.

115. 393 U.S. 503 (1969).

116. 393 U.S. at 506.

117. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

E. *The Private Citizen Holding
No Public Office*

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.¹¹⁸

The private citizen holding no public office lacks the power possessed by public officials to block implementation of Supreme Court decisions. Concededly, the private citizen, particularly in combination with others, possesses some power in this regard, but the problem is less acute than when a public official sets the power of his office against the Court. Still, a private citizen's ability to influence public events is sufficiently strong to merit a brief analysis of the citizen's relationship to a Supreme Court constitutional construction.

Like the school principal in the preceding subsection, the private citizen retains at all times his constitutional right to freedom of expression. Thus, the private citizen has a constitutional right to engage in vigorous, intemperate, and even crude criticism of a Supreme Court decision. As an agency of government, the Court has no greater immunity to verbal attack than Congress or the federal executive. At the same time, the private citizen has a constitutional duty not to interfere with the implementation of a Supreme Court constitutional construction at any level of government. Any such interference would constitute an unlawful act, whether directed at a specific court order or a public official's effort at voluntary compliance. Concretely, the private citizen would have a clear duty not to impede execution of a court order which requires a named school district to comply with *Schempp*. Perhaps even more importantly, the private citizen would have an equally clear duty not to impede a school district's effort to execute voluntarily the *Schempp* mandate.

As with the school principal, a private citizen's advocacy is protected unless it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹¹⁹ For example, if school parents express to the school principal their belief that *Schempp* should not be followed in their school, this, under the *Brandenburg* standard just quoted, would constitute protected speech. The parents are making only a statement of belief and are not urging action. If these same parents initiated a campaign urging teachers at their school to wreck immediately the principal's efforts at compliance with *Schempp*, this, under the circumstances prevalent today in most American school districts, would constitute

118. U.S. CONST., amend. I.

119. 395 U.S. at 447.

unprotected advocacy, an urging of imminent lawless action under circumstances where such action is likely to occur.¹²⁰

If Congress (or the federal executive) expressly rejects a Supreme Court constitutional construction, this rejection would release the private citizen from his duty of noninterference. Like the state official, and for the same reasons,¹²¹ the private citizen would then be free to choose and support his champion among the competing branches of the federal government. He could urge teachers and principals to follow immediately the congressional example; because of Congress' rejection, the citizen would no longer be urging the commission of an unlawful act. For reasons already stated, congressional or presidential rejection of the Court will occur rarely.¹²² Accordingly, for the citizen, the duty of noninterference will be the prevailing reality and should thus receive the main conceptual stress. Human frailty argues against universal acceptance of this duty; protection against atomistic chaos requires its adoption as the governing constitutional standard.

IV. CONCLUSION

The conclusions reached in this Article are designed to further four policy goals within the federal system: fidelity to the wording of the Constitution; predictability of reaction to a Supreme Court constitutional construction; generous opportunity for political endeavor; and the approximation of legal obligation to the realities of political power. If advanced too far, each of these policy goals would encroach unduly on the remaining three. Hence, to maximize the realization of all four goals, compromise is essential. This compromise occurs through the varying applications of judicial supremacy and viable tension to the several parts of the federal system. To apply either of the competing models to all parts of the federal system would promote some of the enumerated policy goals to the practical exclusion of others.

In the application of the competing models to the federal system, judicial supremacy clearly predominates. This is as it should be. Noncompliance with a Supreme Court constitutional construction should not be legalized lightly. Generally, the nation's conception of oughtness should favor the construction's binding force. Without this prevailing conception of oughtness, the federal system would

120. A detailed analysis of the "free speech" area is beyond the scope of this Article. See generally Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—And Beyond*, 1969 Sup. Ct. Rev. 41, for a discussion of how the *Brandenburg* test evolved.

121. See text preceding note 101 *supra*.

122. See notes 83-90 *supra* and accompanying text.

disintegrate. In this regard, the application of viable tension to Congress and the federal executive does legitimate rejection of the Court by those two branches. Admittedly, this concession carries some risk of disintegration within the federal system. The risk, however, is confined to the parts of the federal system least likely to abuse the right of rejection. More importantly, the right of rejection must exist somewhere if the federal system is to have a legal means of resisting judicial encroachment in the particular case before the Court. At the federal government level, I would accept the risk of disintegration, which history indicates is slight, to preserve the right of rejection. In response to a Supreme Court constitutional construction, the federal system should offer a wider choice than acquiescence or illegal repudiation.

Conceptually, my description of the federal system attempts to match the definition of legal obligation to the realities of political power. Why this concern? Concededly, the existence of a legal obligation does not depend on whether the obligation can be enforced. Much of international law, for example, envisions legal obligations under circumstances where no enforcement power exists.¹²³ Closer to home, it is quite possible to say that Congress and the federal executive are obligated legally to comply with a Supreme Court constitutional construction, even if the power to enforce this compliance is lacking. Here, indeed, the nation's conception of oughtness could give practical efficacy to the obligation as defined. Granting all this, the question remains: Why construct a national political system which risks a wide divergence between obligation and power? A nation differs from the international community. It is an organized political system in which the ability to enforce legal obligations is a vital component of justice. Clearly this is true of legal obligations which go to the heart of the system under consideration. Within the federal system, compliance with a Supreme Court constitutional construction is such an obligation. Accordingly, absent a compelling reason to do otherwise, this obligation should be defined in such a way as to ensure its enforceability. In a matter essential to its survival, the federal system should not make a promise that it cannot keep.

123. . . . a law may be established and become international, that is to say binding upon all nations, by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by any given nation party to the agreement. The resistance of a nation to a law to which it has agreed does not derogate from the authority of the law because that resistance cannot, perhaps, be overcome. Such resistance merely makes the resisting nation a breaker of the law to which it has given its adherence, but it leaves the law, to the establishment of which the resisting nation was a party still subsisting.

Osaka Shusen Kaisha v. Owners of the S.S. Prometheus, 2 Hongkong L.R. 207, 225 (1904) (opinion of Acting Chief Justice Berkeley). See also J. BRIERLY, *supra* note 6.