EXTRAJUDICIAL CONSTITUTIONAL INTERPRETATION: THREE OBJECTIONS AND RESPONSES

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Recent cases such as Flores, Kimel *and* Garrett *highlight the fact that the most important question regarding judicial supremacy focuses on the proper degree of deference between the branches rather than the possibility of extralegal defiance of the Court. Extrajudicial interpretation of the Constitution has often been criticized as problematic, insufficient, and not authoritative. Although it is widely accepted that nonjudicial actors can and do interpret the Constitution, many constitutional theorists hold to a theory of judicial supremacy that argues that the Supreme Court is the ultimate, authoritative interpreter of the Constitution. This Article critically examines three of the most prominent objections to extrajudicial constitutional interpretation, and corollary defenses of judicial supremacy, and finds each inadequate. The three objections are that extrajudicial constitutional interpretation is 1) anarchic, 2) irrational, and 3) tyrannical. Each posits a corresponding virtue of judicial supremacy in terms of 1) the settlement function of the courts, 2) the deliberative function of the courts, and 3) the countermajoritarian function of the courts. This Article offers analytical and empirical responses to these critiques of extrajudicial constitutional interpretation, suggesting reasons why such interpretation should be regarded as more authoritative and deserving of greater deference by the courts. These arguments have implications not only for debates over judicial supremacy per se, but also for the related debate over the proper scope of judicial review.*

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HeinOnline --- 80 N.C. L. Rev. 773 (2001-2002)

I. WHO INTERPRETS THE CONSTITUTION? 780
II. FIRST OBJECTION: IT'S ANARCHIC 786
A. The Subtle Vices (and Virtues) of Constitutional Settlements 789
B. The Limits of Judicial Settlement 797
C. The Possibilities of Extrajudicial Settlements 804
III. SECOND OBJECTION: IT'S IRRATIONAL 808
A. The Limits of Judicial Reason 812
B. A Politics of Principle 818
IV. THIRD OBJECTION: IT'S TYRANNICAL 827
A. A Countermajoritarian Court? 831
B. The Overstated Fear of Majoritarian Tyranny 835
CONCLUSION 845

A higher law background runs deep in our constitutional thinking. Whether the record of "eternal and immutable" principles is supreme due to "their own intrinsic excellence"[1] or as the product of conscious and positive acts of "higher lawmaking,"[2] the Constitution is understood to stand above and against politics, a legal constraint on the power of democracy and elected officials. The judiciary emerges naturally from this perspective as an essential guardian of the constitutional order. By issuing authoritative interpretations of the Constitution, the judiciary, and especially the Supreme Court, is thought to circumscribe the sphere of politics with legal norms and ensure that fundamental principles are respected.[3] Constitutions, it is thought, require a single, authoritative interpreter, subject to neither popular pressure nor electoral instability. Constitutional government requires judicial supremacy.[4]

The Supreme Court itself has been a primary exponent of this argument. In 1803 Chief Justice John Marshall laid the legal roots for more recent arguments by joining the claim that the Constitution is

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1. EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 4–5 (1955).

2. 1 BRUCE ACKERMAN, WE THE PEOPLE 266 (1991).

3. *But see* Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 875 (1999) ("[T]he higher law tradition of the U.S. Constitution is less central to the state constitutional experience.").

4. *See* CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 24 (2d ed. 1932) ("The judiciary has the sole right to place an authoritative interpretation upon the fundamental written law."). For present purposes, "judicial supremacy" is understood as the view that the courts should take the leading and ultimate role in authoritatively settling constitutional meaning and resolving constitutional disputes and need show little deference to the constitutional reasoning of other actors, even as other actors should show strong deference to the constitutional reasoning of the courts.

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the "fundamental and paramount law of the nation" with the declaration that "it is emphatically the province and duty of the judicial department to say what the law is."[5] "The Constitution is either a superior paramount law"[6] subject to judicial interpretation and application, or it is "absurd."[7] Marshall tempered those strong words, since it was clear in the context of the time that other political institutions were also active in interpreting the Constitution and that those interpretations were broadly accepted as authoritative.[8] He concluded his opinion more modestly, arguing that surely "the framers of the [C]onstitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature" and that judges could not in good faith "close their eyes to the Constitution, and see only the law."[9]

In the late twentieth century, the Justices of the Supreme Court abandoned such tempering statements. In 1958, Chief Justice Earl Warren, for a unanimous Court, provided his own gloss on the judicial duty to "say what the law is." To those who questioned the judicial authority to define constitutional meaning, the Chief Justice instructed that "it is only necessary to recall some basic constitutional propositions which are settled doctrine."[10] The *Marbury v. Madison* decision "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution" and therefore "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land."[11] Over the next fifteen years, the Court further explained not only to the state governments but also to the Congress and the President that it was the "ultimate interpreter of the Constitution" who could not share the power to interpret the Constitution with any

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5. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
6. *Id.*
7. *Id.*
8. *See generally* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS (1997) (discussing early constitutional interpretation).
9. *Marbury*, 5 U.S. (1 Cranch) at 178.
10. Cooper v. Aaron, 358 U.S. 1, 17 (1958). Chief Justice Warren orally presented the Court's per curiam opinion. The opinion was largely written, however, by Justice William Brennan. BERNARD SCHWARTZ, SUPER CHIEF 295–96 (1983).
11. *Cooper*, 358 U.S. at 18 (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)). *Cooper* can be read narrowly or broadly. Read narrowly, *Cooper* is fully consistent with *Marbury*'s principles in asserting the binding quality of judicial decisions in the context of Article III cases and controversies. Read broadly, *Cooper* goes beyond *Marbury* in making the Court the ultimate guardian of constitutional principles. Both readings can find some grounding in *Cooper* and subsequent cases. I am less concerned with what exactly the Court meant in *Cooper*, however, than with the Court's and commentators' increasing preference for judicial over extrajudicial interpretations of the Constitution.

HeinOnline --- 80 N.C. L. Rev. 775 (2001-2002)

other branch of government.[12] In a series of recent cases, the Court has again reminded Congress that if it "could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' "[13] The "Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches," in particular current judicial precedent.[14] Judicial supremacy is an essential component of the Court's recent activity in limiting congressional power under Section Five of the Fourteenth Amendment.[15]

Academic commentators have been less explicit in their defense of judicial supremacy per se, and like the Court have often embedded arguments in favor of judicial supremacy within arguments favoring judicial review or judicial activism.[16] Although the proposition of judicial supremacy has been subject to more critical examination in recent years,[17] judicial supremacy continues to attract adherents.[18]

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12. *See* United States v. Nixon, 418 U.S. 683, 704 (1974) (the executive branch); Powell v. McCormack, 395 U.S. 486, 521 (1969) (Congress); Baker v. Carr, 369 U.S. 186, 211 (1962) (state government).

13. City of Boerne v. Flores, 521 U.S. 507, 529 (1997). In *Flores*, the Court readily equated congressional disagreement with judicial interpretations of the Constitution as congressional alteration of the Constitution. Similarly, in rejecting the applicability of the political question doctrine to a legislative apportionment case, the Court equated constitutional rights with the judicial interpretation and protection of them, suggesting that only unimportant matters could be entrusted to nonjudicial resolution. Wesberry v. Sanders, 376 U.S. 1, 7 (1964) ("The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I.").

14. *Flores*, 521 U.S. at 535–36. This view has also been cited in support of judicial review of contested congressional powers. United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) ("No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text.").

15. Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001) ("[I]t is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000) ("The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch.") (citing *Flores*); *Flores*, 521 U.S. at 529.

16. See, for example, sources cited in *infra* notes 248–64. "Judicial activism" can be understood as the view that the courts should show relatively little deference to political actors in exercising the power of judicial review and should aggressively strike down the acts of other government officials that the courts reasonably believe to be unconstitutional.

17. *See, e.g.*, SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY 109–26 (1992) (denying that any single interpreter is supreme); ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 353–75 (1992) (same); NEAL E. DEVINS, SHAPING CONSTITUTIONAL VALUES 157–62 (1996) (same); LOUIS FISHER, CONSTITUTIONAL DIALOGUES 231–74 (1992) (same); SANFORD LEVINSON, CONSTITUTIONAL FAITH 27–37 (1988) (examining "Protestant" forms of interpretation); MARK TUSHNET, TAKING THE

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The Court has strongly asserted it.[19] The casebook method of the law schools implicitly treats it as true.[20] The popular press assumes it.[21] When it has been publicly challenged, prominent law professors, editorialists, and elite lawyers have rushed to defend judicial supremacy.[22]

Focusing on a significant aspect of constitutional practice and the theory of constitutional government, the debate over judicial supremacy is important in its own terms. The debate may also provide a useful and different perspective on the central concern of constitutional theory in the twentieth century, the legitimacy and

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CONSTITUTION AWAY FROM THE COURTS x–xi (1999) (denying that any single interpreter is supreme); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 905–06 (1990) (examining the President as a challenger to judicial supremacy); Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401, 413 (1986) (denying that any single interpreter is supreme); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 219–20 (1994) (examining the President as a challenger to judicial supremacy).

18. Bruce Ackerman appears to be a somewhat surprisingly adherent to judicial supremacy. Despite his interest in "constitutional politics," Ackerman sharply distinguishes between constitutional interpretation and constitutional amendment. By categorizing political engagement with the Constitution as examples of "higher lawmaking," he preserves judicial supremacy in the realm of interpretation. 1 ACKERMAN, *supra* note 2, at 261–65.

19. See cases cited in *supra* notes 5–6 and 9–14.

20. Neal E. Devins, *Correspondence: The Stuff of Constitutional Law*, 77 IOWA L. REV. 1795, 1795–97 (1992); *see also* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 983–84 (1998) (positing that the casebook method canonizes the Supreme Court's opinions).

21. Most notoriously, in reporting the results of a survey testing the general public's understanding of the Constitution, the *Washington Post* noted that six of ten respondents "correctly" identified the Supreme Court as the "final authority on constitutional change." Ruth Marcus, *Constitution Confuses Most Americans: Public Ill-Informed on U.S. Blueprint*, WASH. POST, Feb. 15, 1987, at A13. More recently, the *Post*'s judicial reporter explained to readers that the Court has "the last word. The Justices are the final arbiter of what is in the Constitution." Joan Biskupic, *The Shrinking Docket*, WASH. POST, Mar. 18, 1996, at A15. Similarly, a recent academic survey of public knowledge of the Supreme Court approvingly reported that sixty percent of the respondents identified the Court as having "the ultimate 'say' on the Constitution." James L. Gibson et al., Public Knowledge of the United States Supreme Court 4 (2001) (unpublished manuscript), *available at* http://artsci.wustl.edu/~legit/Courtknowledge.pdf (last visited Feb. 12, 2002) (on file with the North Carolina Law Review).

22. *See, e.g.*, Michael Kinsley, *Meese's Stink Bomb*, WASH. POST, Oct. 29, 1986, at A19 (denouncing Edwin Meese's challenge to judicial supremacy); Anthony Lewis, *Law or Power?*, N.Y. TIMES, Oct. 27, 1986, at A23 (same); Stuart Taylor Jr., *Liberties Union Denounces Meese*, N.Y. TIMES, Oct. 24, 1986, at A17 (reporting criticisms of Meese); Murray Waas & Jeffrey Toobin, *Meese's Power Grab: The Constitutional Crisis No One Noticed*, NEW REPUBLIC, May 19, 1986, at 15, 15 (same).

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proper scope of judicial review. Recent works by Mark Tushnet[23] and Jeremy Waldron,[24] for example, have argued against the power of judicial review itself on the grounds that the deliberations of other political actors and institutions should be regarded as equally valuable and authoritative. Even if we do not ultimately accept such strong conclusions, the reconsideration of extrajudicial constitutional interpretation should force us to clarify why we value judicial review and how it should be used.

As recent decisions such as *City of Boerne v. Flores*,[25] *Dickerson v. United States*,[26] and *United States v. Morrison*[27] emphasize, the most important implications of the debate over judicial supremacy may relate to the proper degree of deference the branches should show to one another's constitutional judgments rather than to the problems of extralegal defiance of judicial orders by executive-branch officials highlighted in cases such as *Cooper v. Aaron*[28] or *Ex parte Merryman*.[29] The question may be less *whether* the Court has the authority to settle justiciable cases than *how* the Court should settle such cases, and how nonjudicial institutions should approach non-justiciable (and not yet litigated) controversies. Whereas constitutional theory motivated by the problem of judicial review has largely focused on the substantive problem of how the courts should interpret the Constitution, the debate over judicial supremacy focuses more squarely on the institutional problem of who should make the final decision concerning contested interpretations. In the aftermath of the inconclusive hermeneutical debates of the past two decades, the institutional question of who should answer the hard questions of constitutional meaning becomes particularly important since the answers themselves will undoubtedly be politically and intellectually controversial.

23. *See generally* TUSHNET, *supra* note 17, at 154–76 (arguing that the electoral process allows for better interpretation of the Constitution).

24. *See generally* JEREMY WALDRON, LAW AND DISAGREEMENT 282–312 (1999) (arguing that judicial review violates precepts of liberalism).

25. 521 U.S. 507 (1997).

26. 530 U.S. 428 (2000).

27. 529 U.S. 598 (2000).

28. 358 U.S. 1, 9–17 (1958) (responding to a governor's refusal to obey a court order to desegregate Little Rock schools).

29. 17 F. Cas. 144, 152–53 (C.C.D. Md. 1861). In the *Merryman* case, Abraham Lincoln refused a judicial order to produce a prisoner. *Id.*; *see also* Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 88–100 (1993) (examining the problem of executive defiance).

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This Article will critically examine three prominent objections to extrajudicial constitutional interpretation.[30] The primary normative objections to the authority of extrajudicial constitutional interpretation can be framed in three ways: 1) it's anarchic, 2) it's irrational, and 3) it's tyrannical. Each of these objections to extrajudicial constitutional interpretation posits a corresponding virtue of judicial supremacy: 1) the settlement function of judicial interpretation, 2) the deliberative function of the courts, and 3) the countermajoritarian function of the courts. Although each of these objections to extrajudicial constitutional interpretation has some force, each is deeply problematic and ultimately insufficient to justify a strong form of judicial supremacy. Each of these objections to extrajudicial constitutional interpretation can be met by a structurally similar response. With respect to each of these objections, the critics of extrajudicial constitutional interpretation overstate the advantages of judicial supremacy, for example, by assuming the Court will behave in a strongly countermajoritarian fashion and understate the ways in which extrajudicial constitutional interpretation possesses the characteristics that the critics value, such as a concern with incorporating diverse interests. My responses to these objections will demonstrate the ways in which objections make empirical, analytical, and normative errors in evaluating the relative performance of judicial and nonjudicial actors. Active judicial intervention in constitutional debates and strong deference by political actors to judicial interpretations are not necessary for achieving constitutional order or preserving constitutional principles.

The Article begins with a clarification of the terms of the debate and the contours of extrajudicial constitutional interpretation, a necessary first step given the shifting sands of the debate. Each of the subsequent parts examines a particular objection to extrajudicial constitutional interpretation. Part II demonstrates that the judiciary cannot settle constitutional disputes as its proponents contend and that judicial supremacy is not necessary to insure constitutional order. Part III challenges the assumption that the judiciary is particularly deliberative and contends that nonjudicial actors provide useful perspectives on constitutional meaning. Part IV questions the countermajoritarian capacity of the courts and the assumption that

30. It should be emphasized that the objections to extrajudicial constitutional interpretation presented here are constructed from a variety of sources to highlight common concerns about nonjudicial actors. As such, the objections are presented in a relatively strong form, and individual authors would likely present more nuanced and qualified views.

HeinOnline --- 80 N.C. L. Rev. 779 (2001-2002)

nonjudicial institutions act in a relentlessly majoritarian fashion. This Article concludes by noting the positive democratic virtues of recognizing authoritative constitutional debates outside the courts. Judicial interpretation of the Constitution clearly has its place, but the critique of judicial "activism" should better incorporate an appreciation of extrajudicial constitutional interpretation.

I. WHO INTERPRETS THE CONSTITUTION?

Before addressing the arguments for and against judicial supremacy and extrajudicial constitutional interpretation, the object of debate itself should first be clarified. The primary aim of this section is to distinguish a critique of judicial supremacy from a critique of judicial review. Extrajudicial constitutional interpretation can take many forms, and those various forms are not all equally controversial. The crucial issue is how much deference various political actors should show to the constitutional reasoning of other actors in the political system and who should have the lead role in resolving controversies regarding the meaning of the Constitution. For advocates of judicial supremacy, the courts should take the lead in resolving constitutional disputes and need show little deference to the constitutional reasoning of other actors, even as those other actors should show strong deference to the judiciary.[31] Critics of judicial supremacy support a broader range of positive alternatives, from an interbranch dialogue over constitutional meaning[32] to executive autonomy in constitutional interpretation,[33] but are united in the view that nonjudicial actors should be active constitutional interpreters whose interpretations are entitled to respect and deference from the courts.

Extrajudicial constitutional interpretation comes in many forms, and so do theories of the appropriate hierarchy of the various potential interpreters. At the outset, judicial supremacy should be distinguished from judicial exclusivity in constitutional interpretation. Judicial supremacy merely requires that the Court be the "ultimate"

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31. For Ronald Dworkin, for example, the courts alone act on constitutional principle, and therefore have little reason to defer to the political will of the other branches. RONALD DWORKIN, A MATTER OF PRINCIPLE 33 (1985). From a different perspective, Larry Alexander and Frederick Schauer emphasize the deference that the political branches should show the constitutional interpretations made by the judiciary. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997).

32. FISHER, *supra* note 17, at 3 ("[Constitutional law] is a process in which all three branches converge and interact with their separate interpretations.").

33. Paulsen, *supra* note 17, at 222 (describing an "interpretive tug-of-war").

HeinOnline --- 80 N.C. L. Rev. 780 (2001-2002)

or "authoritative" constitutional interpreter, not that the judiciary be the exclusive interpreter of the Constitution.[34] The judiciary may be the supreme interpreter, but it is not the only one. Most obviously, if least authoritatively, private citizens offer their own interpretations of the Constitution all of the time. Some academics make a living at it. Private interpreters at the bar and in the press rush into constitutional battles before the Court and evaluate and criticize the Court after it has rendered its opinion. Perhaps more importantly, government officials routinely, if often implicitly, render constitutional judgments in the absence of judicial deliberation on the issue. Congress, for example, can be regarded as implicitly asserting an interpretation of its own constitutional authority every time that it passes legislation. In many cases, those constitutional judgments never come under serious judicial scrutiny. The Court's own political question doctrine asserts that at least some of those judgments should never come under judicial scrutiny.[35] The Constitution delegates at least some

34. Ronald Dworkin has recently been moved to address the "institutional questions" of "who must ask these questions" about how the Constitution should be read and "whose answer should be taken to be authoritative." RONALD DWORKIN, FREEDOM'S LAW 34 (1996). Having raised this "mysterious matter," however, Dworkin promptly dismisses it as of no practical importance. *Id.* at 34–35. This "interpretive authority is already distributed by history" and "the most straightforward interpretation of American constitutional practice shows that our judges have final interpretive authority." *Id.*; *see also* RONALD DWORKIN, LIFE'S DOMINION 120 (1994) ("For all practical purposes, the federal courts, and finally the Supreme Court, have the last word about what rights the Constitution affirms and protects, and what the national and state governments therefore cannot do.").

35. *See generally* Nixon v. United States, 506 U.S. 224, 228 (1993) (discussing the applicability of the political question doctrine to a challenge of a federal judge's impeachment and trial in the Senate); Goldwater v. Carter, 444 U.S. 996, 1002–06 (1979) (Rehnquist, J., concurring in the judgment) (arguing that a suit by members of Congress to prevent the President from rescinding a treaty is a non-justiciable political question); Baker v. Carr, 369 U.S. 186, 208–37 (1962) (discussing the applicability of the political question doctrine to a case challenging a Tennessee apportionment scheme); Coleman v. Miller, 307 U.S. 433, 457–60 (1939) (Black, J., concurring in part and concurring in the judgment) (arguing that the notification process for a constitutional amendment is a political question); Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (arguing that whether a new state constitution has been adopted is a political question). The justification for and contours of the political question doctrine remain controversial, and one implication of the critique of extrajudicial constitutional interpretation is that the doctrine should be sharply reduced and perhaps abandoned entirely. Moreover, even while recognizing the existence of the political question doctrine, the Court has asserted its own authority to define its scope and determine any particular controversy that falls within its confines. It remains, that is, a judge-made doctrine and reinforces judicial supremacy even as the Court exercises restraint in any given case. *See also* Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 413–14 (1997) ("The political question doctrine is best understood as a *voluntary allocation* of interpretive responsibility by the Court to the political branches.").

HeinOnline --- 80 N.C. L. Rev. 781 (2001-2002)

interpretive questions to nonjudicial institutions, such as the congressional authority through impeachment and trial to define the meaning of "high crimes and misdemeanors."[36] Even where the judiciary is active and retains the ultimate authority to settle the issue, nonjudicial actors may well engage in a "dialogue" with the Court over the most appropriate interpretation of the Constitution, encouraging the Court to adjust its doctrines to accommodate other views.[37] As long as nonjudicial actors recognize the superior authority of the courts, extrajudicial constitutional interpretation per se need not challenge judicial supremacy. Nonjudicial actors may express their own "individual opinions" about the meaning of the Constitution, but judicial supremacy requires that the actions of the government strictly adhere to the meaning of the Constitution favored by the courts, even when those actions may not be reviewed by the courts.[38]

Theories regarding the appropriate hierarchy of interpreters come in several varieties.[39] The first, judicial supremacy, has already been noted. The other two branches of the national government are likewise obvious candidates for supremacy, and theories of executive and legislative supremacy in constitutional interpretation have been suggested, though they have not attracted serious political support.[40] A theory of state supremacy was extensively developed in the antebellum period, but has found few adherents since the Civil War.[41] The most significant historical and theoretical alternative to judicial

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36. U.S. CONST. art. II, § 4.

37. For important statements of the "dialogue" model of constitutional interpretation, see DEVINS, *supra* note 17, at 41–55 (examining the dialogue between the branches in determining the constitutional questions of segregation, minimum wages, the legislative veto, and religion); FISHER, *supra* note 17, at 233–47 (discussing the manner in which the actions of all three branches affect constitutional interpretation); William N. Eskridge, Jr. & Philip P. Frickey, *Law as Equilibrium*, 108 HARV. L. REV. 26, 28–29 (1994) (arguing that the different branches of government cooperate and compete to shape responses from one another); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580–81 (1993) (arguing that the legislative and executive branches impact the Supreme Court's interpretation of the Constitution).

38. JAMES BUCHANAN, *Inaugural Address*, (Mar. 4, 1857), *in* 10 THE WORKS OF JAMES BUCHANAN 106–107 (John Bassett Moore ed., 1910) ("To [the Supreme Court's] decision, in common with all good citizens, I shall cheerfully submit, whatever this may be, though it has ever been my individual opinion that" the people of a territory may determine whether to accept slavery when ready for admission as a state.).

39. For overviews, see Gant, *supra* note 35, at 366–89; Murphy, *supra* note 17, at 406–12.

40. *See* Gant, *supra* note 35, at 373–83.

41. *See, e.g.*, JOHN C. CALHOUN, *Draft Report on Federal Relations*, *in* 11 THE PAPERS OF JOHN C. CALHOUN 485, 488–510 (Clyde N. Wilson ed., 1978) (elaborating on the compact theory of state sovereignty).

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supremacy, however, is departmentalism, or coordinate construction, which denies that any single interpreter is supreme.[42] Instead each branch, or department, of government has an equal authority to interpret the Constitution in the context of conducting its duties. Departmentalism can be linked to a form of the political question doctrine such that each branch of government has its own, non-overlapping set of interpretive responsibilities. Spheres of interpretive authority are divided up according to the particular institutional competencies of the different branches, and each branch is supreme within its own interpretive sphere.[43] In other forms, departmentalism allows for the possibility of conflict between different, formally equal constitutional interpreters. A nonjudicial actor may choose not to defer to judicial reasoning and instead make "decisions according to her own, rather than the court's, constitutional interpretation."[44]

The range of alternatives to judicial supremacy should also emphasize that opposition to judicial supremacy can be distinguished from opposition to judicial review per se. Of course, in practice, political arguments over judicial supremacy are usually motivated by particular judicial rulings, and as a consequence debates over judicial review and judicial supremacy are often mingled. For a few Jeffersonians, for example, doubts about judicial supremacy led directly to doubts about the legitimacy of judicial review itself.[45] On the other hand, John Marshall's justification for judicial review can be

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42. Edward Corwin probably coined the term "departmentalism" in the aftermath of the Court-packing controversy. EDWARD S. CORWIN, COURT OVER CONSTITUTION 69 (1938). The concept, however, was widely voiced at the founding and intermittently asserted throughout American history. *See* Paulsen, *supra* note 17, at 228–40, 245–50, 262–65 (discussing the concept of departmentalism in the debates of the founders, Lincoln, and former Supreme Court Justices). Even John Marshall's *Marbury* opinion articulates a departmentalist logic. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (stating that the Constitution is a "rule for the government of the *courts*, as well as of the legislature").

43. *See, e.g.*, Murphy, *supra* note 17, at 417 ("[A modified version of departmentalism] lowers the stakes by ascribing different areas of competence .... [I]f widely accepted, this form of departmentalism would reduce, though not eliminate, conflict between the federal judiciary, on the one hand, and Congress and/or the presidency on the other.").

44. Alexander & Schauer, *supra* note 31, at 1362.

45. *See, e.g.*, 11 ANNALS OF CONG. 585 (1802) ("[The] [l]egislature has the exclusive right to interpret the Constitution in what regards the law-making power, and the Judges are bound to execute the laws they make."). *But see* RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS 66 (1974) ("[F]ew Republicans were prepared to deny the right of the Supreme Court to review for itself an act of Congress.... What [Jefferson] would have objected to, and what Marshall did not assert, was a claim that the power of review was solely within the Supreme Court's province, or that the Court's judgment was superior to that of the other branches.").

read as an application of orthodox Jeffersonian departmentalist logic.[46]

As a theoretical matter judicial review and judicial supremacy should be distinguished. Judicial review refers to "the authority of a court, when deciding cases, to refuse to give force to an act of a coordinate branch of government."[47] By contrast, judicial supremacy refers to the "obligation of coordinate officials not only to obey that particular [judicial] ruling but to follow its reasoning in future deliberations."[48] A model of judicial supremacy posits that the Court does not merely resolve particular disputes involving the litigants directly before it or elsewhere in the judicial system. It also authoritatively interprets constitutional meaning. Judicial supremacy requires deference by other government officials to the constitutional dictates of the Court, even when other government officials think that the Court is substantively wrong about the meaning of the Constitution and in circumstances that are not subject to judicial review.[49] Likewise, judicial supremacy requires that other government officials regard judicial opinions as generative, binding not merely in a particular case, but indicating correct constitutional principles that may apply in a wide variety of future, not-yet-contemplated cases.[50] Indeed, it is this feature of judicial constitutional reasoning that Abraham Lincoln and his administration

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46. *See, e.g.*, ROBERT LOWRY CLINTON, *MARBURY V. MADISON* AND JUDICIAL REVIEW 99–101 (1989); David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 333 (1992); *see also* CORWIN, *supra* note 42, at 6 (distinguishing a "*juristic* conception" of judicial review in which the courts "have *peculiar* competence" to interpret the Constitution from a "*political* or *departmental* conception" of judicial review).

47. WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 265 (2d ed. 1995).

48. *Id.*

49. *See* John Harrison, Coordination, the Constitution, and the Binding Effect of Judicial Opinions 22 (Aug. 7, 2000) (unpublished manuscript, on file with the author). As many recognize, the Court does not even formally have the "final" word on constitutional disputes, for constitutional amendments to "overrule" judicial decisions can be and have been adopted. *See, e.g.*, FISHER, *supra* note 17, at 201–05. Normative objections to extrajudicial constitutional interpretation have implications for amendment politics as well, calling into question whether nonjudicial actors can be entrusted with the responsibility to alter as well as interpret the "higher law." This implication has been made more explicit in the context of state constitutions, where judicial rulings are more rarely final in fact. *See* Reed, *supra* note 3, at 875.

50. *See, e.g.*, Michael Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137, 173 (1993) ("[W]ith respect to the duty to abide by valid Supreme Court precedents, the proper obligations of the [P]resident could be said to be . . . similar to those of a judge who sits on a federal court of appeals.").

HeinOnline --- 80 N.C. L. Rev. 784 (2001-2002)

denied in the context of *Dred Scott v. Sandford*.[51] Although the Taney Court may have denied the citizenship of Dred Scott for the purposes of jurisdiction in a federal lawsuit, the Lincoln administration felt free to ignore the Court's opinion in order to recognize black citizenship in the context of the regulation of coastal ships,[52] passports[53] and patents,[54] as well as to pass laws abolishing slavery in the territories[55] and the District of Columbia.[56] It is this authority to say what the Constitution means—not merely with refusing to enforce laws that conflict with the Constitution—that has historically been subject to the greatest challenge and which raises the most interesting questions about the theory and practice of constitutionalism.

The challenge to judicial supremacy is not a challenge to judicial review. Because extrajudicial constitutional interpretation is both realistic and legitimate, one challenge is how to justify the requested deference by nonjudicial actors to judicial constitutional reasoning. Another challenge questions the assumption that the Court should take the lead in defining constitutional meaning and quashing alternative interpretations. The debate over judicial supremacy therefore links to the more prominent debate of the past several decades over "judicial activism" and the proper scope of judicial review. Whereas that more well-known debate focused on the question of how to interpret the Constitution and the problems of distinguishing hard and easy constitutional cases and correctly deciding the hard cases, the judicial supremacy debate is less concerned with making hard cases look easy than with examining who should have the authority to settle those hard cases.[57] Within the confines of extrajudicial constitutional interpretation, different accommodations between judicial and nonjudicial interpreters are

51. 60 U.S. (19 How.) 393 (1856); ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 396–97, 585–86 (Roy P. Basler ed., 1990) ("refusing to obey [*Dred Scott*] as a political rule").

52. 10 Op. Att'y Gen. 382, 412 (1862) ("[N]otwithstanding all that was *said* upon other subjects, the *action* of the court was strictly confined to the plea in abatement.").

53. 5 THE WORKS OF CHARLES SUMNER 497–98 (Boston, Lee and Shepard 1880).

54. 6 THE WORKS OF CHARLES SUMNER 144 (Boston, Lee and Shepard 1880).

55. Abolition of Slavery Act (Territories), ch. 111, 12 Stat. 432 (1862).

56. Abolition of Slavery Act (District of Columbia), ch. 54, 12 Stat. 376 (1862).

57. On the distinction of "who interprets" from "how" and "what" to interpret, see Murphy, *supra* note 17, at 401–04. *See generally* TUSHNET, *supra* note 17, at 6–7 (rejecting judicial review); WALDRON, *supra* note 24, at 283–312 (rejecting judicial determination of rights).

HeinOnline --- 80 N.C. L. Rev. 785 (2001-2002)

possible.[58] This Article does not attempt to specify the proper scope of extrajudicial constitutional interpretation, but rather simply responds to objections that would displace the authority of nonjudicial actors entirely. In doing so, however, it suggests the appropriateness of recognizing a relatively strong authority for extrajudicial constitutional interpretation.

II. FIRST OBJECTION: IT'S ANARCHIC

Larry Alexander and Frederick Schauer, who have defended judicial supremacy as necessary to "the settlement function of the law," have made the most prominent recent objection to extrajudicial constitutional interpretation.[59] Alexander and Schauer's analysis provides a new twist on an old claim—that extrajudicial constitutional interpretation is anarchic. John Marshall made bolder claims on behalf of the Court in relation to his opinion in *McCulloch v. Maryland*[60] than in the earlier *Marbury* case. Marshall began his *McCulloch* opinion by emphasizing the Court's "awful responsibility" to resolve constitutional disputes.[61] The United States, he feared, suffered from too many constitutional interpreters who might uncompromisingly press their claims to the point of disunion and war.[62] Constitutional questions, such as those raised in *McCulloch*, "must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature," and if such questions are "to be so decided, by this tribunal alone can the decision be made."[63] The Chief Justice elaborated on this point in an

58. *See generally* BURT, *supra* note 17, at 77–102 (constitutional interpretation must involve many different institutional participants); FISHER, *supra* note 17, at 3 (interbranch dialogue and accommodation); TUSHNET, *supra* note 17 (eliminate authoritative judicial interpretation); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 213–19 (1999) (restrict judiciary to areas of interpretive determinacy); Murphy, *supra* note 17, at 411–16 (separate spheres of interpretive authority).

59. *See* Alexander & Schauer, *supra* note 31, at 1371 ("[A]n important function of law is to settle authoritatively what is to be done."). In doing so, the law allows "people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions." Richard H. Fallon, Jr., *The Rule of Law*, 97 COLUM. L. REV. 1, 7–8 (1997). Alexander and Schauer particularly emphasize the ways in which such foreseeability can encourage social coordination. *See* Alexander & Schauer, *supra* note 31 at 1371–72.

60. 17 U.S. (4 Wheat.) 316 (1819).

61. *Id.* at 400.

62. *See id.* at 400–01.

63. *Id.* at 401. Marshall's argument on behalf of the Court in *McCulloch* set the stage for the Court's later effort to peacefully settle a politically contested constitutional issue in *Dred Scott*. *See* Keith E. Whittington, *The Road Not Taken: Dred Scott, Constitutional Law, and Political Questions*, 63 J. POL. 365, 377–81 (2001).

HeinOnline --- 80 N.C. L. Rev. 786 (2001-2002)

anonymous newspaper defense of his opinion, arguing that "if we were now making, instead of a controversy, a constitution, where would this important duty of deciding questions which grow out of the constitution, and the laws of the union, be safely and wisely placed?"[64] The Constitution needed a "peaceful and quiet mode" of interpreting and enforcing the laws.[65] The prospect of different state interpretations of the Constitution raised the anarchy question in particularly stark terms. In the debates over state nullification of unconstitutional federal actions, Daniel Webster echoed Marshall's concerns. He asked his congressional colleagues:

> [C]ould anything be more preposterous than to make a government of the whole Union, and yet leave its powers subject, not to one interpretation, but to thirteen, or twenty-four, interpretations?[66] [Could such a thing be] fit to be called a government? No sir. It should not be denominated a constitution. It should be called, rather, a collection of topics, for everlasting controversy; heads of debate for a disputatious people.[67]

If anarchy were to be avoided, then there must be an ultimate authoritative constitutional interpreter, in the body of the Supreme Court.

The anarchy objection has been more recently rehearsed in the context of interbranch disagreement over constitutional meaning. When Attorney General Edwin Meese III gave a speech critical of the Court's declaration of judicial supremacy in the *Cooper* decision, the same prospect of anarchy was raised. The denial of judicial supremacy could "create a situation of enormous chaos," "would produce anarchy," and "invite[s] anarchy."[68] Similarly, Alexander and Schauer set out to "defend *Cooper* and its assertions of judicial

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64. John Marshall, *A Friend of the Constitution*, *in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 208 (Gerald Gunther ed., 1969).

65. *Id.*

66. 6 CONG. DEB. 78 (1830).

67. *Id.*

68. Howard Kurtz, *Meese's View on Court Rulings Assailed, Defended*, WASH. POST, Oct. 24, 1986, at A12 (quoting Geoffrey Stone); Lewis, *supra* note 22; *see also* Paul Brest, *Meese, the Lawman, Calls for Anarchy*, N.Y. TIMES, Nov. 2, 1986, § 4, at 23 (noting that "anarchy would prevail if every official and agency were free to disregard the Court's rulings"); Paul Greenberg, *Meese Wants Government of Men, Not of Law*, SAN DIEGO UNION-TRIB., Nov. 4, 1986, at B7 ("[T]his is to advocate [a] kind of judicial anarchy."); Taylor, *supra* note 22 ("Meese's statements ... were denounced as an 'invitation to lawlessness' today by the American Civil Liberties Union .... Laurence Tribe ... said, 'Mr. Meese's position represents a grave threat to the rule of law because it proposes a regime in which ... the civilizing hand of a uniform interpretation of the Constitution crumbles.' ").

HeinOnline --- 80 N.C. L. Rev. 787 (2001-2002)

supremacy without qualification."[69] They note that "an important—perhaps *the* important—function of law is its ability to settle authoritatively what is to be done," a function that is "especially important" for the Constitution as the highest law.[70] "Insofar as the Constitution is susceptible to divergent views about what it means[,] . . . an important function of the Constitution remains unserved," as it would have "failed to perform the settlement function."[71] Moreover, " 'Protestantism' in constitutional interpretation—interpretive anarchy—produces no settled meaning of the Constitution and thus no settlement of what is to be done with respect to our most important affairs."[72] Judicial supremacy follows not because judicial interpretations of the Constitution "are, by definition, correct, but despite the fact that they may be incorrect."[73] The judiciary's commitment to stare decisis suggests that judicial interpretations of the Constitution will be more stable than nonjudicial interpretations.[74] By contrast, Daniel Webster expressed the concern of many in fretting over the stability of a constitution entrusted to "popular bodies . . . at liberty, too, then to give a new construction on every new election of its own members."[75] Law is intended to overcome disagreement, and judicial supremacy alone insures that political controversies are settled and political power is checked.

This objection to extrajudicial constitutional interpretation overstates the value of constitutional stability, while simultaneously overestimating the ability of the judiciary to impose constitutional settlements and underestimating the capacity of nonjudicial actors to settle constitutional disputes effectively. The settlement function of the law is a valuable one, but it is not the only value that the Constitution serves. Moreover, the question of how constitutional

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69. Alexander & Schauer, *supra* note 31, at 1362.

70. *Id.* at 1377.

71. *Id.* at 1376–77.

72. *Id.* at 1379.

73. *Id.* at 1381.

74. *Id.* at 1372–73, 1378 n.80 (praising the "existence of a regime of precedential constraint for courts"); Allan Ides, *Judicial Supremacy and the Law of the Constitution*, 47 UCLA L. REV. 491, 514 (1999) ("Most importantly, unlike congressional and presidential interpretations of the Constitution, these judicially created rules are not ad hoc (at least in principle they are not). Lower federal courts and state courts must follow them in like cases, and, of equal importance, they will be followed as precedent by the Supreme Court under the doctrine of stare decisis.").

75. 6 CONG. DEB. 78 (1830); *see also* HAINES, *supra* note 4, at 351 (quoting William Howard Taft) (refusing to submit constitutional questions to "the fitful impulse of a temporary majority of an electorate").

HeinOnline --- 80 N.C. L. Rev. 788 (2001-2002)

meaning can be resolved most effectively is an empirical one. Although Alexander and Schauer admit that "in that sense, our argument is empirical and not merely conceptual," nonetheless they generally insist that their "analysis is neither empirical nor historical" but rather normative and analytical.[76] Unfortunately, their argument builds too many problematic empirical assumptions into the analysis.

A. *The Subtle Vices (and Virtues) of Constitutional Settlements*

Alexander and Schauer are clear about the values served by legal stability, though not very specific about how these abstract values apply in the constitutional context. Stable law "serves an important coordination function," inducing "socially beneficial cooperative behavior and providing solutions to Prisoner's Dilemmas and other problems of coordination."[77] Somewhat surprisingly, however, Alexander and Schauer provide few examples of what they regard as analogously beneficial constitutional rules, though they briefly discuss election rules and free speech rules. Representative democracy works better if citizens know when, where, and how they can vote, and vague free speech rules may have a chilling effect on socially desirable speech.[78] But how much finality and clarity is needed in the law in order to facilitate social cooperation? Alexander and Schauer do not say. The practical choice is not really between order and chaos, but between different levels and types of stability, and different mechanisms for securing stability and change. Simply pointing to the settlement function of the law provides little guidance for making decisions about the relative interpretive authority of different political institutions.

Rather surprisingly, Alexander and Schauer are even less clear on what exactly is required to achieve legal settlement and stability. At one point, they simply note that "our argument assumes that

76. Alexander & Schauer, *supra* note 31, at 1377 n.79; *id.* at 1369. Alexander and Schauer have recently clarified this point, admitting that "the empirical dimension is one that cannot be avoided" but shunning any "reliance on the *authority* of history to answer the preconstitutional question." Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 464 (2000). Indeed, Alexander and Schauer now call for research on "the empirical question that lies at the center of the debate." *Id.* at 482 n.78.

77. Alexander & Schauer, *supra* note 31, at 1371. Having a settled rule specifying that we should drive on the right side of the road encourages more people to drive than if such a rule did not exist. *See also* Michael J. Klarman, *What's So Great about Constitutionalism?*, 93 NW. U. L. REV. 145, 179 (1998) ("Finality is a virtue, on this view, because endless reconsideration of the same issues is wasteful, unsettling, and possibly destructive of social peace.").

78. Alexander & Schauer, *supra* note 31, at 1373.

HeinOnline --- 80 N.C. L. Rev. 789 (2001-2002)

Supreme Court decisions provide more clarity than the constitutional text alone."[79] But surely this is the wrong measure. For one thing, "clarity" is not the same thing as "stability." Moreover, the interesting question is not whether a particular constitutional interpretation provides a clearer rule than the original text alone—that is almost necessarily true[80]—but whether judicial supremacy provides more clarity and stability than extrajudicial constitutional interpretation and whether any such marginal gains in clarity and stability are worth the costs in terms of accountability and participation.

Presumably the coordination functions of law require some degree of clarity (such that individuals know what actions are allowed and are able to predict the actions of others) and some degree of stability (such that individuals can predict future behavior) across some range of potential actions (the more of the law that is settled by a particular decision then the more coordination can be induced). How much clarity, stability and scope must constitutional rules have in order to allow socially beneficial coordination? There are clearly trade-offs to be made between these and other dimensions of the law. A very clear and stable law may also be too rigid, hampering rather than inducing socially beneficial activity.[81] Likewise, the substantive quality of the law may become more important if the law is stable and broad than if it were flexible and narrow. It is sometimes better to have no rule than a substantively bad rule. Moreover, a substantively good but fluid rule may be better than a substantively bad but fixed rule. These considerations may apply even more strongly in the constitutional context than in other legal contexts precisely because constitutional rules can be relatively difficult to change and have relatively sweeping effects. As Justice Brandeis observed, the rule of statutory interpretation that "it is more important that the applicable rule of law be settled than that it be settled right" has less force in the constitutional context.[82]

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79. *Id.* at 1377 n.79.

80. *But see* ROBERT F. NAGEL, CONSTITUTIONAL CULTURES 7–17 (1989) (criticizing the confusion and doubt sown by lawyers); Harrison, *supra* note 49, at 8 (noting that "some of the Court's doctrines are fairly countertextual" and thus may produce confusion).

81. This was very much the question during the Progressive Era and New Deal, when legal reformers increasingly urged that apparently clear constitutional rules be construed less rigidly so as to allow adaptation to social change. *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 233–36 (2000).

82. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

The constitutional text itself often prefers standards to rules. It is sometimes better for constitutional rules to be relatively unsettled because it can foster socially beneficial experimentation and allow political diversity. The founders in fact left a large number of constitutional issues unsettled, allowing for future constitutional development rather than seeking to close it off. Alexander and Schauer implicitly regard this as a design flaw, a "constitutional stupidity,"[83] and avoid any inquiry into why the founders may have preferred to leave some things undecided.

Even focusing on Alexander and Schauer's example of election rules, for example, it is striking how much the Constitution left up in the air. The Constitution does specify a fair number of issues regarding the qualification, apportionment, and method of selection of members of Congress. Nonetheless, the Constitution does not seek to answer such basic questions as the time, place, and manner of electing federal representatives, the precise apportionment of House seats within a state, the method of determining a list of eligible candidates, or the precise qualifications of federal voters, leaving such matters to the mutable resolutions of diverse institutions. James Wilson, among others, successfully argued that it would be a mistake to try to authoritatively settle the qualifications of federal voters given the wide range of practices and expectations in the various states.[84] In the early decades of the republic, the date of federal elections varied widely from state to state and over time, as did the method of apportioning House seats and the qualifications of federal voters.[85] States experimented with various forms of balloting and voting before generally settling on the "Australian ballot," a settlement that might have actually contributed to the reduction in popular participation in the electoral process.[86] States and political

83. *See* CONSTITUTIONAL STUPIDITIES/CONSTITUTIONAL TRAGEDIES 84, 115 (William N. Eskridge Jr. & Sanford Levinson eds., 1998). In their contributions to this volume, however, Schauer (addressing constitutional stupidities) and Alexander (addressing constitutional tragedies) focus on other issues. *See id.* at 86 (criticizing the Constitution's "risk aversion"); *id.* at 115 (on the inescapability of constitutional tragedies).

84. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 401 (W.W. Norton 1987) ("It was difficult to form any uniform rule of qualifications for all the States. Unnecessary innovations he thought too should be avoided.").

85. *See* KENNETH MARTIS, THE HISTORICAL ATLAS OF U.S. CONGRESSIONAL DISTRICTS, 1789–1983, at 4–7 (1982); ROSEMARIE ZAGARRI, THE POLITICS OF SIZE 105–12 (1987); Edward M. Phillips, *Why is Today Election Day?*, N.Y.L.J., Nov. 3, 1992, at 2.

86. MICHAEL E. MCGERR, THE DECLINE OF POPULAR POLITICS 64–66, 207 (1986). *But cf.* William E. Dugan & William A. Taggart, *The Changing Shape of the American Political Universe Revisited*, 57 J. POL. 469, 477–78 (1995) (finding little effect on voter

parties continue to experiment with different methods of selecting candidates for inclusion on the ballot, including primary elections, party caucuses, and popular petitions. Despite the relative clarity of the Constitution's rule that senators were to be selected by state legislatures, that textual settlement also gave way to local experimentation as states began to submit the choice of senators to popular vote—a practice later ratified and made uniform by constitutional amendment.[87] The lack of constitutional settlement of these issues would seem to have been a net positive for the development of American democracy. By contrast, there is reason to question whether we are well served by the adoption of settled rules requiring that federal elections be held on the next Tuesday after the first Monday of November or prohibiting state experimentation with term limits on federal legislators.[88]

Even in the context of free speech rules, clear settlements would require sacrificing other significant values. For example, the Supreme Court left an avenue open for useful variation in free speech rules governing obscenity in *Miller v. California*.[89] Although the *Miller* Court purported "to formulate standards more concrete than those in the past," it nonetheless introduced the destabilizing element of "contemporary [local] community standards" as the appropriate measure for evaluating whether materials are legally obscene into the constitutional law governing the regulation of obscene speech while still awaiting the "concrete legislative efforts" of the states.[90] The Court simultaneously displaced precedent, articulated a still vague standard for identifying obscene speech, and allowed substantial local variation in constitutional interpretation by rejecting "fixed, uniform

turnout from adoption of Australian ballot). The Australian ballot is a ballot provided at public expense with all the candidates listed and distributed only at the polling place to be marked secretly by the individual voter. MCGERR, *supra*, at 64.

87. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1; GEORGE H. HAYNES, THE ELECTION OF SENATORS 130–152 (1906); William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452, 468 (1955) ("[T]he Seventeenth Amendment thus simply acknowledged an already existing situation.").

88. 2 U.S.C. § 7 (2000); U.S. Term Limits v. Thornton, 514 U.S. 779, 783 (1995). Despite the clarity of the federal rule for date of elections, the states are effectively circumventing it with loosened absentee ballot rules.

89. 413 U.S. 15 (1973).

90. *Id.* at 20, 24, 25. Even those who are generally sympathetic with the more concrete *Miller* standard, however, have nonetheless been critical of aspects of the substantive rule established in that case. *See, e.g.*, Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 928–32 (1979) (arguing that "obscenity" in the constitutional sense can be isolated in a category of non-speech that does not possess first amendment value).

HeinOnline --- 80 N.C. L. Rev. 792 (2001-2002)

national standards" for a "too big and too diverse" nation.[91] Rather than attempting to create a single, national definition of obscene material that would itself be adequate to settle all future cases, the Court merely gave local jurisdictions guidance in searching for their own best understanding of constitutionally unprotected obscene speech. Not unreasonably, the Court was willing to tolerate some chilling effect on speech, as some speakers uncertain of the precise boundaries of the law restrained themselves so as to avoid legal entanglements, in order to accommodate diverse social preferences that were themselves still very much in transition in the early 1970s.[92]

These examples point to a problem in thinking about the Constitution as primarily serving a coordinating function, and in the type of private law illustrations that drive Alexander and Schauer's analysis. We must ask who and what exactly is being coordinated by the Constitution. Constitutions are primarily directed at government officials and regulate political behavior, unlike most laws that are directed at private citizens and private behavior. It is of course important that citizens know when elections will be held and where to cast their ballots, as Alexander and Schauer indicate. But the Constitution does not even attempt to coordinate that activity. State and federal legislatures provide the specific rules around which individuals can organize. More specific laws, and not just judicial interpretations, routinely supplement constitutional silence or vagueness. This is equally true in the context of free speech, which forms Alexander and Schauer's other example. The alternative to judicial clarification of the First Amendment is not interpretive anarchy, but legislation. Legislatures have always had primary responsibility for specifying the regulatory environment within which private individuals engage in speech activities.[93] Although such

91. *Miller*, 413 U.S. at 30.

92. Although the Court may have reasonably doubted the viability of any national standards for obscenity, it has invited new difficulties by allowing federal "forum shopping" for obscenity prosecutions. *See, e.g.*, United States v. Thomas, 74 F.3d 701, 709–10 (6th Cir. 1995); United States v. Blucher, 581 F.2d 244, 244–45 (10th Cir. 1978).

93. As the continuing controversy over the *Miller* case indicates, however, there may be a multitude of local rule generating bodies. Uncertainty about constitutional meaning may be rectified by numerous conflicting local standards rather than a single national standard. One may then argue that greater social coordination can be achieved with a single uniform standard articulated by some national institution (not necessarily the Court). But Alexander and Schauer do not make that argument. Moreover, the nationalization argument quickly encounters difficulties. Favoring national uniformity over diversity is a substantively controversial decision that is even more difficult to reconcile with Alexander and Schauer's desire for content-independent justifications for judicial supremacy, for example. In the context of obscenity regulation, it reflects a desire

statutory efforts may be excessively vague and require judicial correction,[94] that is hardly the important example of conflicts between judicial and nonjudicial interpretive authority. More telling are the cases in which the judiciary destabilizes a fairly clear speech regime that had been established by legislatures, substituting its judgments of what the First Amendment requires for legislative judgment. Either the legislative or the judicial regime could serve the coordination function, or indeed some equilibrium regime reflecting the contributions of multiple institutions and interpreters. What is at stake in such disputes is the substantive content of the constitutional order. Alexander and Schauer beg the central question by insisting that the sequence of constitutional interpretation stops with the exercise of judicial review, rather than earlier with the passage of the original legislation or later with the passage of revised legislation.

If the issue is not whether to settle the law but how to settle it, then the institutional question of who should settle constitutional disputes becomes more complicated. Courts and legislatures may well settle such disputes differently in keeping with their own particular institutional capacities. For example, individuals need guidance as to what religious practices, what police interrogation techniques, and what criminal prosecutions are legally permissible. The Constitution provides some guidance on these questions, but it is clear that individual interpreters are likely to differ as to what the Constitution requires in each of these areas.[95] It should be noted,

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for a substantively more liberal regime than the "lowest common denominator." *See, e.g.*, Hamling v. United States, 418 U.S. 87, 144 (1974) (Brennan, J., dissenting); Erik G. Swenson, Comment, *Redefining Community Standards in Light of the Geographic Limitlessness of the Internet: A Critique of* United States v. Thomas, 82 MINN. L. REV. 855, 878–80 (1998). In the context of economic regulations, it has historically reflected the substantive interests of large corporations over local businesses and political preferences. *See, e.g.*, Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483, 493–500 (1998). In the context of purely local activities like voting, multiple local settlements can be just as effective in coordinating individual behavior as a single national settlement. In the context of other activities, multiple local settlements may discourage some forms of coordination while simultaneously encouraging others.

94. The void-for-vagueness doctrine provides the primary support for Alexander and Schauer's argument about free speech rules. Alexander & Schauer, *supra* note 31, at 1373 n.58.

95. Despite the indeterminacy of the constitutional text, political and legal actors may still be able to coordinate around a determinate interpretation of the text. Particularly prominent or culturally resonant glosses on constitutional principles and rules may become "focal points" to which independent individual interpreters are naturally drawn. The practical utility of such natural coordination mechanisms gains nothing from the added injunction that they be accepted as "authoritative" or "supreme." In fact, identifying an authoritative interpreter may even be destabilizing because its

HeinOnline --- 80 N.C. L. Rev. 794 (2001-2002)

however, that individuals would not rely on their own personal constitutional interpretations. Rather, guidance from the legislature, which will specify what religious and police practices are legal, would facilitate individual understanding. If the legislative answer is problematic, it is probably not because it fails to satisfy the settlement function of law. Laying that issue aside, the Court has adopted rules regarding religious free exercise and police interrogations that emphasize uniformity, bright lines, and lack of judicial discretion in enforcing constitutional values. In *Employment Division v. Smith*, the Court denied that "the appropriate occasions for [religious-practice exemptions] creation can be discerned by the courts," since to do so would require "judges to weight the social importance of all laws against the centrality of all religious beliefs."[96] In *Miranda v. Arizona*, the Court searched for a clear rule that could at least create the presumption that custodial police confessions were voluntary and non-coerced, while emphasizing that "we cannot say that the Constitution necessarily requires adherence to any particular solution."[97] In both instances the Court developed a particular constitutional rule with its own institutional responsibilities in mind, so as to maximize the efficiency of its direction and monitoring of the lower courts and to minimize the tensions inherent in ad hoc judicial balancing of conflicting social interests.[98] It is not unreasonable for a legislature or executive officer to evaluate those concerns differently

interpretations may be in conflict with "more natural" interpretations to which many actors are likely to continue to gravitate. *See also* Harrison, *supra* note 49, at 7–9 (noting that an authoritative interpreter advocating a new or different rule may find itself out of sync from the majority, and achieving better coordination by following a rule other than one everyone else is following would be difficult). In the specific context of free speech, for example, there was for much of the nation's history a discrepancy between a more protective "popular tradition" and the legal rule enforced by the courts. MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" 7–14 (2000). On focal points more generally, see THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 53–74 (1960).

96. 494 U.S. 872, 890 (1990); *see also* Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 59 (1993) ("A significant portion of the Court's justification focuses on the difficulties that courts encounter in balancing interests in the fashion required by the pre-*Smith* law."); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 190 (1997) ("The real logic of the *Smith* decision has to do with institutional roles.").

97. 384 U.S. 436, 467 (1966).

98. *See* TUSHNET, *supra* note 17, at 43 ("[J]udges stand in a supervisory relation to other actors .... [J]udges have to articulate rules, standards, or guidelines that will lead those other actors to comply to the greatest degree achievable with the Constitution as understood by judges.").

HeinOnline --- 80 N.C. L. Rev. 795 (2001-2002)

and choose a more flexible standard that vests more discretion in the judiciary or elsewhere.[99]

Alexander and Schauer's emphasis on the settlement function of law suggests that constitutional drafting and interpretation should provide clear rules with broad scope, so as to "settle" as many social questions at once as possible and avoid additional wasteful and confusing debate over constitutional issues. As previously illustrated, neither the founders nor subsequent political actors have always adopted this strategy. For instance, Cass Sunstein has emphasized, constitutional decisionmakers have sometimes been "minimalist" rather than "maximalist."[100] Minimalism may be particularly justified when "a constitutional issue is of high complexity about which many people feel deeply and on which the nation is divided."[101] Alexander and Schauer suggest that we should be willing to sacrifice constitutional perfection for constitutional stability, but not all constitutional issues are the same.[102] We tolerate the "imperfection" of the constitutional rule against Presidents under the age of thirty-five, but there may be less reason to tolerate the detailed trimester scheme set forth by the Court in *Roe v. Wade* or the extreme absolutism of the Court's opinion in *Dred Scott*.[103] More incremental and ambiguous decisions leaving room for further political negotiation may have been more appropriate in such cases. A maximalist interpretation of the Constitution in the context of high complexity and disagreement is more likely to be substantively problematic and less likely to be able to command acquiescence. The Court is unlikely to settle such issues, and to the extent that it does it is likely to do so badly. Appeals to the settlement function of the law do not have equal weight in all types of constitutional disputes.

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99. In *Dickerson v. United States*, Justice Scalia argues that Congress can choose to replace *Miranda*, which he characterizes as a mere "prophylactic rule," and contends that *Miranda* has been of dubious value as a workable bright line. 530 U.S. 428, 444, 450–54, 463–64 (2000) (Scalia, J., dissenting).

100. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–23 (1999).

101. *Id.* at 5 (emphasis omitted); *see also* Michael C. Dorf, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 60–79 (1998) (advocating a system of "provisional adjudication").

102. Alexander & Schauer, *supra* note 31, at 1379–81.

103. *Id.* at 1379; *see* Roe v. Wade, 410 U.S. 113, 163–65 (1973); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 445–52 (1856). *But see* Alexander & Schauer, *supra* note 31, at 1383 ("[I]t is better to treat *Dred Scott* as aberrational . . . ."); Emily Sherwin, *Ducking Dred Scott: A Response to Alexander and Schauer*, 15 CONST. COMMENT. 65, 65 (1998) ("Alexander and Schauer have not gone far enough.").

HeinOnline --- 80 N.C. L. Rev. 796 (2001-2002)

The Constitution is not simply a mechanism for addressing coordination problems. It is also about substantive values—expressing them, securing them, and encouraging deliberation on them. Even the settlement function is itself a contested constitutional value. Advocates of judicial supremacy have long prized finality in constitutionalism, and criticized those who would want to reopen old controversies or start new ones.[104] By contrast, those who have favored extrajudicial interpretation have also tended to value public deliberation and accountability and viewed the relative interpretive openness of the Constitution as a positive good rather than an unnecessary evil.[105] Many particular constitutional disputes are likely to require balancing substantive and non-substantive values, rather than simply maximizing content-independent values such as facilitating, planning, and coordination. To the extent that constitutionalism is concerned with more than the settlement function, the justification for any form of interpretive supremacy is weakened. Moreover, once we recognize that constitutionalism is concerned with balancing multiple values rather than maximizing one, then it becomes less clear that the judiciary is the best institution for doing that balancing and rendering authoritative constitutional interpretations. Even if the settlement function suggested the need for lodging interpretive supremacy somewhere, it does not provide an adequate justification for judicial supremacy.[106]

B. *The Limits of Judicial Settlement*

The capacity of the judiciary to settle constitutional disputes easily can be overstated. The judiciary does, of course, resolve individual cases, but that limited settlement function of the courts is not in dispute. Few question the narrow *Cooper* claim that judicial orders should be obeyed and enforced, at least in most circumstances.

104. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 28–32, 50–54, 83–84 (1999) (discussing Federalist and Whig appeals for legalistic constitutional finality).

105. *See, e.g.*, BURT, *supra* note 17, at 98 ("[I]n any regime committed to this understanding of the equality principle, there can be no proper role for an authoritative resolution of disputes."); WAYNE D. MOORE, CONSTITUTIONAL RIGHTS AND THE POWERS OF THE PEOPLE 4 (1996) ("America's fundamental law depends on large measures of openness and tentativeness rather than closure or rigidity."); SUNSTEIN, *supra* note 100, at xiv; WHITTINGTON, *supra* note 104, at 1–9, 54–56, 77–82, 207–08.

106. Substantive constitutional concerns with accountability and dispersion of political power may argue against lodging interpretive supremacy with any single institution. *See* Harrison, *supra* note 49, at 6 ("*Cooper* extends judicial finality from concrete disputes to abstract propositions of law and hence adds substantially to the judges' power. By doing so it calls into operation the master principle of American constitutional design: power is dangerous.").

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The question is how effectively the courts can broadly settle contested matters of constitutional interpretation. Critics of extrajudicial constitutional interpretation assert and assume that the Court can do so,[107] but there are reasons to doubt their assumption in this regard.

The value of rules as such is that they allow individuals to plan better, by knowing the consequences of their own activities and by being able to predict the actions of others. Judicial supremacy is thought to allow the courts to authoritatively settle disputes and thereby allow individuals to get on with the business of planning their lives rather than debating about or worrying over the content of the rules. Judicial supremacy is not adequate to suppress agitation over constitutional disputes, however. Agitation over constitutional meaning may continue even in the presence of a clear law, for example. Thus, a clear rule may allow individuals to know what the law is today, but still not allow them to adequately predict what the law will be in the future. Even if there is only one decisionmaker, and perhaps especially when there is only one authoritative decisionmaker, in the context of an ongoing controversy an individual must account for uncertainty about the durability of any particular rule and the applicability of similar principles to other situations.

A number of sociolegal scholars have emphasized the extent to which the courts shape, rather than resolve disputes, for example, by altering the strategic opportunities perceived by social and political actors. This more "constitutive" than "regulative" view of law and the courts suggests that we are easily misled by focusing on a single, "authoritative" judicial decision rather than on the ongoing dispute that predates that decision and continues after it. As Michael McCann summarizes, "court actions often play an important, if limited and partial, role in fashioning the different 'opportunity structures' and discursive frameworks within which citizens act."[108] Court decisions "work through the transmission and reception of information rather than by concrete imposition of controls."[109] The "effects of judicial opinions . . . are inherently indeterminate, variable, dynamic, and interactive. 'The messages disseminated by courts do

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107. *See, e.g.*, Alexander & Schauer, *supra* note 31, at 1371 (arguing that judicial supremacy is essential to the settlement function of the law).

108. Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 733 (1992); *see also* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 1–14, 278–310 (1994) (providing an overview of the relationships between law and politics in pay equity disputes).

109. Marc Galanter, *The Radiating Effects of Courts*, *in* EMPIRICAL THEORIES ABOUT COURTS 117, 126 (Keith O. Boyum & Lynn Mather eds., 1983).

HeinOnline --- 80 N.C. L. Rev. 798 (2001-2002)

not . . . produce effects except as they are received, interpreted, and used by [potential] actors.' "[110] Likewise, "judicial opinions can reshape the strategic landscape in ways that encourage other citizens and officials to circumvent, defy, and even initiate counter-reform efforts to alter court rulings."[111] From this perspective, neither the law nor the courts can settle disputes in the sense that this objection to extrajudicial constitutional interpretation requires.[112] In McCann's own research on comparable worth litigation, for example, the judiciary was simply one site of conflict among many between labor unions and employers, and judicial decisions were a resource for educating observers, organizing and mobilizing supporters, and providing strategic leverage in negotiations with antagonists. The courts could not and did not, however, settle the issues of comparable worth and pay equity, let alone the broader labor disputes in which those issues were embedded.[113]

The failure of any strong form of the judiciary's settlement function is not simply the result of the inadequate acceptance of judicial supremacy. Merely accepting the non-exclusivity of judicial constitutional interpretation raises the possibility of legal and interpretive instability. Relatively rarely are we likely to react to judicial opinions as Anthony Lewis apparently has: "But when the Court spoke, that was it. The decision reordered nearly everyone's thinking."[114] Judicial decisions and opinions may have an effect on how nonjudicial actors conceptualize particular constitutional problems, but it is exceedingly rare that a judicial opinion can identify a settlement that can extinguish a serious constitutional controversy.[115] As two public opinion scholars concluded, "[w]hen

110. McCann, *supra* note 108, at 733 (alteration in original) (quoting Marc Galanter).

111. *Id.*

112. *See* Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 341–49 (1996).

113. MCCANN, *supra* note 108, at 278–310 (providing an overview of the relationships between law and politics in the pay equity disputes).

114. Anthony Lewis, *When the Court Speaks*, N.Y. TIMES, May 30, 1997, at A29. Ironically, Lewis was responding to the decision in *Clinton v. Jones*, 520 U.S. 681 (1997), which in hindsight he found rather less appealing. *See, e.g.*, Anthony Lewis, *Paula Jones: Lessons*, N.Y. TIMES, Apr. 6, 1998, at A23 (stating that the Court's decision was "divorced from reality"); Anthony Lewis, *Some Unfinished Business*, N.Y. TIMES, Feb. 16, 1999, at A19 ("[W]e must correct the folly of the Supreme Court's 1997 decision in the Paula Jones case."); Anthony Lewis, *What Has Gone Wrong*, N.Y. TIMES, Mar. 2, 1998, at A17 ("Time has made clear how wrong the Court was . . . . [T]his country is going to have to rescue the Presidency from that legal swamp.").

115. *See* THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 145–56 (1989) (finding "little evidence that Court rulings influence mass public opinion"); Valerie J. Hoekstra & Jeffrey A. Segal, *The Shepherding of Local Public Opinion: The*

HeinOnline --- 80 N.C. L. Rev. 799 (2001-2002)

the Court rules on politically controversial cases, it may establish the law of the land, but it does not put an end to debate. It neither converts the opposition nor ends the controversy."[116]

Direct challenges to judicial supremacy are rare. More common are efforts to evade the logic of the Court's reasoning and to influence subsequent judicial opinions. Far from saying the last word on the subject, major judicial forays into new constitutional issues are invitations for litigation to extend or pare back the Court's rulings. Court opinions can unsettle as well as settle the legal and constitutional environment. Despite the apparent finality of the abortion rules set forth in *Roe*, for example, Congress, the executive, the states, and the courts have ever since been involved in the reconsideration of *Roe* and its possible implications.[117] Although some of these efforts were couched in terms of challenges to judicial supremacy, many were not.[118] As both sides in the abortion debate well understood, *Roe* was the beginning not the end of the debate, and the law of abortion could hardly be regarded as settled. Politicians were forced to dedicate substantial resources to the abortion debate, despite *Roe*'s effort to settle the issue.[119] For individuals, planning remained difficult in spite of the Court's rulings, especially given the substantial social resistance to abortion despite

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Supreme Court and Lamb's Chapel, 58 J. POL. 1079, 1088–94 (1996) (finding Court decisions affect opinion only among those with high awareness of the decision but weak prior beliefs about the issue); *see also* Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 768 (1989) (finding Court decisions reinforce existing cleavages in public opinion).

116. Franklin & Kosaki, *supra* note 115, at 753.

117. *See* DEVINS, *supra* note 17, at 56–120. Alexander and Schauer have noted that "our critics are unwilling to come out strongly in support of dispersal of interpretive authority among the 50 states," but the claim depends on how "extrajudicial constitutional interpretation" is understood. Few scholars are eager to authorize *either* the states *or* the national government to be "free to take Supreme Court decisions as being limited to the case in which they arose," but many may be willing to allow both state and national actors to challenge judicial constitutional interpretations. Alexander & Schauer, *supra* note 76, at 476.

118. The "Human Life Bill" can be regarded as a challenge to judicial supremacy, but the legislatively and politically more important debates over public funding of abortions, federal funding of fetal tissue research, parental and spousal notification, waiting periods, partial birth abortions, and the like were not. On the Human Life Bill, see BURGESS, *supra* note 17, at 30–49.

119. *See* DEVINS, *supra* note 17, at 79–82. Indeed, the issue may be more politically settled since the *Casey v. Planned Parenthood*, 510 U.S. 1309 (1992), decision actually made judicial doctrine less rigid and final, for the enhanced legislative responsibility for abortion-law outcomes has altered the incentives facing politicians so as to encourage compromise and stability rather than position-taking. *See* DEVINS, *supra* note 17, at 96.

HeinOnline --- 80 N.C. L. Rev. 800 (2001-2002)

the putative legal settlement. Judicial intervention in the controversy may have even helped radicalize abortion opponents, rendering the social environment even less settled than it otherwise would have been.[120] By detaching constitutional interpretation from the political and social context, the judiciary may hamper rather than facilitate productive social and political decisionmaking.[121]

The doctrine of stare decisis is also a thin reed upon which to base arguments for judicial supremacy. Although providing formal support for the notion that the Court provides more stable constitutional settlements than other institutions, neither the theory nor practice of stare decisis is completely reassuring in this context. It is notable that this argument for judicial supremacy assumes a strong theory of stare decisis that otherwise has little theoretical support in the constitutional context.[122] Although most interpretive constitutional theories make some room for precedent, few regard precedent as decisive by itself.[123] At best, precedent is one mode of constitutional argument among many, and most modern interpretive theories regard precedent as less determinative in the context of constitutional interpretation than in the context of statutory interpretation.[124] Stare decisis may add some stability to judicial constitutional interpretation, but the appropriate place of precedent in constitutional decisionmaking is far less resolved than proponents of judicial supremacy suggest.

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120. *See* Franklin & Kosaki, *supra* note 115, at 768.

121. *See generally* Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998) (emphasizing the need for interbranch dialogue).

122. *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 23–26 (1994); Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2088 (1996).

123. *See generally* Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401 (1988) (noting the tension between stare decisis and interpretation of a written constitution); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991) (examining the balancing of precedent against other factors of constitutional interpretation); Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999) (examining changing treatment of precedent over time); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988) (examining tension between originalism and stare decisis). *But see* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (grounding constitutional interpretation in precedent); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973) (same).

124. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE 39–58 (1982); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1204 n.66 (1987); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1758–67 (1994).

HeinOnline --- 80 N.C. L. Rev. 801 (2001-2002)

The practice of stare decisis is also problematic for those who would favor judicial over nonjudicial constitutional interpretation.[125] Prior interpretive decisions can lend stability to constitutional interpretation by being either regulative or constitutive of later interpretations. In order to distinguish judicial from nonjudicial institutions, however, the value of precedent must lie in its regulative character—its doctrinal, formal authority. Unfortunately, precedent is unlikely to be very regulative in a strong form. Although precedent may help channel judicial decisionmaking as long as the Justices regard the previous cases as largely correct, it is not clear that stare decisis poses a strong obstacle to reversing course when Justices come to believe that the precedent is wrong. The constitutive role of prior decisions—their value as cognitive heuristics and ideological constructs—is likely to be the more empirically plausible, but also is not unique to the judiciary.[126] Legislators and Presidents necessarily view the Constitution through the lens of the past, even though they do not subscribe to the binding authority of history. Extrajudicial constitutional decisions are responsive to past decisions and demonstrate stability, even though nonjudicial actors do not view themselves as regulated by a doctrine of stare decisis. At the same time, Justices routinely flaunt the regulative authority of precedent. They challenge the authority of precedent as soon as it is written by publishing dissents, and they often adhere to that dissenting position in later cases.[127] Justices O'Connor, Rehnquist, Stevens and White, for example, expressed their dissent from the newly announced law in the first flag burning case, and they adhered to their dissenting

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125. It is noteworthy that Alexander and Schauer now criticize the Court for being insufficiently concerned with its settlement function and argue that the Court should be more concerned with stare decisis, issue fewer divided judgments, and the like. Alexander & Schauer, *supra* note 76, at 479–80. Although this prescription follows naturally from their larger theory, the descriptive admission raises problems for their institutional analysis.

126. My claim is not that precedent never serves its regulative function, but merely that the overall significance of the regulative function cannot be assumed. *See generally* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 33–57 (1998) (placing constitutional understandings in context of historical development); Howard Gillman, *What's Law Got To Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 485–96 (2001) (on law as a "state of mind"); Keith E. Whittington, *Once More Unto the Breach: Post-Behavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 622–28 (2000) (discussing legal rules as cognitive heuristics).

127. *See* HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 287–301 (1999) (finding that "the justices are rarely influenced by *stare decisis*").

HeinOnline --- 80 N.C. L. Rev. 802 (2001-2002)

position when the Court revisited the issue the next year.[128] Changes in the membership of the Court augur changes in the case law, for the Court is likely to abandon precedents that are no longer consistent with the commitments of the new majority.[129]

The existing law is vulnerable to pivotal changes in the substantive goals of the lawmakers, whether those lawmakers sit on the bench or in the capitol.[130] Even in the relatively legalistic domain of state liability under federal statutes, the Court has performed several flip-flops in a fairly short period of time and Justices have bitterly questioned the stability of decisions.[131] Any relative advantage in the stability of judicial decisionmaking is more likely to be a function of the lifetime appointments of federal judges than respect for the authority of precedent. A more direct focus on life tenure as the basis of judicial stability would necessarily raise the embarrassing normative issues of accountability and responsiveness and the basic rationale for democratic lawmaking. Given the routine turnover of judicial personnel, even this can only be regarded as a moderate advantage.[132] The Court is not a monolith. It decides constitutional issues by majority rule, and few can regard a controversial question as finally settled when decisive majorities may

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128. *See* United States v. Eichman, 496 U.S. 310, 319 (1990); Texas v. Johnson, 491 U.S. 397, 421, 436 (1989).

129. Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262, 263 (1992); *see also* SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS 59–107 (1995) (presenting an empirical study of precedent alteration from 1946 to 1992); Lawrence Baum, *Membership Change and Collective Voting Change in the United States Supreme Court*, 54 J. POL. 3, 10–13 (1992) (finding that membership change was the main source of voting change in civil liberties decisions between 1946 and 1985).

130. *See* KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 46 (1998) (discussing the correction of "out-of-equilibrium policies").

131. Alden v. Maine, 527 U.S. 706, 760 (1999) (Souter, J., dissenting) (noting that "[t]he Court today takes the altogether different tack of arguing that state immunity from suit in state court was an inherent right of states preserved by the Tenth Amendment"); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985) (Powell, J., dissenting); Nat'l League of Cities v. Usery, 426 U.S. 833, 856 (1976) (Brennan, J., dissenting); Maryland v. Wirtz, 392 U.S. 183, 201 (1968) (Douglas, J., dissenting) (calling the majority opinion "a serious invasion of state sovereignty protected by the Tenth Amendment that . . . is . . . not consistent with our constitutional federalism").

132. *See* Robert A. Dahl, *Decisionmaking in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) ("[O]n the average one new justice has been appointed every twenty-two months . . . . [T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."); James A. Stimson et al., *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 555 (1995) ("Court decisions do, in fact, vary in accord with current public preferences . . . this dynamic representation is about a third to a quarter as effective as for the House and Senate.").

hinge on the vote of a single individual. The smaller the decisionmaking body, the greater the probability that any individual decisionmaker could be decisive to the outcome. To this degree, judicial majorities are more fragile than legislative majorities.

C. The Possibilities of Extrajudicial Settlements

If critics of extrajudicial constitutional interpretation overstate the stability of judicial interpretation, they also underestimate the stability of nonjudicial interpretation. Judicial supremacy is not necessary to settle constitutional understandings. Examples of extrajudicial settlement of constitutional disputes are commonplace. Britain has long relied on constitutional convention rather than constitutional law to provide such settlements, and analogous practices exist in the United States.[133] Policymakers were faced with constitutional indeterminacies early on in the nation's history and had little expectation that the judiciary either would or could clarify and stabilize the constitutional rules. Elected officials reached constitutional settlements of their own. Congress determined, for example, that the President could unilaterally remove executive officials.[134] The President successfully vetoed legislation on policy grounds[135] and excluded the Senate from the negotiation of treaties.[136] Congress and the President agreed on procedures for acquiring new territory and admitting new states into the union.[137] The House and Senate established an understanding of impeachable offenses, and insisted that partisanship was inconsistent with judicial office.[138] George Washington set an enduring precedent of the two-term presidency, and Abraham Lincoln marshaled support for the view that states did not have a right to secede from the Union. The Senate understands that Presidents will generally nominate only members of

133. *See* HERBERT W. HORWILL, THE USAGES OF THE AMERICAN CONSTITUTION *passim* (1925) (comparing the American and English constitutions); GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS *passim* (1984). *See generally* James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules that Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 BUFF. L. REV. 645 (1992) (listing, *inter alia*, the presidential electoral college, treaty interpretation, and Senate approval of Supreme Court nominees as examples of "constitutional conventions").

134. *See, e.g.*, CURRIE, *supra* note 8, at 37–41.

135. *See, e.g.*, ROBERT J. SPITZER, THE PRESIDENTIAL VETO 29 (1988).

136. *See, e.g.*, FORREST MCDONALD, THE AMERICAN PRESIDENCY 222 (1994) (chronicling a violent outburst from Washington in frustration with Senate discord).

137. *See, e.g.*, FORREST MCDONALD, THE PRESIDENCY OF THOMAS JEFFERSON 70–73 (1976).

138. *See, e.g.*, WHITTINGTON, *supra* note 104, at 25–50.

HeinOnline --- 80 N.C. L. Rev. 804 (2001-2002)

their own party to serve in government offices, while the President understands the requirements of "senatorial courtesy." These settlements and others have endured through most of the nation's history with little assistance from the judiciary.

Other political interpretations of the Constitution have structured government behavior for decades at a time. The Federalists established a broad interpretation of federal powers that embraced the incorporation of a national bank, and the Jacksonian Democrats replaced it with a narrow interpretation—John Marshall's formal endorsement of the broad interpretation notwithstanding.[139] The Federalists successfully claimed that the federal tariff power could be used to protect domestic manufacturers, and the Jacksonian Democrats forcefully abandoned that claim.[140] Presidents through most of American history claimed a power to impound appropriated funds, and in the 1970s Congress successfully established a framework for regulating the presidential spending power and clarifying the congressional power of the purse.[141] Congress regularly passes "framework legislation" and "statutes revolving in constitutional law orbits."[142] For much of the nineteenth century, legislatures were the primary institution for determining the scope of individual rights and were able to settle such disputes at least as effectively as the judiciary.[143]

Extrajudicial constitutional settlements gain their stability from a variety of sources, despite the absence of a formal commitment to the authority of precedent. Not least among these supports for settlement is popular opinion. As Edward Corwin noted in outlining departmentalist theory, "*finality* of interpretation is hence the outcome—when indeed it exists—not of judicial application of the Constitution . . . but of a *continued harmony of views among the three*

139. *See* Mark A. Graber, *The Jacksonian Origins of Chase Court Activism*, 25 J. SUP. CT. HIST. 17, 26–28 (2000); Whittington, *supra* note 63, at 368–77.

140. *See* WHITTINGTON, *supra* note 104, at 93–106.

141. *Id.* at 162–73.

142. *See generally* Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 482 (1976) (noting that "framework" legislation interprets the Constitution by providing a legal framework for the governmental decisionmaking process); Gerhard Casper, *The Constitutional Organization of the Government*, 26 WM. & MARY L. REV. 177, 187–93 (1985) ("Both declaratory and regulatory in nature, framework legislation describes the constitutional allocation of authority and regulates the decisionmaking of the President and the Congress.") [hereinafter Casper, *Constitutional Organization*]; Lupu, *supra* note 96, at 3–6 (analyzing a specialized subset of statutes that utilize the language of the Constitution itself).

143. *See* JOHN J. DINAN, KEEPING THE PEOPLE'S LIBERTIES 10–59 (1998).

departments. It rests, in other words, in the last analysis, *on the voting power of public opinion*."[144] James Madison reached a similar conclusion in defending extrajudicial constitutional settlements in the First Congress, contending that:

> In all systems there are points which must be adjusted by the departments themselves, to which no one of them is competent. If it cannot be determined in this way, there is no resource left but the will of the community, to be collected in some mode to be provided by the [C]onstitution, or one dictated by the necessity of the case.[145]

The few historical instances in which Presidents have challenged judicial supremacy and asserted departmentalist theories of constitutional interpretation, they have also commanded precisely this type of public support. Departmentalist Presidents such as Jefferson, Jackson, Lincoln, and Franklin Roosevelt rejected the finality of judicial interpretations in the name of broadly supported popular interpretations.[146] As reconstructive leaders, each of these Presidents was able to forge a new but stable political consensus around his preferred constitutional understandings.[147]

Nonjudicial political actors value legal settlement and stability as well, and as a consequence they generally strive to produce it.[148] Political actors look for compromises and points of agreement so as

144. CORWIN, *supra* note 42, at 7.

145. JAMES MADISON, 12 THE PAPERS OF JAMES MADISON 238 (Charles F. Hobson & Robert Rutland eds., 1977); *see also* JAMES MADISON, 9 THE WRITINGS OF JAMES MADISON 372 (Gaillard Hunt ed., 1910) (observing that "a course of practice of sufficient uniformity and duration to carry with it the public sanction shall settle doubtful or contested meanings"). Judicial decisions, under this view, could be important as evidence of that "course of practice," though not as authoritative interpretations. *See* Harrison, *supra* note 49, at 19.

146. Keith E. Whittington, *Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning*, 33 POLITY 365 (2001); *see also* JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 77–95 (1984); BURGESS, *supra* note 17, at 3–7; FISHER, *supra* note 17, at 238–47; ROBERT SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 23–60 (1971).

147. *See* STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE 38–39 (1993) ("By shattering the politics of the past, orchestrating the establishment of a new coalition, and enshrining their commitments as the restoration of original values, [these reconstructive Presidents] have reset the very terms and conditions of constitutional government.").

148. This is not universally true, however. Notably, marginalized political actors have an interest in destabilizing existing settlements and fanning controversy. For example, the second party system dominated by the Democrats and the Whigs was dedicated to preserving as much as possible early settlements of the slavery issue. By contrast, the success of the Republican Party was dependent on the collapse of that settlement and the intensification of the slavery controversy. Politics is relatively open to such efforts, and such cases again raise the question of whether stability should be regarded as a content-independent good.

HeinOnline --- 80 N.C. L. Rev. 806 (2001-2002)

to bring lingering conflicts to a close. A concern with opportunity costs, a positive desire to maintain stability, and sheer inertia discourage nonjudicial officials from disrupting existing constitutional arrangements without good reason, and indeed elected officials often recognize the weight of prior practice in their deliberations.[149] The constitutional structure itself tends to generate stability and moderation by requiring large coalitions to support change.[150] Although there have been periodic upheavals, political coalitions and the core political agenda are generally quite stable.[151] In general, elected officials operate within the ideological and institutional framework established in earlier political debates. Extrajudicial constitutional settlements are reinforced through the construction of viable and durable electoral and legislative coalitions, the alteration and mobilization of public opinion, and the structuring of political institutions.[152] By ensuring that no one has both the incentive and power to destabilize a given extrajudicial settlement, political actors render their constitutional interpretations "self-enforcing."[153] Regardless of judicial constitutional precedent, the workings of the Voting Rights Act of 1965, among other institutional and sociological factors, ensure that no credible politician has any desire to try to

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149. *See, e.g.*, WHITTINGTON, *supra* note 104, at 175–83 (discussing the use of historical practice in war power debates).

150. *See, e.g.*, Thomas H. Hammond & Gary J. Miller, *The Core of the Constitution*, 81 AM. POL. SCI. REV. 1155, 1157–63 (1987) (providing a formal analysis of stabilizing effects of constitutional structure); KREHBIEL, *supra* note 130, at 230–31 (providing a formal and empirical analysis of stabilizing effects of constitutional structure).

151. KREHBIEL, *supra* note 130, at 4–6, 84–85; KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS 58, 67–69 (1997).

152. WHITTINGTON, *supra* note 104, at 207–28.

153. *See generally* TUSHNET, *supra* note 17, at 95–128 (using the "incentive-compatible" economic model); Avner Greif, *On the Political Foundations of the Late Medieval Commercial Revolution: Genoa During the Twelfth and Thirteenth Centuries*, 54 J. ECON. HIST. 271 (1994) (analyzing self-enforcement in political systems and economic growth); Douglas C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989) (studying constitutional evolution and capital market growth); Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT'L ORG. 299 (1982) (creating interest-based models by which international regimes develop); L.G. Telser, *A Theory of Self-Enforcing Agreements*, 53 J. BUS. 27 (1980) (examining self-enforcement mechanisms for co-venturers seeking agreement); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997) ("[D]emocratic stability depends on a self-enforcing equilibrium: It must be in the interests of political officials to respect democracy's limits on their behavior."); Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519 (1983) (examining transactional costs for self-enforcement); H. Peyton Young, *The Economics of Conventions*, 10 J. ECON. PERSP. 105 (1996) (modeling the formation of conventions with a game theory approach).

HeinOnline --- 80 N.C. L. Rev. 807 (2001-2002)

recreate Jim Crow, for example.[154] Similarly, despite internal disagreement and the lack of external enforcement mechanisms, the legislative chambers have readily managed to create stable subconstitutional rules of internal governance to facilitate coordination.[155] Political actors have their own motives and means for reducing instability and uncertainty in the constitutional and legal environment.

In sum, this objection to extrajudicial constitutional interpretation assumes that finality is the primary constitutional value and one that only the judiciary can produce. Neither assumption is warranted. Finality is a contested virtue in the constitutional context, and one that must be balanced with other concerns. Constitutions do not always or only serve these sorts of coordination and efficiency functions. Judicial supremacy is not the only mechanism for achieving the benefits of settled law in facilitating productive social action. Judicial constitutional interpretation can be destabilizing as well as stabilizing, and formal judicial supremacy divorced from the wider political and social environment is unlikely to settle effectively constitutional disputes. Extrajudicial constitutional interpretation often does produce stable constitutional settlements, even without the recognized existence of an "ultimate" interpreter or adherence to a formal doctrine of stare decisis. There must be some finality to the resolution of constitutional and legal disputes for society to function productively, but constitutional equilibria can be achieved in myriad ways and the stability of the constitutional environment is best regarded as a continuous rather than a dichotomous variable. The alternative to a judicially imposed constitutional order is not anarchy.

III. SECOND OBJECTION: IT'S IRRATIONAL

The appeal to the settlement function of law is also an appeal to a substantively minimal, or "content independent," justification for

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154. *See, e.g.*, EARL BLACK, SOUTHERN GOVERNORS AND CIVIL RIGHTS *passim* (1976) (examining declining influence of segregationist politicians in 1960s). It should be emphasized that more basic sociological factors undermined legislative resistance to desegregation independently of the mobilization of black voters. *See, e.g.*, Joe R. Feagan, *Civil Rights Voting by Southern Congressmen*, 34 J. POL. 484, 485 (1972).

155. *See* STANLEY BACH & STEVEN S. SMITH, MANAGING UNCERTAINTY IN THE HOUSE OF REPRESENTATIVES 38–111 (1988) (examining rules governing floor votes); GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN *passim* (1993) (proposing legislative parties as a solution to the collective action problem); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 143–55 (1988) (analyzing efficiencies of legislative structures).

HeinOnline --- 80 N.C. L. Rev. 808 (2001-2002)

judicial supremacy.[156] Any interpretation of the Constitution would be acceptable, as long as it is stable. By contrast, the second common objection to extrajudicial constitutional interpretation is distinctly substantive. The value of judicial supremacy, in this argument, is not in its capacity to provide authoritative legal settlements, but in its capacity to provide substantively desirable legal outcomes. The judiciary alone serves as a "forum of principle" within the American constitutional system, and deference to extrajudicial decisionmaking would sacrifice the rule of reason to the rule of will.[157]

This argument also has deep roots in American history. John Marshall defended the Court from attack in part by drawing a sharp distinction between matters of law and matters of politics.[158] There could be all kinds of reasonable disagreements about matters of politics, and those disagreements may best be settled in the legislative arena. About the law, however, there could be only one right answer, and by skill and temperament judges were most likely to come to that answer. Freed from the political pressures that gave elected officials a stake in the outcome of constitutional disputes, judges need merely open their eyes to the Constitution to see the truth. Although Marshall emphasized the uncontroversial nature of the judiciary identifying obvious constitutional violations,[159] his distinction between law and politics benefited from the belief in the esoteric nature of legal reasoning that privileged the scholarly credentials of a judge over the representative credentials of a legislator. The great British jurist Edward Coke, who anticipated the power of judicial review, is

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156. Alexander & Schauer, *supra* note 31, at 1371; *see also id.* at 1361 ("An important aspect of the Constitution, as of all law, is its authority, and intrinsic to the concept of authority is that it provides content-independent reasons for action. Accordingly, an authoritative constitution has normative force even for an agent who believes its directives to be mistaken.").

157. DWORKIN, *supra* note 31, at 33–34.

158. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals.... Questions, in their nature political... can never be made in this court."); *see also* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 109–75 (1990) (chronicling the Marshall phase of constitutional jurisprudential evolution); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, at 53–61, 196–200 (1991) (analyzing republican theories of politics); George L. Haskins, *Law Versus Politics in the Early Years of the Marshall Court*, 130 U. PA. L. REV. 1, 5 (1981) (noting Marshall's intent to separate law from politics); William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 932–56 (1978) (calling the distinction "centrally important to understanding John Marshall's jurisprudence"). *But cf.* Christopher L. Eisgruber, *John Marshall's Judicial Rhetoric*, 1996 SUP. CT. REV. 439, 440–41 (arguing that Marshall wanted "to convince people that national institutions, including the federal judiciary, would govern well").

159. *Marbury*, 5 U.S. (1 Cranch) at 177–80.

HeinOnline --- 80 N.C. L. Rev. 809 (2001-2002)

reputed to have relied on such claims in order to assert authority over the British king. To Coke's declaration that the king could not judge cases:

> The King said, that he thought the Law was founded upon Reason, and that he and others had Reason, as well as the Judges: To which it was answered by me, that true it was, that god had endowed his Majesty with excellent Science, and great Endowments of Nature, but his Majesty was not learned in the Laws of his Realm of England .... [Cases] are not be decided by natural Reason, but by the artificial Reason and Judgment of Law, which Law is an Act which requires long Study and Experience, before that a Man can attain to the Cognizance of it.[160]

Alexander Hamilton echoed Coke's claim in arguing that the long judicial tenure under the proposed Constitution was in keeping with the high qualifications that the judicial office would require. The complexities and bulk of the law "must demand long and laborious study to acquire a competent knowledge of them."[161]

The authority of judicial supremacy is rooted on the sharp distinction between the considerations of expediency that are thought to dominate the legislature and the considerations of principle that are thought to dominate the judiciary. The faith that the law was found rather than made by judges was shattered by Legal Realism in the twentieth century, if not earlier, but the faith in the principled nature of judicial decisionmaking has survived.[162] As Edward Corwin argued early in this century, "law comes to be looked upon more and more as something *made* rather than as something *discovered*,—as an act of *authority* rather than an act of *knowledge*."[163] This insight would seem to undermine judicial authority relative to that of legislators, but Corwin assures us that:

> The concept of an automatic declaration of the law is ... no longer necessary to the doctrine of the separation of powers. The judges change the law, it is true, but they go about the business in a vastly different way than the legislature does. The legislature acts simply upon considerations of expediency. The judges are controlled by precedent, logic,

160. Prohibitions del Roy, 12 Co. Rep. 65 (1607).

161. THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiser ed., 1961). Hamilton is thinking specifically of statutory law here.

162. Legal Realism emphasized the indeterminacy of legal rules and the importance of individual judges in creating legal outcomes. For one historical overview, see LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960 (1986).

163. EDWARD S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 64 (1914).

HeinOnline --- 80 N.C. L. Rev. 810 (2001-2002)

> the sensible meaning of words, and their perception of moral consequences.[164]

This theme was picked up and elaborated in the postwar period by Legal Process theorists such as Herbert Wechsler,[165] Henry Hart,[166] Harry Wellington,[167] and Alexander Bickel.[168]

Perhaps the most prominent contemporary defender of this view is Ronald Dworkin. To Dworkin, political institutions are inadequate to addressing matters of moral principle. Instead of "reasoned debate":

> [The] process is dominated by political alliances that are formed around a single issue and use the familiar tactics of pressure groups to bribe or blackmail legislators into voting as they wish. The great moral debate that [Judge Learned] Hand thought essential to the spirit of liberty never begins. Ordinary politics generally aims, moreover, at a political compromise that gives all powerful groups enough of what they want to prevent their disaffection, and reasoned argument elaborating underlying moral principles is rarely part or even congenial to such compromises.[169]

Fortunately, the Court offers an alternative:

> We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once,

164. *Id.* (citation omitted).

165. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) ("[The courts] are bound to function otherwise than as a naked power organ; they participate as courts of law . . . in that they are—or are obliged to be—entirely principled.").

166. *See, e.g.*, Henry M. Hart, Jr., *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959) ("Only opinions which are grounded in reason . . . can do the job which the Supreme Court of the United States has to do.").

167. *See, e.g.*, Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 246–47 (1973) (A legislature "would be constructed with the understanding that it was to respond to the people's exercise of political power." The judiciary should "be insulated from such pressure. It would provide an environment conducive to rumination, reflection, and analysis. 'Reason, not power' would be the motto over its door.").

168. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 58 (1962) (Judicial review "is justified only if it injects into representative government something that is not already there; and that is principle, standards of action that derive their worth from a long view of society's spiritual as well as material needs that command adherence whether or not the immediate outcome is expedient or agreeable.").

169. DWORKIN, FREEDOM'S LAW, *supra* note 34, at 344–45.

HeinOnline --- 80 N.C. L. Rev. 811 (2001-2002)

> someplace, finally, become questions of justice. I do not call that religion or prophecy. I call it law.[170]

According to this view, the alternative to judicial supremacy is apparently the abandonment of constitutional principles.[171]

A. The Limits of Judicial Reason

Framed in this fashion, this objection to extrajudicial constitutional interpretation pulls in conflicting directions. The tensions are not resolved, however, by disentangling the threads of the objection. Whereas Alexander Hamilton defended the judiciary in terms of the artificial reason of the law, Ronald Dworkin defends the courts in terms of the "regulatory reason" of liberal moral philosophy.[172] We have moved from a belief in the science of law to a wish for a principled discourse.[173] Dworkin is clear in arguing that constitutional interpretation requires engagement with "fundamental questions of political morality and philosophy," not "technical exercises in an arcane and conceptual craft."[174] But the Dworkinian shift creates a complication and not just a transition in the defense of the courts as uniquely reasonable. Although Dworkin may prefer that the Court pay more attention to the "philosopher's brief"[175] than to either the "Brandeis brief"[176] or the lawyer's brief, neither the

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170. DWORKIN, *supra* note 31, at 71.

171. *See also* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 89 (1987) ("Judiciary is unique in that it is the only institution committed to arriving at decisions based entirely on arguments and reasoning."); Frank I. Michelman, *Judicial Supremacy, the Concept of Law, and the Sanctity of Life, in* JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY 140, 145 (Austin Sarat & Thomas R. Kearns eds., 1996) ("[W]e do best to assume strong advantages ... from well-honed dialectical and judgmental capabilities; from a cultivated sense of the distinction between public and personal reason; and from a live and broad working knowledge of the law, along with a studied grasp of the country's deep political-moral culture.") (footnote omitted); Alexander & Schauer, *supra* note 31, at 1367 ("[T]here is no reason to suppose that legislators, executives, or bureaucrats would be especially adept at constitutional interpretation ... and good reason to suppose that they would be particularly ill-suited to interpret constitutional provisions designed to limit their own powers.").

172. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 249–51 (1978); STEVEN D. SMITH, THE CONSTITUTION AND THE PRIDE OF REASON 73–104 (1998) (analyzing the shift from traditional legalistic reasoning to philosophical "regulatory reason" in constitutional theory).

173. SMITH, *supra* note 172, at 73–104.

174. DWORKIN, FREEDOM'S LAW, *supra* note 34, at 331, 343.

175. Ronald Dworkin et al., *Assisted Suicide: The Philosophers' Brief*, N.Y. REV. BOOKS, Mar. 27, 1997, at 41.

176. Muller v. Oregon, 208 U.S. 412 (1908) (concerning Brandeis's brief that primarily presented descriptive facts on social conditions in support of the constitutionality of female maximum-hours law).

HeinOnline --- 80 N.C. L. Rev. 812 (2001-2002)

judiciary nor constitutional theory has proven willing to fully embrace moral theorizing as the Court's central institutional mission. In recognition of this institutional fact, Dworkin himself imposes a constraint of "fit" on moral reasoning in the context of constitutional interpretation. The "arduous virtue of fidelity" requires that judges temper their moral reasoning with a concern for inherited text, historical practice, and judicial precedent.[177]

Although we might be willing to recognize and defer to the technical expertise of the courts in rendering legal judgments, the special competence of the courts to provide principled deliberation on constitutional values is substantially less clear. Judicial discourse is characterized by an uneasy mix of different modes of analysis and argumentation that fit awkwardly with the forum-of-principle imagery. Arguments based on text, authorial intent, historical practice, constitutional structure, and precedent are as acceptable and at least as expected in the courts as arguments based on principled reason and the national ethos.[178] In practice, the Justices spend far more time analyzing and employing the Court's own precedents than in constructing a coherent, let alone compelling, vision of justice.[179] The argumentative variety on the bench reflects both the inherent pluralism of the legal tradition and the underlying contradictions of normative constitutional theory.[180] Even as theorists hail the Court as

177. Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1249–50 (1997) ("Lawyers and judges faced with a contemporary constitutional issue must try to construct a coherent, principled, and persuasive interpretation of the text of particular clauses, the structure of the Constitution as a whole, and our history under the Constitution.").

178. *See* BOBBITT, *supra* note 124, at 3–119 (describing "a typology of constitutional arguments"); Fallon, *supra* note 124, at 1194–1209; Griffin, *supra* note 124, at 1745–68. Although such modes of argumentation may not encourage moral deliberation, they may be useful in constraining judges to deciding cases based on reasoned argument rather than mere favoritism or "will." Of course, many advocates of judicial reasoning, including Dworkin, are skeptical of the restraining capacity of neutral reasoning. More relevant for present purposes, however, is the importance of such a reason/will dichotomy for a defense of judicial supremacy. Though neutral legal reasoning may be useful in restraining judges from being willful in regard to the individual parties that come before the bench, it means little for determining whether judges or legislators should specify the constitutional principles to be applied in future cases.

179. Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567, 590–96 (1991). By contrast, the use of precedent can be regarded as part of a method of philosophical reflective equilibrium, as a means of discussing moral substance rather than avoiding it. Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893, 955–61 (1990).

180. *See* BOBBITT, *supra* note 124, at 3–119; LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF 3–25 (1996); Griffin, *supra* note 124, at 1758–62.

HeinOnline --- 80 N.C. L. Rev. 813 (2001-2002)

a potential voice of reason in the constitutional arena, they disagree radically among themselves as to what sorts of arguments are in fact reasonable and appropriate for the Court to adopt. Given these apparently inescapable theoretical (and political) disagreements, the Court's recent penchant for an incremental muddling through with complex and divided opinions and relatively modest substantive movement may itself seem prudent, an appropriate response to persistent political divisions and an uncertain environment.[181] Although such "chastened aspirations" may seem appropriate in the contemporary context, it is hard to regard such judicial reasoning as deserving special deference.[182]

The particularly judicial function of the courts also prevents them from consistently functioning as a special forum of principle. This objection to extrajudicial constitutional interpretation emphasizes the interpretive capacity of the courts and the reasoning contained in judicial opinions. The production of constitutional interpretations is a byproduct of the judicial function, however, and not its primary task, which is deciding cases.[183] Moreover, the primacy of the judicial task of resolving cases affects how the Court approaches its interpretive role. Judicial opinions are structured by their primary functions of legitimating decisions and guiding judges in future cases. These concerns pull judicial opinions away from principled deliberation on constitutional fundamentals and toward the development and application of technical legal rules and narrow arguments. Genuine principled deliberation requires an openness that subverts the judicial task of dispute resolution. In order to sustain their legitimacy as neutral arbitrators of disputes, judges often minimize the potentially controversial nature of their decisions.[184] Controversial judgments are presented as summary conclusions, denying the relevance of reasoned political judgment to resolving the issues presented in a given case. Rather than inviting dialogue on

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181. *See generally* SUNSTEIN, *supra* note 100, at 5 (urging "minimalism" as a response to uncertainty); Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821 (1985) (urging acceptance of a constitutional "imperfect muddle" given the theoretical incoherence of constitutional "perfectionism"); Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79, 84–88 (1959) (describing incrementalism as a rational response to uncertainty).

182. Mark Tushnet, *The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 69–96 (1999).

183. *See* Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126–36 (1999).

184. ALEC STONE SWEET, GOVERNING WITH JUDGES 16 (2000).

HeinOnline --- 80 N.C. L. Rev. 814 (2001-2002)

political fundamentals, a court must endeavor to close off further debate on the meaning of the law and turn away challenges to its reasoning. The Court's particular concern with supervising lower courts and its general concern with establishing precedent directs it away from general ruminations on constitutional meaning. The early nineteenth-century Court may have understood itself as a "republican schoolmaster"[185] seeking to persuade a broad audience on matters of political principle; later Courts have been more fully integrated into the legal machinery.[186] "Although American legal oratory once displayed a literary elegance, it has become technical, spare, and reductive."[187] The Justices of the Supreme Court are not primarily statesmen or philosophers, but lawyers.

The process of judicial decisionmaking also calls into question the unique deliberative capacity of the courts.[188] The cases that reach the Supreme Court are overwhelmingly hard cases in which the correct answers, given the existing law, are at best unclear, if not wholly indeterminate. Nonetheless, the Justices are remarkably consistent, even predictable, in casting their votes in these cases. They can be readily arrayed on a standard conservative-liberal ideological spectrum either by scholars looking at their voting record or by journalists covering their initial appointment, and those identifications are adequate to predicting future voting behavior.[189]

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185. Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 129–55 (discussing the early Court as purveyor of constitutional knowledge); *see also* Eisgruber, *supra* note 158, at 445–73 (examining Marshall's opinions as public texts).

186. *See* Howard Gillman, *Regime Politics and Judicial Empowerment: The Case of Federal Courts in Late Nineteenth-Century America*, AM. POL. SCI. REV. (forthcoming 2002) (examining the integration of the federal judiciary into the administration of national policy in the late nineteenth century).

187. Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 1002 (1992); *see also* ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 290 (1984) ("Legal knowledge in the twentieth century would reach only the few; it would have less and less to do with America's general search for self-expression.").

188. The usual restraints of the ideal judicial process may also be unable to restrain the divisiveness of the politically charged hard cases that come before the Court. *See generally* EDWARD LAZARUS, CLOSED CHAMBERS (1998) (documenting a former clerk's account of the internal politics of the Court); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN (1979) (providing a journalistic account of the internal politics of the Court).

189. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 65, 221–31 (1993) ("Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal."). This is not to say that Presidents always correctly forecast or exploit the predictability of the Justices in making their appointments, though the evidence suggests that more recent nominees have generally been quite accurately gauged at the time of their appointments. Although Justice O'Connor may be the pivotal voter on the

HeinOnline --- 80 N.C. L. Rev. 815 (2001-2002)

The political party affiliations of federal judges generally and of the appointing Presidents are likewise strongly tied to the voting decisions made by those judges.[190] Such results do not indicate that judges simply act on political preferences without regard to jurisprudential considerations, nor do they establish that judges reach the same conclusions to constitutional questions that legislators would.[191] They do, however, call into question the assumption that judges are uniquely principled or thoughtful in reaching their decisions. The Justices approach controversial constitutional questions with their own sets of prior commitments that are reliably expressed in their voting.

Court as a relatively moderate conservative, her voting behavior is broadly predictable over time. *Id.* at 253–54. Even the "stealth candidate," Justice David Souter, has voted in a manner consistent with initial media judgments. Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 818 (1995) (stating that the relationship between Souter's predicted and actual voting patterns are consistent with that of recent Justices). *But see* Lee Epstein et al., *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 J. POL. 800, 810–13 (1998) (observing various patterns of change in the voting behavior of Justices over time); Jeffrey A. Segal et al., *Buyer Beware? Presidential Success Through Supreme Court Appointments*, 53 POL. RES. Q. 557, 561–68 (2000) (finding that "change in judicial behavior diminishes the long run impact of presidential appointments"); Andrew D. Martin & Kevin M. Quinn, Bayesian Learning about Ideal Points of U.S. Supreme Court Justices, 1953–1999, at 20–28 (July 23, 2001) (unpublished paper, *available at* http://www.csss.washington.edu/papers) (finding that "some justices change over time even when controlling for the types of cases that come before the Court").

190. Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 243 (1999) (reporting meta-analysis of existing literature that confirms the "conventional wisdom that party is a dependable measure of ideology in modern American courts"); C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916–1988*, 35 AM. J. POL. SCI. 460, 474 (1991) (reporting significant correlations between judicial and presidential party variables and voting behavior). Party affiliation is a crude measure of judicial ideology, however, and can often be misleading without more refined analysis. *See, e.g.*, JOHN B. GATES, THE SUPREME COURT AND PARTISAN REALIGNMENT 176–83 (1992); Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 STUD. AM. POL. DEV. 229, 262–66 (1998); Stefanie A. Lindquist et al., *The Impact of Presidential Appointments to the U.S. Supreme Court: Cohesive and Divisive Voting within Presidential Blocs*, 53 POL. RES. Q. 795, 812–13 (2000); Michael Ebeid, Influencing the Supreme Court: Democratic Accountability and the Presidential Threat to Judicial Independence (2000) (unpublished Ph.D. dissertation, Yale University) (on file with author).

191. Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, *in* SUPREME COURT DECISIONMAKING 25–26 (Cornell W. Clayton & Howard Gillman eds., 1999); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 333–34 (1992); Whittington, *supra* note 126, at 619–28. *Cf.* WALDRON, *supra* note 24, at 15 (observing that "judges disagree among themselves along exactly the same lines as the citizens and representatives do").

HeinOnline --- 80 N.C. L. Rev. 816 (2001-2002)

The U.S. Supreme Court is also a collective institution. It resolves cases by majority rule. Although there is no evidence that Justices logroll their votes across cases, there is little question that they negotiate the outcomes of individual cases. Opinions are written and rewritten so as to attract the support of reluctant colleagues, and negotiations are held, tactics are employed, and bargains are made as the agenda is set, decisions are made, and opinions are written.[192] Such discussions sometimes take the form of reasoned deliberation over the principles of the case. Often they do not. "Political compromise" to prevent the "disaffection" of needed allies from the majority coalition is commonplace on the Court just as it is in other collective decisionmaking institutions.[193] The modern Court also produces a cacophony of separate opinions that both muffles the institutional voice of the Court and challenges the notion that the majority opinion is uniquely principled or reasonable.[194] There is an external as well as internal politics to judicial decisionmaking. Although the Court may not be subject to the same form of "pressure group" politics as elected officials,[195] they are highly dependent on outside actors to set their agenda, shape their analysis, develop their arguments, and implement their decisions.[196] The Court is immersed in its own set of interest groups, from corporate litigants to public interest legal groups, that seek to influence its decisions. Judicial

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192. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 56–111 (1998); FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT 57–124 (2000) (examining strategic behavior by Justices in producing opinions); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 37–90 (1964).

193. DWORKIN, FREEDOM'S LAW, *supra* note 34, at 344.

194. David M. O'Brien, *Institutional Norms and Supreme Court Opinions: On Reconsidering the Rise of Individual Opinions*, *in* SUPREME COURT DECISIONMAKING, *supra* note 191, at 111 (noting that "when individual opinions are more highly prized than opinions for the Court, consensus not only declines but the Court's rulings appear more fragmented, uncertain, less stable, and less predictable").

195. DWORKIN, FREEDOM'S LAW, *supra* note 34, at 345.

196. CHARLES R. EPP, THE RIGHTS REVOLUTION 44–70 (1998) (analyzing the extent to which judicial constitutional interpretation depends on an external "support structure" of organized interests to sustain litigation campaigns); Lee Epstein, *Courts and Interest Groups*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT, 335–71 (John B. Gates & Charles A. Johnson eds., 1991) (analyzing strategies and effects of interest groups in the courts); Kevin T. McGuire, *The Supreme Court Bar and Institutional Relationships*, *in* THE SUPREME COURT IN AMERICAN POLITICS 115–32 (Howard Gillman & Cornell Clayton eds., 1999) ("Perhaps more than any branch of the federal government, the U.S. Supreme Court is dependent upon individuals outside of government to provide it with information and analysis to support its policy making."); Mark Silverstein & Benjamin Ginsberg, *The Supreme Court and the New Politics of Judicial Power*, 102 POL. SCI. Q. 371, 377–82 (1987) (examining the process by which the Court forged "links with important constituency groups").

politics is not the same as legislative politics, but the reasoning of judicial constitutional interpretation is deeply contested and implicated in the same considerations as extrajudicial constitutional interpretation.

B. *A Politics of Principle*

If the judiciary is not as reasonable and principled as sometimes portrayed, nonjudicial actors are also more reasonable and principled than their critics allow. This objection to extrajudicial constitutional interpretation rests on the assumption that the nonjudicial branches cannot be trusted to interpret the Constitution, for they will instead simply act on their prior preferences. Nonjudicial actors are unprincipled and irrational because they are guided by "expediency,"[197] trade in "power,"[198] are subject to "pressure,"[199] never engage in "moral debate,"[200] and only address "policy" and "collective goals" while ignoring "principle" and individual rights.[201] Such claims are empirically overstated, analytically confused, and normatively ungrounded.

Those who object to extrajudicial constitutional interpretation offer little specific empirical support for their claims, relying instead on broad generalizations of the American political process as interest driven and arbitrary.[202] Although there is of course some truth to this generalization, it obscures the fact that debates over constitutional principles are recurrent in nonjudicial arenas. Indeed, the existence of the extrajudicial "great moral debate" is so well known, and so intense, that it is often embedded within other common labels, such as the "culture war."[203] The modern objection to the unprincipled nature of extrajudicial constitutional interpretation seems to depend more on the example of the Southern Democrats quashing civil rights debates in the mid-century Congress than on contemporary politics,

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197. BICKEL, *supra* note 168, at 58; CORWIN, *supra* note 163, at 64.

198. DWORKIN, FREEDOM'S LAW, *supra* note 34, at 70; Wechsler, *supra* note 165, at 19; Wellington, *supra* note 167, at 246.

199. DWORKIN, FREEDOM'S LAW, *supra* note 34, at 344; Wellington, *supra* note 167, at 247.

200. DWORKIN, FREEDOM'S LAW, *supra* note 34, at 344.

201. DWORKIN, *supra* note 172, at 22, 90–100; DWORKIN, *supra* note 31, at 69.

202. *See, e.g.*, DWORKIN, FREEDOM'S LAW, *supra* note 34, at 344 ("[T]he process is dominated by political alliances that are formed around a single issue and use the familiar tactics of pressure groups to bribe or blackmail legislators into voting as they wish.").

203. *See generally* JAMES DAVISON HUNTER, CULTURE WARS (1992) (describing origins and contemporary expression of pervasive intellectual and political conflict over morals).

HeinOnline --- 80 N.C. L. Rev. 818 (2001-2002)

in which "social issues" involving basic moral principles and individual rights have occupied a central place on the legislative and electoral agenda.[204]

Political debates on matters of constitutional principle are common, and form the background against which judicial decisions themselves are made.[205] The Court is not alone in making principled decisions about constitutional values. It is choosing sides in preexisting debates. Certainly, the well-known instances in which Presidents have challenged the judiciary's claim to being the authoritative interpreter of the Constitution are hard to dismiss as unreasoned. Thomas Jefferson asserted that the President had an independent authority to evaluate the constitutionality of the Sedition Act,[206] and his actions followed an extended and careful public debate over the actions of the Federalist courts and Congress and the requirements of free speech in a democracy.[207] Andrew Jackson's veto of the National Bank,[208] largely written by future Chief Justice Roger Taney,[209] included an elaborate analysis of the constitutional and political principles at stake in the case of the Bank and followed

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204. *See, e.g.*, RONALD INGLEHART, CULTURE SHIFT IN ADVANCED INDUSTRIAL SOCIETY 3–14 (1989); EVERETT CARLL LADD JR. & CHARLES D. HADLEY, TRANSFORMATIONS OF THE AMERICAN PARTY SYSTEM 340–41 (1975).

205. In the following examples, I lay aside political conflicts over the framework of government itself, from the war powers to the "fiscal constitution." Such debates are common, and more likely to be resolved in the political arena than the judicial arena, but are largely ignored by those who advance this objection to extrajudicial constitutional interpretation. It may be more responsive to meet the objection on its own favored ground of rights claims and limitations on government power. *But see* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT *passim* (1997); STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 68–87 (1996); HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION 67–100 (1990); WHITTINGTON, *supra* note 104, *passim*; Charles Black, *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, *passim* (1974); Casper, *Constitutional Organization*, *supra* note 142, at 187–93; Kenneth Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 279–90 (1977); E. Donald Elliott, INS v. Chadha*: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 169–73; Whittington, *supra* note 93, *passim*.

206. THOMAS JEFFERSON, 11 THE WRITINGS OF THOMAS JEFFERSON 50–51 (Andrew A. Lipscomb ed., 1904).

207. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 282–349 (1985); JAMES MORTON SMITH, FREEDOM'S FETTERS 94–155 (1956); Adrienne Koch & Harry Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 WM. & MARY Q. 147, 147–60 (1948).

208. Andrew Jackson, *Veto of National Bank Act*, *in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 576–91 (James Richardson ed., 1897).

209. *See* CARL B. SWISHER, ROGER B. TANEY 194–200 (1935).

years of debate on the appropriate scope and use of federal powers.[210] Abraham Lincoln's rejection of the *Dred Scott* Court's understanding of the nation's constitutional principles is celebrated as foundational, and itself built on years of constitutional analysis by antislavery forces.[211] Franklin Roosevelt's denunciation of the Court's rulings of the mid-1930s was likewise grounded in decades of popular and scholarly debate on the purposes of government power and the scope of individual liberties.[212] In what sense is it useful to assert that the Human Rights Bill[213] of the 1980s or the Religious Freedom Restoration Act[214] of the 1990s was unprincipled or reflected "naked power?"[215] Continuing extrajudicial debates over affirmative action, euthanasia, the death penalty, pornography, school prayer, gay rights,

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210. *See, e.g.*, Marshall, *supra* note 64, at 6–21 (documenting the newspaper exchange over the *McCulloch* case); Whittington, *supra* note 63, at 365–77 (examining political debate over scope of federal powers).

211. LINCOLN, *supra* note 51, at 585–86. *See generally* GEORGE P. FLETCHER, OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY (2001) (reexamining the principles underlying the Reconstruction Amendments); JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 33–42 (1991) (describing Lincoln as foundational to postbellum constitutionalism); WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848 (1977) (describing antecedents to Lincoln's antislavery constitutionalism); GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 121–47 (1992) (examining the Gettysburg Address).

212. *See generally* ALAN DAWLEY, STRUGGLES FOR JUSTICE: SOCIAL RESPONSIBILITY AND THE LIBERAL STATE (1991) (discussing the history underlying the New Deal from the 1890s to 1938); SIDNEY FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865–1901, at 373–400 (1956) (chronicling the early twentieth-century debate over activist government); WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937 (1994) (discussing the half-century of debate supporting Franklin Roosevelt's criticism of the Supreme Court).

213. S. 158, 97th Cong. (1982).

214. 42 U.S.C. §§ 2000bb to 2000bb-4 (2000). This is not to say that Congress gave a full accounting of the issues involved in such legislation or that organized interests were not central to their progress. As with most legislation, members of Congress worked closely with representatives of affected interests in the development of the RFRA. *See* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 12–17 (1994). Likewise, in attempting to correct the Court on the broader principles of religious freedom, Congress was also willing to delegate a variety of subsidiary and potentially controversial and important issues to the judiciary. On the politics of the RFRA, see, for example, *id.* at 12–21. On congressional delegation of issues, see generally DAVID ESPTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATION OF POWERS 196–231 (1999) (discussing congressional delegation powers); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 37–45 (1993) (examining Congress's deference to the Supreme Court on difficult policy issues).

215. Wechsler, *supra* note 165, at 19.

HeinOnline --- 80 N.C. L. Rev. 820 (2001-2002)

Internet privacy, sexual harassment, and gun control reflect sustained concern with individual rights, constitutional values, and political principles. We may disagree with the conclusions that various extrajudicial bodies reach in these debates, as we may disagree with the conclusions of the courts, but it is difficult to maintain that such extrajudicial decisions are unconsidered or neglect considerations of justice and principle. Indeed, it is possible for extrajudicial institutions to give greater solicitude and to be more capable of responding to individual rights concerns than judicial bodies bound by the limits of legal interpretation and dispute resolution. Examples abound, such as when California and Arizona voters attempted to accommodate the medical use of marijuana[216] or the Illinois governor suspended the use of capital punishment given doubts about trial and sentencing procedures[217] or voters in a number of municipalities extended civil rights protections to homosexuals[218] or the Vermont legislature moved to recognize homosexual unions[219] or when state and federal legislatures created procedures for opening government meetings and files to citizen scrutiny.[220] Courts have, of course, been useful in drawing attention to particular, unconsidered problems in the application of government policies, but there is little reason for favoring the judiciary's value judgments about those policies over those of extrajudicial institutions.[221]

Such decisions by political bodies may still be regarded as "expedient" in the sense that the proffered constitutional interpretations may converge with political preferences and electoral ambitions. It is difficult to know what to make of such a complaint, however. To the extent that such interpretive efforts are mere rationalizations of policy preferences that were arrived at

216. John Balzar, *Voters Approve Measures to Use Pot as Medicine*, L.A. TIMES, Nov. 6, 1996, at A1.

217. Maureen O'Donnell, *Illinois to Stop Executions; Ryan Panel to Study 13 Wrongful Convictions*, CHI. SUN-TIMES, Jan. 31, 2000, at 3.

218. *See, e.g.*, *Gay Rights Winning Some Votes*, OMAHA WORLD-HERALD, Apr. 21, 1991, at 16A; Aaron Epstein, *Gay Rights in America; A Supreme Court Case*, SAN DIEGO UNION-TRIB., Oct. 9, 1995, at A1.

219. John Bacon & Haya El Nasser, *Vermont Governor Signs Gay-Union Bill*, USA TODAY, Apr. 27, 2000, at 3A.

220. *See* LEROY N. RIESELBACH, CONGRESSIONAL REFORM: THE CHANGING MODERN CONGRESS 57–58 (1994); Harold C. Relyea, *Opening Government to Public Scrutiny: A Decade of Federal Efforts*, 35 PUB. ADMIN. REV. 3, 3 (1975).

221. *See generally* TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 240 (1999) ("[G]reater precision in the design and execution of policies may result from the Court's intervention in the face of unacceptable consequences in the individual and perhaps marginal case.").

HeinOnline --- 80 N.C. L. Rev. 821 (2001-2002)

independently, they may still constrain political decisionmaking to those positions for which plausible justifications can be found. The judge's obligation to write a formal opinion justifying her vote can do nothing more. Even if the legislative result is expedient in the sense that it conforms to existing policy preferences, such debates still raise and resolve issues of justice and do so in a rationally defensible manner. More basically, it seems implausible that politicians do not act out of mixed motives in such cases. Ultimately, the normative evaluation of Lincoln's opposition to slavery and his interpretation of constitutional principles on this point does not turn on a parsing of his sincere belief that slavery was contrary to American ideals and his strategic calculation that the slavery issue was his ticket to political success. Both judicial and nonjudicial actors can act expediently, but that does not mean that they do not also act on principles.

In addition to being empirically questionable, the objection to extrajudicial constitutional interpretation is also analytically problematic. The ready assertion that "power" not "reason" characterizes nonjudicial bodies and precludes extrajudicial constitutional interpretation is theoretically underdeveloped.[222] Although it is true that "[n]o legislature or executive is obligated by the nature of its function to support its choice of values by the type of reasoned explanation" contained in court opinions,[223] it is false to assume that individual politicians do not therefore have to explain and justify their actions. Legislators are no different than justices in the sense that both are political actors with constituencies and colleagues from whom they must gain support by justifying their votes. Admittedly, the modes of legitimate argument available to legislators are more extensive than those available to judges. It is a sufficient explanation within legislative debate for a representative to justify her vote with reference to the material interests or preferences of her constituents. Such appeals may explain an individual vote, but they are still unlikely to persuade colleagues to throw their own support behind a measure, and building coalitions from diverse individuals remains a central element of the political process.[224] It is

222. The classic statement is Wechsler, *supra* note 165, at 14–15 ("[P]rinciples are largely instrumental as they are employed in politics . . . and are reduced to a manipulative tool.").

223. *Id.* at 15.

224. JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS 49 (3d ed. 1989) ("Part of the process of building a coalition around a given piece of legislation, for instance, is providing potential members of the coalition with handy explanations that they can use in case the vote gives them some trouble back home. They may not join the coalition without such an explanation.").

HeinOnline --- 80 N.C. L. Rev. 822 (2001-2002)

precisely the "politicization" of issues by their entry into the legislative arena that subverts the importance of narrow private interests and necessitates appeals to broader, "public" interests.[225]

Perhaps more importantly, the explanation and justification of legislators' decisions to their home constituents is a central aspect of their political task, though such activities are more likely to be found in the "unofficial" dealings of legislators with their constituents than in their official work in the capital.[226] As John Kingdon concluded in his seminal study of congressional voting decisions, "Congressmen are constantly called upon to explain to constituents why they voted as they did. In the process of answering mail and talking with constituents, questions asking them to justify their votes are put to them repeatedly."[227] Within a congressional district, it is not necessarily self-evident that a given legislative decision is what the voters want. Congressmen routinely strive to persuade their constituents that their votes in Congress were the correct ones, or at least reasonable ones that the constituents should tolerate from their representatives. Every congressional vote has the potential to become a campaign issue, and thus congressmen must be able to develop a compelling explanation for each one. Congressional votes are the raw material for an opposition's campaign. Though relatively few issues are likely to be highlighted in any given campaign, the electorally salient issues and votes are not readily predictable ahead of time. Even if a legislator is not forced to develop a complete justification for every vote cast, she must be convinced that such a justification could be elaborated if necessary.

Congressional decisions are deeply affected by whether compelling justifications for a given vote can be found, whether a legislator believes that he could persuade his constituents that his decision was a reasonable one.[228] Justifying legislative votes is not simply a matter of pandering to voters back home, in part because the voters back home are likely to be diverse but open to reason. Far

225. For a classic statement of this dynamic, see E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 23–43 (1960).

226. This justificatory aspect of the representative task is often taken as a given by those focusing on the internal operation of Congress, but the centrality and difficulty of the task of conveying information between legislators and constituents are at the core of the modern political science literature on interest groups.

227. KINGDON, *supra* note 224, at 47.

228. *Id.* at 47–54; R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 64–87 (1990); RICHARD F. FENNO JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS 141–46 (1978).

HeinOnline --- 80 N.C. L. Rev. 823 (2001-2002)

from confirming the stereotype that legislators "trim and shape their speech and votes" in order to manipulate the electorate,[229] studies of congressional behavior indicate that "House members give the same explanations for their Washington activity before people who disagree with them as they give before people who agree with them."[230] Moreover, explanations of legislative behavior are not only designed to reinforce existing constituent beliefs but also to build trust and enhance "voting leeway."[231] Legislators cannot behave in an "arbitrary" fashion and expect to receive support from voters, interested groups, or legislative colleagues, nor can they be seen as being under the thumb of organized interests who do not represent the views of the legislators' constituencies. They must be able, when asked, to offer public reasons for their actions. Far from being alien to nonjudicial institutions, principled reasoning is necessitated by the structural and electoral incentives of the political process. Judges and legislators do not face the same incentives or reason about issues in the same way, and these differences may be the bases for making useful distinctions between the constitutional tasks of judges and legislators. But it is important to recognize that the necessity for a legislator to regularly hold "town hall meetings" to explain himself to his constituents is not unrelated to the necessity for a judge to write an opinion to explain himself to litigants and colleagues. Unlike judges, however, who are often expected to explain themselves, legislators strive to anticipate the need for explanation and avoid decisions that might require explicit and potentially contested justifications. In the representative context, the ever-present requirement that decisions be justifiable insures that most justifications can go unstated.

The complaint about the use of "power" in this context is also analytically problematic. The complaint about power politics could refer to the legislative process itself—that is, extrajudicial constitutional interpretations depend on gaining majority support in order to be successful, and majority interpretations trump minority interpretations. Of course, the requirement that constitutional interpretations gain majority support before becoming authoritative is to this degree no different in Congress than on the Court. The ultimate interpreter on the bench is the judicial majority, who overpowers the minority through voting. Those who would influence

229. Wechsler, *supra* note 165, at 14–15.
230. FENNO, *supra* note 228, at 157.
231. *Id.* at 151.

HeinOnline --- 80 N.C. L. Rev. 824 (2001-2002)

or join the majority must necessarily compromise and overcome their doubts in order to do so. In the context of public disagreement, we, whether justices, legislators or voters, are necessarily "pressured" by the possibility of not having our favored interpretations adopted. As Jeremy Waldron has cogently argued, decisiveness in the context of disagreement is the unavoidable "circumstance of politics," regardless of the institution that must make the decision.[232]

A central ambiguity in this objection to extrajudicial constitutional interpretation is the appropriate independence of the interpreter. Presumably the concern with pressure, manipulation, and power refers to the concern that interpreters might be influenced to do something that they might not otherwise do.[233] Judicial reasoning is valued in part because it is independent. Judges, *ex hypothesi*, act "sincerely," voting their own mind and advancing their own best interpretive judgment.[234] But nonjudicial actors are not free agents. They may either exercise their own interpretive judgment or be influenced by the electoral pressure of constituents or intermediate actors such as parties and interest groups. It is not clear that nonjudicial actors should exercise their own independent judgment in this sense, however. They are, after all, representatives, and we would normally expect them to be responsive to the opinions of their constituents. If representatives feel electoral pressure to reflect the interpretive judgment of those they represent, then this may not be a normatively problematic pressure. At the same time, there is no a priori reason to dismiss the interpretive judgments of the citizenry, especially once we accept that constitutional decisions are more about value judgments than about technical legal judgments. In practice, the evidence suggests there is a continuing dialogue and adjustment between representatives and their constituents.[235] Elected officials in the United States act as both "trustees" and "delegates."[236]

232. WALDRON, *supra* note 24, at 102.

233. *See generally* Robert A. Dahl, *The Concept of Power*, 2 BEHAV. SCI. 201, 202–03 (1957) ("*A* has power over *B* to the extent that he can get *B* to do something that *B* would not otherwise do.").

234. *See, e.g.*, LAWRENCE BAUM, THE SUPREME COURT 160 (5th ed. 1995) ("[B]ecause the Court has a degree of freedom from environmental pressures, policy preferences may play a larger role in its collective choices than they do in legislatures and administrative agencies."); SEGAL & SPAETH, *supra* note 189, at 73.

235. *See* FENNO, *supra* note 228, at 141–46, 151–54, 168–69; KINGDON, *supra* note 224, at 48–49.

236. FENNO, *supra* note 228, at 161 (Representatives "use delegate and trustee justifications because both are legitimating concepts."); *see also* HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION 144–67 (1967) (examining delegate and trustee conceptions of representation).

Nonetheless, as one congressman explained, "If your conscience and your district disagree too often ... you're in the wrong business."[237] Successful representatives reflect their electorates, without the need for a separate "power politics."[238]

If pressure from below is normatively unproblematic,[239] pressure from the outside is empirically unlikely. Political parties in the United States are notoriously weak.[240] The power of legislative leaders is conditional on agreement within the party; they are facilitators, not dictators.[241] Fellow partisans vote together because, and when, they want to, not because they have to.[242] Often parties organize around such agreements on fundamental constitutional issues, reducing potentially crosscutting tensions and enhancing the capacity of individuals to effectuate their interpretations.[243] Likewise, the power of interest groups comes from their capacity to better link representatives and their constituents. "Interest groups achieve

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237. FENNO, *supra* note 228, at 142.

238. *See generally* Robert S. Erikson & Gerald C. Wright, *Voters, Candidates, and Issues in Congressional Elections*, *in* CONGRESS RECONSIDERED 145–53 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 6th ed. 1997) (noting that one way candidates can win and hold seats is to represent the ideological preferences of the district); KREHBIEL, *supra* note 130, at 223–24 (arguing that politicians who do not adhere to their constituents' preferences suffer at the polls).

239. "Pressure from below" may still be normatively problematic from the perspective of enforcing constitutional limits on democratic majorities. This concern is addressed in Part IV.

240. *See, e.g.*, JOHN H. ALDRICH, WHY PARTIES? 3–61 (1995) (arguing that parties serve rather than constrain officeholders); DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 22 (1974) ("In America the underpinnings of 'teamsmanship' are weak or absent, making it possible for politicians to triumph over parties."); E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 131–32 (1942) ("*[T]he parties are unable to hold their lines in a controversial public issue when the pressure is on* ... and [this] condition constitutes *the most important single fact concerning the American parties*."); Keith Krehbiel, *Where's the Party?*, 23 B. J. POL. SCI. 235, 242–55 (1993).

241. DAVID W. ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE 31–34 (1991); *see, e.g.*, Joseph Cooper & David W. Brady, *Institutional Context and Leadership Style: The House from Cannon to Rayburn*, 75 AM. POL. SCI. REV. 411, 415–17, 423–24 (1981).

242. *See* David W. Brady et al., *The Decline of Party in the U.S. House of Representatives, 1887–1968*, 4 LEGIS. STUD. Q. 381, 394–96, 403–05 (1979); Melissa P. Collie, *The Rise of Coalition Politics: Voting in the U.S. House, 1933–1980*, 13 LEGIS. STUD. Q. 321, 329–38 (1988); Joseph Cooper & Garry Young, *Partisanship, Bipartisanship, and Crosspartisanship in Congress Since the New Deal*, *in* CONGRESS RECONSIDERED, *supra* note 238, at 255–71 ("[A]lthough partisan Houses and Senates have emerged in the 1990s, it is far from certain that the country has entered a partisan era.").

243. *See, e.g.*, POOLE & ROSENTHAL, *supra* note 151, at 86–114 (observing the basic coherence of party voting patterns, with cross-cutting issues such as abortion being gradually absorbed into the partisan structure).

HeinOnline --- 80 N.C. L. Rev. 826 (2001-2002)

influence through the acquisition and strategic transmission of information that legislators need to make good public policy and get reelected."[244] Interest groups help political actors evaluate the likely response of constituents to their actions. Legislators must make decisions in a highly uncertain electoral and policy environment. Interest groups are among the means that legislators use to reduce that uncertainty, and they are influential to the extent that they are useful in doing so and can do so better than competing sources of information, including parties, media, opinion polling, and the legislator's own efforts.[245] Interest groups are effective and influential to the extent that they can make it easier for legislators to explain and justify their voting decisions. It is notable that "citizen groups" who focus largely on such issues of principle can be and are quite effective in influencing legislative decisions precisely because they can mobilize such resources.[246] Nonjudicial actors seek to anticipate voter response to their decisions, and the pressure they feel reflects only the difficulty of that task.[247]

The real issue is not whether extrajudicial constitutional interpretation and principled deliberation exists, but whether it should in any way be regarded as authoritative. It is not necessary at this point to ask whether such efforts have ultimate authority, capable of trumping contrary judicial interpretations. In some instances, they may. More basically, we must inquire into whether extrajudicial constitutional interpretation is entitled to any deference at all or it should be treated as presumptively irrational and tainted. That issue can be better examined in the context of the third objection to extrajudicial constitutional interpretation.

IV. THIRD OBJECTION: IT'S TYRANNICAL

A final objection to extrajudicial constitutional interpretation also hinges on the role that the Court might play within the larger political system. Judicial supremacy, in this view, is regarded "as a

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244. JOHN R. WRIGHT, INTEREST GROUPS AND CONGRESS 2 (1996); *see also id.* at 7 ("Clearly, groups do not get their way simply by applying pressure to elected representatives.").

245. JOHN MARK HANSEN, GAINING ACCESS 5, 11–22 (1991); Richard A. Smith, *Advocacy, Interpretation, and Influence in the U.S. Congress*, 78 AM. POL. SCI. REV. 44, 59 (1984).

246. JEFFREY M. BERRY, THE NEW LIBERALISM 87–118 (1999) (analyzing the influence of liberal public interest groups); WRIGHT, *supra* note 244, at 8.

247. R. Douglas Arnold, *Can Inattentive Citizens Control Their Elected Representatives?*, *in* CONGRESS RECONSIDERED *supra* note 238, at 401–16.

HeinOnline --- 80 N.C. L. Rev. 827 (2001-2002)

permanent and indispensable feature of our constitutional system"[248] because the Court alone functions as a countermajoritarian institution securing the liberties of individuals and political minorities. In the early 1960s, Alexander Bickel famously referred to the Court's "counter-majoritarian difficulty."[249] The core reality of judicial review is that the Court "thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."[250] For Bickel, still rooted in the New Deal liberalism that did battle with the *Lochner v. New York* Court, the judiciary's countermajoritarian character was a disability requiring special rationalization.[251] Many others, however, celebrate precisely this feature of the Court and worry that it will be lost if judicial review is detached from judicial supremacy. Judicial independence and judicial supremacy may be regarded as the twin bulwarks of liberty within American constitutionalism, ensuring that political majorities and their elected representatives do not trample the Constitution underfoot.[252]

Unless the judiciary can stand against elected officials and authoritatively define constitutional meaning, the limits on political power might be lost.[253] The Supreme Court has recently made this connection explicit, quoting *Marbury* to the effect that "[i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' "[254] The Court is needed not merely to prevent the occasional abuse of power that arises when particular government actions violate constitutional provisions, but more importantly to prevent the systematic dismantling of restraints on political power through legislative redefinition of constitutional meaning. Alexander Hamilton suggested this broader significance of

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248. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

249. The "counter-majoritarian difficulty" is the problem of justifying judicial review as a "present instrument of government," given the assumption that judicial review is "undemocratic." BICKEL, *supra* note 168, at 16.

250. *Id.* at 17.

251. On Bickel and his understanding of democracy, see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 37–41 (1996).

252. *See, e.g.*, Michelman, *supra* note 171, at 140 ("Law judges are called independent when . . . their judgments in particular cases are sealed off from the communicated desires, preferences, and even considered legal judgments of other public officials and the citizenry at large.").

253. *See generally* WHITTINGTON, *supra* note 58, at 110–59 (discussing "popular sovereignty and its interplay with originalism as a tool of constitutional interpretation").

254. City of Boerne v. Flores, 521 U.S. 507, 529 (1997) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

HeinOnline --- 80 N.C. L. Rev. 828 (2001-2002)

the judiciary when he emphasized that the "complete independence of the courts of justice is peculiarly essential in a limited Constitution." The "courts were designed to be an intermediary body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority."[255] The Constitution delegates authority to the legislature, and judicial supremacy insures that Congress cannot alter the terms of that authority and put the servant "above his master."[256] Alexander and Schauer are likewise sympathetic to this objection, contending that "there are few examples of Congress subjugating its own policy views to its views about constitutional constraints."[257] They ultimately prefer that the judiciary rather than some other institution settle contested constitutional meanings in part because "constitutions are designed to guard against the excesses of the majoritarian forces that influence legislatures and executives more than they influence courts."[258]

The countermajoritarian Court may be useful for vindicating politically unpopular conceptions of justice as well as for enforcing the terms of the constitutional delegation of political power to the government. It is popular government and the "people themselves" that sometimes create threats to the realization of justice and rights.[259] An independent judiciary that will not "consult popularity" but rather will deliberate on fundamental principles is essential to the goals of constitutional government.[260] Hamilton contended that such threats would be transitory, but some of his contemporaries and more recent commentators have argued that such threats are endemic to democratic government. John Marshall criticized "the wild and enthusiastic democracy" that "brought annually into doubt principles which I thought most sound,"[261] and his fellow Federalists more aggressively argued that an independent judiciary was necessary "to protect [the people] from the violence of their own passions."[262] In his 1892 presidential address to the American Bar Association, John

255. THE FEDERALIST NO. 78, *supra* note 161, at 466.

256. *Id.* at 467.

257. Alexander & Schauer, *supra* note 31, at 1368.

258. *Id.* at 1378 n.80.

259. THE FEDERALIST NO. 78, *supra* note 161, at 469.

260. *Id.* at 471.

261. Nelson, *supra* note 158, at 932 (quoting AN AUTOBIOGRAPHICAL SKETCH BY JOHN MARSHALL 9–10 (J. Adams ed., 1937)).

262. 2 TRIAL OF SAMUEL CHASE, AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 20 (Da Capo Press 1970) (1805) (statement of Joseph Hopkinson).

Dillon explained that the "people had effectually protected themselves against themselves . . . by providing that the Constitution should be interpreted and enforced by the judiciary," for in the modern era "what is now to be feared and guarded against is the despotism of the many—of the majority."[263] Judicial supremacy provides an escape from what the great Jeffersonian iconoclast John Randolph called "King Numbers" and Ronald Dworkin has labeled "statistical democracy."[264] Unfettered by political interests or popular prejudices, the judiciary can penetrate to the true meaning of the Constitution and the subtle requirements of its principled commitments. The lack of judicial interest in the outcome of constitutional inquiries insures better interpretive reasoning.[265] Some questions—questions of justice and rights—are too important to be left in the hands of legislative majorities. Judicial supremacy insures that they are not.

This objection to extrajudicial constitutional interpretation misestimates the political dynamics of these competing institutions while employing a problematic framework for understanding the normative purpose of constitutional interpretation. In general, courts are not as countermajoritarian and nonjudicial actors are not as relentlessly majoritarian as this objection assumes. As a consequence, extrajudicial constitutional interpretation need not subvert "the best principles of political morality" in order to serve "the majority's will" as is often assumed.[266] This is an analytical as well as an empirical claim. Analytically, it is not clear that countermajoritarianism is the best way of understanding the process and goals of constitutional interpretation. Although we may prefer that the interpretive process be principled rather than willful, it need not be separated from politics in order to achieve that objective.

It should be emphasized that this response need not question the utility of judicial review itself. The belief in a countermajoritarian Court capable of enforcing a higher law Constitution often obscures the distinction between judicial supremacy, the authoritative settlement of contested constitutional principles, judicial review, and the correction of particular unconstitutional acts. Judicial review may

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263. John F. Dillon, Address of the President, *in* REPORT OF THE FIFTEENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 167, 203, 206 (1892).

264. PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–1830, at 321 (1830); DWORKIN, FREEDOM'S LAW, *supra* note 34, at 20.

265. CHEMERINSKY, *supra* note 171, at 86–89 ("It makes little sense to allow the majoritarian process to decide what should be protected from itself.").

266. DWORKIN, *supra* note 31, at 70.

HeinOnline --- 80 N.C. L. Rev. 830 (2001-2002)

be valuable in checking democratic excesses and in calling attention to majoritarian abuses and the plight of political minorities without the added authority of judicial supremacy. Nonjudicial actors are too often presumed to be tyrannical, and the proper limits on democratic action are too often assumed to be uncontroversial. Such assumptions can be rejected without suggesting that the nonjudicial actors "could disregard virtually all judicial rulings" and the "antimajoritarian check" of judicial review should be abandoned.[267] It can be readily granted that the Court should have the power to nullify government actions that clearly violate constitutional requirements, that concerns with majority tyranny can help justify that power, and that the Constitution embodies significant countermajoritarian principles.[268] The more difficult question is whether the Court's interpretation of the Constitution should predominate when the political branches act on their own alternative but reasonable constitutional understandings.

A. A Countermajoritarian Court?

Rendering the judiciary the authoritative constitutional interpreter is unlikely to produce significantly more countermajoritarian interpretations than would extrajudicial interpretation. The courts have not been a reliable countermajoritarian force in American politics. Federal judges may be protected by their life terms, but they are carefully selected by political actors. Presidents are unlikely to select, and the Senate is unlikely to confirm, individuals whose views diverge too sharply from the political mainstream, or indeed from the partisan commitments of the current officeholders.[269] The inclination of individual judges is ultimately less important than the institution of the judiciary as a whole, and the collective portrait of the judiciary is routinely shaped by current majorities. Vacancies occur regularly—every 1.89 years

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267. CHEMERINSKY, *supra* note 171, at 96.

268. *See generally* WHITTINGTON, *supra* note 58, at 168 (originalist court may actively use judicial review); Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 165–76 (1996) (discussing framers' intent and original understanding of the Constitution and how the amendment process embodies constraints on democracy).

269. Sheldon Goldman, *Federal Judicial Recruitment*, *in* THE AMERICAN COURTS, *supra* note 196, at 193–194, 201; *see also* PERETTI, *supra* note 221, at 84–93 (citing "[n]umerous studies [that have] consistently confirm[ed] that political factors, particularly partisanship, are paramount and persistent in the [P]resident's recruitment and selection of judicial nominees").

HeinOnline --- 80 N.C. L. Rev. 831 (2001-2002)

for the Supreme Court[270]—giving current majorities an opportunity to control the bench. The lower courts have been regularly restructured and expanded, providing new posts to be filled and altering the overall balance of the judiciary. Furthermore, the institutional mission of the federal judiciary is subject to statutory controls reflecting the goals of elected officials.[271] Even an independent-minded judiciary must worry about the political reaction to its decisions and the complications of implementation, leading judges to temper their rulings and opinions so as to accommodate political realities.[272]

Sometimes lagging, sometimes leading their colleagues in the other branches of government, judges have not been systematically nor significantly countermajoritarian. Judges are subject to many of the same shifts in public mood and political and social circumstances that affect elected officials. As Justice Benjamin Cardozo noted, judges "do not stand aloof on these chill and distant heights .... The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."[273] Judges are neither immune from the social pressures of public opinion nor insulated from public debates on constitutional issues.[274] In racist times, judges

270. In the 213 years between 1789 and 2002, 113 Justices have served on the Supreme Court. Members of the Supreme Court of the United States, *at* http://supremecourtus.gov/about/members.pdf (last visited Mar. 17, 2002).

271. DEBORAH J. BARROW ET AL., THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE 27–64 (1996); Dahl, *supra* note 132, at 288; John M. DeFigueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435, 459–60 (1996); Gillman, *supra* note 186.

272. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 138–81 (1998); WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 123–75 (1964); Mark A. Graber, *The Passive-Aggressive Virtues:* Cohens v. Virginia *and the Problematic Establishment of Judicial Power*, 12 CONST. COMMENT. 67, 67 (1995).

273. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).

274. J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 3–13, 244–54 (1971); Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468, 470, 492–94 (1997); Ronald Kahn, *Institutional Norms and the Historical Development of Supreme Court Politics: Changing "Social Facts" and Doctrinal Development*, *in* THE SUPREME COURT IN AMERICAN POLITICS, *supra* note 196, at 43–59; William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 96–98 (1993); Kevin T. McGuire & James A. Stimson, The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences (April 27, 2000) (unpublished manuscript, on file with author).

HeinOnline --- 80 N.C. L. Rev. 832 (2001-2002)

are likely to reflect the culturally dominant racial beliefs.[275] When national elites are concerned that property rights are in danger, then the judiciary is likely to be sympathetic to those concerns.[276] Members of the judiciary are likely to be responsive when national officials argue that Southern racial policies interfere with the country's international goals or restrictions on civil liberties are necessary to the war effort.[277] The Justices feel social shifts such as the rise of the women's movement in the 1960s and 1970s, just as other officials, and members of the general public, do.[278] Even Warren era judicial activism is largely consistent with the majority preferences of the time.[279] The courts may not be as responsive as elected officials are to shifts in public opinion, but the courts have rarely been significantly out-of-step with the political mainstream for long.[280]

This is not to say that the judicial power to interpret the Constitution makes no difference to political outcomes and is of no consequence. Mark Tushnet probably overstates the case in asserting that "judicial review basically amounts to noise around zero" and that "vigorous judicial review does not make much difference one way or the other," but his skepticism of the ultimate value of judicial review is certainly warranted.[281] Judges are both constrained and motivated by the existing political climate. In the context of constitutional interpretation at least, judges are not merely the agents of legislative majorities. They have room to take independent action and exercise their own constitutional judgments.[282] On many issues, there may be

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275. *See* GIRARDEAU A. SPANN, RACE AGAINST THE COURT 19–35 (1993); Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 304–06.

276. *See generally* HOWARD GILLMAN, THE CONSTITUTION BESIEGED 1–100 (1993) (examining the *Lochner* era conservatism and the response to social and economic concerns of the time); ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW 61–81 (1960) (analyzing economic conservatism of legal and judicial elite).

277. MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS 79–114 (2000); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 34–37 (2000).

278. *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 9–10 (1996); Ronald Kahn & Susan Dennehy, New Historical Institutionalism, Precedential Social Constructs, and Doctrinal Change: Gender Discrimination in the Twentieth Century (Mar. 25, 1999) (unpublished paper, on file with the authors).

279. POWE, *supra* note 277, at 485–99; David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POL. 652, 655–64 (1985); Klarman, *supra* note 278, at 31–66.

280. Stimson et al., *supra* note 132, at 551–56.

281. TUSHNET, *supra* note 17, at 153, 174.

282. *See* Jeffrey A. Segal, *Supreme Court Deference to Congress: An Examination of the Marksist Model*, *in* SUPREME COURT DECISIONMAKING, *supra* note 191, at 237–53.

HeinOnline --- 80 N.C. L. Rev. 833 (2001-2002)

no firm majority, or at least not an effective majority that agrees on a specific constitutional rule. In such cases, the Court can be effective in defining the range of options and potentially in specifying a particular rule from within that range. Legislators may not have independently settled on the particular trimester scheme laid down by the Court in *Roe*, for example, but there was widespread public and political support for some liberalization of abortion laws and the courts were not alone in expanding abortion rights in the early 1970s.[283] Likewise, the judiciary may exploit the varying intensity of political preferences and the difficulties of agenda setting and collective action in the political arena to advance their own constitutional agenda. The Court's protection of flag burning, for example, advanced free speech principles, but in an area of relatively low political salience.[284] Somewhat differently, the Warren Court focused attention on flaws in the criminal justice system that were unlikely to attract legislative interest. The judiciary may also correct small-scale injustices by bringing outliers into line with mainstream norms, in part because what "shocks the conscience" of judges is likely to be shocking to the wider public as well.[285] The Court can make a significant difference in political life at the margin.[286] But the Court's constitutional interpretations are most important when it acts in concert with or in the absence of political majorities rather than as a strongly countermajoritarian force, when judicial interpretation converges with rather than diverges from extrajudicial constitutional interpretation.[287] Judicial constitutional interpretation is unlikely to be significantly more countermajoritarian than is extrajudicial constitutional interpretation, though the judiciary may be able to

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283. *See* DEVINS, *supra* note 17, at 58–60; GERALD N. ROSENBERG, THE HOLLOW HOPE 182–84 (1991); Friedman, *supra* note 37, at 658–68.

284. Friedman, *supra* note 37, at 605–06. Given the symbolic significance of the issue, it is unsurprising that legislators would rush to take a position on it and invite the Court to reverse itself in *United States v. Eichman*, 496 U.S. 310 (1990). In contrast to the Communism cases of the 1950s, however, the flag-burning issue is unlikely to motivate legislators to punish the Court. On the reaction to the security cases of the 1950s, see WALTER F. MURPHY, CONGRESS AND THE COURT 127–241 (1962).

285. *See* Rochin v. California, 342 U.S. 165, 172 (1952).

286. Exactly what the consequences of judicial action might be are not always predictable. By intervening in ongoing political controversies, the Court might further polarize the antagonists and produce significant backlash effects rather than effectively advance its own goals. *See* Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82–83, 110–18 (1994); Klarman, *supra* note 77, at 188–94.

287. *See* POWE, *supra* note 277, 487–97; Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 STUD. AM. POL. DEV. 229, 247–62 (1998); Graber, *supra* note 214, at 36.

HeinOnline --- 80 N.C. L. Rev. 834 (2001-2002)

identify constitutional applications and violations that would otherwise escape political notice. Such a limited brief for judicial review, however, hardly justifies judicial supremacy.

B. The Overstated Fear of Majoritarian Tyranny

Extrajudicial constitutional interpretation need not be as majoritarian, or as tyrannous, as this objection implies. Some may argue that courts and legislatures are more similar than commonly assumed because legislatures can also be relatively impervious to electoral constraints and popular majorities. This is not my argument, and such claims are overstated. It is true, for example, that "despite the need to stand for election, legislators are serving every bit as long as unelected judges, and periodic elections do not appear to threaten this state of affairs significantly."[288] Such considerations as incumbency reelection rates or popular support for legislative terms limits are not sufficient to establish that legislators are actually unresponsive to public opinion or are themselves countermajoritarian, however. Regular elections give legislators great incentives to be responsive to public concerns, and incumbent reelection rates indicate how successful modern legislators are at that task.[289] Post facto stability does not indicate ex ante security, and legislators invest substantial resources toward insuring that they are not out-of-step with their constituents on issues that matter.[290] Given the inherent constraints of diverse political preferences and the difficulties of collective action, there is little reason to believe that elected officials are systematically unresponsive to their electorates.

Elected officials may be responsive and accountable to the public will, but they are not therefore purely majoritarian in their actions. The very insecurity of elective office discourages nonjudicial officials from ignoring minority interests. Politicians gain security in office by servicing broad, heterogeneous constituencies, not by relying on a

288. Friedman, *supra* note 37, at 610.

289. *See* John R. Alford & David W. Brady, *Personal and Partisan Advantage in U.S. Congressional Elections, 1846–1990*, *in* CONGRESS RECONSIDERED, *supra* note 238, at 145–49; Stephen Ansolabehere et al., *Old Voters, New Voters, and the Personal Vote: Using Redistricting to Measure Incumbency Advantage*, 44 AM. J. POL. SCI. 17, 24–28 (2000); Brad Lockerbie, *The Partisan Component of the Incumbency Advantage: 1956–1996*, 52 POL. RES. Q. 631, 642–43 (1999).

290. *See* THOMAS E. MANN, UNSAFE AT ANY MARGIN 44–46, 73–74 (1978); Erikson & Wright, *supra* note 238, at 132–61; George Serra & David Moon, *Casework, Issue Positions, and Voting in Congressional Elections: A District Analysis*, 56 J. POL. 200, 200–01, 204–11 (1994).

homogeneous but narrow group of supporters.[291] Inattention to issues that are of intense interest to a few can provide openings for a serious electoral challenge, and thus elected officials strive to anticipate and defuse such potential challenges and eliminate the base of support for potential challengers.[292] Most congressmen win reelection by large majorities, and those who rely on the support of slim majorities are soon replaced.[293] Partisan supporters constitute the core rather than the total of a successful legislator's electoral constituency.[294]

This district-level dynamic is also played out at the legislative level and is further reinforced by structural features of the American political and constitutional system. Most congressional legislation, both important and trivial, is passed by large majorities and enjoys broad, bipartisan (or at least, crosspartisan) support.[295] Even in the context of partisan votes in the contemporary Congress, there are a substantial number of defections to the legislative majority. For example, even the controversial elements of the Republican's Contract with America attracted, on average, over a third of the Democratic representatives.[296] Often the most significant consequence of partisanship is stalemate, as partisan majorities are unable to overcome the many obstacles to legislative success.[297]

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291. *See* MAYHEW, *supra* note 240, at 18, 46–77; Alford & Brady, *supra* note 289, at 150–54; Gary C. Jacobson, *Running Scared: Elections and Congressional Politics in the 1980s*, *in* CONGRESS: STRUCTURE AND POLICY 39–81 (Mathew D. McCubbins & Terry Sullivan eds., 1987); Richard Herrera & Michael Yawn, *The Emergence of the Personal Vote*, 61 J. POL. 136, 141–49 (1999). At the same time, it is possible for legislative districts and party primaries to become internally more homogeneous, which would influence legislative behavior accordingly. Keith T. Poole & Howard Rosenthal, *The Polarization of American Politics*, 46 J. POL. 1061, 1069–74 (1984) (describing "increasing polarization of the underlying support coalitions" of senators); Tushnet, *supra* note 182, at 43–51 (pointing out that elections have become less party-centered and more candidate-centered, thus changing the face of elections and service in office).

292. Arnold, *supra* note 247, at 414.

293. *See* Alford & Brady, *supra* note 289, at 142–49; Monica Bauer & R. John Hibbing, *Which Incumbents Lose in House Elections: A Response to Jacobson's "The Marginals Never Vanished,"* 33 AM. J. POL. SCI. 262, 264–66 (1989).

294. FENNO, *supra* note 228, at 1–30.

295. *See* ARNOLD, *supra* note 228, at 117–18; KREHBIEL, *supra* note 130, at 5–6, 84–85; DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING AND INVESTIGATIONS, 1946–1990, at 119–35 (1991).

296. *See* JAMES G. GIMPEL, LEGISLATING THE REVOLUTION 119–21, 152–53 (1996).

297. *See, e.g.*, Cooper & Young, *supra* note 242, at 269 ("[A] stable partisan majority still cannot produce major policy outcomes by adopting a partisan mode of operation.... [T]he passage of major legislation still requires forms of behavior and negotiation that are coalitional...."); Carroll J. Doherty, *Partisanship Returns to the Hill, Limiting Legislative Output*, 55 CONG. Q. WKLY. REP. 2824, 2824 (Nov. 15, 1997) (noting that the reason why the 105th Congress failed to send some bills to the President was because these bills "were the object of fierce political warfare between Republicans and Democrats").

HeinOnline --- 80 N.C. L. Rev. 836 (2001-2002)

American parties do not have the capacity to enforce legislative discipline. This creates both the necessity and the opportunity for substantive legislative coalitions to be formed by reaching across party lines.[298] The heterogeneity of the Congress and the American electorate and electoral uncertainty have encouraged the development of legislative norms of "universalism" that incorporate nearly everybody rather than "minimum winning coalitions" that impose their will on large losing minorities.[299] These pressures toward universalism are reinforced by the necessity of winning support across a bicameral legislature and the executive branch. The different size and constituencies of the House, Senate and executive create tensions between them that must be bridged by a successful legislative coalition. Representing larger, more heterogeneous constituencies, senators tend to be more moderate and less polarized than House members.[300] Likewise, the possibility of the presidential veto and the Senate filibuster encourage the formation of supermajorities rather than simple majorities.[301]

This is not to say that this system is without difficulty from the perspective of constitutional principles. Such supermajoritarian pressures create biases toward the status quo, which may be problematic if the baseline is itself unjust, as in the case of postwar racial segregation when a white Southern minority delayed federal legislative action. Likewise, some interests may be so politically ineffective as to be excluded from even a "universalistic" system, as in the case of disenfranchised Southern blacks or the diffuse interests of consumers or taxpayers in the immediate postwar period.[302] It should

298. *See, e.g.*, MAYHEW, *supra* note 240, at 27 ("[N]o theoretical treatment of the United States Congress that posits parties as analytic units will go very far.").

299. *See, e.g.*, Tim Groseclose & James M. Snyder, Jr., *Buying Supermajorities*, 90 AM. POL. SCI. REV. 303, 311 (1996) ("[C]oalitions will often be quite large and sometimes will even be universalistic."); Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245, 245 (1979) ("[N]early all studies report that members of legislatures seek unanimity and are reluctant to exclude minorities . . . .").

300. POOLE & ROSENTHAL, *supra* note 151, at 82 (arguing that senators vote "less along party lines").

301. CHARLES M. CAMERON, VETO BARGAINING 83–106 (2000) (examining the consequences of the presidential veto power); KREHBIEL, *supra* note 130, at 84–86; Daniel Diermeier & Roger B. Myerson, *Bicameralism and Its Consequences for the Internal Organization of Legislatures*, 89 AM. ECON. REV. 1182, 1184–95 (1999).

302. For classic analyses, see THEODORE J. LOWI, THE END OF LIBERALISM, at xiii (1969) (analyzing the reasons for "serious doubt about efficacy and justice in the agencies of government, the processes of policy-making, leadership selection, and the implementation of decisions"); GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 7 (1966) (noting that "not all groups are organized and not all interests are represented"). *But see* Arthur T. Denzau & Michael C. Munger, *Legislators and Interest*

also be noted that legislative polarization has increased sharply in recent years, though the long-term significance of this pattern is not yet clear.[303] By historical and comparative standards, the two parties are still more similar than different and divisions in legislative voting reflect disagreements only on the margins of the contemporary political consensus, and thus the consequences of even majoritarian politics are relatively small.[304] At the same time, the polarization of the parties clearly contributed to the impeachment of Bill Clinton and interests that have become closely tied to the Democratic Party suffer as a result of the change in party control of Congress, even as other interests benefit.[305]

The political system is imperfect, but there is substantial reason to doubt that it has a narrowly majoritarian character. Over most of American history, and certainly over most of the twentieth century, American politics is best described in pluralist rather than majoritarian terms. As Robert Dahl has characterized the central principle of the American constitutional system: "Unanimity, though unattainable, is best; institutions must therefore be so contrived that they will compel a constant search for the highest attainable degree of consent."[306] The point is not that there are no political losers, or winners, but rather that the consequences of losing in the political arena are mitigated by the structure of the American political process.[307] More generally, Dahl has argued:

Groups: How Unorganized Interests Get Represented, 80 AM. POL. SCI. REV. 89, 103 (1986) ("[U]norganized groups can shape and constrain decisions to a greater extent than that predicted by simple demand-oriented group theories of collective action.").

303. *See, e.g.*, POOLE & ROSENTHAL, *supra* note 151, at 229–32 (noting that Congresses have been "very polarized" recently); Cooper & Young, *supra* note 242, 268–71.

304. *See, e.g.*, Cooper & Young, *supra* note 242, at 270 ("[I]t is far from certain that the country has entered a partisan era."); Benjamin Ginsberg, *Elections and Public Policy*, 70 AM. POL. SCI. REV. 41, 44 n.9 (1976) ("[T]he level of conflict between the two parties appears to have diminished considerably over time."); Daniel J. Parks, *Partisan Voting Holds Steady*, 57 CONG. Q. WKLY. 2975, 2975 (Dec. 11, 1999) (noting that "the differences on many big issues between the parties have actually narrowed in recent years"); Keith T. Poole & Howard Rosenthal, *Patterns of Congressional Voting*, 35 AM. J. POL. SCI. 228, 268 (1991) ("[T]he range of potential policy change has been sharply reduced .... [T]he long-term, more relevant pattern has been toward a national consensus.").

305. *See, e.g.*, CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS 207–43 (1995) (discussing the future of Congressional representation of black interests).

306. ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES 329 (1967); *see also* PERETTI, *supra* note 221, at 209–25 (describing the pluralist theory of American democracy and noting its critiques).

307. *See generally* Richard Bellamy, *The Political Form of the Constitution: The Separation of Powers, Rights, and Representative Democracy*, 44 POL. STUD. 436, 437–40 (1996) (structural features of constitutionalism encourage moderation); Juliet A. Williams,

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> In a sense, what we ordinarily describe as democratic "politics" is merely the chaff. It is the surface manifestation, representing superficial conflicts. Prior to politics, beneath it, enveloping it, restricting it, conditioning it, is the underlying consensus on policy that usually exists in the society among a predominant portion of the politically active members.[308]

Democratic politics occurs at the margins of a general political consensus, with judicial review being exercised at the margins of that margin. The quality of American political decisions depends far more on the quality of that basic consensus than on the will of narrow majorities.

The countermajoritarian framework is problematic for analytical as well as empirical reasons. It tends to assume that there is an inherent antagonism between populism and principle and that the vindication of political and constitutional principle requires the rejection of majority will.[309] Such a framework obscures more than it enlightens. It relies on a model of an externalized Constitution that imposes itself on political actors through some independent third party. But the Constitution is not an external force, an alien yoke handed down by some imperial power. It is, after all, *our* Constitution. "We the people" authorize it, and it constitutes us as a nation. It is most effective and meaningful to the extent that it has been internalized, shaping our debates from inside politics rather than constraining them from outside politics. James Madison thought this was likely to be the most significant value of a constitution, in part because he doubted whether, in a democracy, there could be an effective political force outside the majority.[310] The colonial charters had been most useful as a public "standard" and a "signal for rousing [and] uniting the superior force of the community."[311] Likewise, the hope of the Constitution lay in the possibility that it would become "incorporated with the national sentiment."[312] When Franklin

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The Forgotten Check: On the Meaning of Limited Government in a Constitutional Democracy, 6–13 (undated) (unpublished paper on file with the author) (same).

308. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 132 (1956).

309. It may also be the case that the vindication of correct constitutional principles requires the rejection of political principles embraced by political majorities. Such conflicts, however, raise very different questions than the posited conflict between a legislature concerned only with utilitarian majority interests and a judiciary concerned with genuine questions of justice. *See infra* notes 340–47 and accompanying text.

310. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 5 THE WRITINGS OF JAMES MADISON, *supra* note 145, at 273.

311. *Id.*

312. *Id.*

Roosevelt advised his radio audience that "[l]ike the Bible," the Constitution should "be read again and again," he was not asking them to subjugate their policy views to the text but to develop their own understanding of appropriate political action through a dialogue with that foundational text.[313] The success of the Constitution is best measured not by how many times political actors are prevented from acting on their policy views, but by how often their policy views are consistent with constitutional principles. As William Harris has argued, "The Constitution is binding to the extent that it continues to make a political people by providing the grammar by which they speak authoritatively about their public values and continues to define the institutions by which they exert their collective identity."[314] Before we can adequately evaluate the prospect of extrajudicial constitutional interpretation, we must first lay aside the model of judicial review with its assumption of constitutional transgressions and external interpretation and enforcement. We should not expect to often find political actors express policy views that they themselves regard as unconstitutional.[315]

There is something odd about assuming an antagonism between constitutional principle and the popular will, as this objection to extrajudicial constitutional interpretation does. For one thing, we could not expect such a constitutional system to be very stable or enduring. Constitutions must exist within politics and obtain political support. For another, it seems inconsistent with the Founders' basic project of "establishing good government from reflection and choice."[316] Admittedly, Alexander Hamilton and his colleagues thought there were serious obstacles to judicious deliberations on the Constitution,[317] and Madison warned that "experiments" in public deliberation on constitutional questions "are of too ticklish a nature to be unnecessarily multiplied."[318] Nonetheless, for "the framers,

313. LEVINSON, *supra* note 17, at 30.

314. WILLIAM F. HARRIS II, THE INTERPRETABLE CONSTITUTION 118 (1993).

315. The evidence on public support for civil rights and liberties is mixed and difficult to interpret. There is clearer evidence for elite support for such liberties, however. *See, e.g.*, David G. Barnum & John L. Sullivan, *The Elusive Foundations of Political Freedom in Britain and the United States*, 52 J. POL. 719, 734 (1990) (noting "elite tolerance" as one of the factors protecting political freedom in the United States); Susan R. Burgess et al., *Reclaiming a Democratic Constitutional Politics: Survey Construction and Public Knowledge*, 54 REV. POL. 399, 399 (1992) (introducing a survey whose results help "establish public knowledge in constitutional debates").

316. THE FEDERALIST NO. 78, *supra* note 161, at 33.

317. *Id.*

318. *Id.* at 315.

HeinOnline --- 80 N.C. L. Rev. 840 (2001-2002)

reason and will are both required in a well-ordered republic."[319] Constitutional legitimacy hinged on the convergence of reason and will, the realization of a reasonable will.

The insistence on the purity of abstract principles and a strict separation between interest and principle not only creates an unjustified bias against extrajudicial constitutional interpretation but also works against a well-functioning constitutional system. In politics, interest and principle often converge and are mutually reinforcing. To this extent, there is nothing wrong with Alexander and Schauer's example of campaign finance reform in which "no member of Congress has expressed substantive sympathy with campaign finance reform but doubts about its constitutionality" and every member has argued either that "reforms are both desirable and constitutional" or "they are undesirable *and* unconstitutional."[320] Assuming Alexander and Schauer are correct in their claim about the campaign finance reform debates, such a tight correspondence between constitutional and policy views is not universal. Thomas Jefferson entertained serious doubts about the constitutionality of the Louisiana Purchase,[321] James Monroe doubted the constitutionality of useful internal improvements,[322] Abraham Lincoln and a host of abolitionists doubted the federal government's power to prohibit slavery in the states,[323] and few of those who supported presidential line-item veto authority thought that such a power was already provided by the Constitution.[324] On the other hand, in many cases, from abortion to gay rights, the Constitution may be so indeterminate

319. PAUL W. KAHN, LEGITIMACY AND HISTORY 12 (1992).

320. Alexander & Schauer, *supra* note 31, at 1368 n.41. One might reasonably doubt whether judges or academic constitutional commentators are any different in this regard. *See* Rogers M. Smith, *The Inherent Deceptiveness of Constitutional Discourse: A Diagnosis and Prescription*, *in* INTEGRITY AND CONSCIENCE 218–19 (Ian Shapiro & Robert Adams eds., 1998) ("[C]onstitutional interpreters often feel politically and psychologically impelled to argue simultaneously that the results they prefer are in some sense authorized by the Constitution and that they are the best outcomes, all things considered.").

321. MCDONALD, *supra* note 137, at 70–71.

322. SKOWRONEK, *supra* note 147, at 98–107; James Monroe, Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 144–83 (James Richardson ed., 1897).

323. HAROLD M. HYMAN, A MORE PERFECT UNION 99–123 (1973).

324. *But see* Stephen Glazier, *Reagan Already Has Line-Item Veto*, WALL ST. J., Dec. 4, 1987, at 14 ("Contrary to popular misconception, the Constitution already grants the line-item veto to the [P]resident."); Forrest McDonald, *Line-Item Veto: Older Than Constitution*, WALL ST. J., Mar. 7, 1988, at 16 (asserting that "the original understanding of the Framers and 185 years of precedent suggest that [the President] has the constitutional authority to" exercise the line-item veto).

HeinOnline --- 80 N.C. L. Rev. 841 (2001-2002)

as to have relatively little constraining force on political actors. Political views may be developed in reference to constitutional values, rather than hemmed in by them. In such circumstances, it hardly seems fair to disparage political actors for the convergence of their political preferences and constitutional understandings, given that any other constitutional interpreter will be faced with the same dilemma. The constitutional meaning constructed from such materials will necessarily be political in nature, suggesting that nonjudicial actors are the appropriate ones to engage in the task.[325]

Policy preferences do often help shape constitutional interpretation, and vice versa. From a constitutional design standpoint, this may be a virtue rather than a problem. Political interest helps motivate political actors to uphold and defend the Constitution. A central goal of the Constitution was to create political structures in which "ambition must be made to counteract ambition" and in which "personal motives" and private interests are put in the service of the public good.[326] Even the judiciary exploits that possibility, since those who have an interest in the outcome of the case drive litigation. Protections for free speech are more secure if powerful political actors have the incentive to maintain and expand them. Congressional Republicans have an interest in blocking government regulation of campaign advertisements,[327] the Jeffersonian Republicans had an interest in rejecting the Sedition Act,[328] and Larry Flynt had an interest in expanding the boundaries of political satire.[329] Constitutional principles become less, not more, secure if they are disconnected from political and social interests.[330]

Those Presidents, for example, who have challenged the judicial authority to interpret the Constitution have clearly perceived and exploited a convergence between their constitutional principles, their policy preferences, and their political interests. It is not clear why such instances of convergence should be regarded as substantively problematic or antagonistic to principled interpretation. Political interest may help motivate political actors to usefully challenge the courts on matters of constitutional principle. Moreover, principled

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325. *See* WHITTINGTON, *supra* note 58, at 195–212 (describing the limits of originalism and interpretation).

326. THE FEDERALIST NO. 78, *supra* note 161, at 321–22.

327. Alison Mitchell, *House G.O.P. Urges a Vote of No on Ban on Donations*, N.Y. TIMES, Sept. 14, 1999, at A20.

328. *See supra* notes 206–07 (on Jeffersonian opposition to the Sedition Act).

329. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 57 (1988) (holding that pornographic parody is protected speech).

330. *See* Devins & Fisher, *supra* note 121, at 98–104.

HeinOnline --- 80 N.C. L. Rev. 842 (2001-2002)

commitments often do not correspond to personal interests. Slavery would seem to be a good candidate for countermajoritarian analysis. Since those most directly and adversely affected by pro-slavery constitutional interpretations could not vote, presumably antislavery views would find their most natural institutional home in the courts. Yet, the antebellum judiciary was, if anything, more strongly pro-slavery than the other branches of the federal government. Nonjudicial actors were the most prominent in advancing antislavery arguments, and there were sound political reasons for them to do so. Political scientists often analyze slavery in the late antebellum period as a classic wedge issue that could be manipulated by strategic politicians to break up the existing partisan coalitions and raise new individuals and policies to power.[331] Certainly Lincoln would never have been President without it. Such profane political considerations, however, do not render Lincoln's passionate critique of *Dred Scott* any less compelling or the moral feelings of his supporters any less significant. This objection to extrajudicial constitutional interpretation would seem profoundly misplaced if employed to block Lincoln's argument in his First Inaugural that "if the policy of government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court[, then] . . . the people will have ceased, to be their own rulers."[332] Democracy in this context was employed precisely to advance "countermajoritarian" principles.[333] The standard dichotomy between majority "will" and constitutional principle mischaracterizes the nature of the actual conflict in such debates and of the possible outcomes.

The New Deal provides a different but related example. Roosevelt's struggle with the Court was also framed in terms of democracy, but Roosevelt would not have reduced democracy to mere majoritarianism. The relationship between majoritarianism and political principle is likewise unclear in the New Deal case. Defenders of property rights in the late nineteenth and early

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331. *See, e.g.*, ALDRICH, *supra* note 240, at 126–56 (1995); WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM 213–32 (1982); JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM 50–73 (revised ed. 1983).

332. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 268 (Roy P. Basler ed., 1990).

333. It should be emphasized that Southern slaveowners also appealed to countermajoritarianism, in this case to protect the property rights of an unpopular political and demographic minority. *See* JESSE T. CARPENTER, THE SOUTH AS A CONSCIOUS MINORITY, 1789–1861 (1990). Moreover, *no* particular political position in this fragmented conflict can be regarded as simply majoritarian. *See* Graber, *supra* note 214, at 46–50.

HeinOnline --- 80 N.C. L. Rev. 843 (2001-2002)

twentieth centuries often objected to the possible tyranny of the majority, but progressive reformers also often denounced the powerful interests arrayed against them. Both sides, including Roosevelt's extrajudicial constitutional interpretation, can be regarded as deeply principled and motivated by their own concerns with advancing freedom, though each side would also denounce the "power politics" of the other. Like Lincoln, Roosevelt insisted that he would "restore America to its own people."[334] Rather than leaving political decisions to a "selected, self-chosen few," Roosevelt contended that he "would rather leave it in the hands of what we call the democracy of the United States."[335] Roosevelt's denunciation of the Court was not grounded in the anticonstitutionalist claim that the majority should simply get what it wants. It was rather rooted in a progressive understanding of "the ethical conception that a ruler bore a responsibility for the welfare of his subjects"[336] that linked an "economic declaration of rights"[337] and "human rights"[338] with promoting the "general welfare."[339]

Such cases emphasize an important point too often ignored in constitutional theory. The principled decisions at stake in such instances of constitutional interpretation are subject to deep and well-considered political disagreement. In their own historical and political contexts, there are no uncontested right answers in these hard cases. Given such disagreement, considerations of individual rights cannot be readily counterpoised to considerations of majority will. The conflict is really between two different conceptions of individual rights, and the issue is which conception of rights will be authoritatively adopted. In this case, there are reasons for valuing democratic decisionmaking, and judicial "countermajoritarianism" seems like more than just a "difficulty."

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334. Franklin D. Roosevelt, The Governor Accepts the Nomination for the Presidency (July 2, 1932), *in* 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 659 (Samuel I. Rosenman ed., 1938) [hereinafter PUBLIC PAPERS OF ROOSEVELT].

335. Franklin D. Roosevelt, Rear-Platform Extemporaneous Remarks (Oct. 14, 1936), *in* 5 PUBLIC PAPERS OF ROOSEVELT, *supra* note 334, at 478.

336. Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club (Sept. 23, 1932), *in* 1 PUBLIC PAPERS OF ROOSEVELT, *supra* note 334, at 745.

337. 1 *id.* at 752.

338. Franklin D. Roosevelt, An Address on the Accomplishments and Future Aims for Agriculture (Sept. 28, 1935), *in* 4 PUBLIC PAPERS OF ROOSEVELT, *supra* note 334, at 385.

339. Franklin D. Roosevelt, We Have Only Just Begun to Fight (Oct. 31, 1936), *in* 5 PUBLIC PAPERS OF ROOSEVELT, *supra* note 334, at 570.

HeinOnline --- 80 N.C. L. Rev. 844 (2001-2002)

CONCLUSION

In contests between different conceptions of rights, there are principled reasons for favoring more rather than less democratic procedures for resolving the dispute. The result is not the triumph of "the majority's will" or the abandonment of constitutional principle, but the elevation of democratic decisionmaking in a context in which some, unavoidably controversial, decision must be made. In the context of genuine and reasonable disagreement about the content of constitutional principles, the connection between countermajoritarianism and principled outcomes should be regarded skeptically. Jeremy Waldron has recently made this argument most eloquently, and provocatively. As Waldron notes, "The point to remember here is that nothing tyrannical happens to me merely by virtue of the fact that *my opinion* is not acted upon by a community of which I am a member."[340] Waldron himself rejects the constitutionalization of rights and the institution of judicial review entirely, preferring that all political decisions about principles and rights be made democratically.[341] Nonetheless, his point applies equally strongly in the context of disputed constitutional meaning and the question of who should authoritatively resolve those disputes. We might well believe that judicial review serves a useful function in the American constitutional system, and yet still recognize the force of his basic argument that disagreement over conceptions of rights should be built into our constitutional and political theory.[342] Although we may as individuals believe that we know the right answer to our hard constitutional and political cases, as a society there may be no such agreement. Indeed, the lack of agreement may be precisely what makes the case "hard." Though it can be useful to think of rights as "trumps" over "collective goals,"[343] the proper content and scope of rights may itself be a political decision and the trump metaphor may obscure the fact that not everyone agrees on

340. WALDRON, *supra* note 24, at 13.

341. *Id.* at 15 ("Readers will quickly discern my opposition to American-style judicial review."). It should be noted that in speaking outside the particular context of American constitutionalism and judicial review, Waldron is also relatively free to declare "I do not particularly care whether we call these disputes 'disagreements about rights', or 'disagreements about interpretation.' " *Id.* at 12. Of course, within the American constitutional context, the *interpretive* component matters a great deal.

342. *See* Keith E. Whittington, *In Defense of Legislatures*, 28 POL. THEORY 690, 696–700 (2000) (reviewing JEREMY WALDRON, LAW AND DISAGREEMENT (1999) and JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999)).

343. DWORKIN, *supra* note 172, at xi.

what qualifies as a rights violation.[344] In the context of reasonable disagreement, it seems appropriate to allow broad participation in the decision as to the content of our principles rather than remove that decision to an elite institution that will then seek to impose its ruling on, or against, the people at large. The judiciary's most useful role may be in framing constitutional disputes for extrajudicial resolution and in enforcing the principled decisions reached elsewhere rather than in autonomously and authoritatively defining constitutional meaning.[345]

Matters of principle should be regarded as equally a part of the public debate as matters of policy. The search for an escape from "statistical democracy" denigrates the significance of the moral opinions of most citizens at the same time that it seeks to avoid deferring to the wants, preferences, or "wishes" of a popular majority.[346] The charge of tyranny and disrespect of morally autonomous individuals would appear to fall most heavily on those who would seek to remove important constitutional decisions from nonjudicial arenas where genuine popular participation and influence on outcomes is possible.[347] The rejection of mere "statistical democracy" requires that we be able to identify exactly which members of our society may have their opinions disregarded and whose votes are unworthy of being counted, a prospect that seems deeply inconsistent with the liberal commitment of giving each individual "equal concern and respect."[348] As Lincoln argued, if the

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344. *See* WALDRON, *supra* note 24, at 12 ("We cannot play trumps if we disagree about the suits. Or if we do, we are open to what I regard as the unanswerable cynicism of Thomas Hobbes in the motto of this book: for people to demand that we treat *their* theory of rights as the one that is to prevail is 'as intolerable in the society of men, as it is in play after trump is turned, to use for trump on every occasion, that suit whereof they have most in their hand.' ").

345. Richard Pildes has usefully questioned the rights-as-trumps metaphor, arguing that the judiciary and rights discourse is better understood as channeling political reasoning in constitutionally desirable ways. Richard H. Pildes, *Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 727–33 (1998).

346. DWORKIN, FREEDOM'S LAW, *supra* note 34, at 20.

347. "[T]he right to participate has less to do with a certain minimum prospect of decisive impact and more to do with avoiding the insult, dishonour, or denigration that is involved when one person's views are treated as of less account than the views of others on a matter that affects him as well as others." WALDRON, *supra* note 24, at 238 (footnote omitted). *Cf.* DWORKIN, FREEDOM'S LAW, *supra* note 34, at 344 ("[I]ndividual citizens can in fact exercise the moral responsibilities of citizenship better when final decisions involving constitutional values are removed from ordinary politics and assigned to courts.").

348. DWORKIN, *supra* note 172, at 180.

HeinOnline --- 80 N.C. L. Rev. 846 (2001-2002)

people are "to be their own rulers,"[349] then extrajudicial constitutional interpretation must carry some authority.

Extrajudicial constitutional interpretation happens all the time.[350] Sometimes it is implicit or indirect. Sometimes the process is explicit and resembles judicial deliberations on constitutional meaning. Sometimes it is explicit but diverges sharply from judicial norms of interpretive practice. Occasionally extrajudicial constitutional interpretation produces results similar in form to those produced by the courts—articulated and codified rules and standards.[351] Oftentimes, extrajudicial constitutional settlements do not look or operate at all like judicial settlements. Extrajudicial efforts may rely on building institutions and coalitions, shaping public opinion, and allocating political costs so as to settle a constitutional dispute. These are the means by which questions are settled in the political arena, and they are employed in constitutional as well as policy disputes.

The judiciary has a useful role to play in the constitutional system, but so do other political institutions. Attacks on extrajudicial constitutional interpretation and defenses of judicial supremacy have too often proceeded by painting unrealistically optimistic pictures of the courts, denigrating nonjudicial actors, and neglecting to place constitutional interpretation into a comparative institutional context. As Thomas Reed Powell long ago noted:

> Immortal principles fly their standards in judicial opinions, yes. But so they do in the common every-day talk of the butcher and banker, of the suffragist and the anti-suffragist, the pacifist and the militarist, the Socialist and the individualist. Arguments from expediency to reinforce the immortal principles will be found in judicial opinions as they are heard on the hustings. And there are judges who find no

349. LINCOLN, *supra* note 51, at 586.

350. Case studies include: WHITTINGTON, *supra* note 104; BRUCE ACKERMAN, 2 WE THE PEOPLE (1998); MARK E. BRANDON, FREE IN THE WORLD (1998); BURGESS, *supra* note 17; JAMES W. CEASER, PRESIDENTIAL SELECTION (1979); DEVINS, *supra* note 17; DINAN, *supra* note 143; CURRIE, *supra* note 8; FISHER, *supra* note 205; FISHER, *supra* note 17; MOORE, *supra* note 105; DONALD MORGAN, CONGRESS AND THE CONSTITUTION (1966); JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY (1987).

351. This seems to be an important feature of constitutional interpretation for many advocates of judicial supremacy. *E.g.*, CHEMERINSKY, *supra* note 171, at 93–97 ("[T]he judiciary's written opinions announce constitutional standards, permitting government to know what it must do to act constitutionally."). But the Constitution may have "concrete meaning" for political actors even without the benefit of judicial opinions.

> immortal principles, who conceive their task to be that of making wise adjustments amid competing considerations.[352]

The normative case against extrajudicial constitutional interpretation has been built on shaky analytical and empirical foundations. This Article has sought to probe those foundations a bit and suggest that the case against extrajudicial constitutional interpretation is not as strong as many constitutional scholars seem to assume.

Judicial review is an institutional and historical reality, regardless of any academic critiques directed against it. Likewise, judicial supremacy, at least in the strong form sometimes envisioned by the Court and commentators, is unlikely to ever exist in practice. The courts are not the exclusive interpreters of the Constitution, and often are not its ultimate or most authoritative interpreters either. Even so, a reconsideration of the normative case for and against extrajudicial constitutional interpretation is theoretically useful and has implications for political practice. This is most especially the case because judicial supremacy is better conceptualized as existing on a continuum of interpretive authority. The authority to interpret the Constitution is shared by multiple institutions and actors within our political system, and tends to flow among them over time rather than remain fixed in a stable hierarchical or segmented distribution. The question is less whether we should have extrajudicial constitutional interpretation, than how we should evaluate it and how various constitutional interpreters should relate to one another as they engage in their common task.

The debate over extrajudicial constitutional interpretation can be a useful angle for reconsidering questions of judicial deference and judicial activism that have been central to constitutional theory for most of the twentieth century. Once we recognize that extrajudicial constitutional interpretation can co-exist with judicial review, then the normative case for and against extrajudicial constitutional interpretation primarily goes to the question of how much deference the judiciary should show to other political actors in formulating doctrine and evaluating the constitutionality of legislation and how much deference nonjudicial actors should show the judiciary in articulating constitutional understandings and taking political actions. This is not entirely surprising since many of the contemporary defenses of judicial supremacy can best be found in arguments

352. Thomas Reed Powell, *The Logic and Rhetoric of Constitutional Law*, 15 J. PHIL. PSYCHOL. & SCI. METH. 645, 647–48 (1918).

HeinOnline --- 80 N.C. L. Rev. 848 (2001-2002)

favoring judicial activism.[353] Focusing on the problem of judicial supremacy rather than the problem of judicial activism, however, usefully emphasizes both the contested nature of constitutional interpretation and the political issue of comparative institutional competence. The judicial activism debate tends to focus on whether the judiciary has gotten the substantive constitutional questions at issue right, but has tended to downplay the fact that reasonable people disagree wildly on the answers to those questions. Once we recognize that the world is filled not merely with wrongs to be righted but with disagreements about what constitutes a wrong, then the proper scope of judicial deference becomes a more complicated issue. The possibility of extrajudicial constitutional interpretation suggests that our concern should not simply be with identifying the best method for interpreting the Constitution, but with grappling with how we should proceed given that we do not agree on how best to interpret the Constitution or on what particular interpretations flow out of our methodologies.

Normative arguments regarding extrajudicial constitutional interpretation may well be relevant to our constitutional practice.[354] Questioning judicial supremacy will necessarily seem "quixotic" if it is understood primarily as an attack on *Marbury* itself or as a defense of presidential lawlessness.[355] Although *Marbury*, and perhaps even *Cooper*, may be sacrosanct, the use of *Marbury* and *Cooper* to justify active judicial intervention in matters of highly contested constitutional meaning is not. As Robert Cover reminded us, judicial constitutional interpretations have a "jurispathic" quality, suppressing

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353. *See* discussion in *supra* notes 248–64 and accompanying text. The converse is not usually true in the contemporary context, however. Modern critiques of judicial activism are more likely to accuse judges of encroaching on policy and political disputes rather than of making constitutional decisions better made outside the courts. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 11 (1990) (criticizing "[t]he judicial assumption of ultimate legislative power"); ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 73 (1941) (the *Lochner* Court had not only taken control of constitutional interpretation, "but it had also taken control of a large and rapidly expanding sphere of policy"). Focusing on the possibility of extrajudicial constitutional interpretation may provide better grounds for critiquing certain forms of judicial activism.

354. It might be noted that such normative arguments also have an effect on how we understand our constitutional practice. Normative arguments against extrajudicial constitutional interpretation, for example, have helped obscure the historical reality of extensive extrajudicial constitutional interpretation. The institutional questions remain, in Dworkin's words, a "mysterious matter" precisely because our prior normative theories discourage us from investigating such mysteries. DWORKIN, FREEDOM'S LAW, *supra* note 34, at 34.

355. Richard A. Posner, *Appeal and Consent*, NEW REPUBLIC, Aug. 16, 1999, at 37 (review of Mark Tushnet's TAKING THE CONSTITUTION AWAY FROM THE COURTS).

HeinOnline --- 80 N.C. L. Rev. 849 (2001-2002)

alternative understandings of our foundational principles and traditions.[356] It is this quality of judicial interpretation that should be of central concern to debates over extrajudicial constitutional interpretation. Debates over judicial supremacy join the mainstream of twentieth-century constitutional theory by asking *how* the practice of judicial review should be conducted. If contemporary constitutional theory is, as Richard Posner has asserted, "the effort to develop a generally accepted theory to guide the interpretation of the Constitution of the United States,"[357] then the degree of deference owed among various constitutional interpreters is at least as relevant to that project as debates over textualism or originalism or republicanism.

A reconsideration of extrajudicial constitutional interpretation also moves beyond the narrow task of guiding judges. It focuses our attention not only on how judges should interpret the Constitution, but also on how nonjudicial actors should and do interpret the Constitution. Extrajudicial constitutional interpretation is valuable in part because it encourages a constitutional sensibility among political actors. Nonjudicial political actors should not be content to delegate the task of understanding and preserving our most fundamental political values and commitments to a single specialized institution. They should be encouraged to assume their own responsibility for maintaining constitutional government. They should be expected to grapple with matters of principle and not simply register the "occurrent preferences" of constituents.[358] We should be equally concerned with a President writing to a legislator, as Franklin Roosevelt did, that "all doubts should be resolved in favor of the bill, leaving to the courts, in an orderly fashion, the ultimate question of constitutionality," as with a President threatening to pack the Court with his own partisans or questioning the precedential value of a judicial decision.[359] Constitutional values can hardly be regarded as any more secure in the former case than in the latter. Political actors can be expected to regard the Constitution in anything other than purely instrumental terms only if extrajudicial constitutional

356. Robert Cover, *Nomos and Narrative*, *in* NARRATIVE, VIOLENCE AND THE LAW 138–44 (Martha Minow et al. eds., 1993).

357. Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 1 (1998).

358. Owen Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 10 (1979).

359. 4 PUBLIC PAPERS OF ROOSEVELT, *supra* note 334, at 298.

HeinOnline --- 80 N.C. L. Rev. 850 (2001-2002)

interpretation is taken seriously and valued.[360] A constitutional theory that can incorporate extrajudicial constitutional interpretation should tell us not only what the Constitution means, but also how constitutionally conscientious political actors should behave. Removing the objections to extrajudicial constitutional interpretation is a necessary starting point for developing such a broader theoretical agenda.

360. *See* BURGESS, *supra* note 17, at 1–27; Devins & Fisher, *supra* note 121, at 98–104 (arguing that in a regime of judicial supremacy "the Constitution would diminish in value and stature").

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