Chapter One:
The Politics of Constitutional Meaning

The Constitution is often thought to have settled our fundamental political arguments. The Constitution is thought to transcend our current disagreements. Its text embodies our most fundamental commitments, those things about which we no longer disagree, such as the content of our “self-evident” truths and “unalienable rights.” The Founding constituted order out of chaos, setting an authoritative higher law over the discord of politics. We may understand the meaning of that law differently than did those who framed it, but the Constitution remains a source of determinate answers to even our hardest political questions.

We may come to disagree about the proper interpretation of even such a Constitution, however. In such cases, the judiciary becomes an essential guardian of the constitutional order. By issuing an authoritative interpretation of the Constitution, the judiciary, and especially the Supreme Court, secures order and reestablishes agreement. Without such an authoritative interpreter, the constitutional order would threaten to dissolve back into political disagreement. Daniel Webster, one of our nation’s most subtle constitutional thinkers, captured this sense of constitutional order well. When faced with the argument that the individual states that formed the Union could determine the terms of the Union and the meaning of the Constitution, Webster recoiled. Could it be possible to leave the meaning of the Constitution not in the hands of “one tribunal” but in the hands of multiple “popular bodies, each at liberty to decide for itself, and none bound to respect the decisions of others; and each at liberty, then to give a new construction on every new election of its own members?” Could such a thing be “fit to be called a government? No sir. It should not be denominated a constitution. It should be called, rather, a collection of topics, for everlasting controversy; heads of debate for a disputatious people. It would not be a government. It would not be adequate to any practical good, nor fit for any country to live under.”

1 Debates in Congress, 21st Cong., 1st sess. (1830), 6:78.
Constitutions require a single, authoritative interpreter, subject to neither popular pressure nor electoral instability. Constitutional government, Webster and others have argued, requires judicial supremacy.

Webster’s views were controversial in the early nineteenth century, but they are widely accepted now. At least in the United States, judicial supremacy is often regarded as essential to constitutionalism. The legal roots of the current consensus are often traced to Chief Justice John Marshall. In his 1803 opinion in the case of William Marbury v. James Madison, Marshall, having characterized the Constitution as the “fundamental and paramount law of the nation,” importantly declared, “It is emphatically the province and duty of the judicial department to say what the law is.” This was a strong claim to judicial authority over the interpretation of constitutional meaning. The judiciary “must of necessity expound and interpret that rule.” It was the “very essence of the judicial duty” to determine the meaning of the Constitution and to lay aside those statutes that contradicted that fundamental law. Marshall did temper this strong claim, however. In the context of the time, it was clear that other political institutions had been actively engaged in interpreting the Constitution and that those interpretations were broadly accepted as authoritative. The Constitution, Marshall recognized, was not in the hands of the judges alone. He concluded his opinion more modestly, arguing that surely “the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.”

By the mid-twentieth century, the justices of the Supreme Court had abandoned such tempering statements. In 1958, Chief Justice Earl Warren speaking for a unanimous court offered his own

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2 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
3 Ibid., 178.
4 Ibid., 177.
5 Ibid., 180.
interpretation of John Marshall’s famous sentence declaring the judicial duty to “say what the law is.” In response to state government officials who questioned the judicial authority to define constitutional meaning, the chief justice noted that “it is only necessary to recall some basic constitutional propositions which are settled doctrine.”

Warren instructed, “This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land.” He concluded, “Every state legislator and executive and judicial officer is solemnly committed by oath pursuant to Art. VI, cl. 3, ‘to support this Constitution.’

Four years later, the Court was obliged to again explain to the state governments that the Supreme Court is the “ultimate interpreter of the Constitution.” Within a decade the Court had repeated those words first to the Congress and then to the president, and insisted that the power to interpret the meaning of the Constitution “can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power.”

Constitutional maintenance, in this view, requires an independent judiciary with the authority to articulate the meaning of the Constitution and have all other political actors defer to those judicial interpretations. Without judicial supremacy, government officials would be free to ignore constitutional requirements with impunity. The Court has recently employed another favored quote from Marbury to that effect, arguing in Boerne that “if Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be ‘superior paramount law, unchangeable by ordinary means.’ It would be ‘on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.’” The Court concluded, “Under this approach, it is difficult to

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6 Ibid., 178.
8 Ibid., 18 (emphasis added).
conceive of a principle that would limit congressional power.” Implicit in this argument was the equation between the “Fourteenth Amendment’s meaning” and the Court’s own recent interpretation of that text. The Court later clarified what was at stake in the case, offering that “our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches,” in particular current judicial precedent. The Constitution cannot be maintained as a coherent law unless the Court serves as its “ultimate interpreter,” whose understandings of the constitutional text supersede any others and which other government officials are required to adopt.

This strong vision of judicial supremacy raises a number of problems. Those who advocate judicial supremacy, including the Court itself, tend to treat it as a matter of normative directive and accomplished fact. The Court has claimed that judicial supremacy follows logically from the constitutional design and that since Marshall’s declaration of judicial independence “that principle has ever since been respected by this Court and the Country.” But of course this was wishful thinking on the part of the justices. Their very assertion of the principle of judicial supremacy in Cooper came in response to Southern politicians denying that the Court had the authority to bind the states to its own controversial constitutional interpretations. American history is littered with debates over judicial authority and constitutional meaning. Although powerful federal officials have usually acceded to the Court’s claims, judicial authority has often been contested by important segments of the populace, from abolitionists to labor unions to segregationists to pro-life advocates.

If judicial supremacy cannot simply be assumed to exist, then it must be politically constructed. This book is concerned with the process by which judicial supremacy has been constructed over the course of American history. Rather than treating the judicial authority to determine constitutional meaning as a matter of legal doctrine, this book treats it as a political problem to be overcome. It asks why other legal principles have been

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12 Ibid., 535-536.
powerful political actors might recognize such an authority and defer to the judiciary’s particular interpretations of the Constitution. It considers some of the political incentives facing elected politicians and how they often lead them to value judicial independence and seek to bolster, or at least refrain from undermining, judicial authority over constitutional meaning. An examination of the political considerations of elected officials sheds light on how constitutions are constructed and maintained in politically fractious environments. For constitutions and institutions like judicial review to exist in historical reality and be more than imagined moral abstractions, there must be political reasons for powerful political actors to support them over time. Fortunately, there are such reasons.

Interpretive authority under the Constitution has varied over time. At some points in American history, the Court has been able to make strong claims on its own behalf, as it did in Cooper, and others have been willing to recognize that authority. At other points, however, elected officials have strongly asserted their own authority to interpret constitutional meaning and sharply challenged the judiciary’s monopoly on constitutional wisdom. For those who view judicial supremacy as an “indispensable feature of our constitutional system,” such challenges can only be regarded as deeply threatening to cherished constitutional values. An examination of the reasons for the periodic waning of judicial authority, however, provides a more nuanced view of constitutionalism. The struggle for judicial authority has occurred within our constitutional framework, not in opposition to it. The judiciary is not the sole guardian of our constitutional inheritance. Within the American context, judicial authority has often waned precisely when constitutionalism is being taken most seriously in the larger political community.

The Theory of Judicial Supremacy

This book is primarily concerned with judicial supremacy, not judicial review per se. These two concepts should be distinguished. Although judicial supremacy entails judicial review, judicial review need not entail judicial supremacy. The authority of the Supreme Court to exercise the power of judicial

13 Cooper v. Aaron, 358 U.S. 1, 18 (1958).
review is potentially controversial in its own right. Certainly the argument that John Marshall offered on behalf of the Court’s power of judicial review in *Marbury* is problematic, though this is not to say that a compelling constitutional theory justifying the power of judicial review cannot be constructed or that judicial review is not implicit in the very design of the Constitution. The basic concept of judicial review is readily recognizable, however, even divorced from any particular justificatory theory. The doctrine of judicial review refers to the authority of a court, in the context of deciding a particular case, to refuse to give force to an act of another governmental institution on the grounds that such an act is contrary to the requirements of the Constitution. Judges, in this reading, are not merely the agents of the legislature, but rather are the agents of the people. As such, they have an independent responsibility to adhere to the mandates of the Constitution, even when they contradict the instructions of the legislature.

The power of judicial review as exercised by American courts can be further distinguished from the power of abstract constitutional review as exercised by some European courts. The power of judicial review only authorizes courts to refuse to apply a law in a particular case in a manner that contradicts the terms of the Constitution. Judicial constitutional decisions arise only in the context of specific controversies, and the broader applicability of those decisions is a function of precedent and common-law reasoning. By contrast, the power of abstract constitutional review allows a constitutional court to directly evaluate the text of a law prior to its application, or even its formal adoption, for its consistency with constitutional requirements and to exercise a veto to block the promulgation of the law or to issue instructions to the legislature as to how to avoid the constitutional difficulty. The possibility of abstract review clarifies the distinctly “judicial” nature of American-style constitutional review, which arises only in the context of normal judicial proceedings and develops through common-law mechanisms. By contrast, abstract constitutional review is similar to the American presidential veto and is essentially “legislative” in character.

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The concept of judicial supremacy does not focus on the specific act of review itself. Judicial supremacy refers to the “obligation of coordinate officials not only to obey that [judicial] ruling but to follow its reasoning in future deliberations.” A model of judicial supremacy posits that the Court does not merely resolve particular disputes involving the litigants directly before them or elsewhere in the judicial system. It also authoritatively interprets constitutional meaning. For the judicial supremacist, the Court defines effective constitutional meaning such that other government officials are bound to adhere not only to the Court’s disposition of a specific case but also to the Court’s constitutional reasoning. Judicial supremacy requires deference by other government officials to the constitutional dictates of the Court, even when other government officials think that the Court is substantively wrong about the meaning of the Constitution and in circumstances that are not subject to judicial review. Judicial supremacy asserts that the Constitution is what the judges say it is, not because the Constitution has no objective meaning or that courts could not be wrong but because there is no alternative interpretive authority beyond the Court. As Justice Robert Jackson once ironically noted to somewhat different effect, “We are not final because we are infallible, but we are infallible only because we are final.”

It is this authority to say what the Constitution means – not merely to refuse to enforce laws that conflict with the Constitution – that has historically been subject to the greatest challenge and which raises the most interesting questions about the theory and practice of constitutionalism. Admittedly, doubts about judicial supremacy may also lead to doubts about judicial review, and it is usually the specific exercise of judicial review that raises political challenges to judicial supremacy. Nonetheless, there is political and logical space for rejecting judicial supremacy while accepting judicial review. Contrary to the Court’s assertion, it is even possible for the judiciary to accept congressional interpretations of constitutional meaning without abandoning the (admittedly reduced) power of judicial review. Not every act of legislation implies an act of deliberate constitutional interpretation by Congress.

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Indeed, it is not uncommon for Congress to include a disclaimer in its legislation that nothing in the statute should be construed to violate the terms of the Constitution. Even Congress recognizes that it can make mistakes, and judicial review is a convenient mechanism for correcting those errors. What is more constitutionally important are the instances when the Court tells Congress that the legislature’s constitutional judgments are wrong. The judiciary’s authority to set its opinions about the correct meaning of the Constitution above those of Congress, the president, or the electorate are at the root of judicial supremacy. As Jeremy Waldron has usefully pointed out, it is this elite rejection of popular judgments on deeply contested matters of fundamental political principle that is the most troubling aspect of the institution of judicial review for democratic and liberal theory.\(^\text{18}\) Moreover, given the particular significance of the U.S. Constitution to American national and political identity, judicial supremacy implies much more than the exercise of a veto power by a particular privileged government institution or the laying aside of statutory details as legally void. In the context of judicial supremacy, the opinions of the Court have the capacity to mark some political contestants and their positions as distinctly un-American and beyond the pale of legitimate American political discourse.

There are a number of justifications for judicial supremacy, and these justifications tend to overlap with the more political justifications for judicial review.\(^\text{19}\) For some, judicial supremacy is essential to preserving the rule of law and preventing constitutional anarchy. At least in principle, this is the most substantively neutral of the defenses of judicial supremacy. Judicial supremacy, in this view, is necessary not to maintain any particular constitutional order but simply to preserve some kind of order. In practice of course, concern for the rule of law has been most pronounced among those who favored the particular rules being articulated by the Court. Nonetheless, the necessity of some conception of judicial supremacy to the maintenance of law in a strong sense carries a fair degree of plausibility. If the rule of law requires


\(^{19}\) Traditional, “legal” justifications for judicial review, such as that offered in the *Marbury* opinion itself have fewer implications for judicial supremacy since they emphasize the Constitution’s relevance to the judicial resolution of particular cases rather than the importance of the judiciary to maintaining the Constitution. See also, Edward A. Hartnett, “A Matter of Judgment, Not a Matter of Opinion,” *New York University Law Review* 74 (1999): 123.
that some institution serve as the ultimate interpreter of the law, then the judiciary certainly seems like a plausible candidate for the role.

The rule-of-law justification for judicial supremacy has been a common response to challenges to judicial authority. In the early years of the republic, challenges to the authority of the Supreme Court to determine the meaning of the Constitution often arose from the states. In the federal context of the antebellum period, the alternative to judicial supremacy appeared to be not merely a lack of legal uniformity, but a genuine threat of disunion. Congress, the executive branch, and the federal judiciary were all complicit in the sedition prosecutions of Jeffersonians during the administration of John Adams. In order to mount their protest against the Sedition Act, Thomas Jefferson and James Madison turned to the political institutions most sympathetic to their cause: the southern state legislatures. The Virginia and Kentucky resolutions of 1798 not only argued that the Sedition Act was unconstitutional, but further contended that as independent representative institutions and as the members of the original federal compact the state governments had the authority and responsibility to explain the true meaning of the Constitution and to identify these constitutional violations. The resolutions called on the other states to join in the protest, but the official response to the resolutions was less than supportive. As might be expected, some state legislatures forthrightly defended the Sedition Act as not only constitutional but also good public policy. Others demurred in their assessment of the Sedition Act but argued strongly that the state legislatures were the wrong forum for considering this dispute. The Supreme Court alone could serve as a common judge to arbitrate such disputes and determine the meaning of the Constitution.20

When the state nullification issue was raised again three decades later, Daniel Webster rehearsal this conclusion. He asked his congressional colleagues, “could anything be more preposterous than to make a government for the whole Union, and yet leave its powers subject, not to one interpretation, but to thirteen, or twenty-four, interpretations? Instead of one tribunal, established by and responsible to all,

with power to decide for all, shall constitutional questions be left to four and twenty popular bodies, each
at liberty to decide for itself, and none bound to respect the decisions of the others?” He doubted whether
the government would be capable “of long existing” under such circumstances.\(^{21}\)

The threat of legal anarchy absent judicial supremacy is not limited to the particular circumstances of
possible state resistance to judicial interpretations of the Constitution. The states have usually been
regarded as being on particularly weak footing in asserting the authority to dispute the constitutional
reasoning of the federal judiciary, and it is no accident that the Court’s strongest statements in support of
its own interpretive supremacy have come in cases involving state government officials. Even Judge
Gibson of Pennsylvania, who in 1825 was relatively late in still arguing against the Supreme Court’s
authority to engage in the judicial review of congressional statutes, nonetheless accepted without question
the necessity of the Supreme Court’s right to review the constitutionality of state legislation in order to
insure national uniformity in effective constitutional meaning.\(^{22}\) Modern doubts about judicial supremacy
by executive branch officials have brought forth similar loud denunciations of such an invitation to
anarchy.\(^{23}\) Recent jurisprudential theory has likewise been brought to bear against “extrajudicial
constitutional interpretation.” Larry Alexander and Frederick Schauer have argued, for example, “an
important function of law is to settle authoritatively what is to be done,” noting that this settlement
function of law has “value independent of the content of particular laws.”\(^{24}\) Uncertainty about the law
would undermine the very value of law, and thus the law requires the existence of an ultimate interpreter
who can authoritatively settle disputes about legal meaning. By contrast, “‘protestantism’ in
constitutional interpretation – interpretive anarchy – produces no settled meaning of the Constitution and

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\(^{21}\) *Debates in Congress*, 21\(^{st}\) Cong., 1\(^{st}\) sess. (1830), 6:78. Webster’s contrast between the one judicial tribunal and
the many “popular bodies” is characteristic of the Federalist and Whig approach to this question. The order of the
law was threatened not only by the multiplication of interpreters, but also by the flighty character of “popular
bodies” subject to periodic elections. See also, Keith E. Whittington, *Constitutional Construction* (Cambridge:
Harvard University Press, 1999), 40-66.

\(^{22}\) Eakin v. Raub, 12 Serg. & Rawle 330, 344 (Pa 1825)

\(^{23}\) E.g., Howard Kurtz, “Meese’s View on Court Rulings Assailed, Defended,” *New York Times* (24 October 1986):
979.
thus no settlement of what is to be done with respect to our most important affairs.”

The other branches should defer to the Court not because the Court will always be substantively right about the correct content of the law, but because only judicial supremacy can insure that the law will have any content at all.

A second justification for judicial supremacy is more substantive. The value of judicial supremacy is not in its capacity to provide authoritative legal settlements, in this view, but in its capacity to provide substantively desirable legal outcomes. The judiciary alone serves as a “forum of principle” within the American constitutional system. This argument also has deep roots in American history. John Marshall defended the Court in part by drawing a sharp distinction between matters of law and matters of politics. There could be all kinds of reasonable disagreements about matters of politics, and those disagreements may be best settled in the legislative arena. About the law, however, there could be only one right answer, and by reason and temperament judges were most likely to come to that answer. Freed from the political pressures that gave elected officials a stake in the outcome of constitutional disputes, judges need merely open their eyes to the Constitution to see the truth. Although Marshall emphasized the uncontroversial nature of the judiciary identifying obvious constitutional violations, his distinction between law and politics benefited from the belief in the esoteric nature of legal reasoning that privileged the scholarly credentials of a judge over the representative credentials of a legislator. The great British jurist Edward Coke, who anticipated the power of judicial review, is reputed to have relied on such claims in order to assert authority over the British king. To Coke’s declaration that the king could not judge cases, “the King said, that he thought the Law was founded upon Reason, and that he and others had Reason, as well as the Judges: To which it was answered by me, that true it was, that god had endowed his Majesty with excellent Science, and great Endowments of Nature, but his Majesty was not learned in

25 Ibid., 1379.
the Laws of his Realm of England.” Cases “are not to be decided by natural Reason, but by the artificial Reason and Judgment of Law, which Law is an Act which requires long Study and Experience, before that a Man can attain to the Cognizance of it.”

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

The authority of judicial supremacy is rooted on the sharp distinction between the considerations of expediency that are thought to dominate the legislature and the considerations of principle that are thought to dominate the judiciary. The faith that the law was found rather than made by judges was shattered by Legal Realism in the twentieth century, but the faith in the principled nature of judicial decisionmaking has survived. As Edward Corwin argued early in this century, “law comes to be looked upon more and more as something made rather than as something discovered – as an act of authority rather than as an act of knowledge.” This insight would seem to undermine judicial authority relative to that of legislatures, but Corwin assures us that “the concept of an automatic declaration of the law is . . . no longer necessary to the doctrine of the separation of powers. The judges change the law, it is true, but they go about the business in a vastly different way than the legislature does. The legislature acts simply upon considerations of expediency. The judges are controlled by precedent, logic, the sensible meaning of words, and their perception of moral consequences.”

More recently, Alexander Bickel has similarly justified judicial review, contending “that the process is justified only if it injects into representative government something that is not already there; and that is principle, standards of action that derive their worth from a long view of society’s spiritual as well as material needs that command adherence whether or not the immediate outcome is expedient or agreeable.”

Perhaps the most prominent contemporary defender of this view is Ronald Dworkin. To Dworkin, political institutions are inadequate to addressing matters of moral principle. Instead of “reasoned debate,” the “process is dominated by political alliances that are formed around a single issue and use the familiar tactics of pressure groups to bribe or blackmail legislators into voting as they wish. The great moral debate that [Judge Learned] Hand thought essential to the spirit of liberty never begins. Ordinary politics generally aims, moreover, at a political compromise that gives all powerful groups enough of what they want to prevent their disaffection, and reasoned argument elaborating underlying moral principles is rarely part of or even congenial to such compromises.”

Fortunately, the Court offers an alternative. “We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophecy. I call it law.”

A final justification for judicial supremacy also hinges on the role that the Court might play within the larger political system. Judicial supremacy, in this view, is regarded as an “as a permanent and indispensable feature of our constitutional system” because the Court alone functions as a countermajoritarian institution securing the liberties of individuals and political minorities. In the early 1960s, Alexander Bickel famously referred to the Court’s “counter-majoritarian difficulty.” The core reality of judicial review is that the Court “thwarts the will of representatives of the actual people on the here and now; it exercises control, not in behalf of the prevailing majority, but against it.” For Bickel, still rooted in the New Deal liberalism that did battle with the *Lochner* Court, the judiciary’s countermajoritarian character was a disability requiring special rationalization. Many others, however, celebrate precisely this feature of the Court, and worry that it will be lost if judicial review is detached from judicial supremacy. Judicial independence and judicial supremacy are the twin bulwarks of liberty

33 Cooper v. Aaron, 358 U.S. 1, 18 (1958).
34 Bickel, 17.
within American constitutionalism, insuring that political majorities and their elected representatives do not trample the Constitution underfoot.

Unless the judiciary can stand against elected officials and authoritatively define constitutional meaning, the limits on political power will be lost. The Supreme Court has recently made this connection explicit, quoting John Marshall to the effect that “if Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be ‘superior paramount law, unchangeable by ordinary means.’” The Court is needed not merely to prevent the occasional abuse of power that arises when particular political actions violate constitutional provisions, but more importantly to prevent the systematic dismantling of the restraints on political power through legislative redefinition of constitutional meaning. Alexander Hamilton suggested this broader significance of the judiciary when he emphasized that the “complete independence of the courts of justice is peculiarly essential in a limited Constitution.” The “courts were designed to be an intermediary body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority.” The Constitution delegates authority to the legislature, and judicial supremacy insures that Congress cannot alter the terms of that authority and put the servant “above his master.”

The countermajoritarian Court may be useful in vindicating politically unpopular conceptions of justice as well as for enforcing the terms of the constitutional delegation of political power to the government. It is popular government and the “people themselves” that sometimes creates threats to the realization of justice and rights. An independent judiciary that will not “consult popularity” but rather will deliberate on fundamental principles is essential to the goals of constitutional government. Hamilton contended that such threats would be transitory, but both some of his contemporaries and more recent commentators have argued that such threats are endemic to democratic government. Judicial

35 See also, Keith E. Whittington, Constitutional Interpretation (Lawrence: University Press of Kansas, 1999), 110-159.
37 Hamilton, et al., No. 78, 466, 467.
38 Hamilton, et al., No. 78, 469, 471.
Supremacy provides an escape from what the great Jeffersonian iconoclast John Randolph called “King Numbers” and Ronald Dworkin has labeled “statistical democracy.” Unfettered by political interests or popular prejudices, the judiciary can penetrate to the true meaning of the Constitution and the subtle requirements of its principled commitments. Some questions – questions of justice and rights – are too important to be left in the hands of legislative majorities. Judicial supremacy insures that they are not.

Constitutional Politics

One problem with the theory of judicial supremacy is that it takes insufficient account of our historical experience under the Constitution. It rests on a set of historically abstracted normative arguments and a largely mythical historical narrative. Within that mythology of judicial supremacy, constitutional politics is aberrational and pathological. In fact, constitutional politics has been a real and regular feature of American political life, and a persuasive theory of judicial supremacy will have to take those experiences into account.

The mythology of judicial supremacy rests on the centrality of the Supreme Court’s decision in Marbury v. Madison in establishing judicial supremacy as historical fact. This Marbury myth reflects in part the highly legalistic perspective of adherents to the theory of judicial supremacy. In this formalistic approach to constitutionalism, the identification of legal precedent is critical. John Marshall’s opinion in Marbury is (somewhat contentiously) interpreted as arguing for judicial supremacy. The existence of that Marbury opinion is then taken as establishing judicial supremacy as historical fact. The presence of an authoritative legal text is taken as equivalent to the establishment of constitutional reality. The Court has itself been a prime purveyor of this view. The Cooper Court asserted, for example, the simultaneous

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41 For a related discussion of the Marbury myth, see also Robert Lowry Clinton, Marbury v. Madison and Judicial Review (Lawrence: University Press of Kansas, 1989), 4-30.
claims that *Marbury* established the Court as the supreme expositor of the Constitution and that this principle of judicial supremacy has “ever since been respected by this Court and the Country.”42 Laying aside the questions of whether *Marbury* actually made such a claim on behalf of judicial authority and whether such a claim has since been respected by the Court, there is little question that the principle of judicial supremacy has long been contested within “the Country” more broadly and not infrequently rejected. Judicial supremacy could well be “settled doctrine” without being an established feature of American constitutional practice.43 Nonetheless, advocates of judicial supremacy frequently recur to this *Marbury* doctrine in order to avoid questions about the foundations of judicial supremacy. Ronald Dworkin has recently been moved to address not only the problem of the best interpretive method to be adopted by the judiciary, but also the “institutional questions” of “who must ask these questions” about how the Constitution should be read and “whose answer should be taken to be authoritative.” Having raised this “mysterious matter,” however, Dworkin promptly dismisses it as of no practical importance. After all, this interpretive “authority is already distributed by history, and details of institutional responsibility are matters of interpretation, not of invention from nothing.” He offers that “the most straightforward interpretation of American constitutional practice shows that our judges have final interpretive authority,” though he gives no particular support for this claim beyond an earlier reference to *Marbury*.44

An alternative tradition of authoritative constitutional interpretation outside the courts undermines this narrative of unchallenged judicial supremacy. In fact, looking beyond the pronouncements of the Court exposes a wide range of constitutional activities by other political actors. A variety of political actors have regularly struggled over the proper interpretation of the Constitution and the best way to effectuate its principled commitments in government practice. The judiciary has provided only one source of commentary on the meaning of the Constitution, and that commentary has not always been the

42 Cooper v. Aaron, 358 U.S. 1, 18 (1958).
43 Ibid., 17.
most important one in translating constitutional text into reality. A coherent theory of judicial supremacy must somehow explain how this long tradition of political constitutional discourse is consistent with the model of the Court as the ultimate constitutional interpreter.

Perhaps the most difficult example of constitutional politics from this perspective is the historically recurring assertion of departmentalist theories of constitutional interpretation. Departmentalism refers to a theory that each branch, or department, of government has the authority to determine constitutional meaning independent of the judgments of the other branches. Whether passing legislation, exercising the presidential veto or pardoning power, or enforcing statutes, Congress and the president are to be guided by their own constitutional interpretations, regardless of prior judicial rulings relating to relevant aspects of the Constitution. For the departmentalist, the Court’s rulings are only binding within its own legal context, on litigants and lower courts. Other constitutional actors, such as presidents, are free to follow their own constitutional understandings, whether that leads them into direct conflict with the Court or simply to narrow the scope of judicial reasoning.

Departmentalism is not the strongest possible challenge to judicial authority. Departmentalism does not, for example, challenge the existence of judicial review itself. A departmentalist president may well agree with John Marshall that in conducting its own duties the Court is not obliged to follow a law that it believes to be unconstitutional. The departmentalist would simply claim a similar authority for the other branches, limiting the generative force of judicial pronouncements. The departmentalist does not deny the Court’s authority to decide cases, and even to inquire into the meaning and relevance of the Constitution in resolving those cases. But he does deny the Court’s authority to articulate constitutional norms or define constitutional meaning. The Court’s opinions only explain and justify its actions; they do not offer authoritative interpretations of the Constitution. The Court’s constitutional reasoning can only guide its own actions; other political actors must act on their own best understandings of the Constitution, even if those lead them to different conclusions than those reached by the Court.

45 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).
The departmentalist logic can support a wide range of activities. The least controversial applications of the departmentalist logic can, in fact, be compatible with theories of judicial supremacy. The elected branches of government necessarily engage in some level of constitutional interpretation as they go about their normal business. In passing a statute, Congress is necessarily asserting, with more or less explicit consideration, that the given legislation is consistent with the Constitution. In some instances, Congress will legislate in areas that have not yet been subject to litigation and authoritative judicial interpretation of relevant aspects of the Constitution. In such cases, Congress must independently interpret the Constitution and act on its own best judgment of its requirements. Likewise, many judicial supremacists would accept at least some criticism of existing judicial doctrine by elected officials. The Department of Justice may submit arguments to the Court contending that the Court has erred in its earlier interpretations of the Constitution and should reverse itself. The president may nominate, and the Senate may confirm, new justices who disagree with the existing constitutional law. Members of Congress or the president may even make public statements disagreeing with judicial rulings, though such public disputes over constitutional meaning can quickly become problematic from the perspective of judicial authority and supremacy as they may foster uncertainty about the law or undermine the implementation of judicial rulings.

More tellingly, departmentalism authorizes political actors to act on understandings of the Constitution that are in conflict with judicial interpretations. The president may veto legislation or pardon individuals who violated laws that he regards as unconstitutional, even though the Court has declared such legislation to be consistent with the Constitution. Congress may pass statutes that are inconsistent with existing judicial doctrine. Such legislation may simply read Court doctrines very narrowly, rejecting the Court’s constitutional interpretation without violating its specific ruling. Congress continues to employ the legislative veto, for example, even though the Court struck down one such veto device as unconstitutional and clearly regarded all such procedures as inconsistent with the Constitution. The Court

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has not aggressively pursued these “violations” of the 1983 *Chadha* decision, partly acceding to the contrary constitutional interpretation adhered to by Congress.⁴⁷ The state governments have often pursued a similar strategy. The states have, for example, advanced a variety of schemes to admit religious symbols and activities into public facilities, to heavily regulate abortion services, and to prevent the racial desegregation of public schools, even when such efforts were in clear contravention of the Court’s understanding of constitutional requirements.⁴⁸ More rarely, elected officials have directly challenged judicial authority by rejecting even the specific constitutional interpretations of the Court. The Religious Freedom Restoration Act, for example, sought to “overturn” the Court’s 1990 *Smith* ruling and reestablish the Court’s earlier interpretation of the religious free exercise clause of the First Amendment.⁴⁹ President Andrew Jackson vetoed the rechartering of the National Bank in part on constitutional grounds, despite an earlier Court ruling that the Bank presented no constitutional problems. Political actors may also threaten to circumvent the Court and disregard its constitutional opinions, for example by refusing to enforce or implement its decisions, by removing certain cases from its jurisdiction, or by altering the judicial personnel through impeachment or “packing.”⁵⁰

Beyond the specific possibility of departmentalism lies a larger realm of general constitutional politics that is not readily consistent with theories of judicial supremacy. Political actors make a host of decisions that involve the Constitution but may bear little relation to the judiciary.⁵¹ Although such political activities can be regarded as “departmentalist” in that they involve independent constitutional judgments by nonjudicial officials, they do not so directly involve questions of judicial authority. The early sessions of Congress and first administrations were regularly faced with, and resolved,

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constitutional problems that did not evoke a competition with the courts. The Constitution specifies a procedure for appointing executive officials, for example, but does not specify any method for removing them other than impeachment. Congress and the president were quickly faced with the question of whether executive officials were by implication appointed for life until they committed offenses that warranted impeachment, and if not whether they could be removed by the unilateral action of the president or if they could only be removed with the consent of the Senate that had confirmed their original nomination. The Constitution does not specify any procedures for admitting new states into the Union, nor does it say whether states may choose to leave the Union. The Constitution is unclear as to whether the requirement that the Senate give its “advice and consent” to treaties mandates that senators be involved in the negotiation of treaties or can merely ratify completed agreements. The Constitution gives the House the sole power to impeach and the Senate the sole power to try impeachments, but it provides only the vague standard for impeachable offenses and gives no guidance as to how a Senate trial must be conducted. More subtly, the Constitution does not indicate the appropriate grounds on which the president may exercise his veto power, the appropriate qualifications of judges, the appropriate structure of the lower federal courts, the appropriate shape of legislative districts, or the meaning of the guarantee that states will have “republican governments.”

Some of these matters were left to the discretion of future officeholders. Some were simply overlooked by the founders when they drafted the Constitution. They are nonetheless fundamental to our constitutional order and they determine the basic character and operation of our government and political system. Political actors have been forced to construct constitutional meaning from the inadequate hints provided in the text and from their own political sensibilities. As a consequence, nonjudicial actors have routinely engaged constitutional issues and made important decisions about constitutional meaning, sometimes in a dialogue with the courts and sometimes not. The more we appreciate the range of constitutional politics, the less the judiciary appears to be the “ultimate” authoritative interpreter of the

Constitution or a particularly special guardian of constitutional meaning. The judiciary may be supreme within its sphere, but the Constitution also exists outside the judicial arena.

Judicial supremacy itself rests on political foundations. The judiciary may assert its own supremacy over constitutional interpretation, but such claims ultimately must be supported by other political actors making independent decisions about how the constitutional system should operate. The Court’s self-referential reliance on a few sentences from John Marshall’s opinion in *Marbury* may be used to establish a doctrine of judicial supremacy, but it is the purest bootstrapping to imagine that it establishes judicial supremacy as a political practice. As the *Cooper* Court at least recognized, the assertion of judicial supremacy is only meaningful if other powerful political actors acquiesce to that declaration. When the Court is unable to persuade other officials that its reading of the Constitution is substantively correct, it can at least answer the question of why those other officials should accept that the Constitution means *that* with the judicial supremacist’s retort, “because we said so.” But such a response would be mere question begging if the authoritativeness of judicial interpretations is itself challenged by other officials, possessed by reason and an alternative reading of the text. In response to the question of institutional authority, the Court will have to engage in genuine dialogue with other officials and persuade them to accept its authority on substantive grounds. The willingness to defer to the Court on constitutional issues itself requires a constitutional judgment on the part of elected officials, and the external observer would at least want to know more about how the Court could have won such a political victory.

The Puzzles of Judicial Supremacy

A number of important empirical and normative questions remain to be answered about the theory of judicial supremacy. Treating judicial supremacy simply as a legal doctrine, justified by the authority of precedent, does little to advance our understanding of judicial supremacy and how it might fit within the constitutional order. Once we move beyond the mere assertion that the Constitution somehow “requires” judicial supremacy and that the judiciary always determines constitutional meaning, we are left with
difficult problems of explaining the relative success of judicial supremacy over competing possibilities and the consequences for our constitutional system of both judicial supremacy and challenges to it. Ultimately, these empirical and normative concerns are related. In particular, I think that we will be able to gain a more complete appreciation of the normative issues associated with judicial supremacy if we examine its political and historical roots.

The most basic empirical question to be asked concerns the political foundations of judicial supremacy. Judicial supremacy did not emerge as a fully formed and politically dominant constitutional theory at the time of the Founding or in the early years of the nation’s history, as legal theories emphasizing the *Marbury* precedent might suggest. It is the modern Court, not the early Court, that has been most aggressive in asserting the reality of judicial supremacy. Even the more limited institution of judicial review developed gradually. The political foundations for the secure exercise of the Court’s power to review legislation for its constitutionality were laid over the course of decades by the Marshall Court and were still weak when the Taney Court issued its *Dred Scott* decision. Mark Graber in particular has insightfully laid bare the Court’s long political struggle to establish the power of judicial review, and any exploration of the political foundations of judicial supremacy must be equally sensitive to the logic of judicial politics.53 Given the evident power of elected government officials to intimidate, co-opt, ignore, or dismantle the judiciary, we need to understand why they have generally chosen not to use that power and instead to defer to judicial authority.

Just as the rise of judicial supremacy requires a political explanation, so do challenges to judicial supremacy. In the legal mode, challenges to judicial supremacy, such as departmentalism, are often treated simply as flawed constitutional theories. Occasional departmentalist episodes in American history

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are products of intellectual mistakes. Of course, these particular intellectual mistakes do not look entirely innocent, so the legal analysis has been readily linked to political analyses emphasizing challenges to judicial supremacy as self-interested behavior by those who had lost in court.\textsuperscript{54} The history of the \textit{Cooper} case itself provides an exemplar of such politically opportunistic challenges to judicial supremacy in the form of Governor Orval Faubus. It was Faubus who called out the National Guard in 1957 to prevent the desegregation of the Little Rock schools, which in turn led to the litigation in \textit{Cooper} and the Court’s ultimate effort to “answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the \textit{Brown} case.”\textsuperscript{55} Although Faubus initially denied that he was “defying the orders of the United States Supreme Court” in calling out the Guard to maintain “order,” he later declared that “the Supreme Court decision is not the law of the land.”\textsuperscript{56} For Faubus, the challenge to the judicial authority to determine constitutional meaning simply gave a veneer of legitimacy to the state’s resistance to federal policies that were unpopular with the governor’s constituents.

Also in 1957, the political scientist Robert Dahl provided a more systematic explanation for conflicts between the Court and the elected branches at the national level. Extrapolating from the example of the New Deal, Dahl posited that the Court would obstruct congressional majorities only when the membership of the Court lagged a rapid change in the dominant electoral coalition.\textsuperscript{57} In normal circumstances, the justices who had been appointed by the president and confirmed by the Senate would operate in partnership with the elected branches of government. In the rare circumstances of electoral instability, however, new congressional majorities may find their policies being rejected by holdover justices who had been appointed by the recently dethroned party. By implication, political attacks on the

\textsuperscript{54} In concluding his response to Edwin Meese’s 1986 Tulane speech criticizing judicial supremacy, Paul Brest wrote, “Would he have made the same speech if a majority of the Supreme Court supported the Administration’s views on issues such as abortion and school prayer? The transparent political motives underlying Mr. Meese’s radical proposal demonstrates why at least the Attorney General ought not to be entrusted with the power to contradict judicial decisions.” Paul Brest, “Meese, the Lawman, Calls for Anarchy,” \textit{New York Times} (2 November 1986), sec. 4, page 23.

\textsuperscript{55} \textit{Cooper v. Aaron}, 358 U.S. 1, 17 (1958).


Court were an effort to overcome judicial obstruction of important federal policies. Unfortunately, the use of the judicial veto has not been closely correlated with such electoral transitions, and political attacks on judicial supremacy do not correspond with periods of unusual judicial activism.\textsuperscript{58} The failure of the obstructionist Court hypothesis has left scholars without an adequate explanation for such periods of resistance to judicial authority. With the exception of Roosevelt’s Court-packing plan, elected officials appear to have attacked the Court without justification, perhaps out of a hysterical overreaction to earlier grievances. Court-curbing measures appear to an emotional release, not a rational strategy to advance policy objectives – a psychological phenomenon, not a political one.\textsuperscript{59} The reconstruction of a political explanation for such challenges to the courts is an important starting point for understanding fluctuations in judicial authority.

Normative and legal theories of judicial supremacy also face the difficulty of integrating their absolutist formal claims on behalf of judicial authority with the empirical reality of constitutional politics. The pervasiveness of constitutional politics intrudes into arguments on behalf of judicial supremacy in various ways. Even strong advocates of judicial supremacy recognize some realm of nonjudicial constitutional interpretation, from the preliminary interpretive efforts of the legislature in passing statutes to the independent efforts of the House of Representatives in identifying an impeachable offense. At the very least, the nonexclusivity of judicial constitutional interpretation creates complications for theories of judicial supremacy.\textsuperscript{60} At the same time, however, those who wish to call attention to the pervasiveness of constitutional politics must also explain the surfeit of constitutional law. In some fashion, judicial authority to interpret constitutional meaning must be related to the ongoing practice of constitutional politics. The Constitution inside the courts must be reconciled with the Constitution outside the courts.

The most basic normative question to be asked is whether judicial supremacy is essential to constitutionalism. Many scholars and judges have assumed that it is. The Rehnquist Court has been clear

\textsuperscript{58} This thesis is considered in more detail in Chapter Two.

in identifying the judicial authority as the ultimate interpreter of the Constitution with the capacity of a
collection to constrain political actors, who could otherwise alter or ignore the terms of the Constitution
at will as it suited their immediate needs. Likewise, the Warren Court asserted that judicial supremacy
was an “indispensable feature of our constitutional system.” Challenges to judicial supremacy thus
appear to be attacks on constitutionalism itself. Without judicial supremacy, “the civilizing hand of a
uniform interpretation of the Constitution crumbles” and the “balance wheel in the American system”
would be lost. Many scholars have therefore been distressed to find that judicial supremacy has not
been more widely accepted and politically effective. The rejection of judicial supremacy is tantamount to
the rejection of judicial independence. Gerald 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. The prior assumptions of the judicial supremacy model of
constitutionalism render political pressure on the judiciary deeply problematic and the supposed
foundations of constitutional values quite insecure. But we cannot know when “judicial independence” is
“most necessary” unless we more carefully consider the constitutional significance of what goes on
outside the courtroom.

The Logic of Constitutional Authority

The starting point for much of our thinking about the judiciary and constitutional interpretation is the
assumption of a rigid distribution of interpretive authority. We tend to assume that some institution must
simply have the authority to determine constitutional meaning, and that other institutions must have the
 corresponding obligation to defer to that authority. Most often, interpretive authority is assumed to be

60 See also, Scott E. Gant, “Judicial Supremacy and Nonjudicial Interpretation of the Constitution,” Hastings
62 Cooper v. Aaron, 358 U.S. 1, 18 (1958).
vested in the judiciary, producing judicial supremacy. A variety of normative, legal and doctrinal rationales support the existence of judicial supremacy and the Court’s right and responsibility to issue authoritative interpretations of disputed constitutional commitments. Less often, but more provocatively, some have asserted that interpretive authority is most appropriately invested in some other institution, usually Congress or the president, which is then to be regarded as supreme over the other branches of government. A final option is to distribute interpretive authority across multiple institutions, each “supreme within its sphere” to borrow a phrase from John Marshall, but none supreme over all parts of the Constitution. This theory of “fixed departmentalism” “accepts that there is such a thing as authoritative interpretation in a given matter, but rejects the notion of a single supreme interpreter regarding all matters. Instead, allocation of interpretive authority varies by topic or constitutional provision.”

The Court’s political questions doctrine, for example, recognizes that some constitutional questions may be authoritatively resolved outside the judiciary, such as the meaning of the “high crimes and misdemeanors” impeachment standard or the substantive requirements of the republican guarantee clause. These interpretive questions have been allocated to the political branches to answer. The various potential constitutional interpreters have “different areas of competence.” Allocating interpretive authority among those different branches according to their particular area of competence would both “decreas[e] the scope of judicial authority” and reduce if not eliminate conflicts between the judiciary and the other branches of government over interpretive authority.

Although these approaches disagree sharply on where interpretive authority should be located, they all agree that ultimate interpretive authority can be located somewhere. There is a correct and stable answer to the question of “who shall interpret?” which can be deduced from the structure, purpose or

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66 Gant, 384. Gant very usefully distinguishes this theory of fixed departmentalism from “fluid departmentalism,” in which “allocations are made but are not unalterable” or “that no allocation can be made at all – that all departments have an equal claim as interpretive agents in all matters,” though he seems to find fixed departmentalism to be the more common theory. Ibid.
specific provisions of the Constitution. In this book, I want to develop a different logic, a political rather than a legal logic. Over the course of American history, there has been no single, stable allocation of interpretive authority. Rather, various political actors have struggled for the authority to interpret the Constitution. They have sought to displace other potential constitutional interpreters and to assert their own primary authority to determine the content of contested constitutional principles. That struggle for interpretive authority has varied in its intensity over time. Often, political actors have been content to defer to the interpretive authority of others. Quite often, they have chosen to defer to the judiciary and have been willing to support claims of judicial supremacy. At times, however, the struggle has been intense and involved leading political figures. At times, others who have been able to make a compelling case that they understand the Constitution better than the courts have displaced the judiciary as the authoritative interpreter of the Constitution. They have not been content to refrain from entering the judiciary’s peculiar area of competence, but have instead argued forthrightly that in a democracy the Constitution is too important to be left in the hands of the judges alone.

Challenges to judicial supremacy can come from several directions, from Congress or the president, from state officials or private citizens. For a variety of reasons, however, those challenges are likely to be most fully and significantly developed by the president. Individual legislators, state officials, or citizens may all question judicial supremacy to relatively little effect. Given the inherently controversial nature of the Court’s activities, there is likely to always be an undercurrent of resistance to judicial supremacy. The interesting question is when that undercurrent becomes the mainstream and the authority of the judiciary to determine constitutional meaning becomes a politically salient problem attracting the attention and sympathies of powerful political actors. Given the status and power of the presidency, executive challenges to judicial supremacy are likely to represent the most important ones.

Legislative challenges to judicial supremacy are also likely to be inherently limited in their aspirations. At the extreme, a congressional challenge to the Court’s authority would imply legislative supremacy in interpreting the Constitution. Legislative supremacy, however, would tend to subvert the
power of judicial review itself. Unsurprisingly, given this result, commentators tend to find “few systematic assertions of legislative supremacy since the nation’s founding.”69 Unable to develop explicit theories of legislative supremacy, congressional challenges to judicial authority are more likely to take the form of criticisms of particular judicial decisions. Unable to say that Congress is a more authoritative interpreter of the Constitution than the Court, legislators are instead likely to content themselves with saying that the Court has made a mistake in some particular constitutional decision. Congress is more likely to try to enter into a dialogue with the Court over a particular constitutional interpretation than to challenge the Court’s authority as the ultimate interpreter. This limited aspiration tends to be reinforced by the sequence of legislative and judicial actions, in which the Court at least formally can always have the last word. Congress finds it difficult to express a challenge to judicial authority without “enacting a lawsuit” and inviting a reassertion of judicial supremacy, as in the Boerne case.70 Congress can readily deny the exclusivity of judicial constitutional interpretation, but it cannot easily challenge the claim that the Court is the ultimate constitutional interpreter.71

As a challenge to judicial supremacy departmentalism supports coordinate interpretation of the Constitution by the legislative branch as readily as by the executive branch, but it is no accident that presidents have historically been the primary exponents of departmentalism. Presidents are better positioned to challenge judicial authority than is the legislature. Holding the “power of the sword,” presidents have the opportunity to act more directly on judicial decisions and after the Court has spoken. More generally, presidents have a variety of high-profile opportunities to challenge judicial supremacy without subjecting themselves to judicial review and response, from the informal power of the bully pulpit to the formal veto and pardoning powers. More ambitiously, the presidency is a hierarchical rather

69 Gant, 374.
71 As the Court emphasized in Powell, the political questions doctrine carving out areas of the Constitution for congressional interpretive responsibility remains after all judicial doctrine. The Court always controls the carving, in effect delegating some interpretive disputes to the legislature to resolve but retaining the authority to rescind that delegation, as it in fact had done in the legislative reapportionment cases. Powell v. McCormack, 395 U.S. 486, 521 (1969); Baker v. Carr, 369 U.S. 186, 209-236 (1962).
than a collective institution. The “unity” of the executive means that the president need only consult his own conscience before challenging the Court, whereas the fractious deliberations of Congress weakens and muddies any legislative challenge to the judiciary. The “energy,” “decision, activity,” and “dispatch” that Alexander Hamilton admired in the executive has public as well as administrative consequences.\footnote{Hamilton, et al., No. 70, 424.}

The president has a visibility that enhances his authority and gives weight to his pronouncements. The president has emerged as the “interpreter-in-chief,” who can “make politics” by redefining the political landscape.\footnote{Mary E. Stuckey, The President as Interpreter-In-Chief (Chatham, NJ: Chatham House, 1991); Stephen Skowronek, The Politics Presidents Make (Cambridge: Harvard University Press, 1993).} Individual legislators speak, but the legislative body can only act.\footnote{HStuckey} Only the president and the judiciary can and regularly do combine their actions with statements about their larger meaning and justification. Through his public statements the president is capable of expressing a constitutional vision that can stand opposed to that offered in the opinions of the Court.

Presidents are political leaders, and it is the logic of leadership in the American political system that has particular consequences for judicial authority. Almost by accident, presidents alter their political environment. They cannot help but lead. Their electoral campaigns shape the legislative agenda. Their public pronouncements echo across the political landscape. Their actions disrupt existing policy and political networks. If presidents are natural leaders, the demands of leadership also structure and constrain their behavior. Individual presidents must determine what it means to lead well in their particular historical and political context.

Presidential authority is rarely considered in the analysis of the presidency, but is rather subsumed in the related notions of power and influence. From that perspective, the powers of the presidency are fairly fixed by constitutional text, precedent and tradition. The creation or recognition of a new power by one president necessarily empowers his successors, as with the growth of the policy veto, or the war powers, or the removal power. Presidential interpretation of the Constitution is generally understood in the same way. If one president can successfully challenge judicial supremacy, then they must all have the same
power. Departmentalism, or more specifically presidential review, would become a part of the office of the presidency as if it had been written into Article II of the Constitution, just like the veto or pardoning power (and just like the power of judicial review for the Court). Some presidents may be more or less skilled or effective in the use of their inherited powers, but their political arsenal is the same.

As an effort to understand constitutional authority, this approach is wrong. Constitutional authority is fluid, not fixed. Presidents cannot all make the same leadership claims on their fellow political actors. As Stephen Skowronek has emphasized, “a president’s authority hinges on the warrants that can be drawn from the moment at hand to justify action and secure the legitimacy of the changes affected.” The president is both empowered and constrained by the set of partisan commitments and informal political resources that he brings with him to the office and builds during his term. Thus, although all presidents have quite a bit of power to effect political change, not all presidents can do so successfully and the political response to those changes is neither uniform across presidencies nor strictly a function of the political skill of individual presidents. The authority for a president to act is structured by the expectations of other political actors, which help define “what is appropriate for a given president to do.” All presidents are disruptive of the status quo and change their political environments. Not all presidents, however, have the authority to explain and legitimate those changes. All presidents can and do talk about the Constitution. Not all presidents can speak with authority.

This book will examine fluctuations in judicial interpretive authority primarily in the context of the presidential leadership task. The problems of presidential leadership provide a useful, though not exclusive, perspective on the struggle for constitutional authority within the American system over time, the incentives facing political actors to support or undermine judicial authority, and the opportunities available to the judiciary to assert and develop their own claims to authority. Political actors defer to the

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76 Skowronek, 18.
authority claims of the courts because the judiciary can be useful to their own political and constitutional
goals, or at least because challenging the Court may be too politically costly. Judicial authority must be
won and defended, and at the expense of other potential constitutional interpreters.

Political Goals and Constraints

A president has two overriding imperatives. He wishes to advance his agenda and to maintain his
political coalition. Presidential agendas vary over time. Some presidents have broad and ambitious
agendas. Others have narrow and modest agendas. Presidents would prefer to be able to define their own
political agenda, and not merely advance a preset list of initiatives drawn from a party platform or the
congressional calendar. That is, presidents want to lead. Few are content with the role of a mere clerk,
and all hope to occupy the office in their own right and to leave their individual stamp on the nation.

The presidential office is unique in American politics, and it invites its occupant to make expansive
claims to the authority to lead the nation. Moreover, part of the presidential agenda is likely to involve
constitutional meaning. The Constitution is foundational in American politics, not only in the sense that
it establishes the boundaries of legal action but also in the sense that it authorizes, invites and structures
political activity. An implicit or explicit constitutional discourse comes naturally to presidents, not
because they are the special caretakers of our constitutional tradition but because their visions of political
leadership lead them to push the boundaries of that tradition. The president “tells us stories about
ourselves, and in so doing he tells us what sort of people we are, how we are constituted as a community.
We take from him not only our policies but our national self-identity.”78 Because presidential ambitions
are foundational, the Constitution becomes a basic resource and constraint.

In addition to defining and promoting an agenda, presidents are obliged to maintain their political
coalition. This is in part an instrumental good: maintaining coaltional stability facilitates implementation

77 Ibid.
78 Stuckey, 1.
of the presidential agenda. It is also a distinct presidential imperative. To a greater or lesser degree, presidents are representatives of a preexisting political coalition. That coalition places independent demands on the president, which the president will likely seek to meet both out of a sense of political obligation, in payment for earlier assistance rendered, and in expectation of future legacies. Whether for independent or instrumental reasons, however, presidents must expend resources nurturing political coalitions. The president will be required to pursue an agenda that is secondary to his own but favored by coalition members, and he will be expected to help build and to avoid damaging coalitional strength.\(^7^9\)

A president cannot afford to simply be a policy entrepreneur or a “policy wonk.” He is also by necessity a coalition leader. The president and vice-president are the only nationally elected political officers. As a political candidate, the president is highly visible and must appeal to an unusually diverse constituency. The electoral success of a presidential candidate depends on his ability both to take control of the existing party establishment and to consolidate new support around his campaign and presidency. The legislative success of a president likewise depends on his ability to mobilize partisan supporters within Congress and to build new legislative coalitions around particular policy proposals.

In pursuing these twin goals of advancing a substantive agenda and promoting a stable coalition, presidents are faced with a variety of constraints that limit their ability to realize these goals. Such constraints will help determine the presidential strategy in pursuing his objectives. They impose limits on what is possible and force presidents to make choices. They may also be sufficiently internalized so as to shape the types of goals that the president formulates in the first place. That is, we should be equally concerned with the formation of presidential goals and with the choice of strategies that the president might adopt to advance those goals.

Presidents are constrained in part by limited resources. The presidential supply of certain resources, such as time, is finite, which imposes opportunity costs and prevents presidents from pursuing every issue that they might favor. Presidents must pick their battles, and they must prioritize their agenda. Every

\(^{79}\) Such coalitional obligations are not historically constant. For example, nineteenth century presidents were more beholden to their parties than are twentieth century presidents.
issue that the president might pursue would require some expenditure of time and energy in order to shape alternatives, formulate strategies, mobilize supporters, and the like. Although some issues might, in the abstract, be resolvable by a given president, they may be crowded off the presidential agenda by more pressing concerns that are more politically salient, more intensely preferred, or more practically consequential. The need for prioritization is equally felt in the arena of constitutional disputes as it is in routine policy disputes. Debates over abortion, euthanasia, and religious liberty may readily rise to the top of the political agenda and demand attention from political leaders, whereas the requirements of a criminal defendant’s right to counsel or police interrogation techniques may never receive full political consideration.

Presidents also have limited powers that necessitate their reliance on other political actors. The institutional powers of the presidency are specific and limited, and the American constitutional system is highly fragmented. In order to advance his agenda, the president must usually win support for his policies from other political actors, in Congress and elsewhere, with their own, independent political and policy concerns. Although the powers of the presidency are limited, they are not necessarily fixed. Presidents often struggle over the contours of their office as well as over government policy. In seeking to advance their primary goals, presidents are likely to push the boundaries of their inherited office and encourage others to recognize their expanded powers.

The president is also constrained by the strength of his coalition. A presidential agenda may be hard to pursue if legislative support is weak or lacking, as when the opposition party controls one or both houses of Congress. Similarly, the presidential coalition may itself be diffuse or fragmented, limiting the president’s ability to focus support for a particular agenda. Somewhat differently, the presidential coalition may be relatively brittle, even if it momentarily retains control of crucial government institutions. Legislative majorities may splinter or face electoral losses if forced to act on an ambitious positive agenda. The relative vulnerability or strength of the presidential coalition will alter calculations of whether and how to pursue individual agenda items, while also shifting the priority between the president’s own positive agenda and his coalitional maintenance responsibilities.
Presidents may also be constrained by the broader ideological and institutional context within which he must operate. The president cannot be idiosyncratic in defining his agenda. The credibility of the president’s agenda depends in part on its fit within the larger ideological and institutional environment within which it is offered. An individual president is structured by a preexisting regime. The Eisenhower administration, for example, was partly prefigured by its arriving in the context of the modern presidency and the post-New Deal era. Despite Eisenhower’s own preferences for congressional leadership and smaller government, he did not have the option of emulating Calvin Coolidge. Similarly, in the shadow of Ronald Reagan Bill Clinton’s political legacy will be shaped more by deficit reduction and welfare reform than by such activist proposals as health care reform that he might have otherwise favored.

The presidential challenge is both to pursue his goals within these constraints and to attempt to loosen the constraints themselves. The judiciary may be either one of these felt constraints or a means for managing or even overcoming the various tensions inherent in the presidential task. We tend to think of the judiciary as a constraint on the president and political actors generally, imposing constitutional limits on them and impinging on their natural tendency to ignore constitutional obligations. As a consequence, there is a tendency to assume that judicial authority is always under threat from political leaders. At best that threat is inactive, as when the legislature favors policies that the Court finds to be within their constitutional discretion to enact. In such instances the judiciary is tolerated, but only because it is irrelevant. At worst the threat to judicial authority becomes active, most notably if the Court were to strike down laws that enjoy widespread popular support. It is in such circumstances that the “countermajoritarian difficulty” is faced most squarely and judicial authority may be expected to wane.

A better appreciation of the goals and constraints facing political leaders, however, should force us to modify that view. The judicial authority to interpret the Constitution may be an opportunity as well as a hindrance to political actors seeking to advance substantive agendas and maintain vulnerable coalitions. An autonomous judiciary with the power to resolve divisive constitutional issues may well be a solution to a variety of problems that political leaders face. Moreover, the political constraints facing presidents may in turn strengthen the Court, helping to insulate it from political attacks. Interpretive authority
cannot be wrested from the judiciary without being placed elsewhere. Dissatisfaction with the Court must be linked with some plausible alternative to judicial supremacy before judicial authority can be seriously challenged. For most of American history there has been no such plausible alternative.

The Political Context of Constitutional Authority

These considerations can be framed in the context of three basic situations in which political leaders might find themselves. Each of these situations reflects a different set of incentives facing political leaders and thus a distinct set of likely strategic choices. In particular, these strategic environments reflect the presidential relationship to the constitutional and political regime. Bruce Ackerman, for example, defines a constitutional regime as “the matrix of institutional relationships and fundamental values that are usually taken as the constitutional baseline in normal political life.”\(^{80}\) Similarly, Stephen Skowronek refers to partisan regimes as “the commitments of ideology and interest embodied in preexisting institutional arrangements.”\(^{81}\) These webs of institutional, ideological and partisan commitments form a basic context within which presidents operate and help structure their strategic options, and provide a first cut on the set of constraints and opportunities facing a given political leader. Presidents may be either supportive of or opposed to these established sets of commitments, and if opposed may or may not have the political resources to significantly alter the inherited regime.\(^{82}\) Presidents may be positioned to reconstruct the inherited constitutional order, in which case they will seek to maximize their own interpretive authority. More likely, they will operate within that established order, whether in affiliation with or in opposition to the dominant regime. In such cases they will be forced to share the interpretive task with the courts and will have a variety of reasons to defer to judicial authority. When the political debate begins to focus on the “constitutional baseline” itself, judicial authority becomes more tenuous and

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81 Skowronek, 34.
82 This basic framework draws on Skowronek’s more general analysis of presidential leadership. See generally, Skowronek, 33-58.
other political actors make stronger claims to interpretive primacy. When the baseline is itself fairly stable and constitutional debates become more diffuse and focused on more marginal disputes, the political incentives to displace the primary interpretive authority of the Court are weak.

A very few presidents are well situated to reconstruct the established order along new lines. These presidents come to office opposed to the established regime but at a time when that order is weak and collapsing. As a result, these presidencies are primarily concerned with destroying the last vestiges of the old regime and articulating the foundations of the new one. Presidential political authority is maximized through the confluence of the presidential capacity to disrupt existing political relations and the shaky legitimacy of the status quo. The key question during these moments is who will take control over the future direction of the polity. Overpowering competing institutions and actors is a prerequisite for presidential success.

The reconstructive task leads presidents to politicize constitutional meaning. As a consequence, reconstructive presidents are likely to deny judicial supremacy and reject the idea that the Court is the ultimate expositor of constitutional meaning. Historically, these are the presidents who have asserted the authority to ignore the Court’s constitutional reasoning and act upon their own independent constitutional judgments. In other words, reconstructive presidents tend to be departmentalists. The list of presidents who have adopted such a stance is a familiar one, and includes Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, and less strongly Ronald Reagan. The judicial authority to settle disputed constitutional meaning wanes as a concurrent presidential authority to reconstruct the inherited constitutional order waxes. This situation is examined in more detail in Chapter Two.

Reconstructive presidents are relatively rare. Few presidents have the desire or authority to challenge inherited constitutional and ideological norms and attempt to construct a new political regime. Far more common are affiliated leaders, who rise to power within an assumed framework of goals, possibilities and resources.83 Affiliated leaders are primarily concerned with continuing, extending, or more creatively

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83 Skowronek distinguishes between two types of affiliated leaders, those in a politics of articulation and those in a politics of disjunction. As we will see, that distinction is relevant to judicial authority as well. But I find the
reconceptualizing the fundamental commitments made by an earlier reconstructive leader. They are second-order interpreters. They interpret the inherited regime, not the constitutional order itself – that is, they interpret the interpretations of the reconstructive leader. They are the workaday practitioners of constitutional politics, concerned with clarifying what the constitutional regime is rather than with specifying what it should be.

The political situation of an affiliated leader both limits his own interpretive authority and creates opportunities for other institutions, most notably the judiciary, to assert their own interpretive authority. An affiliated Court can be expected to articulate the constitutional commitments of the dominant coalition. To that extent, the judiciary is an important asset to the dominant coalition. The Court can help enforce and extend those commitments, perhaps in ways that are not readily available to legislative leaders who must cope with fractious coalitions and crowded agendas. Somewhat differently, an affiliated Court draws on similar sources of authority as an affiliated president. When the inherited regime is collapsing under the force of a reconstructive president’s challenge, then the Court is vulnerable. When the regime itself is resilient, however, the Court’s interpretive authority can be a source of strength. When constitutional politics is primarily interpretive rather than creative, the Court can lay claim to a larger space of operations. Even so, the dominant political coalition’s support for judicial authority is contingent. Operating too far outside the framework of regime commitments would put the Court in danger of losing its political support. Within that framework, however, the Court has substantial autonomy to shape its own agenda and elaborate constitutional meaning. This situation is examined further in Chapter Three.

Reconstructive presidents are not the only leaders who manage to come to power while opposing the dominant regime. Nonetheless, not every oppositional president is as well positioned to remake the inherited order as Jefferson, Jackson, Lincoln and Roosevelt were. These other oppositional presidents, who “preempt” a continuing partisan order, come to office with relatively little authority and few differences between affiliated leaders to be less important than their similarities for purposes of examining the logic of their relationship to the Court.
resources with which to significantly increase their authority. The regime that they oppose is still vibrant, popular and resilient to pressure. The preemptive situation is one of sharp constraints. Preemptive presidents have unusually wide latitude in conducting their office in the sense that their oppositional status carries few partisan commitments or political expectations that they must achieve during their administration. The preemptive president is fortunate to be elected and complete his term of office without incident; other priorities take a backseat to this minimalist imperative. Preemptive presidents are distinguished by coming to power in a context of little ideological or political support. The more “political” and politically responsive the institution, the less likely it is to be a reliable ally to the president. The very features that make the old regime resilient remove possible political resources from an oppositional president, and the continued strength of the old regime insures that such presidents cannot expect to advance their oppositional agenda very directly.

For oppositional political leaders, the Court is both a potential constraint and a potential means for overcoming constraints. Preemptive presidents are likely to find themselves in disagreement with much of the substance of the Court’s output, just as they are likely to disagree with other political actors affiliated with the dominant regime. Oppositional leaders are likely to face more immediate obstacles than the relatively distant threat of judicial review, however, and they are unlikely to have either the motive or the resources to mount a serious challenge to judicial authority. They may even have reasons to attempt to bolster judicial authority. In a generally hostile political environment, a relatively independent judiciary can be an asset to an oppositional president. Unable to assume a leadership role in construing the Constitution, the president can at least hope to influence the courts as they exercise their interpretive responsibilities and may look to the judiciary as a potential ally in the president’s struggle against the numerous more partisan foes. Judicial supremacy may be the favored choice of oppositional presidents simply because the alternatives are either unavailable or even less attractive. This situation is examined in Chapter Four.

Over time the federal judiciary seems to have gained more authority over constitutional interpretation. As it has become evident that judicial supremacy is more often a help than a hindrance to political
leaders, it would not be surprising if judicial supremacy has become more prominent and secure. The
general political environment has also evolved in such a way that the logic of deference to judicial
authority has itself become more prevalent. The strategic calculations of the professional politician of the
twentieth century increasingly emphasized the value of recognizing judicial authority, even as the
judiciary built political resources of its own. This broader developmental tendency is explored in Chapter
Five.

Conclusion

Constitutional theory is often treated in the same formalistic manner as constitutional law. The
implications of the Constitution are developed as logical implications of an abstract text. Judicial
interpretive authority is posited as absolute, ahistorical and politically effective. At the same time,
sensible claims on behalf of the utility of judicial review for maintaining constitutional forms has been
transmogrified into a demand for judicial supremacy. The ultimate exposition of constitutional meaning
by the Supreme Court is deemed a necessary and sufficient condition for sustaining constitutionalism.
All that remains is to determine how the Court should interpret the text. Constitutional maintenance
becomes a bloodless and technical enterprise best conducted by the legal intelligentsia.

This vision of constitutional maintenance is neither desirable nor realistic. Constitutional
maintenance is above all a political task. As such, it must be considered in political terms. Constitutions
cannot survive if they are too politically costly to maintain, and they cannot survive if they are too distant
from normal political concerns. Constitutions are made real by being constantly embraced and reenacted
by citizens and government officials. The Court cannot stand outside of politics and exercise a unique
role as guardian of constitutional verities. The crucial problem is not that judicial interpretations cannot
remain “objective” and “neutral” and sealed off from political considerations. The more fundamental
problem is that the Court’s judgments will have no force unless other powerful political actors accept the
importance of the interpretive task and the priority of the judicial voice. Constitutional law rests within a
larger field of constitutional politics, and the scope and substance of constitutional law will be shaped by that politics.

The Court must compete with other political actors for the authority to define the terms of the Constitution. For the Court to compete successfully, other political actors must have reasons for allowing the Court to “win.” The president, among others, must see some political value in deferring to the Court and helping to construct a space for judicial autonomy. Judicial supremacy makes the strongest claims on other political institutions. It asserts not only that the Court has a role not only in applying the law of the Constitution to specific disputes between individual parties but also in defining the content of the nation’s most fundamental values and the appropriate workings of the most basic structures of governance. This is a strong claim to make, and we can easily imagine why other political actors might not wish to accede to such a claim. We can easily imagine presidents dismissing the authority of the Court and ignoring its opinions, if not its decisions. We can easily imagine a Court reduced to political subservience, inactive in the exercise of its power of review and incapable of acting independently. But judicial supremacy has grown and become more secure over time. Despite occasional voices of dissent, crucial government officials have generally supported the judiciary and recognized its claim to being the ultimate interpreter of constitutional meaning.

The American judiciary has been able to win the authority to independently interpret the Constitution because recognizing such an authority has been politically beneficial to others. Relative judicial independence and authority can help elected political officials overcome a variety of political dilemmas that they routinely encounter. In particular, the authority of the federal judiciary is rooted in concerns for electoral success and coalitional maintenance and the complications for political action created by the American constitutional system of fragmented power. Within boundary constraints set by other political actors, the judiciary has enjoyed significant autonomy in giving the Constitution meaning.

The judicial authority to interpret the Constitution is neither absolute nor stable. The judiciary has been able to sustain its claims to interpretive predominance primarily because, and when, other political actors have had reasons of their own to recognize such claims. Powerful political figures have often
found such reasons and have determined that judicial supremacy has been in their own best interests. Occasionally, political leaders reject the court’s claims for its own superiority and have advanced their own claims for interpretive authority. Constitutional authority has not been distributed once and for all by either the text or history. Constitutional authority, both substantive and interpretive, is dynamic and politically contested. The judiciary is an important player in this constitutional process, but it is not the only player. Challenges to judicial authority in part show the vibrancy of our constitutional system, as various political figures grapple with the requirements of the Constitution and try to reach a compelling understanding of our most fundamental values and commitments. If the voice of the judiciary is often primary in our dialogue over constitutional meaning, it is not the only voice that speaks in the name of the Constitution and sometimes not the best.