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The Politics of Constitutional Meaning

The Constitution is often thought to transcend our current disagreements and to have settled our fundamental political arguments. 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 is thought to become 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 discord. Daniel Webster, one of our nation's most incisive 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] Constitutions require a single, authoritative interpreter, subject to neither popular pressure nor electoral instability. Constitutional government, Webster and others have argued, requires judicial supremacy.

[1] *Debates in Congress*, 21st Cong., 1st sess. (1830), 6:78.

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."[2] 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.[3] "The Constitution is either a superior paramount law" subject to judicial interpretation and application, or it is "absurd."[4]

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." How could a judge uphold his own duties to the Constitution if its text "is closed upon him, and cannot be inspected by him?"[5] The courts did not so much have authority over the Constitution and over other political actors as they had the obligation not to "close their eyes on the Constitution, and see only the law."[6]

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 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."[7] The Warren Court instructed, "This decision

[2] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
[3] Ibid., 178.
[4] Ibid., 177.
[5] Ibid., 180.
[6] Ibid., 178.
[7] Cooper v. Aaron, 358 U.S. 1, 17 (1958). The opinion was in fact drafted by Justice William Brennan. Bernard Schwartz, *Super Chief* (New York: New York University Press, 1983), 295–96. But compare this fit of post–New Deal modesty: "There is no reason to doubt

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." It concluded, "Every state legislator and executive and judicial officer is solemnly committed by oath pursuant to Art. VI, cl. 3, 'to support *this* Constitution. "[8] 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."[9] 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."[10]

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 conceive of a principle that would limit congressional power."[11] 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

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that this Court may fall into error as may other branches of the Government. Nothing in the history of attitude of this Court should give rise to legislative embarrassment if in the performance of its duty a legislative body feels impelled to enact laws which may require the Court to reexamine its previous judgments or doctrine. . . . It can reconsider a matter only when it is again properly brought before it in a case or controversy; . . . the new case must have sufficient statutory support." Helvering v. Griffiths, 318 U.S. 371, 400–401 (1942).

[8] Cooper, 18 (emphasis added).

[9] Baker v. Carr, 369 U.S. 186, 211 (1962).

[10] U.S. v. Nixon, 418 U.S. 683, 704 (1974). See also Powell v. McCormack, 395 U.S. 486, 521 (1969).

[11] City of Boerne v. Flores, 521 U.S. 507, 529 (1997), quoting from Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). See also Kimel v. Florida Board of Regents, 528 U.S. 62, 81 (2000); Board of Trustees v. Garrett, 121 U.S. 955 (2001).

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.[12] It is for the Supreme Court to "speak before all others for [the nation's] constitutional ideals."[13] 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.

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."[14] 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 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 politicians 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, for judicial review, there are such reasons.

[12] Ibid., 535–36.
[13] Planned Parenthood v. Casey, 505 U.S. 833, 868 (1992).
[14] Cooper v. Aaron, 358 U.S. 1, 18 (1958).

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, and 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. Within the American context, judicial authority has often waned precisely when constitutionalism is being taken most seriously in the larger political community.

This book is particularly concerned with how the separation of powers and the structure of American political parties have affected the institutional struggle for constitutional leadership over the course of American history. Presidents—in their capacity as heads of the government, as national political leaders, and as national party leaders—have been particularly important in determining the relative authority of the Supreme Court to say what the Constitution means. Presidents may challenge the supremacy of the Court as a constitutional interpreter, or presidents may defer to the supremacy of the Court on constitutional matters and encourage other political actors to defer also. The political incentives that lead presidents to choose either to challenge or to defer to the Court's constitutional leadership have shaped both the substance of our constitutional understandings and practices and the place of the judiciary within the constitutional order. Through much of American history, presidents have found it in their interest to defer to the Court and encourage it to take an active role in defining the Constitution and resolving constitutional controversies. Even before the Supreme Court claimed that it was the ultimate interpreter of the Constitution, political leaders had already asserted the same thing. The strategic calculations of political leaders lay the political foundation for judicial supremacy.

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 judi-

cial supremacy. The authority of the Supreme Court to exercise the power of judicial 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.[15] 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 the agents of the people, not merely of the legislature. 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.[16] 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. Abstract constitutional review is similar to the American presidential veto and is essentially "legislative" in character.

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."[17] A model of judicial supremacy posits that the

[15] For critiques of Marshall's argument in *Marbury*, see Edward S. Corwin, "*Marbury v. Madison* and the Doctrine of Judicial Review," *Michigan Law Review* 12 (1914): 538; Alexander M. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962), 1–14; William W. Van Alstyne, "A Critical Guide to *Marbury v. Madison*," *Duke Law Journal* 1969 (1969): 1.

[16] E.g., Alec Stone, *The Birth of Judicial Politics in France* (New York: Oxford University Press, 1992).

[17] Walter F. Murphy, "Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter," *Review of Politics* 48 (1986): 407.

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."[18]

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. 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 is 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 the-

[18] Brown v. Allen, 344 U.S. 443, 540 (1953).

ory.[19] 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 particularly 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.[20] For some, judicial supremacy is essential to preserving the rule of law and preventing constitutional anarchy. Thinking particularly of the competing constitutional assertions of the state governments, this was Daniel Webster's concern when he asked his congressional colleagues, "[C]ould 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] For others, the value of judicial supremacy is not in its capacity to provide authoritative legal settlements, but in its capacity to provide substantively desirable legal outcomes. The judiciary alone serves as a "forum of principle" within the American constitutional system, capable of focusing on "questions of justice" free from the din of "the battleground of power politics."[22] For still others, judicial supremacy is regarded as "a permanent and indispensable feature of our constitutional system" because the Court alone functions as a countermajoritarian institution securing the liberties

[19] Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999).

[20] Traditional, "legal" justifications for judicial review, such as those 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.

[21] *Debates in Congress*, 21st Cong., 1st sess. (1830), 6:78. The fear of constitutional anarchy without judicial supremacy has been carefully argued more recently and more generally; see Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation," *Harvard Law Review* 110 (1997): 1371.

[22] Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), 71.

of individuals and political minorities.[23] 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 or "the people themselves."[24] Judicial supremacy insures that they are not.[25]

The *Marbury* myth asserts that judicial supremacy has been with us from the beginning, an unproblematic deduction from the nature of constitutionalism itself. The Supreme Court has been a prime purveyor of this view, but the Court is not alone. Advocates of judicial supremacy frequently recur to *Marbury* in order to avoid questions about the foundations of judicial supremacy. Ronald Dworkin, for example, raised the "mysterious matter" of "whose answer should be taken to be authoritative" in regard to constitutional meaning only to dismiss 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," the evidence for which is simply *Marbury*.[26]

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 the 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. There is a robust tradition of authoritative constitutional interpretation outside the courts, however, which undermines the narrative of unchallenged judicial supremacy. The judiciary has provided only one source of commentary on the meaning of the Constitution, and that commentary has not always been the most important one in translating constitutional text into real-

[23] Cooper v. Aaron, 358 U.S. 1, 18 (1958).

[24] Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: American Library, 1961), No. 78, 469.

[25] For a more elaborate and critical examination of these arguments, see Keith E. Whittington, "Extrajudicial Constitutional Interpretation: Three Objections and Responses," *North Carolina Law Review* 80 (2002): 773.

[26] Ronald Dworkin, *Freedom's Law* (Cambridge: Harvard University Press, 1996), 34, 35.

ity.[27] 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.

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

[27] See, e.g., Louis Fisher, *Constitutional Dialogues* (Princeton: Princeton University Press, 1988); Bruce Ackerman, *We the People*, 2 vols. (Cambridge: Harvard University Press, 1991, 1998), vol. 1; David P. Currie, *The Constitution in Congress*, 3 vols. (Chicago: University of Chicago Press, 1997, 2001, 2005); Keith E. Whittington, *Constitutional Construction* (Cambridge: Harvard University Press, 1999); Larry D. Kramer, *The People Themselves* (New York: Oxford University Press, 2004).

of judicial politics.[28] 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 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.[29] The history of the *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 *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 *Brown* case."[30] 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."[31] For Faubus, the challenge to the judicial authority to

[28] Mark A. Graber, "The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7 (1993): 35; Graber, "The Passive-Aggressive Virtues: *Cohens v. Virginia* and the Problematic Establishment of Judicial Power," *Constitutional Commentary* 12 (1995): 67; Graber, "Federalist or Friends of Adams: The Marshall Court and Party Politics," *Studies in American Political Development* 12 (1998): 229; Graber, "Establishing Judicial Review? *Schooner Peggy* and the Early Marshall Court," *Political Research Quarterly* 51 (1998): 7; Graber, "Naked Land Transfers and American Constitutional Development," *Vanderbilt Law Review* 53 (2000): 71; Graber, "Establishing Judicial Review: *Marbury* and the Judiciary Act of 1789," *Tulsa Law Review* 38 (2003): 609. See also Michael McCann, "How the Supreme Court Matters in American Politics: New Institutionalist Perspectives," in *The Supreme Court in American Politics*, ed. Howard Gillman and Cornell Clayton (Lawrence: University Press of Kansas, 1999); Kramer, *The People Themselves*.

[29] 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," *New York Times*, 2 November 1986, sec. 4, p. 23.

[30] Cooper v. Aaron, 358 U.S. 1, 17 (1958).

[31] Quoted in Daniel A. Farber, "The Supreme Court and the Rule of Law: *Cooper v. Aaron* Revisited," *University of Illinois Law Review* 1982 (1982): 393, 397.

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.[32] 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 might find their policies being rejected by holdover justices who had been appointed by the recently dethroned party. By implication, political attacks on the 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.[33] 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 be an emotional release, not a rational strategy to advance policy objectives—a psychological phenomenon, not a political one.[34] 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

[32] Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law* 6 (1957): 279.

[33] This thesis is considered in more detail in chapter 2.

[34] E.g., David Adamany, "The Supreme Court's Role in Critical Elections," in *Realignment in American Politics*, ed. Bruce Campbell and Richard Trilling (Austin: University of Texas Press, 1980), 244–46.

identifying an impeachable offense. At the very least, the nonexclusivity of judicial constitutional interpretation creates complications for theories of judicial supremacy.[35] 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 was clear in identifying the judicial authority as the ultimate interpreter of the Constitution with the capacity of a constitution to constrain political actors, who could otherwise alter or ignore the terms of the Constitution at will as it suited their immediate needs.[36] Likewise, the Warren Court asserted that judicial supremacy was an "indispensable feature of our constitutional system."[37] 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.[38] Many scholars have therefore been distressed to find that judicial supremacy has not been more widely accepted and more 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.[39] 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.

[35] See also Scott E. Gant, "Judicial Supremacy and Nonjudicial Interpretation of the Constitution," *Hastings Constitutional Law Quarterly* 24 (1997): 359.

[36] City of Boerne v. Flores, 521 U.S. 507, 529 (1997).

[37] Cooper v. Aaron, 358 U.S. 1, 18 (1958).

[38] Laurence Tribe, quoted in Stuart Taylor Jr., "Liberties Union Denounces Meese," *New York Times*, 24 October 1986, A 17; Anthony Lewis, "Law or Power?" *New York Times*, 27 October 1986, A 23.

[39] Gerald N. Rosenberg, "Judicial Independence and the Reality of Political Power," *Review of Politics* 54 (1992): 394.

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 vested in the judiciary, producing judicial supremacy. A variety of normative, legal, and doctrinal rationales supports 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,[40] 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."[41] 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.[42] 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.[43] Although these ap-

[40] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

[41] Gant, "Judicial Supremacy," 384. Gant very usefully distinguishes this theory of fixed departmentalism from "fluid departmentalism," in which "allocations are made but are not unalterable" or "no allocation can be made at all . . . 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.

[42] On the political questions doctrine, see Baker v. Carr, 369 U.S. 186 (1962); Luther v. Borden, 48 U.S. (7 How.) 1 (1849); Coleman v. Miller, 307 U.S. 433 (1939); Goldwater v. Carter, 444 U.S. 996 (1979).

[43] Murphy, "Who Shall Interpret?" 417.

proaches 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 "Who shall interpret?" that can be deduced from the structure, purpose, or 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."[44] 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.[45] 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.[46]

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 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 weaken and muddy 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 conse-

[44] Gant, "Judicial Supremacy," 374.

[45] The Religious Freedom Restoration Act has been criticized as a strategic and normative mistake precisely because it approached the Court as an antagonist rather than as a collaborator. Neal Devins, "How Not to Challenge the Court," *William and Mary Law Review* 39 (1998): 645.

[46] 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, 209–36 (1962).

quences.[47] 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.[48] Individual legislators speak, but the legislative body can only act.[49] 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 all his successors must 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).[50] Some presidents may be more or less skilled or effective in the use of their inherited powers, but their political arsenal is the same.

[47] Hamilton, Madison, and Jay, *The Federalist Papers*, No. 70, 424.

[48] 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).

[49] See also, Waldron, *Law and Disagreement*, 119–46; Kenneth A. Shepsle, "Congress is a 'They,' Not an 'It': Legislative Intent as an Oxymoron," *International Review of Law and Economics* 12 (1992): 239.

[50] E.g., Frank H. Easterbrook, "Presidential Review," *Case Western Reserve Law Review* 40 (1990): 905; Michael S. Paulsen, "The Most Dangerous Branch: The Executive Power to Say What the Law Is," *Georgetown Law Journal* 83 (1994): 217.

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."[51] 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."[52] 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 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.

[51] Skowronek, *The Politics Presidents Make*, 18.
[52] Ibid.

That is, presidents want to lead. Few are content with the role of a mere clerk, though such a role was more common in the nineteenth century, 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."[53] 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 coalitional stability facilitates implementation 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, though such coalitional obligations are not historically constant. Nineteenth-century presidents, for example, were more beholden to their parties than were twentieth-century presidents.

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 presi-

[53] Stuckey, *Interpreter-in-Chief*, 1.

dency. 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 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 felt in the arena of constitutional disputes as much 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. 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 rela-

tively 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 they 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, even if he had the desire to do so. 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 the legislature's 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 prob-

lems 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."[54] Similarly, Stephen Skowronek refers to partisan regimes as "the commitments of ideology and interest embodied in preexisting institutional arrangements."[55] These webs of institutional, ideological, and partisan commitments form a basic context within which presidents operate, 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.[56] 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 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 incen-

[54] Ackerman, *We the People*, 1:59.

[55] Skowronek, *The Politics Presidents Make*, 34.

[56] This basic framework draws on Skowronek's more general analysis of presidential leadership. See generally, ibid., 33–58.

tives to displace the primary interpretive authority of the Court are weak. Presidents rarely confront these strategic situations in their pure form. They are better understood as ends on a continuum than boxes that individual presidents occupy. They are useful starting points, however, in thinking about how the Court fits into the presidential effort to manage the conflicting demands of political leadership.

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 2.

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.[57] Affiliated leaders are primarily concerned with continuing, extending, or more creatively reconceptualizing the fundamental commitments made by an earlier reconstructive leader.

[57] 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 differences between affiliated leaders to be less important than their similarities for purposes of examining the logic of their relationship to the Court.

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 and working out its momentary problems 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 sources of authority similar to those of 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 3.

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 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 4.

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, 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 5.

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 have 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.[58] Judicial supremacy makes the strongest claims on other political institutions. It asserts 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

[58] The process started early. In 1765, the royal governor of the colony of Massachusetts Bay, Francis Bernard, was presented with the Boston Memorial declaring the Stamp Act unconstitutional and calling on the governor to block its implementation in the colony. Before the governor's council, Samuel Adams and James Otis argued that acts of Parliament that violated English liberties were void and could be disregarded. After they had presented their case, Bernard responded, "The arguments made use of, both by Mr. Adams and you, would be very pertinent to induce the Judges of the Superior Court to think the Act of no validity, and that therefore they should pay no regard to it; but the question with me is, whether that very thing don't argue the impropriety of our intermeddling in a matter which solely belongs to them to judge of in their judicial department." Even though the governor was not elected, he was accountable in other ways and torn between the demands of the colonists and the demands of the authorities in London. Under the circumstances, he too saw the advantage of passing the buck to the courts. Josiah Quincy, *Reports of the Cases argued and adjudged in the Superior Court of Judicature* (Boston: Little, Brown, 1865), 206.

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.