

To Say What the Law Is: Judicial Authority in a Political Context

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PROSPECTUS

THE ARGUMENT: The volume explores the political foundations of judicial supremacy. A central concern of the project is explaining judicial authority in America, the general acceptance of the Supreme Court in particular taking the primary, if not the exclusive, role in interpreting the Constitution. Judicial authority is central to judicial independence. The relative independence of the judiciary is partly a function of such formal constitutional features as life terms and guaranteed salaries, but the more significant determinant of judicial independence is the expectation on the part of other political actors that the courts will play a significant role in the constitutional system. The degree of authority and independence to be exercised by the courts is now the subject of sharp dispute in many emerging democracies, especially in Eastern Europe. The United States was the first nation to establish a system of constitutional review of legislation, and judicial authority is perhaps now greatest in this country. The modern American constitutional order, especially the institution of judicial review, has been a prominent model for constitutional founders in other nations. The process by which this extensive judicial authority was developed in the United States remains unclear, however. As noted constitutional scholar Alexander Bickel observed in the 1960s, the power of judicial review creates a “counter-majoritarian difficulty.” How do we justify the power of a panel of unelected lawyers to strike down statutes duly passed by the legislature and supported by popular majorities, especially given our strong national commitment to democratic ideals? Although many objections can be raised to Bickel’s formulation, some version of this problem has often been central in American politics. How did we come to accept the practice of judicial review despite its antidemocratic, or at least nondemocratic, tendencies? Why do powerful and popularly elected officials defer to the judgment of the Supreme Court?

These questions become particularly crucial when we realize that this deference has not been automatic in American history. Many of our most celebrated presidents have specifically denied that they have any obligation to defer to the constitutional opinions of the Court, and have challenged the judiciary for the right to pronounce authoritative interpretations of constitutional meaning. Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt and Ronald Reagan have all suggested that the president has an equal responsibility to articulate constitutional requirements, even if the presidential judgment conflicts with that of the Court. These “departmentalist” presidents – who have adhered to this theory that each branch of government is equal in its authority to interpret the Constitution – have led political movements that have questioned not only particular judicial decisions but also the basic institutional authority of the courts, often provoking serious legislative efforts to alter or constrain the judiciary. The book often focuses on the president, but it is centrally concerned with the interaction of a

variety of political officials with each other and the Constitution and the implications of that interaction for the judiciary. In this context, the president is often a particularly important player, both directly as president and indirectly as leader of partisan and legislative coalitions.

The book examines the implications for the theory and practice of constitutionalism and limited government of such political threats to judicial supremacy. The book combines normative and empirical analysis in order to address the problem of how constitutions are established and maintained over time. The problem of judicial supremacy provides a particularly useful angle on that issue, both because many take judicial supremacy to be essential to the viability of a constitutional system and because the contest over the authority to interpret the meaning of the Constitution has been central to the development of our own Constitution. My examination of these departmentalist presidents suggests that in challenging judicial supremacy, they did not challenge fundamental constitutional commitments. The critique of the judiciary was rooted in a concern for the Constitution rather than in the rejection of constitutionalism and constitutional values. In these moments of institutional conflict, disputes over the meaning of the Constitution has been placed at the center of American politics and the problem of constitutional interpretation has been opened up to a much wider group of participants. We have often altered our understanding of what our constitutional commitments have required as a consequence of these wide-ranging debates, with significant consequences for government practice and judicial doctrine. Challenges to judicial supremacy have contributed to our constitutional tradition, not threatened it.

Not all presidents have the authority to challenge judicial supremacy, however. The book will also explore the political incentives that lead most presidents and elected officials to defer to judicial determinations of constitutional meaning and to support the judicial authority to interpret the Constitution. These incentives focus on agenda management by elected officials. Elected officials have three central problems: limited political resources, fragile political coalitions, and electoral uncertainty. Allowing the judiciary to take a lead role in interpreting constitutional meaning often allows politicians to ameliorate these problems. The judiciary can focus on constitutional issues that are of real concern to elected officials but have lower priority than other political issues that must require their limited resources. Rather differently, the unelected federal judiciary can advance constitutional interpretations that would threaten the stability of legislative coalitions and electoral constituencies if advanced by elected officials. Politicians have more to gain in many cases from criticizing or praising the particular decisions of the Court, or simply avoiding blame for particular outcomes, than from accepting responsibility for directly addressing those issues themselves. In cases ranging from slavery to abortion, elected officials have reason to prefer judicial supremacy. As a consequence, the judiciary has substantial autonomy to interpret and enforce the Constitution, while still operating within broad ideological and political constraints. If the judiciary strays too far from generally accepted understandings of

constitutional meaning, elected officials will have incentives to challenge the judiciary more directly. Within those constraints, however, judicial independence is real and significant.

THE CONTRIBUTION OF THIS VOLUME: This book is consistent with the historical new institutionalist perspective developed within political science. This approach has been particularly prominent in studies of the courts, the presidency, and American political development. It is particularly concerned with understanding the growth and change of political institutions over time, the interaction of different political institutions, and the significance of political institutions to political behavior and outcomes. In the context of the law and the courts, this approach has tended to take the legal perspective seriously, while still emphasizing political influences and choices (e.g., Cornell Clayton and Howard Gillman, eds. *Supreme Court Decision Making* [Chicago, 1999]). In its understanding of the actions of nonjudicial actors, this book will draw in particular on the concept of “political time” developed in Stephen Skowronek’s *The Politics Presidents Make* (Harvard, 1993), supplemented by theories of political coalitions and leadership most extensively developed within the congressional studies literature. The book also directly speaks to the constitutional theory literature. It makes a specific contribution to the growing literature on judicial supremacy and/or constitutional politics, but it also makes a more general contribution to the broad literature on judicial review.

This work will make a number of distinctive contributions to the existing literature. This will, in fact, be the first extended examination of the political foundations of judicial authority and the growth of judicial supremacy. The concept of judicial supremacy is once again becoming of great importance to constitutional theory, in part because of recent Court decisions. It plays an increasingly prominent role in normative discussions of judicial review and is likely to become increasingly central to debates over judicial activism. This book is particularly timely in addressing an important but neglected dimension of this debate. The existing literature on judicial supremacy is almost entirely normative. This book will be distinctive in taking a historical, empirical angle on that normative debate. Unlike much empirical work within political science, my work is deeply motivated by normative questions and has direct relevance to ongoing normative debates. My empirical analysis in this book, as in my previous works, is designed to shed light on both empirical and normative problems, and thus has the potential to reach a wide scholarly audience and contribute to several literatures. This book also makes a contribution to the growing empirical, historical analysis of the Court (e.g., Howard Gillman’s *The Constitution Besieged* [Duke, 1993]; Barry Cushman’s *Rethinking the New Deal Court* [Oxford, 1998]). In doing so, it addresses the substantively important topic of judicial review and does so with a sweeping historical scope. At the same time, it places the Court within a larger political context and in particular in relation to the president.

As a consequence, it should be of equal interest to presidency scholars or general scholars in American politics as to specialists in the judiciary or constitutional law.

More substantively, the argument of the book is particularly distinctive on three counts. First, it provides a developmental perspective on judicial review and judicial supremacy. This perspective is almost wholly lacking in the traditional legal literature, which emphasizes the single precedent of *Marbury v. Madison* but ignores the long political struggle to establish judicial authority. This book examines how the judicial authority to determine constitutional meaning has been politically won and maintained over time, a point of particular significance for newly emerging constitutional systems in Eastern Europe and elsewhere. Second, this book provides a dynamic rather than static view of constitutional interpretation. Most arguments about who should interpret the Constitution take sides (either for or against the Court) and draw fixed boundaries that are supposed to be enduring. I believe such a static perspective on institutional authority is historically implausible and normatively undesirable. This book is concerned with demonstrating how and why interpretive authority flows among different actors in the constitutional system. Third, rather than simply justifying and favoring either extrajudicial constitutional interpretation or judicial supremacy, this book justifies and explains the need for both judicial and extrajudicial constitutional interpretation. It explains why we have so much judicial constitutional interpretation, if constitutional politics is a real phenomenon. It explains why judicial supremacy rises and falls over time. It explains why we should embrace the defiance of President Abraham Lincoln on slavery while still rejecting the defiance of Governor Orval Faubus on segregation. Ultimately, this layered approach to the problem is both more realistic and more compelling than more rigid alternatives.

There is no book currently on the market that is directly analogous to this book. There are, however, related books that help establish the debate I am addressing. Most recently, Jeremy Waldron's *Law and Disagreement* (Oxford, 1999) and Mark Tushnet's *Taking the Constitution Away from the Court* (Princeton, 1999) have argued for a sharply reduced role for the Court in constitutional interpretation. My book is far more empirical than Waldron's, and more historically rich and thematically cohesive than Tushnet's. Moreover, my book is less concerned with rejecting judicial review as these authors do than with explaining the proper place of judicial review within the larger constitutional system. Bruce Ackerman's *We the People* (Harvard, 1991) is engaged in a similar project. I reject Ackerman's controversial theory of unconventional constitutional amendments and situate constitutional politics within a more traditional interpretive framework. At the same time, however, my work takes nonjudicial actors and political strategies more seriously than does Ackerman and is less committed to justifying recent constitutional law. Louis Fisher's *Constitutional Dialogues* (Princeton, 1987) is similar to my

work in its more dynamic perspective and focus on extrajudicial interpretation. My work is much more theoretically engaged than is Fisher's, however, and more thematically coherent.

I expect my book to be of broad interest to scholars working in constitutional theory, judicial politics/public law, presidential politics, American politics generally, American political development, and American political and constitutional history. I expect the book to be suitable for and to find a market in graduate classes and upper-division undergraduate classes in constitutional theory, law and interpretation; the separation of powers; the courts; the presidency; and American political development. I would also hope that the book would be of interest to an elite general audience interested in the American Constitution, the Court and the presidency, and American history.

FORMAT AND ORIGINS: I anticipate that the final manuscript will be 100,000 to 120,000 words in length, with six chapters. I anticipate that the manuscript will contain a very small number of tables and line drawings. This work was supported in part by fellowships from the John M. Olin Foundation and the American Council of Learned Societies. This manuscript will draw upon, but will not reproduce, material published in *Polity* and in *Constitutional Politics*, eds. Sotirios Barber and Robert George (Princeton University Press). Permissions to reprint those materials have been acquired.

SCHEDULE: Although aspects of this argument exist in the form of various conference papers, no additional elements of the book are currently available for review. I hope to have a completed manuscript by January 1, 2002.

THE AUTHOR: Keith E. Whittington is Assistant Professor of Politics and John Maclean Jr. Presidential Preceptor at Princeton University. His research interests include constitutional law and theory, separation of powers, American political development, and American political thought and culture. He is the author of *Constitutional Construction: Divided Powers and Constitutional Meaning* (Harvard University Press, 1999) and *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (University Press of Kansas, 1999). He has also published articles on American constitutional theory and development, the presidency, the judiciary, impeachments, and federalism in such journals as *Law and Social Inquiry*, *Political Theory*, *Studies in American Political Development*, *Hastings Constitutional Law Quarterly*, as well as *Policy Review* and *Reason* magazine. He has been a visiting scholar at the Social Philosophy and Policy Center and a fellow of the John M. Olin Foundation and the American Council of Learned Societies.

The Dynamics of Constitutional Authority: Judicial Review in a Political Context

1. The Politics of Constitutional Meaning
2. The Construction of Constitutional Regimes
3. The Judiciary and the Affiliated Leader
4. The Judiciary in the Politics of Opposition
5. The Growth of Judicial Authority
6. Conclusion: The Dynamics of Constitutional Authority

Chapter One: The Politics of Constitutional Meaning

Chapter One reviews the theory of judicial supremacy, the theory that the judiciary is the ultimate authoritative interpreter of the Constitution. The chapter introduces the theory, describes its main components, and the normative arguments supporting it and the theoretical controversy surrounding it. Judicial supremacy raises two problems of particular interest, the normative problem of whether judicial supremacy is really central to constitutionalism and the empirical problem of how judicial supremacy might be established. The chapter sketches a logic of constitutional authority that will be elaborated over the course of the book and that can help solve those two problems. This logic is centrally concerned with the political incentives facing political actors in a variety of circumstances to advance independent constitutional understandings.

Chapter Two: The Construction of Constitutional Regimes

Chapter Two considers the exceptional case of political challenge to judicial authority to interpret the Constitution. Presidential conflicts with the Court are often regarded as grave challenges to constitutionalism and judicial independence. This chapter will argue that this claim paints an inaccurate portrait of American politics and underestimates the strength of American constitutionalism. The chapter defines departmentalism and identifies the presidents who have voiced this theory of coordinate constitutional interpretation. The chapter will critically examine the existing approaches to explaining such presidential challenges and will develop an alternative approach emphasizing the reconstructive goals of these presidents and their struggles to win the authority to remake constitutional understandings, illustrating the argument with reference to the presidencies of Jefferson, Jackson, Lincoln, Roosevelt, and Reagan.

Chapter Three: The Judiciary and the Affiliated Leader

Chapter Three is the first of two chapters that consider the more usual case of presidential deference to and encouragement of judicial authority to settle disputed constitutional meanings. This chapter will focus on the incentives for presidents who lead politically dominant coalitions to defer nonetheless to the judiciary. The chapter will develop several incentives grounded in the president's strategies for electoral and policy success and coalitional maintenance, with particular emphasis on the ways in which a relatively autonomous but sympathetic Court can advance the ideological interests of the president while minimizing the political consequences of electoral blame and coalition fragmentation. The argument will be illustrated with a variety of historical examples.

Chapter Four: The Judiciary in the Politics of Opposition

Chapter Four is the second of two chapters that consider the common case of presidential deference to and encouragement of judicial authority to settle disputed constitutional meanings. This chapter will focus on the incentives for presidents who come to power in opposition to the still dominant political coalition. Although these presidents are likely to be in general ideological disagreement with the Court, these presidents nonetheless face a variety of incentives to defer to judicial authority and even to attempt to bolster the authority of the courts. The chapter will focus on the oppositional president's relative weakness in the political arena and his turn to the courts as both an alternative forum of policymaking and as a potential ally and shield against partisan opponents. The argument will be illustrated with a variety of historical examples.

Chapter Five: The Growth of Judicial Authority

Chapter Five will consider the secular growth of judicial authority over time. Judicial supremacy is increasingly asserted and accepted. As the previous two chapters detail, most presidents face a variety of incentives for supporting judicial authority and independence, and serious challenges to judicial supremacy are relatively rare. Building on the political logic developed over the past three chapters, this chapter will also consider several political developments that have helped entrench judicial supremacy in the modern period. The considerations will particularly emphasize the weakening of the political parties, the changing electoral calculations of legislators, and the increasing strategic importance of the Court to

the policy goals of both major parties. Challenges to judicial supremacy are still possible, but the Court has been increasingly well positioned to act independently to define constitutional meaning.

Chapter Six: Conclusion

Chapter Six concludes the book with a summary of the core logic of the dynamics of the authority to interpret the constitution and a reconsideration of the historical development of judicial independence and supremacy and the normative implications of those developments. The chapter will consider the relationship between constitutional politics and constitutional law and the importance of judicial independence to constitutional development and maintenance. The chapter emphasizes that judicial supremacy is politically secure in the United States and serves a useful function within the constitutional system, while also noting that political challenges to judicial supremacy are an important and valuable feature of a vibrant constitutional system.