Chapter Two:

The Construction of Constitutional Regimes

In the early twentieth century, scholars and commentators began to speak of "judicial supremacy." This is not surprising timing. It was during this period, when the *Lochner* Court was in full swing, that the "higher law" features of the American constitutional system became most evident.[1] It was not until the twentieth century that a specific term, judicial review, was coined to refer to the judicial invalidation of laws on the grounds of their being contrary to the requirements of the Constitution.[2] The power of judicial review had long been recognized and occasionally exercised, but it was not until the turn of the century that the Court routinely played this role and seemed to review the actions of the coordinate legislative branch as if it were a mere administrative agency or subordinate court.[3]

Perhaps most notably, political scientist Charles Grove Haines entitled his 1914 book examining the history of judicial review, *The American Doctrine of Judicial Supremacy*. Haines began, "One of the axioms of political theory and governmental practice is that there must be in every state a supreme authority whose determinations are final and not subject to any recognized higher power." This supreme authority would be "the very essence of the state."[4] Identifying where supremacy lay within a political system would clarify the basic nature of that political system and the locus of political power. It could provide the basis for distinguishing and categorizing the various governments of the world. Haines found that the state and federal governments of the United States seemed to be in a class by themselves. In this country alone had a constitution imposing written limitations on the government been established and the

[1] See, e.g., Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law," *Harvard Law Review* 42 (1928): 149.
[2] Edward S. Corwin, "The Establishment of Judicial Review," *Michigan Law Review* 9 (1910): 102. Competing terms to describe the phenomenon were being suggested at the same time, including "judicial supremacy," "judicial veto," and "judicial nullification." Charles Grove Haines, *The American Doctrine of Judicial Supremacy* (New York: Macmillan, 1914), 16n2.
[3] This was the original context for the term judicial review, as legislatures provided for judicial examination of administrative actions to insure their conformity with the law. See, e.g., John Den, et al. v. The Hoboken Land and Improvement Company, 59 U.S. 272, 283 (1855); Frank Goodnow, "The Administrative Law of the United States," *Political Science Quarterly* 19 (1904): 115; Thomas Reed Powell, "Judicial Review of Administrative Action in Immigration Proceedings," *Harvard Law Review* 22 (1908): 360.
[4] Haines, 1.

judiciary given "the extraordinary power . . . to say what the law is," including the law of the Constitution. "Thus the judiciary, a coordinate branch of the government, becomes the particular guardian of the terms of the written constitution." The rest of the government is "held within the bounds of authority as understood and interpreted by the judicial power," for the "judiciary has the sole right to place an authoritative interpretation upon the fundamental written law."[5] For "most practical purposes the judiciary exercises supreme power in the United States," which was then leading to popular controversy and such common denunciations as "judicial legislation" and "judicial oligarchy."[6]

The controversy over this peculiar American doctrine only seemed to grow, until the storm finally broke in 1937 with President Franklin D. Roosevelt's dramatic challenge to the Court and the judicial withdrawal from the struggle over the New Deal. Political scientist Edward Corwin had been one of the most insightful, and critical, commentators on the Court and its understandings of the Constitution in the years leading up to Roosevelt's battle with the Court. Although a Republican, Corwin had in fact been an advocate of and advisor to the Roosevelt administration, and had been involved in the planning and promotion of the president's proposal to "reorganize" the federal judiciary. The following year he attempted to justify that effort with a remarkable historical and theoretical treatise on *The Court Over the Constitution*, informed by "the fresh perspective afforded by the New Deal" and interested in examining how judicial review could be made into, in the words of the subtitle, "an Instrument of Popular Government."[7]

In that book, Corwin suggested an innovative reconceptualization of the doctrine of judicial review. In particular, he suggested a distinction between a "juristic" conception of judicial review, in which the courts are the proper authority to interpret the Constitution due to their special competence in the field, and a "departmentalist" conception. Departmentalism would hold that constitutional interpretation is not peculiar to the courts, but rather that each of the three coordinate branches has an equal responsibility and authority to interpret. Whenever each branch acts, it necessarily exercises an interpretive power. The

[5] Haines, 5.
[6] Haines, 11.
[7] Edward S. Corwin, *Court over Constitution* (Princeton: Princeton University Press, 1938), vii.

question is not whether the non-judicial branches will interpret the Constitution, but "what deference are they required by the Constitution to pay relevant judicial versions of the Constitution, when such are available?"[8] Departmentalism refuses to recognize the "transubstantiation whereby the Court's opinion of the Constitution . . . becomes the very body and blood of the Constitution."[9] "Finality of interpretation is hence the outcome – when it exists – not of judicial application of the Constitution to the decision of cases, but of the continued harmony of views among the three departments."[10] The judicial interpretation of the Constitution "is final for the case in which it is pronounced, it is not final against the political forces to which a changed opinion may give rise," whether in the judiciary itself or in the other branches of government.[11] Though the professional bar could be expected to support judicial interpretation, the "driving power" behind the departmentalist conception had "always been *Presidential leadership*."[12]

Corwin ultimately turned this departmentalist theory in support of Roosevelt, arguing that the Court's rulings against the New Deal had "thrust forward the political aspect of the Court's role in constitutional interpretation as never before." Under such circumstances, it was entirely appropriate that the president challenge the Court's constitutional interpretation directly rather than seek a constitutional amendment. For those "who deny the necessary identity of the judicial version of the Constitution with the Constitution," the juristic insistence on the amendment route "simply begs the question whether the Constitution needs amending."[13]

The case for the departmentalist conception of constitutional interpretation has been built as much on historical precedent as on theoretical analysis. Corwin was the first to point to what has become a standard list of presidents who articulated the departmentalist themes. In addition to Franklin Roosevelt, that list has traditionally included Thomas Jefferson, Andrew Jackson and Abraham Lincoln.[14] More

[8] Corwin, 15.
[9] Corwin, 68.
[10] Corwin, 7 (emphasis omitted).
[11] Corwin, 61.
[12] Corwin, 69.
[13] Corwin, 80, 80n84.
[14] See, e.g., Robert Scigliano, *The Supreme Court and the Presidency* (New York: Free Press, 1971), 23-50; John Agresto, *The Supreme Court and Constitutional Democracy* (Ithaca: Cornell University Press, 1984), 78-95, 116-

recently, the Reagan administration has struck some of those themes as well. For Corwin and others primarily concerned with establishing the consistency of departmentalism with the American constitutional tradition, these cases have been most useful as precedents. It is notable, however, that these presidents alone have made such appeals. "When presidents disagree with the constitutional decisions of the federal courts, they appoint judges, endorse constitutional amendments to overturn disfavored decisions, or flog the decisions from the bully pulpit of the White House." They "act *as if* the opinions of the federal judiciary have special priority in the interpretation of the Constitution" and do not ordinarily claim the authority to act on their own independent understandings of the Constitution.[15]

This pattern requires no particular explanation for those legal scholars interested in advocating the case for the departmentalist conception of constitutional interpretation. The important point for them is that prominent officials have over the course of American history repeatedly voiced the theory. Merely listing a series of decontextualized quotations from these presidents, however, may lose important information that would help not only to justify departmentalism but also to explain these episodes of presidential challenge to judicial authority. Understanding the political rationale for such presidential challenges will clarify why the authority to give meaning to the Constitution has at times shifted away from the judiciary and to the political branches of government and how the American constitutional order develops. Before exploring that political rationale, it would be useful to briefly review these presidential challenges to judicial supremacy and a prominent political account of them.

Presidential Challenges to Judicial Authority

138; Walter F. Murphy, "Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter," *Review of Politics* 48 (1986): 409-412; Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988), 39-43; Susan R. Burgess, *Contest for Constitutional Authority* (Lawrence: University Press of Kansas, 1988), 1-27; Louis Fisher, *Constitutional Dialogues* (Princeton: Princeton University Press, 1988), 233-247; Frank H. Easterbrook, "Presidential Review," *Case-Western Reserve Law Review* 40 (1989-1990): 906-911; Michael Stokes Paulsen, "The *Merryman* Power and the Dilemma of Autonomous Executive Branch Interpretation," *Cardozo Law Review* 15 (1993): 84-98; Steven G. Calabresi, "Caesarism, Departmentalism, and Professor Paulsen," *Minnesota Law Review* 83 (1999): 1421.

[15] Geoffrey P. Miller, "The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law," *Law and Contemporary Problems* 56 (1993): 42.

Presidents have been the most prominent and most important challengers to the judicial authority to settle constitutional meaning, though they have not been alone in doing so. Thomas Jefferson was the first president to explicitly embrace this theory, and explained and defended the theory at greatest length. The Jeffersonians had in fact come to power challenging the authority of the federal judiciary. Responding to fears of war abroad and domestic opposition at home, the Federalist Congress passed the onerous Alien and Sedition Acts in 1798, which were vigorously enforced by party loyalists in the executive and judicial branches. Organizing resistance where they could, the growing Jeffersonian opposition turned the states. Resolutions penned by Jefferson and James Madison attacking the constitutionality of the Acts were passed by Kentucky and Virginia, respectively. In doing so, they asserted the authority of the states to pass judgment on the constitutionality of federal legislation. Jefferson's Kentucky Resolution denied that any branch of the federal government could be the "exclusive or final judge" of the powers delegated to that government by the Constitution. As the members of the federal compact, each of the states had "an equal right to judge for itself" whether the Constitution had been violated and how violations should be remedied.[16] When a number of Federalist-controlled state legislatures responded by asserting the supremacy of the federal judiciary to resolve constitutional disputes, Madison penned a Report on the Resolutions for the Virginia legislature in 1799. To the objection that "the federal judiciary is to be regarded as the sole expositor of the Constitution, in the last resort," Madison responded that judicial supremacy was inadequate to the preservation of the Constitution since "the judicial department also may exercise or sanction dangerous powers beyond the grant of the Constitution."[17]

[16] Thomas Jefferson, *The Writings of Thomas Jefferson*, ed. Paul Leicester Ford, vol. 7 (New York: G.P. Putnam's Sons, 1896), 292.

[17] James Madison, *The Writings of James Madison*, ed. Gaillard Hunt, vol. 6 (New York: G.P. Putnam's Sons, 1906), 351. Madison later qualified this argument by noting that the states were not taking direct action to enforce their constitutional views, backing off Jefferson's stronger suggestion that the states had the authority to take remedial action against the federal government. Ibid., 402. In Congress, Madison had earlier denied that the judiciary had greater authority than the other branches to settle constitutional disputes. *Annals of Congress* (June 17, 1789), I:519-521.

Jefferson subsequently turned his attention away from the states and toward the elected branches of government, and particularly the president, as interpreters of the Constitution. Upon assuming the presidency, Jefferson asserted the authority to act on his own understanding of constitutional requirements. As the chief executive, Jefferson wrote "I affirm that [sedition] act to be no law, because in opposition to the constitution; and I shall treat it as a nullity, wherever it comes in the way of my functions."[18] It was in fact his "duty to arrest its execution at every stage," and therefore "discharged every person under punishment or prosecution under the sedition law."[19] In response to various correspondents and the reception of the Court's *Marbury* opinion, Jefferson elaborated on his understanding of constitutional interpretation and judicial authority, arguing that the departments of government must be "co-ordinate and independent of each other." The Constitution has given "no control to another branch" of the decisions of one branch, and ultimately "each branch has an equal right to decide for itself what is the meaning of the Constitution."[20] That judges could be "the ultimate arbiters of all constitutional questions" was "a very dangerous doctrine indeed."[21] Far better that the "co-ordinate branches should be checks on each other" and be "equally independent in the sphere of action assigned to them."[22] Judges could interpret the Constitution only "*for themselves*."[23]

Jackson later echoed Jefferson's argument. The *locus classicus* for Jackson's departmentalism is the message accompanying his veto of the rechartering of the Second National Bank in the summer of 1832, which was among his most prominent and important acts and statements. In that message, Jackson argued that the "Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others." The interpretations of the Constitution offered by the judicial branch were not authoritative, but only entitled to "such influence as

[18] Jefferson, *Writings*, 8:58n1.
[19] Jefferson, *Writings*, 8:309n1.
[20] Jefferson, *The Writings of Thomas Jefferson*, ed. Andrew A. Lipscomb, vol. 11 (Washington, D.C.: Thomas Jefferson Memorial Association, 1903), 213, 214; Jefferson, *Writings*, ed. Ford, 10:141.
[21] Jefferson, *Writings*, ed. Ford, 10:160.
[22] Jefferson, *Writings*, ed. Ford, 8:311n1.
[23] Jefferson, *Writings*, ed. Ford, 9:517.

the force of their reasoning may deserve."[24] Jackson was less blunt in his handling of the Cherokee cases. As part of a series of conflicts involving the Court, the state of Georgia, and the Cherokee tribe, the Marshall Court in1832 struck down a state statute requiring the licensing of all whites in Cherokee territory as in conflict with a superior national statute and treaties.[25] Though Jackson may not have declared, "John Marshall has made his decision, now let him enforce it," it was common in the contemporary press that the president might refuse to enforce the Court's decision based on his theory of the independence of the coordinate branches and given his hostility to both Marshall and the Indians.[26] As it developed, the president was never formally required to execute an order of the Court in that case, but he publicly stated his disinclination to do so.[27] Before the Court had even ruled, Jackson had informed interested parties that "on mature reflection" he had satisfied himself that the state had acted within its constitutional authority and the president "has not authority to interfere."[28] Similarly, in 1831 Jackson told Congress that it did not have the authority over Indian tribes residing within a state and could not give the president the authority to "make war upon the rights of the States," a constitutional argument that he elaborated in a letter to his Secretary of War.[29] After the Court's decision in *Worcester*, Jackson wrote, "the decision of the supreme court has fell still born and they find it cannot coerce Georgia to yield to its mandate."[30] Jackson was happy to enlist the courts in support of his own policies, such as revenue collection in the resistant South Carolina, and he refrained from throwing his own weight behind

[24] Andrew Jackson, *Presidential Messages, Addresses and State Papers*, ed. Julius Miller, vol. 3 (New York: Review of Reviews, 1917), 995, 996. Roger Taney, the presumed author of Jackson's veto message, emphasized a qualification of that departmentalist theme some three decades later. In an 1860 letter to Martin Van Buren, Taney wrote that Jackson "was speaking of his rights and duty, when acting as part of the Legislative power [in exercising the veto], and not of his right or duty as an Executive officer." Quoted in Charles Warren, *The Supreme Court in United States History*, vol. 1 (Boston: Little, Brown, and Company, 1926), 763.
[25] Worcester v. Georgia, 31 U.S. 515 (1832).
[26] For discussion, see Warren, 1:756-761.
[27] For discussion of the administrations actions and obligations in the Cherokee cases, see Richard E. Ellis, *The Union at Risk* (New York: Oxford University Press, 1987), 30-32, 112-120; Edwin A. Miles, "After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis," *Journal of Southern History* 39 (1973): 519.
[28] Quoted in Richard P. Longaker, "Andrew Jackson and the Judiciary," *Political Science Quarterly* 71 (1956): 345n9.
[29] Quoted in Longaker, 346.
[30] Andrew Jackson, *The Correspondence of Andrew Jackson*, ed. John Bassett, vol. 4 (Washington, D.C.: Carnegie Institute, 1929), 430.

the numerous judicial reform measures backed by his supporters, but he was clear that the Court's constitutional understandings were not authoritative for the other branches of the national government.

Abraham Lincoln offered yet another variation on the departmentalist theme. Lincoln developed this position at length in responding to the *Dred Scott* decision in his 1858 "debates" with Stephen Douglas. Lincoln noted that "I do not propose to disturb or resist the [Court's] decision" as it applied to Dred Scott and his family. But he would not make the Court's constitutional understanding "a rule of political action, for the people and all the departments of the government." Adding "something to the authority in favor of my own position," Lincoln rehearsed at length Jefferson and Jackson's departmentalist theories.[31] He repeated and adhered to that understanding upon gaining the White House. Central to the Court's holding in *Dred Scott* was the argument that free blacks were not citizens under the Constitution. In the course of its daily business the Lincoln administration was faced with the question of whether or not to adhere to the Court's understanding of citizenship and chose to break from the Court. Federal statute required, for example, that the masters of coastal trading ships be American citizens, raising the "question whether or not colored men can be citizens of the United States . . . and therefore competent to command American vessels."[32] Lincoln's Attorney General, Edward Bates, wrote a lengthy formal opinion providing a detailed rebuttal to Chief Justice Roger Taney's argument against black citizenship. That opinion became the basis for the subsequent decisions by the administration, on encouragement from abolitionist Republican legislators, to begin granting passports and patents to blacks.[33] Congress and the president likewise enacted legislation abolishing slavery in all federal territories and the District of Columbia, directly rejecting the Court's specific argument that the federal territories had to be open to slavery and with Lincoln noting that he "never doubted the constitutional authority of Congress" to take such action.[34]

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[31] Abraham Lincoln, *Abraham Lincoln*, ed. Roy P. Basler (New York: Da Capo, 1990), 418.
[32] *Official Opinions of the Attorneys General of the United States*, vol. 10 (Washington: D.C.: Government Printing Office, 1861), 382 (emphasis omitted).
[33] *The Works of Charles Sumner*, vol. 5 (Boston: Lee and Shepard, 1874), 498; Ibid., 6:144.
[34] Abolition of Slavery Act (Territories), ch. 112, 12 Stat. 432 (1862); Abolition of Slavery Act (District of Columbia), ch. 54, 12 Stat. 376 (1862); Lincoln, 640.

Lincoln was less public about his reasoning when faced with state and federal habeas corpus writs for civilians held by the military during the Civil War. When Chief Justice Taney concluded that Congress alone had the authority to suspend the writ of habeas corpus, the military refused to comply with his orders, the president disregarded the papers Taney transmitted to him, and Lincoln explained to Congress his understanding of presidential authority during a rebellion.[35] His attorney general subsequently issued a formal opinion stating, "the president and the judiciary are coordinate departments of government, and the one not subordinate to the other," and empowered "to act out its own granted powers, without any ordained or legal superior possessing the power to revise and reverse its action."[36] Even after passage of a congressional statute continuing the suspension of habeas corpus, the War Department issued an order instructing military officers to cite presidential authority for refusing to honor such writs.[37]

Franklin Roosevelt reached similar conclusions about the relative authority of the Court and the president in interpreting the Constitution. The argument was made most famously as Roosevelt sought to justify his Court-packing plan. Given his immediate object of getting the Court to accept the presidential understanding of the Constitution, Roosevelt broke from the traditional rhetoric of three independent branches. Instead, he "described the American form of Government as a three horse team provided by the Constitution to the American people." The people would find that "two of the horses are pulling in unison today; the third is not," and the people could rightfully "expect the third horse to pull in unison with the other two."[38] The Court was misreading the Constitution, or perhaps not reading it at all. As a result, the "balance of power between the three branches of the Federal Government, has been tipped out of balance by the Courts," and Roosevelt declared, "it is my purpose to restore that balance."[39] Unlike

[35] Lincoln, 600-601. For discussion, see Robert Scigliano, *The Supreme Court and the Presidency* (New York: Free Press, 1971), 39-44.
[36] *Opinions of the Attorneys General*, 10:85, 77.
[37] Scigliano, 42.
[38] Roosevelt, 6:123, 124.
[39] Ibid., 6:133.

lawyers, "the lay rank and file of political parties . . . have respected as sacred *all* branches of their government. They have seen nothing *more* sacred about one branch than about either of the others."[40]

In earlier addresses prior to his proposal to reorganize the judiciary, Roosevelt had hearkened back to the examples of Jefferson, Jackson and Lincoln. In Little Rock, Roosevelt reminded his audience that Jefferson "had the courage, the backbone, to act for the benefit of the United States without the full and unanimous approval of every member of the legal profession." Roosevelt was in fact twisting history a bit to make his point, for the example he used of Jefferson's courage was the Louisiana Purchase, about which Jefferson himself had substantial constitutional qualms. Nonetheless, Roosevelt cast Jefferson as justifying the constitutionality of the Purchase against the lawyerly doubters, "and, my friends, nobody carried the case to the Supreme Court."[41] Similarly, Andrew Jackson was willing to buck the "so-called guardian groups of the Republic," in order to realize an "era of a truer democracy." The "American doctrine" that emerged from the Jacksonian presidency was that "the American people shall not be thwarted from their high purpose to remain the custodians of their own destiny."[42] Roosevelt's most direct appeal to Lincoln and the authority of departmentalism, however, came in a speech he prepared but never had to deliver. In preparation for an adverse ruling from the Court in the gold clause cases, determining whether the government could abrogate gold payments for public and private debts, Roosevelt prepared a speech quoting Lincoln's first inaugural, declaring that "vital questions affecting the whole people" could not be "fixed by decisions of the Supreme Court" unless "the people will have ceased to be their own rulers." Though (presumably) the majority of the justices "have decided these cases in accordance with the letter of the law as they read it," the president had an obligation "to protect the people of the United States to the best of his ability." Roosevelt could not "stand idly by and . . . permit the decision of the Supreme Court to be carried through to its logical, inescapable conclusion" to

[40] Ibid., 6:365.
[41] Ibid., 5:196.
[42] Ibid., 5:198.

the detriment of the country and in disregard of the best understanding of the legal obligations of the government and debtors.[43]

Most recently, Ronald Reagan has questioned the authority of the judiciary to settle contested constitutional meaning. He insisted that "the issue of abortion must be resolved by a democratic process," and called for Congress to pass legislation "to restore legal protection to the unborn" despite the Court's declaration that such laws were unconstitutional.[44] Edwin Meese, Reagan's attorney general, prominently drew the "necessary distinction between the Constitution and constitutional law," and insisted that judge-made constitutional law did not determine the meaning of the Constitution. Constitutional law is merely "what the Supreme Court says about the Constitution," not the authoritative Constitution itself. Citing the examples of Jefferson, Jackson and Lincoln, Meese denied the authority of judicial precedents for resolving political debates over constitutional meaning and insisted that "constitutional interpretation is not the business of the Court only, but also properly the business of all the branches of government."[45] The Reagan administration likewise adopted the position of executive "nonacquiescence" in cases in which the executive branch believed a statute was unconstitutional or in cases of disagreement among the circuit courts as to the meaning of the Constitution, though this assertion of executive interpretive authority was tempered by deference to the holdings of the Supreme Court.[46]

Departmentalist presidents are substantively important in their own right and significant for normative theories of constitutional interpretation, though for empirical theorizing about presidential-judicial relations they are somewhat *sui generis*. It should be noted that these cases of presidential assertion of independent authority to interpret the Constitution are directed toward the Court. This focus does not cover cases of executive departmentalism aimed at Congress, as when Andrew Johnson asserted

[43] Roosevelt, *F.D.R.: His Personal Letters*, ed. Elliott Roosevelt, vol. 3 (New York: Duell, Sloan and Pearce, 1950), 459. Roosevelt apparently also threatened to defy an adverse Court decision involving a military trial of saboteurs during World War II. Scigliano, 49.
[44] Ronald Reagan, *Public Papers of the Presidents of the United States: 1983* (Washington, D.C.: Government Printing Office, 1984), 876.
[45] Edwin Meese, "The Law of the Constitution," *Tulane Law Review* 61 (1987): 981, 982, 985.
[46] See Samuel Estreicher and Richard L. Revesz, "Nonacquiescence by Federal Administrative Agencies," *Yale Law Journal* 98 (1989): 679; Deborah Maranville, "Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism," *Vanderbilt Law Review* 39 (1986): 471. Unsurprisingly, the judiciary reacted negatively to this argument. See, e.g., Lear Siegler, Inc. Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1117-1126 (9th Cir. 1988)

the right to disobey the Tenure of Office Act, in order to bring the constitutional dispute into the courts, or the practice of Bill Clinton and other recent presidents of issuing signing statements expressing constitutional doubts about legislation and pledging to administer the law accordingly. Likewise, Richard Nixon is traditionally not included in the list of departmentalist presidents. Though critical of various court decisions and aggressive in litigation, Nixon did not claim the authority to act contrary to the Court's interpretation of constitutional meaning. Notably, Nixon quickly complied with the Court's ruling to turn over subpoenaed documents to the special prosecutor, despite his attorney's equivocation at oral arguments.[47] Such cases, however, are useful in indicating that presidential challenges to judicial authority are best regarded as existing at one end of a continuum, along which lesser assertions of presidential constitutional authority can be arrayed.

Some Approaches to Understanding Presidential Challenges to Judicial Authority

It is not uncommon for presidents and politicians generally to complain about the Court. It is uncommon for presidents to claim that judicial understandings of the Constitution do not have the authority to bind the coordinate branches and that presidents have an independent authority to interpret the Constitution for themselves and to act on those interpretations in carrying out their own constitutional responsibilities. The ability of modern constitutional theorists to point to examples of such presidential claims in American history may help demonstrate that such arguments are not completely innovative and unprecedented. This does not, however, help us understand why judicial authority has been challenged in this way, why it has been challenged so rarely, or how we should evaluate such challenges.

For many constitutional scholars, such challenges seem quite dangerous. Although some of our most celebrated presidents have embraced departmentalist theories, this has often been seen as a flaw within

[47] During the oral arguments for United States v. Nixon, Justice Thurgood Marshall asked "Well, do you agree that [the issue of executive privilege] is before this Court, and you are submitting it to this Court for decision?" Nixon's attorney, James St. Clair, responded, "This is being submitted to this court for its guidance and judgment with respect to the law. The President, on the other hand, has his obligations under the Constitution." Quoted in Alexander and Schauer, 1364n22.

their presidencies rather than a model to be emulated. Their challenges to judicial authority may be seen as detracting from, rather than contributing to, the greatness of their presidencies. Presidential challenges to judicial authority seem particularly threatening, given that the executive is potentially the "most dangerous branch" since the presidency possesses both force and will and exerts its influence both at the beginning and the end of the legal process.[48] Such challenges to judicial authority are often seen as posing basic threats to the rule of law and constitutionalism.

The theoretical critique of departmentalism converges with a prominent empirical explanation for these episodes of presidential challenge. The normative defense of judicial supremacy against these presidential assertions does not itself make any claims about why these particular presidents make such claims. Like its proponents, the critics of departmentalism are more concerned with its theory than with its historical practice. A political explanation for this historical pattern can be easily derived, however, from a few prominent precepts about American politics.

Robert Jackson, Franklin Roosevelt's attorney general and eventual Supreme Court nominee, provided the core of such an explanation at the end of his examination of "the struggle for judicial supremacy." Jackson argued that the party system has tended "to separate the judiciary from the elective branches and to place them in opposition." Although the party system "often serves to bridge the constitutional division between the executive and legislative branches," that "inducement to cooperation has at all critical times operated in reverse between the judiciary and the elective branches of government." When the dominant party has, in effect, "appointed all the judges," then there will be no important differences between the branches. "But at every turn in national policy where the cleavage between the old order and the new was sharp, the new President has faced a judiciary almost wholly held over from the preceding regime." These partisan differences have "been an estranging influence between the Court and the great Presidents, Jefferson, Jackson, Lincoln and Franklin D. Roosevelt."[49]

[48] Michael Stokes Paulsen, "The Most Dangerous Branch: Executive Power to Say What the Law Is," *Georgetown Law Journal* 83 (1994): 217.
[49] Robert H. Jackson, *The Struggle for Judicial Supremacy* (New York: Vintage, 1941), 314, 315.

This basic argument was given more systematic form in a pioneering article by Robert Dahl. Though Dahl was also working in the shadow of Roosevelt's struggle with the Court, he also had the benefit of observing the operation of the New Deal Court on which Jackson served and Dahl was interested in a slightly different question. Dahl set out to examine the empirical basis for the common claim that Court "stands in some special way as a protection of minorities against tyranny by majorities," or from a different perspective that the Court "supports minority preferences against majorities" in opposition to "popular sovereignty and political equality."[50] Dahl himself thought this quite unlikely. Given the stability of national lawmaking coalitions and the regularity of presidential appointments to the Court, it could be expected that "the 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."[51] Examining the Court's history of striking down congressional statutes, Dahl concluded "except for short-lived transitional periods when the old alliance is disintegrating and the new one is struggling to take control of political institutions, the Supreme Court is inevitably a part of the dominant national alliance."[52] To Dahl, the New Deal and the New Deal Court were indicative of a larger pattern. Courts that lag behind rapid electoral change are obstructive, but the appointment process soon leads to judicial quiescence as the reconstituted Court accepts and legitimates the actions of the political branches.

This simple and intriguing hypothesis seemed to readily explain not only the judicial behavior that concerned Dahl, but also the political challenges to the Court that Robert Jackson, Edward Corwin and others had observed. The judicial politics literature has widely embraced Dahl's basic starting point, that the Court is a policy-making institution and judges will use the power of their institution on behalf of favored policies. Judicial independence should make itself felt in the willingness of judges to exercise their veto over disfavored policies and in the success of judges in imposing their policy agenda on other officials. It would not be surprising if political frustration with the judicial obstruction, however

[50] Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6 (1957): 282, 283.
[51] Ibid., 285.
[52] Ibid., 293.

temporary, would lead to court-curbing efforts to overcome judicial resistance. In particular, presidents who come to power through "realigning" or "critical" elections should face holdover courts, and Jefferson, Jackson, Lincoln and Roosevelt could be seen as the beneficiaries of such critical elections.

Unfortunately, Dahl's simple hypothesis has not borne up well under scrutiny. Subsequent empirical analyses of Dahl's thesis have generally failed to confirm his findings.[53] In terms of the number of judicial invalidations of federal law, the New Deal era is anomalous rather than representative. So-called lagging courts have not been uniquely active in the exercise of judicial review.[54] In addition, the Court has been active during periods of relative electoral stability, when the judiciary should be firmly under the control of the dominant coalition and presumably passively endorsing the work of its coalition partners in Congress. Rather than acting as a reliable partner of elected officials, the Court often emerges as an independent and disruptive force in politics. The realigning elections of 1896 consolidated Republican control over the national government, rather than creating a sharp transition between parties, and yet it was accompanied by increasing judicial activism. Somewhat differently, the Warren Court that was coalescing just as Dahl published his initial article seemed to immediately disappoint his expectation of continued judicial quiescence. The basic pattern of judicial review activity does not match Dahl's framework.

[Insert Table 2.1 about here]

[53] See generally, Richard Funston, "The Supreme Court and Critical Elections," *American Political Science Review* 69 (1975): 795; Jonathan D. Casper, "The Supreme Court and National Policy Making," *American Political Science Review* 70 (1976): 50; Bradley C. Canon and S. Sidney Ulmer, "The Supreme Court and Critical Elections: A Dissent," *American Political Science Review* 70 (1976): 1215; Roger Handberg and Harold F. Hill Jr., "Court Curbing, Court Reversals, and Judicial Review: The Supreme Court versus Congress," *Law and Society Review* 14 (1980): 309; Gregory A. Caldeira and Donald J. McCrone, "Of Time and Judicial Activism: A Study of the U.S. Supreme Court, 1800-1973," in *Supreme Court Activism and Restraint*, eds. Stephen Halpern and Charles Lamb (Lexington, MA: Lexington Books, 1982); William Lasser, "The Supreme Court in Periods of Critical Realignment," *Journal of Politics* 47 (1985): 1174; John B. Taylor, "The Supreme Court and Political Eras: A Perspective on Judicial Power in a Democratic Polity," *Review of Politics* 54 (1992): 345.

[54] Dahl's model suggests other hypotheses beyond the obstruction/deference pattern. For a critique of the hypothesis that the Court can legitimate newly dominant majorities, see David Adamany, "Legitimacy, Realigning Elections, and the Supreme Court," *Wisconsin Law Review* 1973 (1973): 790. For a comprehensive consideration of the thesis that the Court acts as a catalyst for realignments, see John B. Gates, *The Supreme Court and Partisan Realignments* (Boulder, CO: Westview Press, 1992).

This framework for understanding judicial review also has theoretical complications. Dahl suggested that judges behave like policymakers elsewhere in the government, obstructing the policies they dislike. But Dahl ignored the unique institutional environment that mediates the ready linkage of judicial policy preferences with the incidence of judicial invalidation. Court action is shaped by such institutional commitments as precedent, doctrinal analysis, the constitutional text, and the mechanics of litigation.[55] Electorally driven policy innovation will not necessarily provoke judicially relevant problems, regardless of the partisan feelings of holdover judges. Judicial review is not readily analogous to a policy veto. The implications of electoral change for judicial action depend heavily on the particular substance of dominant institutional and policy commitments, which are not easily captured in such formal analyses of partisan transitions.[56] For example, to the extent that judicial review expresses judicial policy preferences, it is asymmetric.[57] Judicial review is more useful for hampering the expansion of government than for hampering the reduction of government, regardless of any policy disagreements between the Court and the elected branches.[58] The expansionist political program of the New Deal Democrats is not representative of periods of electoral transition. Thomas Jefferson, Andrew Jackson and Ronald Reagan all came to power hoping to cut back the national government. Moreover, simply knowing how often the Court has invalidated federal legislation does not establish the political importance or salience of the Court's actions and the laws that were invalidated. To the extent that subsequent scholars have followed

[55] Rogers M. Smith, "Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law," *American Political Science Review* 82 (1988): 89; Howard Gillman, "The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making," in *Supreme Court Decision-Making*, eds. Cornell W. Clayton and Howard Gillman (Chicago: University of Chicago Press, 1999); Keith E. Whittington, "Once More Unto the Breach: Post-Behavioralist Approaches to Judicial Politics," *Law and Social Inquiry* 25 (2000): 601.

[56] See, e.g., Wallace Mendelson, "The Politics of Judicial Supremacy," *Journal of Law and Economics* 4 (1961): 175; Arnold Paul, *Conservative Crisis and the Rule of Law* (Ithaca: Cornell University Press, 1960).

[57] Mark A. Graber, "The Jacksonian Origins of Chase Court Activism," *Journal of Supreme Court History* 25 (2000): 17.

[58] This point can be complicated, however. As the Rehnquist Court has shown, judicial review can be used to obstruct the federal government's efforts to constrain the state governments. The judicial power to interpret statutes, rather than simply void them, suggests another mechanism for the judiciary to pursue its distinct policy goals and one that can be used to expand, as well as restrict, government. See, e.g., Casper, 56; R. Shep Melnick, *Between the Lines* (Washington, D.C.: Brookings Institution, 1994).

Dahl's lead in simply counting how many laws have been invalidated by the Court, an important dimension of interbranch tensions has been overlooked.[59]

The inadequacy of Dahl's model and measures of judicial activism not only still leaves us with the problem of explaining judicial behavior, but it also leaves us with the lingering problem of explaining political reactions to the Court. We are left with his core intuitive insight into the American historical experience – that elected officials are periodically in conflict with the Court – but without his ready explanation for that conflict, an unusually obstructionist judiciary. For those who would follow Dahl's logic, elected officials seemed to have attacked the Court without political justification, with the exception of Franklin Roosevelt. David Adamany, for example, suggests that these political challenges to the Court occur because the new majorities are "harboring deep hostility toward the Court" because of its earlier decisions and "resent . . . that they cannot immediately place their own men in the desirable seats of judicial authority." These presidents and their supporters hysterically overreact to the Court, "inspiring internal disunity" and becoming "diverted from [their] program of substantive policies" by a pointless "quarrel."[60] The explanation for such presidential challenges turns from the political to the psychological, a failure of "emotional intelligence" on the part of individual officeholders.[61]

Dahl framed conflicts between political actors and the courts in terms of divergent policy preferences. One alternative is to reframe those conflicts in terms of substantive disputes over constitutional meaning. Although political scientists have been quick to accept Dahl's portrait of judges as policy-makers, there is an intuitive appeal to regarding them as at least as concerned with the perceived constitutional transgressions of political majorities as with their policy agenda. Rather than judges stooping to battle elected officials over policy, perhaps elected officials rise up to battle judges over the Constitution.

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[59] It is notable that in the New Deal period that motivated Dahl incidence of judicial review and significance of judicial review was conflated. The Court was both very active and acting on politically important issues. Dahl and others have made the sensible assumption that the exercise of judicial review is intrinsically important. It may well be the case, however, that judicial review can be exercised in a fashion that is not particularly politically salient.
[60] David Adamany, "The Supreme Court's Role in Critical Elections," in *Realignments in American Politics*, eds. Bruce Campbell and Richard Trilling (Austin: University of Texas Press, 1980), 245, 246.
[61] Fred I. Greenstein, *The Presidential Difference* (New York: Free Press, 2000), 6.

Refocusing on the constitutional issues involved in these conflicts, and not just the policy obstructions, may clarify why these conflicts occurred and what was at stake in these disputes.

Bruce Ackerman offers a theory of constitutional change that moves in that direction. He posits a number of "constitutional moments" over the course of American history in which political actors alter the Constitution by unconventional methods and launch a new constitutional regime.[62] For Ackerman, such presidential challenges to the Court signal a political interest in transforming the Constitution, a transformation that would be complete if political officials were able to win large and sustained electoral mandates for their constitutional proposals and force other institutions to accede to their wishes. Eschewing formal constitutional amendments through regular Article V procedures, transformative leaders can effectively amend the Constitution by overcoming the institutional obstructions to their constitutional proposals. Although Ackerman recognizes Jefferson's and Jackson's conflicts with the judiciary, this process of constitutional transformation is most fully realized in Roosevelt's triumph over the Court in 1937. Ackerman judges the Jeffersonian and Jacksonian projects as insufficiently sweeping, insufficiently productive of judicial doctrine, and substantively too decentralizing and libertarian to be significant constitutional moments initiating new constitutional regimes, but they are part of a pattern of constitutional politics.[63]

Ackerman's attention to constitutional politics is extremely helpful, but it ironically remains too wedded to judicial supremacy. Ackerman does not question the central claim of judicial supremacy, that the courts are the authoritative interpreters of the Constitution. Although Ackerman does not provide an elaborated theory of constitutional interpretation, he works with an implicit assumption that the courts faithfully preserve the Constitution until political actors demonstrate the authority to amend that higher law.[64] A striking feature of Ackerman's approach is his argument that apparent judicial mistakes in constitutional interpretation, including most notably *Dred Scott* and *Lochner*, were in fact the correct

[62] Bruce Ackerman, *We the People*, vol. 1 (Cambridge: Harvard University Press, 1991); Ackerman, *We the People*, vol. 2 (Cambridge: Harvard University Press, 1998).
[63] Ackerman, 1:71-78.
[64] For a critique of Ackerman for his lack of an interpretive theory, see Robert Justin Lipkin, *Constitutional Revolutions* (Durham, NC: Duke University Press, 2000), 28-76.

interpretations of the Constitution as it existed at the time. Disagreement with those decisions suggested only the need to amend the Constitution. The Constitution appears to have a determinate, if not necessarily obvious, meaning, which the judiciary affirms and enforces through constitutional law. Political attacks on the Court are not challenges to judicial interpretive authority, but rather signals to the electorate that an unconventional constitutional amendment is being proposed. Constitutional politics is concerned with making new higher law, not interpreting the existing law.

Ackerman provides a clear political account of political conflict with the Court, and one that has the appealing feature of recognizing elected officials as constitutional agents. Two difficulties with this account are particularly relevant for present purposes, however. First, Ackerman's emphasis on an amendment model of constitutional change is theoretically limiting and historically problematic.[65] In particular, Ackerman never seriously grapples with the question of how these elected officials understood and presented their own actions. This problem infects his extended discussion of the passage of the Reconstruction amendments, where he ignores the extent to which the Reconstruction Congress is committed to a legislative supremacy within the normal constitutional framework as well as how they understood and justified the irregularities in the process creating the Reconstruction amendments. More immediately, it infects his discussion of Roosevelt and the New Deal. He does not explore the administration's own thinking about how best to respond to the Court's challenge to the New Deal, including its debates over whether to pursue an Article V amendment and whether Roosevelt's fundamental problem was with the Constitution as it existed or simply with the Court itself. The Roosevelt administration ultimately decided to question the fidelity of the *Lochner* Court, not the acceptability of the written Constitution. Like his predecessors, Roosevelt challenged judicial supremacy and repeatedly offered a distinctive interpretation of the Constitution as more faithful to the constitutional inheritance than the one asserted by the judiciary.

[65] For one alternative approach to constitutional politics, see Keith E. Whittington, *Constitutional Construction* (Cambridge: Harvard University Press, 1999).

Although a unanimous Court lined up against the administration in some embarrassing defeats such as the May 1935 *Schechter* and *Humphrey* cases striking down the National Recovery Act and limiting the presidential removal power, the New Dealers knew from early on that the Court was more generally sharply divided on the constitutionality of social legislation and that everything turned on the swing vote of Justice Owen Roberts.[66] Three months earlier, the administration had won some close cases, and Roosevelt wrote, "I shudder at the closeness of five to four decisions in these important matters." Senator George Norris was more proactive, "These five to four Supreme Court decisions on the constitutionality of congressional acts it seems to me are illogical and should not occur in a country like ours."[67] When Justice Roberts swung the other way on the Railroad Retirement Act in early May, the Department of Justice began to investigate "the question of the right of the Congress, by legislation, to limit the terms and conditions upon which the Supreme Court can pass on constitutional questions."[68] The press was soon reporting rumors that Roberts would make a presidential run in 1936.[69] Prominent legal scholars Felix Frankfurter, Henry Hart, and Thurman Arnold, among others, took to the media to denounce Roberts as entering a "mental darkroom" and lacking "common sense," "taking debaters' points" with a "combination of pure fantasy and legal syllogisms with little persuasive power." The apparent solidification of a narrow conservative majority on the Court had convinced many New Dealers that "the menace of the Supreme Court" hung "over all legal attempts to solve the social problems that are crowding upon us."[70] Dissenting Justice Harlan Fiske Stone, later Roosevelt's choice as Chief Justice, characterized the decision to sympathetic legal scholar Thomas Reed Powell as "the worse performance

[66] Humphrey's Executor v. United States, 295 U.S. 602 (1935); A.L.A. Schechter Poultry Corporation v. United States, 295 U.S. 495 (1935). Roosevelt was shocked by the three unanimous opinions that were handed down against him on May 27, 1935, asking "where was Ben Cardozo?." Stanley Reed, FDR's solicitor general at the time, had thought that *Humphrey* "couldn't be lost." Quoted in William E. Leuchtenburg, *The Supreme Court Reborn* (New York: Oxford University Press, 1995), 89, 64.
[67] Quoted in Leuchtenburg, 88.
[68] Ibid., 89.
[69] Leuchtenburg, 43-44.
[70] Quoted in Leuchtenburg, 46-47.

on the Court in my time."[71] Attorney General Homer Cummings declared, "I tell you, Mr. President, they mean to destroy us."[72]

For those who had been long engaged in the Progressive critique of the *Lochner* era jurisprudence, it was clear that the primary fault was in the Court rather than in the Constitution. That still left the immediate question of what was to be done, of course, and options under active consideration ranged from corrective constitutional amendments to some form of legislative court-curbing. A veteran of previous amendment battles, Roosevelt was skeptical of the Article V route that faced obstructions in the states and still left interpretive authority in the courts. Strategic and ideological considerations came together in the reconstructive posture. Standing on three decades of Progressive constitutional scholarship and agitation, Roosevelt consciously insisted that the Constitution did not need to be amended. It needed to be more favorably interpreted.[73] The courts needed to be able to "recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world."[74] The Framers had intentionally and appropriately used "phrases which flexible statesmanship of the future, within the Constitution, could adapt to time and circumstance." It was an "unending struggle" to "preserve this original broad concept of the Constitution" against those who would "shrivel" it. Some of the justices "have sought to *read* into the Constitution language which the framers refused to *write* into the Constitution," but the president asked the American people to "give their fealty to the Constitution *itself* and not to its misinterpreters."[75] In a May 1935 press conference Roosevelt compared the recent decisions of the Court to its actions in the *Dred Scott* case, but reassured reporters that the mistake could be corrected without the necessity of a constitutional amendment.[76] In pitching the nation back to the "horse-and-buggy age," the Court had not only neglected to interpret "the Constitution in light of these

[71] Ibid., 48.
[72] Ibid., 92.
[73] In a 1932 campaign address, Roosevelt suggested a similar instinct in connection with his earlier career. In New York, reformers "had to go about amending the Constitution" in order to pass workmen's compensation, but the fault was in "the courts, thinking in terms of the Seventeenth Century, as some courts do." Roosevelt, *Papers*, 1:774.
[74] Roosevelt, *Papers*, 6:55.
[75] Roosevelt, *Papers*, 6:363, 366, 367.
[76] Roosevelt, Papers, 4:222.

new things that have come to the country" but had also ignored its own prior decisions, "the whole tendency" of which had been to view the Constitution "in the light of present-day civilization."[77]

The second difficulty with this account of constitutional politics is that it does not extend its political analysis far enough. Ackerman is particularly enlightening in explaining the political rationale for carrying the debate onto the constitutional dimension. Elected officials do not deliberate on the Constitution because they are particularly high-minded but because they have immediate political needs that gradually draw them into constitutional disputes. In these moments of constitutional politics, Ackerman provides a political explanation for why the judiciary is challenged. He has not, to this point, provided a similar political explanation for the presumably more deferential behavior of elected officials at other times or for the behavior of judges at any time. The possibility of judicial politics or the judiciary as an active agent of constitutional development creates severe problems for his normative and historical narrative, and Ackerman takes pains to marginalize it. The preservationist role of the judiciary is generally assumed to be politically unproblematic. In keeping with the assertion of the Court in *Cooper*, Ackerman seems to assume that the principle that the Court is "supreme in the exposition of the law of the Constitution" has "ever since [*Marbury*] been respected by this Court and the Country."[78] That assumption remains problematic, and the political foundations of judicial supremacy need to be laid bare.

Constitutional Authority in Political Time

These presidential challenges to the judicial authority to determine constitutional meaning can be better understood if they are placed within their particular political context and the political tasks that these presidents have faced. Since constitutional theory has generally proceeded on the assumption that constitutional meaning, including the determination of the institutional authority to settle constitutional disputes, is a matter of abstract reasoning, departmentalist claims have been treated as logical conclusions

[77] Ibid., 209, 210.
[78] Cooper v. Aaron, 358 U.S. 18 (1958).

from fundamental postulates about constitutional text and structure.[79] The correctness of that reasoning can then be readily abstracted from any immediate political context. A more developmental approach would suggest that claims about constitutional meaning arise out of particular political contexts and are only comprehensible when considered in that context. The central question to be answered is why these presidents made such challenges and why they attracted substantial political support in so doing.

The traditionally recognized departmentalist presidents are notable for the ambition of their political projects, as well as for their conflicts with the courts. These presidents are distinctive in their authority to act to remake the inherited political system. In his examination of presidential leadership, Stephen Skowronek has emphasized the extent to which presidential action depends upon a prior claim to authority.[80] Before an individual occupies the presidency, the political agenda is already partially determined through commitments previously made by the candidate, the president's party, and the president's predecessors. In addition, presidents are not free to act as they choose on the agenda that they do face. Skowronek suggests that the authority to act is derived from the political regime, the "commitments of ideology and interest embodied in the preexisting institutional arrangements."[81] Depending on how the president relates to this larger political order – his claim to political authority to supplement his claim on the inherent resources of his office – some strategic options become easier, while others become more difficult to pursue. The concept of political time describes the pattern formed by the presidential relationship to political authority, the intersection of the vitality of the regime and the president's relationship to it.

Reconstructive presidents periodically emerge in opposition to weak regimes. Their authority in office is rooted in their antagonism to existing commitments, allowing them to gain prestige precisely through their efforts to shatter the inherited constitutional order. Presidents such as Abraham Lincoln and Franklin Roosevelt achieve "greatness" through their ability to tear down the inherited but discredited

[79] E.g., Michael Stokes Paulsen, "The Most Dangerous Branch: Executive Power to Say What the Law Is," *Georgetown Law Journal* 83 (1994): 217.
[80] Stephen Skowronek, *The Politics Presidents Make* (Cambridge: Harvard University Press, 1993).
[81] Skowronek, 34.

regime and raise up a new one in their own image. They "reconstruct" the nation by reinterpreting its fundamental commitments. Because their leadership task is foundational, they are called upon to reconsider basic substantive political values and reconfigure existing institutional arrangements. The political strength of these substantive claims enhances their own authority to act and thus the institutional stature of the presidency. Lincoln became a powerful president because of the political support that he could muster behind his political vision, and his presidency became historic as a consequence of the constitutional depth and political success of that vision.

An important feature of this model of political time is the relative rarity of reconstructive presidents. Few presidents have either the inclination or support to mount such a political effort. The political authority that falls to these presidents is not readily available to their successors. If presidential challenges to judicial supremacy are fundamentally connected to the politics of reconstruction, then the nature of the threat to constitutionalism that many critics of coordinate constitutional interpretation raise has to be reevaluated. A "Euclidean" approach to constitutional theory can neither explain the historic assertion of departmentalist claims nor recognize their limited scope.[82] Although these historic episodes of presidential attacks on the Court are familiar, they have not been adequately integrated into constitutional theory. The next section indicates how our historical experience with presidential challenges to judicial supremacy is coherent with the political time approach and suggests how these particular presidential-judicial conflicts need to be situated within the broader context of these administrations and their political efforts.

Reconstructive Presidencies and Constitutional Authority

In order to address the relationship of the judiciary to the reconstructive presidency, the political order being shattered and recreated by those presidents must be reconsidered. At times, Skowronek suggests that presidential efforts to recast the dominant regime are somehow significant for an understanding of the

[82] Paulsen, 226.

constitutional order. He notes briefly, for example, that these reconstructive presidents "have reset the very terms and conditions of constitutional government" and that their struggles "have penetrated to the deepest questions of governmental design and of the proper relations between state and society."[83] But his explicit discussion of political regimes renders them essentially partisan, oriented around relatively narrow differences of policy and constituency. The Constitution enters most directly into his discussion as an important background condition for the emergence of reconstructive politics. The "constitutional ordering of institutional prerogatives . . . frames the persistent pattern of political disruption."[84] By creating a system of separated powers, the Constitution insures that presidents will struggle with other actors for control over the government. As part of that basic institutional design, the Constitution arms each president with the "same basic prerogatives of the presidential office," such as the pardoning and veto powers.[85] Although Bruce Ackerman uses the term "constitutional politics" to refer to the political effort to remake the effective set of fundamental values and formal powers, Skowronek uses the same term merely to refer to the presidential exploitation of their available powers in pursuit of other, non-constitutional goals.[86] When he speaks of presidents keeping or recasting the "political faith," he is inevitably speaking of coalitional policy platforms.[87] He does find the Court to be an increasing impediment to presidential goals, but the judiciary in this sense is just part of the generally "thickening" institutional environment, and Skowronek offers no particular theory of presidential-judicial conflict and attributes no special significance to it.[88]

The constitutional politics of reconstructive presidents extends beyond the instrumental use of available institutional resources and formal powers. Constitutional meaning is not fixed. The president cannot uncontroversially claim the authority of his office, for the nature of the office is itself often in dispute.[89] Moreover, the regimes that presidents attempt to structure, and which in turn structure

[83] Skowronek, 39, 38.
[84] Skowronek, 9.
[85] Skowronek, 12.
[86] Bruce Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991), 7; Skowronek, 12.
[87] Skowronek, 12.
[88] Skowronek, 75.
[89] This feature of presidential politics is not emphasized here. Skowronek recognizes that the presidential office develops over time and discusses, for example, Jackson's expansion of the veto power and Lincoln's constitutional

presidential action, are deeply entangled with the constitutional order as they understand it. This feature of reconstructive politics makes the Court particularly relevant and insures presidential conflict with the judiciary. For these presidents, fellow partisans are not the only threats to their authority, for their authority claims are constitutional as well as partisan. Because reconstructive presidents are attempting to restructure inherited constitutional understandings, they find the judiciary to be an intrinsic challenge to their authority, even absent the contemporaneous exercise of judicial review. The heightened constitutional sensitivity of these presidents is likely to make any contemporary judicial actions unusually salient, far out of proportion to what might be expected simply looking at the volume of judicial activity. At least as fundamental as any judicial policy obstruction, however, is the judiciary's constant engagement with constitutional meaning. For political leaders with reconstructive ambitions, the ongoing judicial elaboration of the constitutional inheritance necessarily frustrates that ambition and potentially calls into question the very legitimacy of substantive presidential actions. The assertion of "judicial omniscience in the interpretation of the Constitution" will itself seem quite arrogant and shocking to political leaders who sought and gained power in order to advance radically different constitutional understandings.[90] As a result, judicial authority within the constitutional system should be expected to vary with political time as well.[91] The president and the judiciary compete over the same constitutional space, with the authority of presidents to reconstruct the inherited order supplanting judicial authority to settle disputed constitutional meaning.

In order to develop this dimension of reconstructive politics, the constitutional concerns of these presidents must be emphasized. The connections between their conflicts with the Court and other actors must be developed, and the logic of the politics of technique that Skowronek finds as characteristic of late regime leaders must be extended to the legal sphere. This section develops several relevant features of reconstructive politics and their consequences for the separation of powers. These historical episodes are

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innovations in prosecuting the Civil War. More often, however, he distinguishes institutional innovation from constitutional continuity, creating some unresolved tensions for his historical analysis.

[90] Leuchtenburg, 48 (quoting Harlan Fiske Stone).

[91] It might be noted that judicial authority appears to vary with "secular time" also, as discussed in Chapter Five below. See also, Caldeira and McCrone; Mark Silverstein and Benjamin Ginsberg, "The Supreme Court and the New Politics of Judicial Review," *Political Science Quarterly* 102 (1987): 371.

not unfamiliar, but they are sharply at odds with the assumptions of judicially centered theories of constitutionalism.

These historical episodes of presidential challenge to the judicial authority to determine constitutional meaning are best understood as part of political time and as an aspect of the president's reconstructive stance, rather than in the terms of currently available accounts. In particular, existing accounts of such presidential-Court conflicts posit that these presidents are engaged in the majoritarian rejection of limits of their policy preferences and demonstrate a targeted hostility toward an obstructionist judiciary. Neither claim provides an adequate interpretation of these events. In addition to advancing the specific institutional claim that presidents have a right to engage in coordinate construction of constitutional meaning, reconstructive presidents can be expected to articulate a more general and substantive vision of the Constitution. The judiciary is unlikely to be the only adversary that the president will face, and presidential challenges to judicial supremacy are likely to be linked to presidential assaults on other political enemies who challenge presidential leadership. Departmentalist claims are also likely to be accompanied by a politicization of constitutional meaning that displaces the legalistic discourse favored by the Court. The reconstructive perspective calls attention to the positive contribution these presidents have made to American constitutionalism and to the dynamics of American constitutional development.

Visions of the Constitution

Reconstructive presidents are most concerned with establishing their own substantive vision of the constitutional order. Conflict with the Court is merely a by-product of this primary focus. Existing approaches to presidential challenges to judicial supremacy often view them in purely instrumental terms, legal ploys designed to overcome policy conflicts between the president and the Court. Such approaches overlook the substantive political vision that reconstructive presidents seek to realize. Particular conflicts with the courts are contingent outcomes of this constitutive effort. Departmentalism is implicit in the reconstructive posture, rather than the legitimating theory for attacks on the Court. Reconstructive presidents need not be hostile to courts per se or judicial review in general. For most presidents, there

may be occasional disagreements with the Court and efforts to alter the trajectory of constitutional law, but there is no crisis of, or challenge to, judicial authority. For reconstructive presidents, however, establishing a contested vision of the constitutional order is central to their political task.

Reconstructive politics shifts the institutional locus for the debate over constitutional meaning, as the examples of Jefferson and Roosevelt make clear. The challenge to judicial authority mounted by these presidents did not sweep constitutional principles from the public sphere, as many modern advocates of judicial supremacy tend to assume. Rather, a de-emphasis on the judicial interpretation of the Constitution simply accompanied an increased focus on constitutional meaning on the part of the president. Whereas the judiciary usually emphasizes the constitutional constraints on government power, reconstructive presidents draw inspiration from the Constitution for their positive vision of how political power should be used. In presidential hands, the Constitution becomes an ideal to be realized in political practice rather than a set of rules that hamper political action. The symbol of the Constitution is employed to legitimate presidential actions. The policies of the administration are portrayed as not merely consistent with but as products of the Constitution. As architects of fundamental political change, reconstructive presidents appeal to the Constitution to help legitimate their enterprise. The substantive vision of the Constitution that these presidents offer is explicitly different than the interpretations and practices of their immediate predecessors, but these presidents insist that theirs is an effort to save the Constitution from the mishandling of their immediate predecessors and the Court itself.

For Thomas Jefferson and his followers working within the republican paradigm, the "Revolution of 1800" meant saving the Constitution from the Federalists' centralizing and monarchical tendencies. Jefferson had left Washington's administration as a result of disagreements over the constitutional and policy wisdom of presidential policies. The subsequent administration of John Adams and his congressional supporters pursued even more aggressively an effort to expand the power of the national government. The Republican Party began in opposition to what was seen as the Federalists' constitutional heresy. But for Jefferson, unlike some future presidents, those apparent constitutional errors were still of recent vintage. The revolution required less the adoption of a whole new set of policies than the reversal of recent Federalist initiatives and the prevention of future drift, "the inviolable

preservation of our present federal constitution."[92] The Jeffersonians feared that the Constitution was being strangled in its cradle, and extraordinary means such as the formation of an organized political party were necessary to preserve it from a cabal of aristocratic conspirators. For the Jeffersonians, Federalist policies fostered corruption within the republic, using public resources to support private privilege through such instruments as protectionist tariffs and excise taxes. At the same time, "more disposed to coerce than to court" the public, the Federalists were using the state apparatus to consolidate their own power through such actions as the expansion of the judiciary and the passage of the Alien and Sedition Acts.[93]

Jefferson insisted on a return to first principles: "a wise and frugal government which shall restrain men from injuring one another" and be dominated by the legislature was the "sum of good government."[94] Believing that the citizenry "agreed in ancient whig principles," it was Jefferson's task merely to "define and declare them" to provide "the ground on which we could rally" to resist the enemies of the Constitution.[95] For his supporters, Jefferson's ascension to office meant that "the Revolution of 1776 is now and for the first time arrived at its completion," as "the issue of which rested the liberty, Constitution, and happiness of America" was resolved.[96] Jefferson's constitutional task after the election was primarily negative, uprooting as many of the invidious institutions introduced by the Federalists as advisable. Some were retained, most notably the National Bank that Madison had fought in Congress and Jefferson had fought in the cabinet during the Washington administration as unwise and grossly unconstitutional.[97] Many others were dismantled. Those parts of the hated Alien and Sedition Acts that had not expired by their own terms were repealed, and those who had been prosecuted were pardoned and their fines reimbursed with interest. A host of internal taxes instituted by the Federalists were immediately repealed, and the military and its budget were slashed. Cost-cutting efforts were undertaken

[92] Jefferson, *Writings*, ed. Ford, 7:327.
[93] Jefferson, *Writings*, ed. Ford, 7:447.
[94] Jefferson, *Writings*, ed. Ford, 8:3.
[95] Thomas Jefferson, *The Writings of Thomas Jefferson*, ed. H.A. Washington, 9 vols. (New York: John C. Riker, 1853-1856), 4:386.
[96] Quoted in Lance Banning, *The Jefferson Persuasion* (Ithaca: Cornell University Press, 1978), 270.
[97] Stanley Elkins and Eric McKitrick, *The Age of Federalism* (New York: Oxford University Press, 1993), 224-240; David P. Currie, *The Constitution in Congress* (Chicago: University of Chicago Press, 1997), 78-80.

in the domestic budget, with some general tightening of the appropriations process, in order to reduce government and ease the burden of the public debt. The Judiciary Act of 1801 was repealed, eliminating both Federalist judges and the federal judicial presence in the countryside.[98] The mobilization of the late 1790s began an extensive process of specifying the true meaning of the Constitution and identifying constitutional errors. Federalist politicians and publicists, as well as the Court, were frequent targets of criticism, as the Jeffersonians sought to teach its constitutional values and consolidate their dominance in American politics.

Even at this early date, however, Jeffersonian constitutionalism was not simply a return to the pristine Constitution before the Federalist fall. The Jeffersonian Constitution carried different inflections and emphases than it had before, developed through the interaction of inherited principle, changing circumstance, and response to Federalist actions. Themes of democracy, free speech, agrarianism, and frugality were more prominent in the reconstruction of the Constitution than they had been previously. The president called upon the nation "to retrace our steps and to regain the road which alone leads to peace, liberty, and safety," recovering the "creed of our political faith" and the "text of civil instruction."[99] The Jeffersonian interpretation of the Constitution built on an existing tradition, but it did so selectively. Jefferson provided a sweeping vision of constitutional principles and their political implications, not detailed textual analysis of the founding document. Even as John Marshall in the judiciary worked to make constitutional interpretation seem more technical and apolitical in cases such as *Marbury*, the Jeffersonians in the public arena emphasized the contested nature of constitutional meaning and the need for a broad-based campaign to win support for their constitutional vision.

Franklin Roosevelt's understanding of the crisis of his times and the appropriate response to it was quite different than Jefferson's, but the two presidents shared a concern with recovering the Constitution as a foundation of and guide for their politics. If Jefferson feared that the Constitution had become a "mere thing of wax" in the hands of his opponents, Roosevelt and his allies complained that the

[98] See generally, Forrest McDonald, *The Presidency of Thomas Jefferson* (Lawrence: University Press of Kansas, 1976), 41-52; Leonard D. White, *The Jeffersonians* (New York: Macmillan, 1956); Richard E. Ellis, *The Jeffersonian Crisis* (New York: Norton, 1971), 19-107, 233-284; Drew R. McCoy, *The Elusive Republic* (New York: Norton, 1980).
[99] Jefferson, *Writings*, ed. Ford, 8:5.

Constitution had become a "straitjacket" as implemented by his foes.[100] Like Jefferson, Roosevelt thought the Constitution was more than merely a set of constraints on government. It was a normative ideal toward which political actors should strive. In an important 1932 campaign speech to the Commonwealth Club, Roosevelt contended that predatory government was overcome by two commitments: one to "limitations on arbitrary power," but the other to "the rise of the ethical conception that a ruler bore a responsibility for the welfare of his subjects."[101] In pledging himself "to a new deal for the American people," Roosevelt continually emphasized that the administration, the Democratic Party, and the U.S. government should be dedicated to "the greatest good to the greatest number of our citizens."[102] Government had the obligation and the power to secure "economic and social security" for "the great mass of our people."[103] Quoting Chief Justice Edward White, Roosevelt insisted that the Constitution should not be viewed as being "a barrier to progress instead of being the broad highway through which alone true progress may be enjoyed."[104] Although Roosevelt's particular conflicts with the Court centered on legal restrictions that hampered the administration's policies, the president also drew upon the Constitution to create positive authority for the New Deal. The Constitution was flexible enough to allow Roosevelt's actions, and progressive enough to call for such actions.

The "New Deal" was more than a slogan for a particular list of policies. The New Deal was the realization of Roosevelt's constitutional vision, an effort to achieve "greater freedom [and] greater security for the average man."[105] As such it was tied less to the particular policy approach embodied in the "First" New Deal or the "Second" New Deal, than to the general commitment to positive popular government. In realizing that commitment, Roosevelt was generally less proactive than reactive. His initial proposals embodied in such First New Deal legislation as the National Industrial Recovery Act were largely more ambitious versions of the government-business cooperation efforts favored by his

[100] Jefferson, *Writings*, ed. Ford, 10:141; "Unshackling the Tax Power," *New Republic* (30 January 1935).
[101] Franklin D. Roosevelt, *Public Papers and Addresses of Franklin D. Roosevelt*, ed. Samuel I. Rosenman, 6 vols. (New York: Random House, 1938), 1:745.
[102] Roosevelt, 1:659, 650.
[103] Roosevelt, 6:361.
[104] Roosevelt, 3:421.
[105] Roosevelt, 3:422.

predecessor.[106] Having committed the government to progressive ends, however, the Roosevelt administration did struggle to be responsive to the cacophony of competing pressures and interests that commitment had helped unleash, resulting in legislation such as the Wagner Act and the Social Security Act.[107] At the same time, Roosevelt aggressively sought to shape the popular image of the Republicanism he intended to displace. Despite many apparent similarities at the policy level, Roosevelt maximized the apparent ideological divisions between the New Deal and the old order, portraying his opponents as Social Darwinists, reactionaries, and Tories. Roosevelt denounced "Republican leaders" as "false prophets" who had "failed in national vision." In their place, Roosevelt called upon his followers to "constitute ourselves prophets of a new order" that would "restore America to its own people."[108]

One of Roosevelt's central political tasks was to articulate a constitutional order consistent with the social demands of the modern age. In his speech to the Commonwealth Club during his first presidential campaign, Roosevelt declared that "faith in America . . . demand[s] that we recognize the new terms of the old social contract."[109] His language here is significant. The political task is to reinterpret the old, to reconcile the new political commitments with the inherited constitutional order, not simply to claim legitimacy on completely new grounds. The particular new terms that Roosevelt hoped to recognize required "the development of an economic declaration of rights, an economic constitutional order."[110] A mature nation would abandon the "jungle law of the survival of the so-called fittest" in order to implement a "philosophy of social justice through social action."[111] But such social justice was merely "an expression, in concrete form, of the human rights" perpetuated "by the adoption of the Constitution of the United States."[112] The New Deal was the appropriate realization of the Constitution's aspirations and commitments in the context of a new political economy.

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[106] See, e.g., Ellis Hawley, "Herbert Hoover and Modern American History: Sixty Years After," in *Herbert Hoover and the Historians*, ed. Mark M. Dodge (West Branch, IO: Herbert Hoover Presidential Library Association, 1989);
[107] For an overview, see Colin Gordon, "Rethinking the New Deal," *Columbia Law Review* 98 (1998): 2029.
[108] Roosevelt, 1:658-659.
[109] Roosevelt, 1:756.
[110] Roosevelt, 1:752.
[111] Roosevelt, 4:771.
[112] Roosevelt, 4:385.

Government as an instrument of social justice was not only to secure human rights, however, it was also to democratize government. Roosevelt's New Deal elaborated the promise of a government working for the "general welfare" of the whole people, including the "forgotten man at the bottom of the economic pyramid."[113] The government was to be the custodian of the whole people and responsive to the whole people. Such efforts were understood to protect democratic forms of government against either reactionary or radical threats and to better realize the democratic promise of the constitutional inheritance itself. Roosevelt's reconstruction of constitutional authority served the dual purpose of loosening the constraints on government power and of reframing the positive responsibilities of government.[114] Just as Jefferson's vision of good government required political officials to prevent citizens from injuring one another and nothing more, so Roosevelt's vision required officials to "cure . . . these evils of society" and nothing less.[115]

Pervasive Presidential Conflict

Constitutional analyses of these presidential-judicial conflicts often take them in isolation. The Court is portrayed as the sole obstruction to an otherwise dominant governing majority, and these departmentalist presidents single out the judiciary as a particular object of scorn and criticism. As a consequence, the judiciary is imagined to be uniquely vulnerable to presidential aggressions, a lonely bastion of constitutionalism under siege by feckless politicians. These clashes with the judiciary,

[113] Roosevelt, 1:625. Roosevelt was drawing on a vibrant tradition of reformist constitutional thought. William E. Forbath, "Caste, Class, and Equal Citizenship," *Michigan Law Review* 98 (1999): 1, 23-76.

[114]Lincoln and Reagan shared with Roosevelt this concern with establishing the new terms of the old order. In contrast, Jefferson and Jackson primarily emphasized the need to save the Constitution from imminent threat of subversion. For the later presidents, the problems facing the constitutional order are long-standing, not imminent. The true Constitution had to be recovered, but it could not simply be saved. For Roosevelt, this required shedding the immature philosophy of social Darwinism. For Lincoln, the promissory note of the Declaration of Independence's egalitarianism had to be repaid and the temporary compromise with slavery had to be abandoned. Garry Wills, *Lincoln at Gettysburg* (New York: Simon and Schuster, 1992); James M. McPherson, *Abraham Lincoln and the Second American Revolution* (New York: Oxford University Press, 1991). For Reagan, the excesses of modern liberalism had to be purged from government and society in "a Second American Revolution of hope and opportunity" in order to "renew the meaning of the Constitution" and "restore constitutional government" so that free individuals could reap the rewards of their own efforts. Ronald K. Muir, Jr., "Ronald Reagan: The Primacy of Rhetoric," in *Leadership in the Modern Presidency*, ed. Fred I. Greenstein (Cambridge: Harvard University Press, 1988), 260.

[115] Jefferson, *Writings*, ed. Ford, 9:197; Roosevelt, 4:423.

however, are part of a more general pattern of pervasive conflict that characterizes these administrations. Conflicts with the courts are only a single skirmish within the larger presidential offensive to establish his authority to remake American politics, as more detailed consideration of Jackson and Roosevelt demonstrates.

Andrew Jackson's veto of legislation to recharter the Second National Bank is the focal point for much of the analysis of his challenge to the judiciary. Jackson was in part faced with the difficulty that the veto power had traditionally, though not uniformly, been exercised on constitutional, not policy, grounds. A constitutional objection to the Bank bill was complicated, however, by the Supreme Court's earlier acceptance in *McCulloch v. Maryland* of an implied congressional power to incorporate the Bank.[116] In order to veto the Bank bill, Jackson would have to reject the Court's authority to settle the constitutional issue. Jackson argued that the president must be guided by his "own opinion of the Constitution" and defend it "as he understands it, and not as it is understood by others."[117] The Supreme Court "ought not to control the coordinate authorities of this Government." As far as Jackson was concerned, it was the legislature's "abandonment of the legitimate objects of Government" that posed "most of the dangers" to the republic. The president rejected both Chief Justice John Marshall's specific constitutional reasoning and the Court's authority to bind the other departments to its particular understanding of constitutional requirements. Jackson's hostility to the Marshall Court was often intense, and when the Court became an obstacle to his own political goals, he was prepared to ignore it.[118]

Although Jackson's argument has clear implications for judicial authority, it must also be understood in the context of more pervasive political conflict. Jackson had not singled out the judiciary for particular

[116] McCulloch v. Maryland, 17 U.S. 316 (1819).
[117] Andrew Jackson, *A Compilation of the Messages and Papers of the Presidents*, ed. James D. Richardson, 20 vols. (New York: Bureau of National Literature, 1897), 3:1145.
[118] Efforts to minimize Jackson's conflict with the Court depend primarily on Jackson's rejection of the doctrine of nullification, which challenged judicial authority to define the Constitution vis-a-vis the states. Jackson's support for the judiciary against the nullifiers, however, was highly contingent and expressed his commitment to nationalism, not his respect for judicial authority. Jackson's departmentalist logic is not readily bounded, and the hostility of the Jacksonians more broadly to the courts is undeniable. Michael Stokes Paulsen, "The *Merryman* Power and the Dilemma of Autonomous Executive Branch Interpretation," *Cardozo Law Review* 15 (1993): 81. Cf., Richard Longaker, "Andrew Jackson and the Judiciary," *Political Science Quarterly* 71 (1956): 341; Fisher, 238-241. But Jackson's willingness to employ the courts in his battle against the nullifiers does emphasize the contingent, political nature of the conflict. The Court is part of reconstruction politics – not the object of irrational hatred.

assault. The Court as an institution was at most a sideshow to the main event. The veto message itself is indicative of this broader context. The rejection of judicial supremacy was a necessary step in Jackson's argument, but the main target of his ire was the Bank and its Whig supporters. The Court may have enabled Congress to violate the Constitution in this way of thinking, but it was the Bank and its conspirators who were prepared to do the violating. The Court had only made it more necessary for the president to step forward and do his duty to the Constitution. The "rich and powerful," Jackson argued, were acting to "bend the acts of governments to their selfish purposes," and Congress was willing to oblige them, arraying "section against section, interest against interest." Jackson could not speculate on what "interest or influence, whether public or private, has given birth to this act," but he could assure Congress and the American people that those interests and influences had not found their way into the executive branch. "Rich men have not been content with equal protection and equal benefits" of the laws. They had instead "besought us to make them richer by act of Congress," and Congress was willing to "shake the foundations of our Union" in order "to gratify their desires."[119]

Moreover, the veto message was a campaign document as well as a communiqué to Congress.[120] The authority it claimed for the president was not only against the Court, but more importantly also against his electoral opponents. Jackson concluded his veto message by simply stating that "I have now done my duty to my country," and leaving it up to "my fellow-citizens" to sustain him.[121] Jackson's posture as independent constitutional interpreter not only authorized him to reject the proposed legislation, but it also fed his claim on the votes of the citizenry. It was both his willingness to do his duty in the face of opposition and the content of his substantive constitutional vision that made him deserving of popular support. An isolated focus on the judiciary has tended to portray the veto as a serious challenge to judicial review, but a broader perspective indicates that judicial review was at best an incidental concern. The primary purpose of the message was to rally support for Jackson's substantive constitutional vision against all of his opponents, from private interests to congressional leaders. Most directly, the president's

[119] Jackson, 3:1153.
[120] Robert V. Remini, *Andrew Jackson and the Bank War* (New York: W.W. Norton, 1967), 80-100.
[121] Jackson, 3:1154.

veto denied the conclusive authority of Congress to define the extent of its own powers. With his veto, Jackson was challenging legislative supremacy as well as judicial supremacy, and those institutional claims were specifically tied to a particular substantive vision that helped establish and legitimate Jackson's stance.

Franklin Roosevelt's Court-packing plan is similarly taken as an exemplar of presidential conflict with the judiciary, but it too must be placed in the context of the reconstructive president's more general conflicts and struggles for political authority. His Court-packing rhetoric linked that effort to similar battles the administration was waging against the forces of paralysis and reaction elsewhere. Just months after his 1936 reelection, the president proposed legislation to enable him to nominate an additional justice for each existing justice over the age of seventy, to a total of fifteen, giving Roosevelt an immediate majority on a reconstituted Court. A bipartisan Senate Judiciary Committee report ultimately denounced the plan as an "invasion of the judicial power" requiring such an emphatic rejection that "its parallel will never again be presented to the free representatives of the free people of America."[122] Despite such vocal opposition, a scandalized press and Congress, and a fortuitously timed switch in the Court's majority, the plan nearly passed and before his sudden death from a heart attack the Senate majority leader claimed to have the necessary votes.[123] Roosevelt himself expressed surprise at the tumult, asking if "some people really believe that we did not mean it" when he had warned in November that "we had only just begun to fight."[124] Although his surprise at the reaction to his Court-packing plan was disingenuous — he had prepared the plan in secret to heighten its dramatic effect — his bewilderment at the political dilemma it created is more understandable. The Court-packing plan was consistent with his larger rhetorical message of late 1936 and early 1937, and indeed with the themes of his entire presidency. For the president, his attack on the Court was of a piece with his attack on numerous other opponents.

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[122] Senate Committee on the Judiciary, *Reorganization of the Federal Judiciary*, 75th Cong., 1st sess., 1937, S. Rept. 711, 10, 23.
[123] Leuchtenburg, 132-162; Michael Nelson, "The President and the Court: Reinterpreting the Court-Packing Episode of 1937," *Political Science Quarterly* 103 (1988): 267; Gregory A. Caldeira, "Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan," *American Political Science Review* 81 (1987): 1139.
[124] Roosevelt, 6:114.

To the president, the Court was allied with a broad array of entrenched and elite interests that would have to be overcome in order to achieve the new constitutional order that Roosevelt envisioned. As opposition to the New Deal built, the president declared in a 1936 campaign address that "organized money" were "unanimous in their hate for me — and I welcome their hatred. I should like to have it said of my first administration that in it the forces of selfishness and of lust for power met their match. I should like it said of my second Administration that in it these forces met their master."[125] Mastering those forces of selfishness required democratizing the government, both in form and substance. The president warned another audience that some "would like to turn the conduct of Government over to a selected, self-chosen few. I would rather leave it in the hands of what we call the democracy of the United States."[126] Popular government should also serve the good of the people, promoting justice "for the great masses" and abandoning a philosophy of "indifference" that did not "promote the general welfare" but only benefited the few.[127]

In his 1937 annual message to Congress, Roosevelt's challenge to the Court was direct as he defended his own reading of the Constitution as better than that offered by the Court. The president's own constitutional studies had convinced him that the "vital need is not an alteration of our fundamental law, but an increasingly enlightened view with reference to it." The text should be given a "liberal interpretation" so as to be an "instrument of progress."[128] The Court had been "asked by the people to do its part in making democracy successful," and Roosevelt contended that the people had "a right to expect" the Court to allow the use of "legitimately implied" powers for the "common good."[129] Although the president initially justified his Court-packing plan on the basis of increased efficiency, he soon turned to a political defense, arguing that he needed a Court that would "enforce the Constitution as written," or more to the point, justices "who will bring the Court to a present-day sense of the Constitution."[130] A "reinvigorated, liberal-minded Judiciary" would not "override the judgment of the Congress on legislative

[125] Roosevelt, 5:568-569.
[126] Roosevelt, 5:478.
[127] Roosevelt, 5:280, 568.
[128] Roosevelt, 5:639.
[129] Roosevelt, 5:641.
[130] Roosevelt, 6:126, 127.

policy."[131] Forcing the Court to recognize presidential authority to construct the terms of the Constitution in the interest of and at the behest of the people at large was essential to realizing the promise of democracy in America.

A central theme of Roosevelt's presidency was the need to unleash the political power created by the Constitution to promote the welfare of the people. In recent years, he argued, the power of the government to do good for the whole people had been allowed to atrophy. Private interests who hoped to gain at the expense of the common good had thrown up obstacles to reform that exploited constitutional forms to defeat constitutional purposes. From his perspective, the Court's flawed interpretations of the Constitution could not be readily corrected by constitutional amendment because a small number of self-interested state legislatures could, and had before, blocked the ratification of progressive amendments. Even Congress itself was resistant to change. As part of his 1936 reelection campaign, Roosevelt organized pro-reform groups such as the Labor Nonpartisan League that could circumvent Democratic Party regulars and mobilize progressive support behind the president and his priorities. After his reelection, he actively sought, but failed to achieve, a purge of conservative legislators from the Democratic Party and Congress. Roosevelt's attorney general, Homer Cummings, wrote in his diary that behind "all of these fights, including the Supreme Court fight, there lies the question of the nomination of 1940, and the incidental control of party destinies."[132] Critics of the New Deal might denounce Roosevelt as some kind of "Caesar or Napoleon," but he assured his supporters, those critics preferred to lodge government power the hands of a "select" and "educated class, of a class which is, and knows itself to be, deeply interested in the security of property and the maintenance of order." Against this select class of the old order, the president found his anchor in "democracy – and more democracy."[133] The president's war against the power brokers had many fronts.

Roosevelt's Court-packing plan was announced just two months after the unveiling of his proposal to reorganize the executive branch. The judiciary was not the only obstruction to be cleared away, and the

[131] Roosevelt, 6:133, 129.
[132] Quoted in Sidney M. Milkis, *The President and the Parties* (New York: Oxford University Press, 1993), 81.
[133] Roosevelt, 6:331.

two proposals were rhetorically linked as necessary to save democracy from crisis and elite rule. The reorganization plan, known as the Brownlow Report, sought to draw policy-making into the executive departments and to develop administrative controls under direct supervision of the president, addressing a widespread concern that rapid growth had left the government fragmented and uncoordinated. As with the Court-packing plan, Roosevelt saw the Brownlow Report as a vehicle for adapting the Constitution to the requirements of a new age.[134] Roosevelt introduced his proposal as a fight to save democracy. Reform was necessary "unless it be said that in our generation national self-government broke down and was frittered away in bad management. Will it be said 'Democracy was a great dream, but it could not do the job?'"[135] Both continuing economic crisis and political resistance to the New Deal made such questions quite pressing, especially given the implicit example of events in Europe. Presidential authority, he argued, had to be expanded to overcome bureaucratic resistance to policy goals. Executive reorganization would in turn allow the government to overcome political resistance from private interests. The "freedom of self-government" depended on "an effective and efficient agency to serve mankind and carry out the will of the Nation."[136] The Constitution designated the president as the agent of the nation, and he must have "the authority commensurate with his responsibilities under the Constitution."[137] As the Report asserted, "the President is a political leader – leader of a party, leader of the Congress, leader of a people," and "the President alone" constitutionally possessed "the whole executive power of the Government of the United States."[138] Congress eventually approved executive-branch reorganization, but only in a significantly diluted form from what the president had wanted.

The obstacles to presidential authority were legion, and the judicial challenge was one of many that such reconstructive presidents had to overcome in order to lay claim to their right to define the future of American governance.[139] Departmentalism was not an isolated and idiosyncratic theory adopted by these

[134] Roosevelt reportedly regarded the Brownlow committee as doing the work of a "constitutional convention." John A. Rohr, *To Run a Constitution* (Lawrence: University Press of Kansas, 1986), 136.
[135] Roosevelt, 5:669.
[136] Roosevelt, 5:669.
[137] Roosevelt, 5:673.
[138] *Report of the President's Committee on Administrative Management* (Washington, D.C.: Government Printing Office, 1937), 31, 2.
[139] Although Jefferson's partisan opponents were easily vanquished, he faced continuing resistance to his project from his ideological base, domestic economic interests, and foreign agents. Drew R. McCoy, *The Elusive Republic*

presidents. It was an aspect of their general political posture. What is most notable about these presidents is not their hostility to the judiciary, but their struggle against a variety of competitors for the authority to interpret the Constitution's meaning in a new historical context. These presidents recognized that there were many voices in the political arena advocating different readings of the nation's constitutional traditions, and their reconstructive efforts were aimed at establishing their own voice and vision as paramount. Departmentalism is neither the exclusion of the judicial voice nor the rejection of the last barrier to majoritarian political power. It is part of the presidential recognition of an ongoing struggle for political authority among the many competing institutions within the Founders' fragmented constitutional system.

Technique Versus Ideology

An important aspect of this presidential effort to shift institutional authority over the Constitution is the reconceptualization of the nature of the Constitution and the judiciary. Within the politics of reconstruction, the judiciary is portrayed as itself highly politicized.[140] Whether because constitutional renewal is a political task or because the judiciary has allowed itself to become politicized, the reconstructive president asserts the need to reclaim control over the nation's constitutional future. The judicial claim to authority is forfeited through a demonstration that its project is an essentially political one. For reconstructive presidents, judicial authority is undercut not by the countermajoritarian problem but by the substantive nature of judicial action in that historical moment. Judicial authority is undermined by the perception that the courts are addressing non-judicial problems in behaving in a non-judicial fashion. They are behaving politically. These presidents have not generally framed the problem of

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(New York: W.W. Norton, 1980); McDonald, 75-160. Lincoln, of course, faced severe challenge to his constitutional vision from the southern states, partisan foes, and internal divisions within his own party. Skowronek, 198-227. Reagan struggled with a powerful opposition party and "liberal special interests." Ronald Reagan, *The Public Papers of the Presidents of the United States: Ronald Reagan, 1988-89* (Washington, D.C.: U.S. Government Printing Office, 1991), 1619. The reconstructive effort required challenging the authority of a myriad of opponents for all of these presidents.

[140]Of course, some political actors are always likely to regard the judiciary as politicized. E.g., Alan Westin, "The Supreme Court, the Populist Movement, and the Campaign of 1896," *Journal of Politics* 15 (1953): 3. The key question is whether dominant political actors take up such arguments, or whether such claims remain the province of a marginal few dissenting from a vital political regime.

judicial authority in the terms favored by modern academic theory, as a problem of judicial resistance to untrammeled majority rule. Presidential authority does not depend on the elimination of judicial review, but rather on the appropriate delimitation of the sphere of judicial action. The judiciary retains authority to act, but only where its decisions can be truly regarded as "legal." The distinction between law and politics is not fixed, however. The meaning of purely legal action is itself politically constructed. During these reconstructive moments, the understood sphere of legality is substantially reduced, and the realm of politics is correspondingly expanded. These presidents attempt to move the line dividing those issues appropriately settled by judicial action and those requiring political resolution. For political leaders in a reconstructive posture, these constitutional disputes are essentially political, and it is the president not the courts that must speak for the Constitution.

The abortion debate has recently exposed such a dynamic at work in the contrasting positions of Jimmy Carter and Ronald Reagan. As a political outsider and born-again Southerner, Carter faced a particularly daunting task of maintaining an increasingly frayed party coalition, while also keeping faith with the political image and concerns that brought him to the presidency in the first place. The Court placed abortion on the national agenda, but its position was consistent with that of the progressive wing of the Democratic Party. As abortion polarized Democrats, the Carter administration could not take a clear position on the issue. Party stalwarts were committed to the Court's resolution of the abortion question, even as Carter's own conservative and evangelical characteristics appealed to pro-life voters. As a consequence, when pressed on how he could "support abortion" in a 1980 press conference, Carter deferred to the Court. Not only did the president distinguish sharply between his personal beliefs on the issue and his politically salient policy stance, but he also denied his own power to take action on the issue at all. For Carter, the optimal political strategy was to maximize the judicial authority to resolve the issue and remove abortion from the political arena. Thus, he insisted that "I'm personally against abortion," but he noted, "as President I have taken an oath to uphold the laws of the United States as interpreted by the Supreme Court of the United States. So, if the Supreme Court should rule, as they have, on abortion and other sensitive issues contrary to my own personal beliefs, I have to carry out, in accordance with my

solemn oath and my duties as President, the ruling of the Supreme Court."[141] In this policy area, the president portrayed himself as a mere executive officer, not as a political agent. The presidential duty, as he portrayed it, was both clear and rigidly administrative.[142] As a private citizen, Carter might disagree with the substance of the Court's decision. But as a constitutional officer and political representative, the president supported the Court and was powerless to resist it.

Although not central to his reconstructive effort, Ronald Reagan offered a radically different view of the abortion debate. Benefiting from a relatively united party and a consistent political profile, Reagan's political authority and electoral future were enhanced by politicizing the issue. Reagan's political authority derived from a conservative base that expected him to emphasize the political mutability of the status quo on abortion. Thus, unlike Carter who emphasized that his hands were tied by the courts that had sole authority to interpret the law, Reagan insisted that "the issue of abortion must be resolved by our democratic process. Once again I call on Congress to make its voice heard against abortion on demand and to restore legal protection for the unborn."[143] Whereas Carter portrayed abortion as a legal issue about which he could have only personal views, Reagan insisted that abortion was a political issue about which policy should be made. The range of vehicles for politicizing the issue was wide, and some posed a more direct challenge to judicial authority than did others. Thus, Reagan not only supported direct legislative action to overturn *Roe*, but also supported constitutional amendments to the same effect and various policies that restricted access to abortion procedures and arguably subverted the spirit of *Roe*.

Similarly, the Court's abortion rulings helped motivate Reagan's attorney general to endorse the views of earlier reconstructive presidents on the authority of the Court. "Constitutional interpretation is not the business of the Court only," Edwin Meese argued, "but also properly the business of all branches of government."[144] As a result, the administration contended that "incorrect" judicial rulings were entitled to no broader application than to the immediate parties in the single case. The president would

[141] Jimmy Carter, *The Public Papers of the Presidents of the United States: Jimmy Carter, 1980* (Washington, D.C.: U.S. Government Printing Office, 1982), 2354.
[142] See also, Mark A. Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7 (1993): 46-50.
[143] Reagan, *Public Papers: 1983*, 876.
[144] Edwin Meese, "The Law of the Constitution," *Tulane Law Review* 61 (1987): 985.

not disobey the Court, but he would not adopt its interpretation of the laws either. Without sufficient congressional support to threaten judicial independence, the president's efforts were as much or more about political authority as policy achievement. In this case, the judiciary served as a useful foil for Reagan to establish his oppositional credentials. Reagan's position taking on the abortion issue was a sharp departure from that of previous administrations, but Republicans did not have to bear the policy consequences of their strongly pro-life stance.[145] Undermining the judicial monopoly on constitutional reasoning and fostering an alternative constitutional discourse that delegitimated the Court was part and parcel of Reagan's rhetorical effort as president.[146]

Central issues of government are redefined during reconstructions such that they become objects of choice rather than faith. In that context, their very importance militates against judicial determination of the results. Abraham Lincoln was the most assertive on this point, contending in his First Inaugural that "if the policy of government, upon vital questions, affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court . . . the people will have ceased to be their own rulers."[147] It was the very importance of the slavery issue that necessitated its democratic resolution. If self-government is to be meaningful, then it is precisely the most fundamental, the most vital political questions that must be subject to democratic decision. Moreover, the variability of the outcome emphasized the political character of the issue; policy choice implied political jurisdiction. Lincoln's ringing endorsement of the politicization of the slavery issue contrasts sharply with his predecessor's careful effort to depoliticize the same. Four years earlier, James Buchanan had argued that "differences of opinion" on this issue were "happily, a matter of but little practical importance," for "it is a judicial question, which legitimately belongs to the Supreme Court of the United States."[148] It was the president's duty, along with that of all good citizens, to "cheerfully submit" to the Court's decision. Although "under our system there is a

[145] Devins, 56-148.
[146] It is significant that the Reagan administration was both forced to and willing to adopt a departmentalist stance on the abortion issue, even though abortion was not central to the administration's policy objectives. Reagan chose to politicize the Court, but much of Reagan's reconstructive project could be accomplished without running afoul of judicial doctrine, eliminating the necessity of a Rooseveltian showdown with the Court.
[147] Abraham Lincoln, *Abraham Lincoln*, ed. Roy P. Basler (New York: Da Capo Press, 1990), 585-586.
[148] James Buchanan, *The Works of James Buchanan*, ed. John Bassett Moore, 12 vols. (Philadelphia: J.B. Lippincott, 1908-1911), 10:106.

remedy for all mere political evils in the sound sense and sober judgment of the people . . . . this question of domestic slavery is of far graver importance than any mere political question." As a consequence, Buchanan called upon "every Union-loving man . . . to suppress this agitation."[149] It was precisely because of the importance of the slavery issue that Buchanan contended that it had to be depoliticized. Lincoln's conclusions were radically different from Buchanan's because his situation was radically different. Lincoln's own authority as the prophet of a new constitutional order was enhanced by drawing slavery firmly into the political realm and inviting the agitation that Buchanan desperately sought to hold at bay. Lincoln possessed the authority to address the slavery issue; Buchanan emphatically did not. As a consequence, Buchanan sought to bolster the authority of the Court in order to preserve the little authority that might still be available to him, while Lincoln undermined the Court in order to claim constitutional authority for himself.[150]

The hollowness of Buchanan's effort illustrates of the larger dilemma that presidents and judges share in such a vulnerable situation. The old formulas no longer have the ideological force to command authority. The ready claim that slavery was settled as a matter of inherited law was increasingly implausible. Both anti-slavery constitutional theories and increasingly strained legislative efforts to compromise the slavery issue highlighted the fact that the status quo was contingent and discretionary. President Buchanan and Chief Justice Taney's claims that their hands were tied by the requirements of the founders' Constitution were met with derision rather than sympathy or relief. The meaning of the Constitution in regard to slavery was obviously and politically in dispute, and the Court could add little by simply taking sides. The fact that it was "taking sides" on a political controversy was too nakedly apparent to quell the losers in the dispute.[151]

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[149] Buchanan, 10:109.

[150] It should be emphasized that Buchanan and Lincoln also differed in their relation to the substantive rulings of the Court. Buchanan could afford to elevate judicial authority, and Lincoln was forced to undermine it, as a consequence of the Court's pro-slavery ruling. Departmentalism emerges out of contingent political situations, not the intrinsic beliefs of individual occupants of the office. Notably, for Buchanan defending the Court was a favored alternative to defending slavery directly. Regardless of judicial actions, the Democrat Buchanan was required to be pro-slavery, but his preference was not to have to talk about slavery at all, and he hoped that the Court could provide him the cover to shift politics away from the slavery issue.

[151] On this problem, see generally Martin Shapiro, *Courts* (Chicago: University Press of Chicago, 1981), 1-35.

Lincoln did not deny that slavery was a constitutional issue, but he insisted that its resolution was the political task of the current people.[152] From the perspective of the political forces that buoyed Lincoln, the Court was merely part of a "slave power conspiracy" that sought to remove the decision from the people while hiding behind the Constitution. Though Lincoln granted that "we cannot absolutely *know* that all these exact adaptations are the result of preconcert," the consistency of the actions of Democratic senators, presidents and justices made it "impossible not to *believe* that [they] worked upon a common *plan*."[153] The Constitution did not require *Dred Scott*; the political commitments of the slave power did. Once inherited legal formulas sound empty and "mechanical," judicial authority is poised to be overthrown. As the Republicans contended, under such circumstances the Court is entitled to no more respect than "a majority of those congregated in any Washington bar-room."[154] The Court had made a choice about America's constitutional future. But that was a choice, the Republicans insisted, that the Court had no right to make.

Within the politics of reconstruction, the judiciary's posited "legal" solutions seem like political assertions. Judicial judgments are construed as assertions of judicial will, and as a consequence they are attacked politically by those with greater claims to the authority to make such decisions. Unsurprisingly, the analysis of the Legal Realists was particularly supportive of the New Deal critique of the Court. Felix Frankfurter and Henry Hart characterized the Court's opposition to the New Deal as "petty" and filled with "intellectual frivolity," appealing only to "the Bar Association gallery while leaving the substance of the matter untouched."[155] Similarly, Thurman Arnold denounced the Court's opinions as "dry as a common-law pleading," with a "complete lack of common sense" and "little persuasive power," making "bland assumptions" that "must shock any realistic mind."[156] Separately, Arnold wrote that the public must "have faith in institutions of legal learning as guaranties that principles, forgotten in the wickedness

[152] Lincoln, 403.
[153] Lincoln, 377.
[154] Quoted in Barry Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy," *New York University Law Review* 73 (1998): 428n385.
[155] "A Dred Scott Decision," *New Republic* (22 May 1935): 34.
[156] "The Court Rules Out Security," *Nation* (1935): 588.

of a political world, are being constantly refined and made more useful for the world of tomorrow."[157] In repeating the "old incantations," the Court could no longer sustain that faith.[158]

Roosevelt saw the Court as both political and partisan. On the eve of his first election, Roosevelt departed from his prepared text in order to assert that "the Republican Party was in complete control" of the courts.[159] Once in office, Roosevelt downplayed the particularly partisan nature of the dispute in order to emphasize the broader question of who would control America's "constitutional destiny."[160] It "is not going to be a partisan issue . . . . it is a question for national decision on a very important problem of Government."[161] If democracy were to succeed, then the president had to have the power to "appoint Justices who will act as Justices and not as legislators."[162] The Jeffersonians similarly asserted that the judiciary had abandoned its appropriate legal tasks and entered into politics. The courts had become, they contended, a mere outpost of the electorally banished Federalist Party, "and from that battery all the works of republicanism are to be beaten down and erased."[163] The reconstructive attack on the judiciary is not an attack on judicial independence per se, but on what is understood to be the inappropriate politicization of the courts by those who had lost the authority to speak for the people.

The Judiciary in the Politics of Reconstruction

The judiciary not only serves as a target for presidential attacks in these instances. The courts also serve as political agents helping to create the reconstructive situation in the first place. Presidents are not

[157] Thurman Arnold, *The Symbols of Government* (New Haven: Yale University Press), 52.
[158] Robert G. McCloskey, *The American Supreme Court*, Second Edition revised by Sanford Levinson (Chicago: University of Chicago Press), 207.
[159] Roosevelt, 1:837.
[160] Roosevelt, 6:130.
[161] Roosevelt, 4:221.
[162] Roosevelt, 6:129. See also, Robert H. Jackson, *The Struggle for Judicial Supremacy* (New York: Vintage, 1941).
[163] Jefferson, *Writings*, ed. Washington, 4:424-425. Similarly, the Jacksonians thought the courts were ravaged by "political bias" and had subverted constitutional principles of limited government through their rulings, which required a political response to restore the judiciary to its proper sphere. Charles Warren, *The Supreme Court in American History*, 2 vols. (Boston: Little, Brown, and Company, 1926), 1:633-687, 729-779. Complaints about the politicization of the judiciary, and comparisons with the *Dred Scott* and *Lochner* Courts, were basic to Reaganite constitutional theory, which likewise sought to return the courts to the realm of mere law. Robert H. Bork, *The Tempting of America* (New York: Free Press, 1990): Meese, 979.

the only order-shattering actors on the political stage.[164] The Court has also tended to exacerbate the crisis of the old regime by pushing forward with its inherited and evolving political agenda even in the face of increasing tensions within the dominant political coalition. The judiciary provides only a temporary refuge for adherents to the old order as judicial action widens existing fissures and creates opportunities for a reconstructive leader to exploit.[165] Likewise, the Court must make its own calculations as to how to preserve its authority in the face of presidential attack.

The judicial challenge is to the president's legitimacy, as well as to his policies. Courts that have lagged the electoral returns have not always been activist courts, though they have often been provocative. The Court has not always played the obstructionist role associated with the Hughes Court during the first New Deal.[166] Nonetheless, the judiciary has been active in building its own authority to construe constitutional meaning, advancing its position as the authority of elected officials wanes, and retrenching when reconstructive leaders take the offensive. Often the crucial judicial move has not come in response to newly elected political forces, but rather has come as the Court seeks to consolidate inherited constitutional understandings in the late stages of a declining regime. In this context, Roosevelt's "problem" was not simply with the Court's obstruction of New Deal legislation, but was also, and perhaps more fundamentally, with the vision of the constitutional order that the Court had been articulating over the previous decades.

As the above cases already suggest, the Court is an important actor in structuring the reconstructive situation. Presidents such as Thomas Jefferson or Abraham Lincoln were not intrinsically hostile to the judiciary. Thomas Jefferson's relationship with the Court would undoubtedly have been more cordial had he been able to appoint Spencer Roane to be Chief Justice rather than been faced with Adams's lameduck appointment of John Marshall. Likewise, James Buchanan's and Abraham Lincoln's responses to the

[164] Skowronek argues that presidents cannot help but be order-shattering, but that in the context of reconstruction that destructive effect is both intentional and strategically helpful. The Court also finds itself shattering received orders, but it is less clear that the effect is ever either intentional or helpful for the Court.
[165] See also, Gates, 169.
[166] It can be argued that the obstructionist nature of the Hughes Court has been generally overstated. See, Barry Cushman, *Rethinking the New Deal Court* (New York: Oxford University Press, 1998).

Court may have been reversed had the Court stretched to endorse abolitionist William Goodell's vision of the Constitution in *Dred Scott* rather than John C. Calhoun's. But if Jefferson and Lincoln had felt no threat from the Court, they also would not have been reconstructive leaders. The reconstructive stance emerges from the interaction of the political situation and presidential goals. The Court helps shape that political situation, in these cases by cementing constitutional understandings at odds with those of the ascending administrations. Even absent specific knowledge of case outcomes, presidents such as Buchanan could be confident in the Court's role as a coalition partner. Both prior judicial appointments and earlier doctrinal developments indicated the relative safety of the Court for those affiliated leaders in the late stages of the regime.

The Court can be expected to help advance the goals of the old order.[167] As Dahl noted, regular appointments of judges by elected officials generally help keep the courts in line with mainstream political opinion. As noted here, in addition to making policy and courting constituents political actors help articulate a constitutional vision, and affiliated justices are likely to share that constitutional vision and help implement it directly. Affiliated political actors can be expected to invite judicial intervention into political struggles, secure in the knowledge that the Court will intervene on their behalf.[168] The Court need not regard itself as partisan in such situations, for the constitutional understandings shared by those affiliated with the regime will be entrenched and assumed. Lincoln may have seen the Taney Court as an arm of the "slave power conspiracy" and Roosevelt may have seen the Hughes Court as simply "Republican," but to the justices their actions were simply in defense of the Constitution as they understood it.

In the context of transitional periods, however, such actions can have politically destabilizing effects. Judicial authority is strong at these moments precisely because regime authority is weak. The judiciary often finds itself making the controversial decisions that the elected officials cannot make, or at least would prefer to avoid making. Buchanan would not have needed to defer to the Court if he could have

[167] Dahl, 284-286; Powe, 485-501.
[168] Graber, 37-61.

reconciled his competing political commitments on his own, or if he could have kept slavery off the national agenda entirely. He needed the Court to offer a technical resolution to the slavery issue, precisely because any explicitly political effort at resolution could be expected to tear the Democratic Party apart, as Buchanan's intervention in "Bleeding Kansas" later that year demonstrated when Stephen Douglas and other Northern Democrats decisively broke from the administration when it embraced the controversial pro-slavery Lecompton constitution favored by the Southern Democrats.[169]

But as Lincoln emphasized, a retreat into the politics of technique is unlikely to be successful in the long term, even if it is the only strategic move remaining for these hollowed out regimes. Thus, Chief Justice Taney echoed President Buchanan's rhetoric in emphasizing the legal necessity of the *Dred Scott* decision. Like Buchanan, Taney disavowed the political significance of his personal views, contending, "It is not the province of the court to decide upon the justice or injustice, the policy or impolicy of these laws." But this disavowal reinforced the duty of the Court "to interpret the instrument as [the founders] have framed it, with the lights we can obtain on the subject, and to administer it as we find it, according to the true intent and meaning when it was adopted."[170] Justice John Catron asserted that such an unsettling controversy "*must* ultimately be decided by the Supreme Court," and in correspondence he urged the president to reinforce that view in his annual message to Congress and the nation.[171] Similarly, the "*Lochner*-era" Court struggled to apply long-held constitutional principles to increasingly vigorous social and legislative challenges. For the justices who would eventually be denounced as "old men," reasserting inherited understandings was consistent with both the ideological commitments of the Republican Party and the neutral application of the law.[172] As fissures within the governing coalition grow wider, and the hold of that coalition on elective office grows weaker, the Court is increasingly called upon to defend the old order. Not only are affiliated politicians likely to shift policies to the judicial arena for resolution, but legislation and decisions percolating up through the judicial hierarchy are also likely to emphasize the

[169] Kenneth M. Stampp, *America in 1857* (New York: Oxford University Press, 1990), 295-322.
[170] Dred Scott v. Sandford, 60 U.S. 393, 405 (1857).
[171] Buchanan, 10:106. Significantly, Justice Benjamin Curtis disagreed. See, Keith E. Whittington, "The Road Not Taken: *Dred Scott*, Constitutional Law, and Political Questions," *Journal of Politics* 63 (2001): 365.
[172] Howard Gillman, *The Constitution Besieged* (Durham: Duke University Press, 1993).

disputed issues.[173] As the old regime collapses, the judiciary is likely to be both a visible defender of the old order and one that survives electoral turnover. As a consequence, it is a likely target for a reconstructive leader seeking to dismantle the previous regime.

Even if the Court does not become an activist obstruction to the policy success of the reconstructive president, it will remain a threat to the new regime's stability and legitimacy. The departmentalist stance undermines the Court's authority to challenge the new regime. The president reclaims the authority of the Constitution by delegitimating the supremacy of the Court. The presidential emphasis on his own authority to define constitutional meaning, however, is often accompanied by more immediate efforts to restructure judicial power. During these periods, the Constitution and the courts are of relatively high political salience. The decisions that the Court makes (or has recently made) go to the heart of the central political disputes of the period, and political actors are likely to react with a far greater intensity to those decisions than to the average exercise of the judicial power to interpret the Constitution. The Court and its actions may be subject to sustained, high-level political attention. Reconstructive presidents have signaled their willingness to ignore or curb the Court, not just their disagreement with its decisions. The weapons used to attack the Court have varied, from the Jeffersonian elimination of judgeships to Roosevelt's efforts to pack the Court, but they have been consistent features of reconstruction politics. The authority of the reconstructive president to remake the political landscape results in unusually close ties between the White House and Congress. Although such unity does not guarantee legislative success, it does enhance the likelihood of serious court-curbing efforts. Moreover, such efforts have generally proven successful in forcing judicial accommodation to political pressure, even without the actual restriction of judicial power.[174] For the Marshall Court, the judicial response included the exercise of the "passive-aggressive virtues" as the Court exploited opportunities to enhance its authority without running

[173] Gates, 169-183.
[174] Stuart S. Nagel, "Court-Curbing Periods in American History," *Vanderbilt Law Review* 18 (1965): 925; Rosenberg, 378-383.

afoul of Jeffersonian priorities.[175] In the New Deal context of greater judicial activism and a more activist legislative agenda, judicial retreat and ultimate co-optation was the only viable outcome.[176] Judicial independence may insulate the judiciary from normal political pressures, but the extraordinary circumstances of reconstructive politics are more likely to necessitate strategic adjustments by the Court.[177] When challenged by the politically powerful and active posture of the reconstructive leader, judicial options have been severely constrained and judicial authority has only been maintained by accommodating the new order.

The Court does not exist outside of political time, but rather it both helps determine political time and occupies a position within it. Through its actions, the Court has acted as a catalyst for change. It has provided a temporary shelter for politically besieged presidents, even as it has sharpened the political crisis by reemphasizing the crumbling constitutional construct of the old order. In doing so, the Court helps create the political situation within which reconstructive leaders can emerge. The Taney Court could articulate the pro-slavery underpinnings of the Democratic regime in a way that Buchanan could not, but in doing so it handed Lincoln the platform he needed to make his bid to restructure the political landscape. In the wake of these electoral and ideological crises, the Court has proven vulnerable. It has found its options severely limited, and it has maintained a diminished authority by giving ground to the reconstructive leader.

Contest for Authority

These cases of presidential-judicial conflict follow the patterns of behavior expected by the political time approach as consistent with struggles for political authority. Application of this approach to interbranch relations raises a number of suggestive implications for an understanding of the separation of

[175] Mark A. Graber, "The Passive-Aggressive Virtues: *Cohens v. Virginia* and the Problematic Establishment of Judicial Power," *Constitutional Commentary* 12 (1995): 67.
[176] Leuchtenburg, 132-236.
[177] E.g., Jack Knight and Lee Epstein, "On the Struggle for Judicial Supremacy," *Law and Society Review* 30 (1996); 87; Ackerman, *We the People: Transformations*, 255-382. Cf., Jeffrey A. Segal, "Separation of Powers Games in the Positive Theory of Congress and the Courts," *American Political Science Review* 91 (1997): 28.

powers and of constitutional theory more broadly. Establishing a link between departmentalist presidents and the political time model also suggests the need to reconceptualize departmentalist theory to take into account its cyclical appearance. In doing so, constitutional theory must be made more dynamic in order to take into account the historical operation of political institutions.

Reconsideration of the reconstructive presidencies makes sense of our historical intuitions of judicial-presidential conflict. Such conflict was real and explicable in political terms, but it did not turn on the quantification of judicial activism or an immediate disagreement between the branches on policy goals. The constitutionalist perspective emphasizes the struggle for authority that is also part of the political realm, and the utility of that dimension for fully understanding political events. The judiciary and the presidency are not simply static entities with potentially conflicting preferences. They are also competing and dynamic institutions struggling for the authority to define the nature of the political regime. The basis for that authority is granted in the Constitution, but the extent of that authority is subject to historical action. The politics of reconstruction hinges on the ability of the president to bolster his authority to define the new regime and to wrest control over the definition of the constitutional order from other political actors, including the judiciary. This contest for authority determines presidential power to reshape the political future and judicial authority to intervene in political affairs.

These conflicting authority claims arise naturally from the competing drives of these political institutions in the constitutional system, and is exacerbated by the unusually strong claims of the reconstructive leader. The judiciary's implicit challenge to presidential authority creates an opening as well as a threat for reconstructive presidents. In the course of establishing their own constitutional vision, these presidents must necessarily shatter previously established constitutional understandings laid down by the Court. Taney was a threat to Lincoln not because of what he might do, but because of what he had already done. For Lincoln to succeed he not only needed to avoid the judicial veto, he also needed to replace Taney's constitutional logic with his own. The Taney Court's actions in the 1850s were immediately helpful to Lincoln, sharpening the division between the rising Republican Party and the existing political power holders and encouraging the further articulation of Lincoln's alternative vision of America's constitutional future. Such presidents need to reemphasize the distinction between judicial

pronouncements and the Constitution itself, in order to create the space for them to impose their own gloss on that foundational text.

The role of the Court in the American constitutional system also creates an opportunity for these presidents, for it may be used as a foil to enhance the president's own authority. Given their unique authority position within political time, reconstructive presidents are strengthened by opposition. These leaders come to power with a mandate to remake politics. Encountering resistance from defenders of the old order only serves to revive that basic mandate. Politically isolated, judges make a particularly good representative of the old, discredited commitments and entrenched interests. As those most directly speaking in constitutional terms, the courts are likely suspects in the subversion of the inherited Constitution, and conflict with the courts is a useful platform for articulating the president's own constitutional vision. Judicial authority to define constitutional meaning is likely to be weakest when contested by presidents armed with such a powerful mandate.

The historical use of departmentalist arguments indicates that departmentalism appears not as a basic prerogative of the presidential office, but rather as a structurally dependent resource. Not every president has access to the claims of authority that a Jefferson or a Lincoln had, and as a consequence the departmentalist logic does not apply to every president. Andrew Jackson was not wrong in his advocacy of departmentalism, but his position relative to the Constitution is not universally shared. James Buchanan could not look to Jackson as a model for the everyday power of the presidency on this point, even though he could benefit from Jackson's efforts in redefining and expanding the use of the president's veto or his removal power over executive officers. Departmentalism emerges as an extraordinary feature of the constitutional structure, not as an ordinary part of normal politics.

The distinction is relevant to our specific evaluation of departmentalism as good constitutional theory. One of the enduring objections to departmentalism is the threat of legal and constitutional chaos that might follow in the wake of the acceptance of coordinate interpretation of the Constitution. If there were no hierarchy of interpreters, it is thought, then the constitutional order would collapse under the weight of

conflicting and irresolvable interpretations.[178] This criticism gains its force, however, by being made in an ahistorical, apolitical context. The presidents with the authority to invoke the departmentalist logic are also particularly well positioned to foster the political consensus needed to restructure constitutional meaning. If it is true, as Edward Corwin argued, that the finality of constitutional meaning is the outcome of the "continued harmony of views among the three departments," then the success of departmentalism ultimately turns on the ability of the relevant political actors to achieve such a consensus.[179] The alignment of elected officials in the politics of reconstruction tends to isolate the Court and enhance the effectiveness of the departmentalist stance. Reconstructive presidents are notable for their expansive authority to remake the political environment in their own image, resolving conflict through their own political actions rather than through judicial dictate. Although departmentalism may well lead to deadlock for more constrained leaders, for reconstructive presidents deadlock only becomes the opportunity for reorienting and expanding their own claims to authority.[180] The reconstructive authority is not boundless. These presidents encountered a variety of obstacles to implementing their constitutional vision, and they adjusted their efforts accordingly. Political actors are routinely constrained by their political surroundings, though this is more evident in subsequent chapters. The expectation that departmentalism will lead to political chaos assumes that political actors will press their claims regardless of the consequences, which is of course not true. Presidents have challenged judicial authority for specific and limited purposes, and have depended on the support of allies in the legislature, the executive branch, and the electorate to make their challenge meaningful.

Such a political reconstruction of the constitutional order may still raise normative concerns regarding the types of values being advanced by presidents. The mere fact that political actors are reconstructing

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[178] E.g., Alexander and Schauer, 1371-1385; Erwin Chemerinsky, *Interpreting the Constitution* (Westport, CT: Praeger, 1987), 96.

[179] Corwin, 7.

[180] This also supplies the answer to the presumably knockdown question of what if Richard Nixon had simply refused to produce the tapes in response to court order. The answer is most likely the same as to what if Nixon had refused to resign — he would have been impeached. The waxing of congressional and judicial authority mirrored Nixon's lack of authority. Nixon was "forced" to obey the Court's order because Nixon was no Lincoln — he did not have the authority to put forward departmentalist claims plausibly. Although Nixon cannot be decisively placed in political time here, he has been neither traditionally regarded as a "departmentalist" president nor classified by Skowronek as reconstructive. For analysis of Nixonian conflicts as primarily defensive and legalistic, see also Whittington, 158-206; L.H. LaRue, *Political Discourse* (Athens: University of Georgia Press, 1988).

the constitutional regime does not mean that they are reconstructing it for the better. The difference between Andrew Jackson's and John Marshall's approach to Indian claims highlights this concern. From a modern perspective, the Court's attitude toward the Indians may well be preferred to Jackson's. Other presidential conflicts with the Court, such as Lincoln's or Roosevelt's, belie any ready valorization of the judiciary's Constitution, however. Especially in these moments of conscious and active reconsideration of basic constitutional principles, it is not clear that the judiciary systematically provides substantively preferable results. In the context of substantial political disagreement about the content of our constitutional inheritance, the supremacy of the judiciary in resolving those disagreements poses its own significant normative difficulties. Normative examinations of the value of judicial review should take account of such historical instances of constitutional politics.[181]

Contextualizing departmentalist theory in this fashion has a significant implication for constitutional theory more broadly. Specifically, departmentalist practice suggests the need to recognize the dynamic nature of the Constitution, which in turn requires recognizing the relationship between politics and the Constitution. The deductive reasoning of traditional constitutional theory draws from a model of the Constitution as a purely legal text. Constitutional interpretation provides dichotomous absolutes — an action is either constitutionally permissible or it is not, an interpretation is either correct or it is wrong. Although aspects of the text operate in this fashion, the Constitution is also a political document.[182] As such, constitutional meaning emerges from the integration of political events and textual authority. Constitutional theory has created an either/or choice between departmentalist and juristic conceptions of constitutional review. In practice, however, the Constitution has not presented that stark choice. Under certain conditions, departmentalism becomes available. In most circumstances, presidents lack the authority to lay claim to such a power. Presidential authority under the Constitution cannot simply be claimed; it must be constructed. At the same time, conflicts between divergent political institutions, such as the president and the judiciary, have been significant to forcing constitutional development and shaping

[181] Cf., Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999).
[182] Stephen M. Griffin, *American Constitutionalism* (Princeton: Princeton University Press, 1996), 13-58.

our constitutional understandings and practices.[183] The Constitution is not "up-dated" through judicial action and deliberation alone. Constitutional meaning emerges through the interaction of competing actors with distinct goals and missions. Even without such explicit constitutional mechanisms such as Canada's "notwithstanding clause," which allows legislation to go into effect notwithstanding conflicting constitutional requirements, political officials can and do engage the Court over constitutional meaning. Political leaders concerned with reconstructing the constitutional order have mustered both the will and the means to open basic constitutional issues to political consideration. In doing so, they do not claim the right to act against the Constitution. They have asserted the right to read the Constitution for themselves.

An additional set of implications relevant to theorizing about judicial independence and the justification for judicial review should be made explicit. Robert Dahl's conclusion that the Court is rarely capable of acting as a countermajoritarian institution has been more recently echoed. Rosenberg, for example, has argued that the judiciary is least likely to resist political initiatives precisely "when it is the most necessary" to do so, when the Court's interpretations are being challenged.[184] The example of the reconstructive presidents, however, suggests that the normative lessons to be drawn from such conflicts are not so clear. The normative literature on judicial review has generally assumed that the Court alone is the "forum of principle" in the American system and that political action merely reflects unconsidered policy desires.[185] This substantive judgment requires further consideration. Judicial retreat in the face of the presidential offensive is only problematic if the judiciary is clearly identified with correct constitutional values. If, however, constitutional principles are themselves being contested by the various branches of government, then it makes little sense to favor automatically the judiciary's preferred interpretation. Again, the assumption that the Taney Court was a better guardian of the Constitution than Lincoln may depend on misplaced comparisons with other moments in political time and on the assumption that there is no politics of authority but only a politics of interest and policy preference. That the Court is sometimes more principled than elected officials does not demonstrate that the Court is

[183] See also, Karen Orren and Stephen Skowronek, "Beyond the Iconography of Order: Notes for a 'New Institutionalism'," in *The Dynamics of American Politics*, eds. Lawrence C. Dodd and Calvin Jillson (Boulder, CO: Westview Press, 1994).
[184] Rosenberg, 394.
[185] E.g., Dworkin, 9-102.

always more principled, or that its principles are necessarily correct. Judicial authority to interpret the Constitution waxes and wanes. Taking seriously the authority claims of other political actors suggests that such variation may be highly appropriate as elected officials occasionally adopt a leadership role in determining contested constitutional meaning.

This analysis also suggests that judicial authority is at its weakest when the judiciary is perceived to be highly politicized. The waning of judicial authority within political time is marked by a number of features. The above analysis indicates the occasional presidential challenge to judicial supremacy. To take another measure, the introduction of bills to restructure and rein in the judiciary is also periodic, with leadership support for such measures and their relative success most likely to come during these same reconstructive periods.[186] Such efforts are consistent with the unwillingness on the part of elected officials to defer to the judiciary in its efforts at constitutional interpretation. Such activism on the part of the elected officials reflects both substantive disagreement with the Court and an increasing belief that the judiciary is not engaged in a functionally unique task. It is precisely the denial of the ready identification of the Court and the Constitution that feeds these challenges to judicial authority. A seemingly politicized judiciary is fair game for political intervention. Judicial authority to act independently of other government officials depends on the belief that the courts are genuinely engaged in a task that is the "proper and peculiar province of the courts," as Alexander Hamilton claimed.[187] The political evaluation of and response to the courts depends on the perceived character and importance of judicial action, not its frequency.

[186] Nagel, 927.
[187] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961), 467. See also, Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990); Keith E. Whittington, "Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution," *Studies in American Political Development* 9 (1995): 55.

Table 2-1:

Number of Federal Statutes Held Unconstitutional by the Supreme Court, 1790-2000

Period	Number	Period	Number
1790-1799	0	1900-1909	9
1800-1809	**1**	1910-1919	6
1810-1819	0	1920-1929	15
1820-1829	0	**1930-1939**	**13**
1830-1839	**0**	1940-1949	2
1840-1849	0	1950-1959	5
1850-1859	1	1960-1969	16
1860-1869	**4**	1970-1979	20
1870-1879	7	1980-1989	16
1880-1889	4	1990-2000	30
1890-1899	**5**	Total	

Source: Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation* (Washington, D.C.: Government Printing Office, 1992, 1998), updated by author.

Approximate realignment periods marked in bold.[188]

[188] It should be noted that Mark Graber has persuasively argued that this standard count underrepresents the Court's activity during the antebellum period when Congress effectively delegated to the judiciary the authority to sort through land claims and resolve disputes in a manner consistent with the Constitution (though potentially at odds with the original congressional determination). Mark A. Graber, "Naked Land Transfers and American Constitutional Development," *Vanderbilt Law Review* 53 (2000): 73. The consequences for the Dahl thesis are unclear. Judicial review was more routinized prior to *Dred Scott* than is commonly recognized, but those property cases also did not involve the kind of principled disagreements at stake in *Dred Scott* and similar cases. As others have recognized, any list of judicial invalidations is somewhat misleading because the Court often engages in creative statutory interpretation to eliminate apparent constitutional problems – changing federal policy without formally exercising the power of judicial review. But Graber's point is generally consistent with mine. Judicial review is not always particularly countermajoritarian, and judicial authority turns on the uses to which it is put and the structure of political conflict at the time.