New American

Written by **Staff** on June 6, 2016
Published in the June 20, 2016 issue of the New American magazine. Vol. 32, No. 12

Letters to the Editor

Assuming and Ruling

According to the Article “A Government of, by, and for Judges: Who Will Be Our Next Oligarch?” in the March 21 issue, the federal judiciary operates on a myth having to do with “judicial review,” established by the Supreme Court case of *Marbury v. Madison* in 1803. It is mistakenly believed that judicial review is the power of the Supreme Court to decide the meaning of the Constitution and to strike down laws that the court finds unconstitutional.

Much of American constitutional law today rests on that myth. It is assumed “We the People,” who ordained and established the Constitution, are all bound by the Supreme Court’s pronouncements. The decisions of the Supreme Court are regarded as essentially a part of the Constitution, and therefore the Supreme Court is the final authority on constitutional change. But most points of the myth are erroneous.

Marbury v. Madison did *not* create the concept of judicial review, but applied well-established principles. The idea that courts possess an independent power and duty to interpret the law — and in the course of doing so must refuse to give effect to acts of the legislature that contradict the Constitution — was established in *The Federalist*, No. 78, written by Alexander Hamilton.

This *does not mean* the federal judiciary has supremacy over the other branches, per Hamilton: “Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.”

The myth of judicial review arises from the Supreme Court’s Chief Justice Marshall’s famous words in *Marbury*, “It is emphatically the province and duty of the judicial department to say what the law is.” It is assumed from this comment Marshall was saying the opinions of the Supreme Court are supreme and, therefore, was claiming that the Supreme Court is the final authority on constitutional change.

However, this sentence is taken out of context. The paragraph in its entirety reads:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Nothing in Chief Justice Marshall’s opinion in *Marbury* makes a claim of judicial supremacy. In the above passage Marshall is arguing constitutional supremacy, not judicial supremacy. It is the proposition of *Marbury v. Madison* for the federal judiciary to uphold what is textually written in the U.S. Constitution. This requires the judicial branch to be independent of but not superior to the legislative and executive branches. Marshall’s statement of judicial review rests on premises of separation of powers that are fundamentally inconsistent with the assertion by any one branch of the

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federal government of a superior power of constitutional interpretation over the others. Marshall continues: “The duty and power of judicial review exist in the first place because the Constitution is supreme *over the judiciary* and governs its conduct. The framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.”

Constitutional supremacy implies strict textualism as a controlling method of constitutional interpretation, not subjective judicial discretion.

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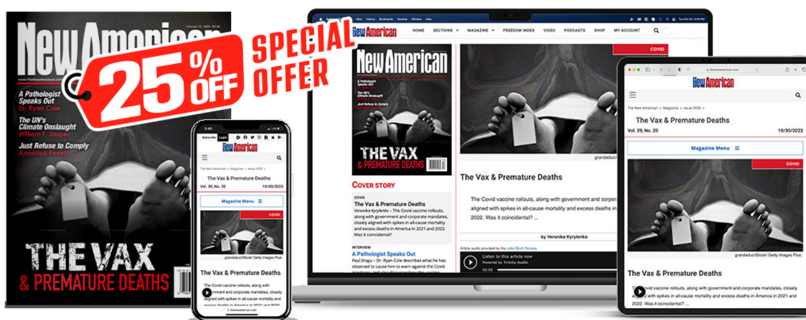

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