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## Giving the Constitution to the Courts

### *Political Foundations of Judicial Supremacy*

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**INTRODUCTION**

Judicial supremacy is the new judicial review. From the time Alexander Bickel introduced the term “countermajoritarian difficulty” in 1962<sup>1</sup> until very recently, justifying judicial authority to strike down legislation in a nation committed to democratic self-government was the central problem of constitutional theory. But many who had satisfied themselves as to the legitimacy of judicial review have since taken up the related but distinct question of whether, though legitimate, constitutional interpretation should be the exclusive province of the judiciary. That is, is it ever appropriate to locate constitutional interpretive authority outside of constitutional courts, whether within the coordinate branches of government or the citizenry more generally?

Recent attacks on judicial supremacy, mostly from the academic left, have sought to debunk the strongest form of the proposition that the Constitution means whatever the Supreme Court says it means. Thus, Larry Kramer traces the history of popular constitutionalism as a bulwark against the robust vision of judicial supremacy advanced by the Warren Court in cases like *Cooper v. Aaron*.<sup>2</sup> Reva Siegel and Robert Post denounce the “juricentricity” of the Rehnquist Court, which they say should have been more attentive to the contributions of political culture to constitutional meaning.<sup>3</sup> Mark Tushnet argues provocatively that citizens and public officials should disregard Supreme Court constitutional pronouncements that conflict with their reasonable conceptions of what he calls the “thin” Constitution.<sup>4</sup> And Jeremy Waldron suggests that in modern liberal democracies, judicial review is vastly inferior to the legislative process at settling questions of rights.<sup>5</sup>

There is an irony in all this rending of tunics over judicial power. Popular constitutionalists believe that the people themselves should play an active role

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1. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962).
  2. 358 U.S. 1, 18 (1958) (stating that *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), “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”); see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).
  3. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 *IND. L.J.* 1 (2003).
  4. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). On Tushnet’s terminology, the “thin” Constitution comprises the fundamental guarantees of liberty and equality that it shares with the Declaration of Independence. See *id.* at 11.
  5. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006).

in constitutional elaboration. But the place of federal judges within our system is itself of constitutional dimension. Our federal judges are creatures of the Constitution, their duties mandated in the rather bare terms of Article III and the scope of their power answerable to the people in their exercise of higher lawmaking. Settling the role of the federal judiciary vis-à-vis other political institutions is a matter of what Keith Whittington has called “constitutional construction,” the ongoing creation of the Constitution’s meaning through “the political melding of the document with external interests and principles.”<sup>6</sup> Constitutional construction is sympathetic with the popular turn in constitutional theory, describing as it does the process by which constitutional ambiguity is resolved outside the courts by nonjudicial actors.

On the very terms of the debate to which popular constitutionalists have rightly steered scholarly attention, the fact that judicial supremacy was frowned upon in ages past should not, then, be sufficient reason to displace it today. Rather, we must evaluate the institution of judicial supremacy as a product of constitutional construction and according to the criteria that a privileging of dynamic and popular construction demands. Judges are not supreme just because they say so, but neither are they subordinate just because legal academics say they should be. An attack on judicial supremacy is an act of political advocacy, not a declaration of truth; assessing the normative argument requires us to ask why others appear to accept the institution, whether that acceptance is adequately informed, and whether it is premised on an attractive conception of state power. Only after understanding the underexplained appeal of judicial supremacy to those outside the judiciary may we assess its theoretical bona fides and, as appropriate, either mourn or celebrate its ascension.

Digging to the roots of that appeal is yeoman’s work, though, and Whittington tries his hand in a careful new book, *Political Foundations of Judicial Supremacy*.<sup>7</sup> Whittington recognizes the need for an account of the conventionality of judicial supremacy that incorporates the motives of other political players. “[T]he 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,” he says.<sup>8</sup> “For the Court to compete successfully,

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6. KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 1 (1999).

7. KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007).

8. *Id.* at 26.

other political actors must have reasons for allowing the Court to ‘win.’”<sup>9</sup> Whittington argues that members of the elected branches, and presidents in particular, historically have bolstered and sustained judicial supremacy in order to conserve their own political resources. As Part I explains, Whittington excels at what I call the microtheory part of his project: his description of elected officials’ incentives to prop up the judiciary – whether as a means of enforcing political commitments against opposition forces, circumventing veto gates, or delegating decision-making authority on issues of low political return.

Whittington’s book is structured, however, around a macrotheory that proves far less persuasive. Whittington relies on a taxonomy of presidential types that situates administrations along a spectrum from the “reconstructive” presidencies of men such as Thomas Jefferson and Franklin Delano Roosevelt; to presidents who are “affiliated” with an orthodox political regime, such as William Howard Taft and Lyndon Johnson; to “oppositional” presidents like Grover Cleveland and Bill Clinton who, through coalition-building, come to power despite being out of step with the ideological commitments of the dominant regime. Differently situated presidents face different sets of political incentives, which influence their relative support for judicial supremacy. Only in reconstructive presidencies, which are rare, can we expect to see a full-throated attack on the Court’s ultimate interpretive authority.<sup>10</sup>

It would be too strong to say that I reject this model. It may well be that, at least in retrospect, one can array presidents along something like Whittington’s spectrum, and in order to understand fully the reality of nested opposition between the judiciary and elected officials, one certainly needs to tell a story about relative levels of political capital. But as Part II discusses, Whittington fails to demonstrate that his taxonomy bears any necessary relation to the growth or survival of judicial supremacy, a subject central to his project but which he too often elides with judicial affection. Ours is a constitutional history rife with interbranch conflict, no less so in recent years than early on, and yet the strong secular trend since at least the end of the Civil War is growing support for judicial supremacy among elected officials, judges themselves, and large numbers of citizens more generally. Showing any one of these buttresses to be “foundational” is an ambitious undertaking that Whittington fails to pull off.

In truth, Whittington devotes little space to defending the view that institutional political support is uniquely necessary to judicial supremacy. His writing is tactical, his composition admirably precise. Pigeonholing broad

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9. *Id.*

10. *Id.* at 23-25.

swaths of history into narrow and contestable conclusions does not seem to suit Whittington's intellectual temperament. But the cost of responsible inquiry is relevance, and I wonder how far Whittington has advanced the ball toward understanding the origins of judicial supremacy. As Part III discusses, the thickness of our reliance on judicial supremacy suggests roots both deeper and more diffuse than systematic political expediency can supply. Courts are part of a collective self-conception that includes an institutional commitment to justice and individual rights; they serve as a form of political insurance for both systematic and occasional political losers; they provide a measure of predictability that assists us in ordering our personal and professional affairs; and they figure in the expedient resolution of values debates that cannot be sorted out through the retail political process. The relative stability of our particular form of constitutional politics should motivate us to ask not whether judicial supremacy is a correct understanding of the role judges should play in our system, but instead, whether it is a valuable one. To answer that question, the political foundations of judicial supremacy to which we must attend are not our presidents' motives but our own.

#### I. THE POLITICAL UTILITY OF COURTS

It is dangerous, not just to us but to them as well, for politicians to have too much power. With authority, alas, comes discretion, which is not always helpful in trying to run a government. Consider the following. On August 17, 1961, defectors diverted a Russian-bound Cuban merchant boat, the *Bahia de Nipe*, and received permission to dock in Lynnhaven, Virginia.<sup>11</sup> The next day, libels were filed against the vessel by various individuals and businesses that had unsatisfied claims against the Cuban government, which owned the boat. In response, Cuba requested, via a communiqué to the State Department, that the United States recognize its right to sovereign immunity and return the vessel to Cuba.<sup>12</sup> The *Bahia de Nipe* arrived in U.S. territory barely a year after the Bay of Pigs invasion and at the end of two weeks of diplomatic negotiations for the return of a hijacked U.S. airplane that had been diverted to Havana. The plane had been secured in exchange for the release of a Cuban patrol boat that was being held in Key West.<sup>13</sup> As Secretary of State Dean Rusk wrote understatedly in an August 19, 1961, letter to Attorney General Robert

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11. See *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24, 25 (4th Cir. 1961).

12. See 1 ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, *INTERNATIONAL LEGAL PROCESS* 122 (1968).

13. See *id.* at 88-103.

Kennedy, “the release of [the *Bahia de Nipe*] would avoid further disturbance to our international relations in the premises.”<sup>14</sup>

Unsurprisingly, the State Department acquiesced and filed a suggestion of immunity in the district court. Adhering to the Supreme Court’s instruction of near-absolute deference to the Executive on assertions of foreign immunity,<sup>15</sup> the court dismissed the suit and the Fourth Circuit affirmed the dismissal.<sup>16</sup> The potential negative diplomatic ramifications of the State Department’s refusal to exercise its discretion to grant immunity overwhelmed all other considerations, including the impact the decision would have on the investment-backed expectations of the domestic business community. The suggestion of immunity conflicted, after all, with the instructions given in former State Department acting legal adviser Jack Tate’s well-known letter of 1952.<sup>17</sup> The Tate letter dictated that the United States would thenceforward adhere to the “restrictive” theory of sovereign immunity, under which “the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).”<sup>18</sup> At least some of the libellants’ claims unquestionably arose from Cuba’s commercial activities, but adhering to the Tate standard when the Department had the discretion to do otherwise was not a realistic diplomatic option.<sup>19</sup>

Under the circumstances, it might well have been better that the State Department not have the discretion in the first place. State and Justice Department officials recognized this as early as the Johnson Administration, when study began on what eventually became the Foreign Sovereign Immunities Act of 1976 (FSIA).<sup>20</sup> The FSIA sought formally to incorporate the restrictive theory of sovereign immunity into U.S. law and to provide

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14. Letter from Dean Rusk, Sec’y of State, to Robert Kennedy, Att’y Gen. (Aug. 19, 1961), in CHAYES ET AL., *supra* note 12, at 109.

15. See *Mexico v. Hoffman*, 324 U.S. 30, 35-38 (1945); *Ex parte Peru*, 318 U.S. 578, 589 (1943).

16. *Rich*, 295 F.2d at 26.

17. Letter from Jack B. Tate, Acting Legal Adviser of the Dep’t of State, to Philip B. Perlman, Acting Att’y Gen. (May 19, 1952), in 26 DEP’T ST. BULL. 984 (1952).

18. *Id.* at 984.

19. See Kevin P. Simmons, Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543, 548-49 (1977) (calling the State Department’s decision in *Rich* “completely inconsistent with the policies that it had announced in the Tate letter” but noting that “notwithstanding adoption of the Tate Letter, the State Department, as an essentially political body, often succumbed to the daily exigencies of political pressure exerted by foreign states and issued State Department suggestions in return for concessions or political trade-offs on the foreign relations front”).

20. Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602-1611 (2006)).

jurisdiction to federal courts to determine its application.<sup>21</sup> Thus, the FSIA retains a default of sovereign immunity and provides enumerated exceptions, most significantly for the foreign state's commercial activities.<sup>22</sup> Even though the FSIA purported to curtail significantly presidential power to grant or to deny immunity, namely by placing that decision within the judiciary, the Act was drafted by the State and Justice Departments based on work done over three administrations from both major political parties.<sup>23</sup> Former State Department Legal Adviser Monroe Leigh testified to the difficulties occasioned by the Tate letter at the FSIA committee hearing:

If the Department follows the Tate letter in a given case, it is in the incongruous position of a political institution trying to apply a legal standard to litigation already before the courts. On the other hand, if forced to disregard the Tate letter in a given case, the Department is in the self-defeating position of abandoning the very international law principle it elsewhere espouses. . . .

. . . .

[W]e would hope that in most cases we would be able to resist [political pressures from foreign governments], but in practice I would have to say to you in candor that the State Department, being a political institution, has not always been able to resist these pressures. And to my way of thinking, this consideration of political factors is, in fact, the very antithesis of the rule of law which we would like to see established.<sup>24</sup>

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21. See H.R. REP. NO. 94-1487, at 7 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6605.
  22. 28 U.S.C. § 1605(a)(2) (2000); see *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, 2358 (2007) (Stevens, J., dissenting).
  23. See Harvey M. Sklaver, *Sovereign Immunity in the United States: An Analysis of S. 566*, 8 INT'L LAW. 408, 408 (1974); Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 43 (1978); Fredric Alan Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUD. WORLD PUB. ORD. 1, 50 n.4 (1976).
  24. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 26, 35 (1976) [hereinafter *Hearing*] (statement of Monroe Leigh, Legal Adviser, Department of State).



It has not been much easier for courts to apply the restrictive theory than it was for the State Department.<sup>25</sup> But to evaluate the success of the FSIA on that basis is to miss the point. Although the State Department still routinely participates in immunity disputes as *amicus curiae*, it does so on the understanding that its recommendations are just that.<sup>26</sup> This, quite explicitly, is Ulysses lashing himself to the mast.<sup>27</sup>

Presidents Johnson, Nixon, and Ford all had incentives to give to the judiciary a foreign affairs power that the Court had previously sought to disclaim. And although the Supreme Court has described grants of sovereign

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25. See ERNEST K. BANKAS, *THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW* 94 (2005) (calling court application of the restrictive theory “cumbersome and elusive”). The drafters of the FSIA intentionally left vague the definition of “commercial activity” in order that the courts might develop standards on their own in a common law fashion. See *Hearing, supra* note 24, at 53 (statement of Monroe Leigh, Legal Adviser, Department of State) (“We realize that we probably could not draft legislation which would satisfactorily delineate [the] line of demarcation between commercial and governmental. We therefore thought it was the better part of valor to recognize our inability to do that definitively and to leave it to the courts with very modest guidance.”).

26. By way of example, the State Department argued as *amicus curiae* in *Permanent Mission* that a municipal tax lien on real property did not put in issue “rights in immovable property” and therefore did not trigger an exemption from India’s sovereign immunity under 28 U.S.C. § 1605(a)(4) (2000). See Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352 (2007) (No. 06-134). Two decades earlier the State Department had argued the opposite position when the issue was whether there was federal court jurisdiction to adjudicate a municipal tax lien on a recreational home for the head of Libya’s Mission to the United Nations. See *id.* at 19 n.15 (discussing *City of Englewood v. Socialist People’s Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985)). It is possible that two different administrations simply adopted inconsistent legal positions in the two cases, but it is difficult not to wonder at the relevance of the fact that at the time of *City of Englewood* the United States had no diplomatic relations with Libya and had designated it as a state sponsor of terrorism. See Edward Schumacher, *The United States and Libya*, 65 FOREIGN AFF. 329 (1986). The State Department lost both cases.

27. The House committee report on the FSIA made clear that the statute was expressly designed to tie the State Department’s hands:

A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity.

H.R. REP. NO. 94-1487, at 7 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6606; see also *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 487-88 (1983).

immunity as a matter of comity rather than of constitutional imperative,<sup>28</sup> the question of *who decides* certainly has constitutional dimensions. If a President wished to grant immunity to a foreign sovereign engaged in commercial activity within the meaning of the FSIA, it is far from clear that either Congress or the Court would have the constitutional authority to prevent him from doing so.<sup>29</sup> Executive embrace of the FSIA is therefore a clear example of political support for judicial supremacy in certain constitutional matters.

Whittington offers a rich account—what I call his microtheory—of why elected officials are apt rather often to behave in this counterintuitive way. Nixon’s presidency, and to a lesser extent Ford’s, were what Whittington, drawing on the work of Stephen Skowronek,<sup>30</sup> alternately calls “preemptive” or “oppositional.” On Whittington’s account, preemptive presidents manage to win office despite their hostility to a political regime that remains “vibrant, popular, and resilient to pressure.”<sup>31</sup> Such presidents often cobble together unorthodox coalitions (think Grover Cleveland’s uniting of Northeast Mugwumps and Southern Bourbon Democrats) and might be assisted by spoilers, such as Theodore Roosevelt in 1912 or Ross Perot in 1992. In the modern idiom, these are the great triangulators, often facing opposition both from the other side of the aisle and from stalwarts within their own party, but winning elections all the same.<sup>32</sup>

Because preemptive presidents lack a stable base of support and often preside over a divided government, they lack the political capital to challenge the Court’s constitutional authority directly.<sup>33</sup> But on Whittington’s telling, their support for judicial supremacy is not just defensive. The Supreme Court is notoriously slow to embrace institutional change; if the Senate is the nation’s cooling saucer, the Court is its refrigerator. Constitutional law is existentially predisposed to maintaining commitments over time,<sup>34</sup> and so “[t]he law,

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28. See *Verlinden B.V.*, 461 U.S. at 486; *Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116 (1812).

29. See, e.g., Lawrence Allan Nathanson, Note, “*Imperatives of Events and Contemporary Imponderables*”: *The Effect of the Foreign Sovereign Immunities Act on Presidential Power*, 62 B.U. L. REV. 1275 (1982).

30. See STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* 34-45 (1993) (distinguishing between “reconstructive,” “affiliated,” and “disjunctive” presidencies).

31. WHITTINGTON, *supra* note 7, at 161.

32. See *id.* at 206.

33. See *id.* at 166.

34. See JED RUBENFELD, *FREEDOM AND TIME* 168 (2001) (“[Constitutionalism] is democracy—or at least it ought to be, it promises to be, it holds itself out as the possibility of, democracy—

especially constitutional law, is likely to have a relatively long history, its origins predating the rise of the currently dominant regime.”<sup>35</sup> Not only is law inherently resistant to temporary partisan shifts, but judges themselves, particularly the unelected, life-tenured federal sort, are socialized into a culture of resistance to transitory political pressure.<sup>36</sup> The otherwise lonely preemptive president, out of step with the commitments of the political regime du jour, might therefore find in the Court a comrade in arms. Thus, when the Reconstruction Congress impeached Andrew Johnson for violating the Tenure of Office Act through his dismissal of Secretary of War Edwin Stanton, Johnson pleaded that the matter be “‘submitted to that judicial department of the government intrusted by the Constitution’ with the power to say what the law means.”<sup>37</sup> You would say the same in Johnson’s shoes.

Oppositional presidents are not the only ones with reason to promote judicial supremacy. Lyndon Johnson, whose State and Justice Departments began the machinations that produced the FSIA, fits Whittington’s description of an “affiliated leader.” These presidents are associated with and come to power espousing the precepts of the dominant regime. Johnson’s Great Society reforms may be understood as a refinement of Roosevelt’s New Deal, a “continuing, extending, or more creative[] reconceptualizing [of] the fundamental commitments made by an earlier reconstructive leader.”<sup>38</sup> Affiliated leaders may have good reason to raise the volume of the Court’s interpretive voice. Whittington’s *leitmotif* is the complexity and diversity of the American constitutional order, whose federalism deliberately frustrates the widespread propagation of political orthodoxy.<sup>39</sup> Judicial supremacy may serve as a work-around of sorts insofar as the judiciary can be used to police state and local actors who resist the dominant regime.<sup>40</sup> We see this dynamic most

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over time.”); see also Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1056 n.73 (1984) (“By virtue of its life tenure, the Supreme Court will characteristically be the last institution to be dominated by a new governing coalition.”).

35. WHITTINGTON, *supra* note 7, at 167.

36. *Id.* at 169.

37. *Id.* at 184 (quoting 1 TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 40 (Washington, D.C., Gov’t Printing Office 1868)); Tenure of Office Act, ch. 154, 14 Stat. 430, 430 (1867) (repealed 1887).

38. WHITTINGTON, *supra* note 7, at 23.

39. See generally THE FEDERALIST NO. 10 (James Madison).

40. See WHITTINGTON, *supra* note 7, at 105.

obviously with President Kennedy's warm embrace of the Warren Court's enforcement of cultural liberalism against the states.<sup>41</sup>

The Court's relative insulation from quotidian politics provides additional incentive for affiliated presidents and other elected officials in effect to delegate decision making to the judiciary. Whittington argues that members of Congress are generally less likely than presidents to launch conspicuous assaults on judicial supremacy,<sup>42</sup> and he identifies instances in which political expediency counsels deference to the third branch. Elected officials can take positions and make decisions on popular elements of their political program and allow the Court to make decisions on less popular or lower visibility issues. This is, of course, a matter of simple posturing, whereby Congress bats political hot potatoes across First Street, voting for or not strongly opposing legislation that it hopes will be struck down, but it is also a matter of conserving valuable political energy.<sup>43</sup> Consider the growing prevalence of statutory provisions for expedited Supreme Court review, which the Court recently described as "responding to a congressional concern that if a provision of the statute is declared invalid there is an interest in prompt adjudication by this Court."<sup>44</sup> Such provisions were added to statutes such as the Flag Protection Act and the Bipartisan Campaign Reform Act (BCRA) to enable skeptical legislators to hold their noses and vote for popular bills that they opposed on constitutional or even partisan grounds.<sup>45</sup> The availability and

41. *Id.* at 117-19.

42. *See id.* at 15-16. Whittington suggests that Congress is not well-positioned to assert legislative supremacy, in part because such assertions are almost invariably tested in the courts themselves. *See id.* at 16.

43. *See id.* at 120-24, 134-52.

44. *Office of Senator Mark Dayton v. Hanson*, 127 S. Ct. 2018, 2021 (2007); *see also Clinton v. City of New York*, 524 U.S. 417, 428-29 (1998) ("The special section [of the Line Item Veto Act] authorizing expedited review evidences an unmistakable congressional interest in a prompt and authoritative judicial determination of the constitutionality of the Act."). Neal Devins has noted that the expedited review provisions of several recent high-profile statutes were added to the bills only after constitutional objections were raised: "Congress—rather than settle the issue itself—decided that it was best to hand the matter off to the Supreme Court." Neal Devins, *Congress as Culprit: How Lawmakers Spurred On the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 443 (2001).

45. *See* Bipartisan Campaign Reform Act of 2002 § 403(a)(3), 2 U.S.C. § 437h(a)(3) (Supp. 2004); Flag Protection Act of 1989 § 3, 18 U.S.C. § 700(d) (2000); *cf.* President's Statement on Signing the Bipartisan Campaign Reform Act of 2002, 38 WEEKLY COMP. PRES. DOC. 517, 517-18 (Mar. 27, 2002) (signing Bipartisan Campaign Reform Act despite First Amendment "questions" and "reservations about the constitutionality of the broad ban on issue advertising" in the expectation that "the courts will resolve these legitimate legal questions as appropriate under the law").

finality of judicial review thereby streamlines the business of the political branches. This redounds to the benefit of an affiliated leader and his congressional allies, who may then devote more resources to enacting and taking credit for other aspects of their agenda.<sup>46</sup>

Robert Dahl argues in his well-known essay on judicial decision making that “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.”<sup>47</sup> The rightness of that hypothesis as stated depends on one’s definition of “long,” but it is correct in any event if we regard “never” as hyperbole. Given the usual affinity of judges for the dominant regime, it makes sense that affiliated leaders would seek to share power with them. Governance takes time and energy, and judges have a different and useful set of resources to offer. Quite unlike Congress, their decisions require the assent of one, or two, or at most five, and so often can be predicted with confidence and implemented with relatively little to-do.<sup>48</sup> As an impetuous sibling seeks comfort in parental arbitration, elected officials may use the judiciary to validate their side of political debates.<sup>49</sup> And as the FSIA example illustrates, delegation to the courts helps political actors resist the siren song of political expediency in favor of long-term commitments that are more valuable in the end.<sup>50</sup>

Nearly every president may be characterized as either preemptive or affiliated in Whittington’s taxonomy, and so nearly every president has found himself frequently in a position to affirm judicial supremacy. But every now and again a president carries a mandate for a new political order. The regimes against which the others are defined—those that other leaders are either affiliated with or opposed to—must themselves be created by what Whittington, here relying expressly on Skowronek, calls “reconstructive” presidencies: those of Jefferson, Jackson, Lincoln, Roosevelt, and to a lesser degree, Reagan. The authority of reconstructive regimes is “rooted in antagonism to existing commitments, allowing them to gain prestige precisely through their efforts to shatter the inherited constitutional order.”<sup>51</sup> In terms more familiar to legal scholars, reconstructive presidencies are the stuff “constitutional moments” are made of, when “[a]s a result of many electoral

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46. See WHITTINGTON, *supra* note 7, at 136-38.

47. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-maker*, 6 J. PUB. L. 279, 285 (1957).

48. See WHITTINGTON, *supra* note 7, at 124-25.

49. See *id.* at 152.

50. See *id.* at 86.

51. *Id.* at 50.

victories on many different levels, a broad movement of transformative opinion . . . earn[s] the authority to set major aspects of the political agenda.”<sup>52</sup>

According to Whittington, reconstructive presidents alone have both the will and the power to challenge the Court’s interpretive authority. The courts are not just part of the ancien régime but might indeed be partly responsible for the revolutionary condition. A recalcitrant Court might “push[] forward with its inherited and evolving political agenda even in the face of increasing tensions within the dominant political coalition.”<sup>53</sup> Court intransigence may help provoke a robust demonstration of political power—witness the 1936 electoral landslide, which cemented the authority of Roosevelt’s essentially populist, antibusiness New Deal coalition and emboldened the President to propose his Court-packing legislation.<sup>54</sup> Constitutional change is typically part of the reconstructive enterprise, making conflict with the Court inevitable.

Perhaps the boldest instance of such conflict is Jackson’s 1832 veto of the rechartering of the Second Bank of the United States, in which he dismissed *McCulloch v. Maryland*<sup>55</sup> as just one man’s opinion:

The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.<sup>56</sup>

Jackson’s departmentalism owes a debt to Jefferson,<sup>57</sup> but his aggressive and reactionary populism was a fundamental rebranding of Jefferson’s more restrained republicanism. Says Whittington, “Conflicts with the courts are only a single skirmish within the larger [reconstructive] presidential offensive to establish his authority to remake American politics . . . .”<sup>58</sup> Jackson’s challenge to the Court’s interpretive authority was of a piece with his challenge to

52. 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 409 (1998).

53. WHITTINGTON, *supra* note 7, at 72.

54. See ACKERMAN, *supra* note 52, at 312-14; WHITTINGTON, *supra* note 7, at 57-58.

55. 17 U.S. 316 (1819).

56. President Andrew Jackson, Veto Message to the Senate (July 10, 1832), *reprinted in* 2 JAMES D. RICHARDSON, *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897*, at 576, 582 (Washington, D.C., Gov’t Printing Office 1898); see WHITTINGTON, *supra* note 7, at 59-61.

57. See KRAMER, *supra* note 2, at 189.

58. WHITTINGTON, *supra* note 7, at 59.

legislative supremacy and his effort to remake the nation in his own anti-elite image.<sup>59</sup>

Everything judges do is paid for or enforced by political actors. Jackson was conspicuously aware of the implications of that dependency, but most presidents prefer not to dwell on it.<sup>60</sup> Instead, the exigencies of political life lead them to participate in and reinforce a political ethos of judicial supremacy. Members of Congress also participate, lacking the bully pulpit or the unity of purpose necessary to stake a credible claim to legislative supremacy.<sup>61</sup> Whittington's valuable contribution is to emphasize and elaborate upon the very good reasons why the departmentalist claims celebrated by some proponents of popular constitutionalism are the exception, not the rule of American politics.

Whittington is of the "regime politics" tradition in political science, which long ago rejected the idea that judicial behavior may be usefully explained without a full accounting of the pressures that the rest of the polity exerts on judges.<sup>62</sup> Thinking of judges as autonomous Herculean actors who exist to stem the tides of popular will does not get us far toward understanding why they make the decisions they do. Rather, and indisputably, courts are semiautonomous political instruments whose activities are "one of many means politicians and political movements employ when seeking to make their constitutional visions the law of the land."<sup>63</sup> Whittington capably demonstrates that no single thread runs through the various reasons politicians like judicial supremacy. Understanding why a particular President finds comfort in the judiciary at a particular historical moment requires identifying his place in what Skowronek has called "political time"—the state of the relationship

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59. See *id.* at 60–61.

60. Historians disagree whether Jackson threatened not to enforce any injunction that might be issued (and never was) in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). See Anton-Hermann Chroust, *Brevia Addenda: Did President Jackson Actually Threaten the Supreme Court of the United States with Nonenforcement of Its Injunction Against the State of Georgia?*, 4 AM. J. LEGAL HIST. 76 (1960). As Whittington writes, Jackson's famous response to the Court's subsequent decision in *Worcester v. Georgia*, 31 U.S. 515 (1832)—"John Marshall has made his decision, now let him enforce it"—is likely apocryphal. WHITTINGTON, *supra* note 7, at 33. But what Jackson undeniably did say—" [t]he decision of the supreme court has fell still born, and they find that it cannot coerce Georgia to yield to its mandate"—is just as dismissive of Court power. *Id.* at 34 (quoting 4 ANDREW JACKSON, THE CORRESPONDENCE OF ANDREW JACKSON 430 (John Spencer Bassett ed., 1929)).

61. WHITTINGTON, *supra* note 7, at 15–16.

62. See Martin Shapiro, *Public Law and Judicial Politics*, in 2 POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 365 (Ada W. Finifter ed., 1993).

63. Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425, 427 (2005).

between the President's own interests and commitments and the ideological landscape in which he comes to power.<sup>64</sup> This must be right, and indeed (as with most great insights) feels rather obvious in retrospect.

## II. THE GROWTH OF JUDICIAL SUPREMACY

Whittington wants to do more, though, than simply explain the phenomenon of support for judicial supremacy by elected officials. Had he titled his book "Political Acquiescence in Judicial Supremacy," it would have been shorter, less interesting, and more successful. But to tell a story of creation, as is Whittington's ambition, he must make the case that the support of institutional actors is not just consistent with judicial supremacy but is in fact responsible for it. This he has not done. His observations about the motivations of political actors to preserve judicial independence are incisive, at times brilliant, but he does not make the link between political support for judges and the inception, growth, or continuing health of the institution of judicial supremacy.

Let's begin where we left off, with reconstructive presidencies. Whittington rightly argues that the strongest reconstructive presidents are best-situated to make departmentalist claims. "Reconstructive presidents are notable for their expansive authority to remake the political environment in their own image," he says, "resolving conflict through their own political actions rather than through judicial dictate."<sup>65</sup> It should follow, then, that judicial supremacy as an institution is at its low ebb during reconstructive periods. Indeed, Whittington says as much: "Judicial authority to define constitutional meaning is likely to be weakest when contested by presidents armed with such a powerful mandate."<sup>66</sup> Likely to be, perhaps, but is it? This book does not make the case.

The relationship between presidential reservations of interpretive authority and the prosperity of judicial supremacy as an institution is complicated and difficult to measure. The Court itself is likely to respond to a weak strategic position by avoiding conflict with the political branches. Conflict avoidance might take the form of resort to manipulable prudential mechanisms like ripeness, standing, or the political question doctrine; it might be reflected in docket control, particularly in the post-1925 era of largely discretionary

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64. SKOWRONEK, *supra* note 30, at 30.

65. WHITTINGTON, *supra* note 7, at 78.

66. *Id.* at 77.



Supreme Court review;<sup>67</sup> or it might simply recommend deference on the merits.<sup>68</sup> The Court was particularly adept at self-restraint under Marshall's stewardship. For all the Chief Justice's braggadocio in cases like *Marbury v. Madison*<sup>69</sup> and *McCulloch v. Maryland*,<sup>70</sup> his Court carefully husbanded its resources. The Court struck down only one federal law during Marshall's tenure—the provision of the Judiciary Act of 1789<sup>71</sup> declared unconstitutional in *Marbury*—and its docket was dominated by land title disputes about which hardly anyone but the parties could get animated.<sup>72</sup> As Mark Graber writes, “[c]onstitutional issues of more political consequence in Jacksonian America, such as the national bank, internal improvements, tariffs, and national expansion, were settled by elected officials with little if any judicial involvement.”<sup>73</sup>

Public confidence in the Court rose dramatically into the 1850s.<sup>74</sup> Wrote Charles Warren of the antebellum years, “While there were extremists and radicals in both parties . . . who inveighed against it and its decisions, yet the general mass of the public and the Bar had faith in its impartiality and its ability.”<sup>75</sup> Over the period from *Marbury* to *Dred Scott v. Sandford*,<sup>76</sup> Barry Friedman writes, “the public came gradually to accept the binding effect of Supreme Court constitutional pronouncements, not only upon the parties to the case, but upon other branches of state and national government and future litigants as well.”<sup>77</sup> It is well-known that *Dred Scott* led Lincoln and others to

67. See Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936 (1926) (codified as amended at 28 U.S.C. §§ 344-50 (2000)).

68. Bickel's is the classic treatment of “the mediating techniques of ‘not doing.’” BICKEL, *supra* note 1, at 112. See generally *id.* at 111-98 (discussing “the passive virtues”).

69. 5 U.S. (1 Cranch) 137 (1803).

70. 17 U.S. 316 (1819).

71. Ch. 20, 1 Stat. 73.

72. See Mark A. Graber, *Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debates*, 81 CHI.-KENT L. REV. 923, 931 (2006).

73. *Id.* at 932. Elsewhere Graber has labeled Marshall's penchant for bold but empty rhetoric the “passive-aggressive virtues”: “Strict Jeffersonians, old Republicans, and Jacksonians may have frequently been enraged by the tone of early Supreme Court opinions, but Marshall and his brethren rarely reached decisions that these political leaders could actually disobey.” Mark A. Graber, *The Passive-Aggressive Virtues: Cohens v. Virginia and the Problematic Establishment of Judicial Power*, 12 CONST. COMMENT. 67, 68 (1995).

74. See WHITTINGTON, *supra* note 7, at 107.

75. 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 206 (1926).

76. 60 U.S. (19 How.) 393 (1857).

77. Barry Friedman, *The History of the Counter-majoritarian Difficulty: The Road to Judicial Supremacy* (pt. 1), 73 N.Y.U. L. REV. 333, 340 (1998).

question publicly the precedential authority of Supreme Court decisions, but that decision could not have been rendered absent the Court's reservoir of institutional capital. The Taney Court's intervention was explicitly invited by Congress, the President, and the public more generally. In the debates over the resolutions that would form the Compromise of 1850, Henry Clay defended congressional silence on the issue of slavery in the territories by saying, "Now, what ought to be done more satisfactory to both sides of the [slavery] question, . . . [than] to leave the question of slavery or no slavery to be decided by the only competent authority that can definitely settle it forever, the authority of the Supreme Court of the United States?"<sup>78</sup> Similar language appears in the debates over the Kansas-Nebraska Act of 1854.<sup>79</sup> Politicians with views as diverse as Lincoln, Buchanan, and Jefferson Davis were quoted publicly saying that the Court was uniquely competent to resolve the question that had fractured the Congress since the nation's founding.<sup>80</sup>

Marshall was probably wrong when he said in 1819 that "by this tribunal alone can the decision [in *McCulloch*] be made."<sup>81</sup> Consistent with the Court's

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78. CONG. GLOBE, 31st Cong., 1st Sess. 1155 (1850), *quoted in* WHITTINGTON, *supra* note 7, at 251-52. Congress also expanded the Court's jurisdiction over slavery questions. *See* Wallace Mendelson, *Dred Scott's Case—Reconsidered*, 38 MINN. L. REV. 16, 19 (1953).

79. Ch. 59, 10 Stat. 277. Judah Benjamin, a Democratic senator from Louisiana, said of the deliberations:

Morning after morning we met, for the purpose of coming to some understanding upon [slavery in the territories]; and it was finally understood by all, agreed to by all, made the basis of a compromise by all the supporters of that bill, that the Territories should be organized with a delegation by Congress of all the power of Congress in the Territories, and that the extent of the power of Congress should be determined by the Courts.

CONG. GLOBE, 36th Cong., 1st Sess. 1966 (1860), *quoted in* Mendelson, *supra* note 78, at 21; *see also* Mendelson, *supra* note 78, at 21-22 (citing statements of Southern senators suggesting their purported willingness to submit the issue to the Court even if the outcome was not in their favor).

80. *See* CONG. GLOBE, 31st Cong., 1st Sess. app. at 154 (1850) (speech of Jefferson Davis) ("We have only said that we are entitled to a decision of the Supreme Court of the United States . . ."); President Abraham Lincoln, Speech at Galena, Ill. (July 26, 1856), *reprinted in* 2 COLLECTED WORKS OF ABRAHAM LINCOLN 355 (Roy P. Basler ed., 1953), *quoted in* WHITTINGTON, *supra* note 7, at 252 n.106 ("The Supreme Court of the United States is the tribunal to decide [the extension of slavery to the territories], and we [Republicans] will submit to its decisions . . ."); Mendelson, *supra* note 78, at 24 (discussing Buchanan's endorsement of judicial resolution in his inaugural address). The debate over the legal status of slavery in the federal territories is as old as the existence of federal territories. *See* DON E. FEHRENBACHER, *SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE* 41-54 (1981).

81. *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819).

relative lack of institutional capital, the constitutionality of the Bank of the United States was settled not by Marshall's Court but by Jackson's veto of the second bank bill in 1832.<sup>82</sup> Four decades later, though, there had developed a widespread perception that only the Supreme Court could decide the status of slavery in the federal territories. Whether trust in the Court resulted from artful management of its institutional resources or from the ongoing support of the political branches is something of a chicken and egg problem. But given the aggressive departmentalist claims made by Jefferson and Jackson,<sup>83</sup> the two figures who so dominated nineteenth-century antebellum politics, it is certainly not obvious that either they or the weak interstitial presidents who surrounded them deserve much credit for creating an authoritative federal judiciary.

The departmentalist positions of later reconstructive Presidents Lincoln, Roosevelt, and Reagan were progressively more timid. Indeed the last two are better described as capitulating to the Court's interpretive authority. Judicial supremacy has seen better days than the Civil War, of course. Lincoln had announced during the Lincoln-Douglas debates that he did not regard *Dred Scott* as constitutional precedent,<sup>84</sup> and in 1862, Congress prohibited slavery in the federal territories, in derogation of the case's second holding.<sup>85</sup> Lincoln later ignored Taney's decision in *Ex parte Merryman* declaring invalid Lincoln's suspension of the writ of habeas corpus.<sup>86</sup>

At least two additional points about Lincoln's relationship to the Court are relevant to our discussion, however. First, Lincoln's claims about *Dred Scott* rejected not the decision itself but its status as a binding precedent. "We do not propose that when *Dred Scott* has been decided to be a slave by the court, we,

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82. See S. 147, 22d Cong., 1st Sess. (1832).

83. Jefferson wrote that "each of the three departments has equally the right to decide for itself what is its duty under the constitution, without regard to what the others may have decided for themselves under a similar question." Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), quoted in KRAMER, *supra* note 2, at 106.

84. See *infra* text accompanying note 87.

85. An Act To Secure Freedom to All Persons within the Territories of the United States, ch. 111, 12 Stat. 432 (1862). Several other constitutionally contested issues, including the imposition of a federal income tax, the issuing of paper money, and conscription, never reached the Court during the war. See David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1140-41 (2006) (taxes); *id.* at 1178-85 (paper money); *id.* at 1196-1201 (conscription); Daniel W. Hamilton, *Popular Constitutionalism in the Civil War: A Trial Run*, 81 CHI.-KENT L. REV. 953, 956 (2006).

86. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487); see Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), reprinted in 4 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 80, at 421, 423.

as a mob, will decide him to be free,” he said at the sixth debate with Douglas, “but we nevertheless do oppose that decision as a political rule which shall be binding on . . . the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision.”<sup>87</sup> Contrast that with Jackson’s implicit endorsement of the law of the street in response to *Worcester v. Georgia*.<sup>88</sup> Especially in light of Lincoln’s previous support for judicial supremacy, both in the years leading up to *Dred Scott* and earlier in his political career,<sup>89</sup> Lincoln’s reluctance to launch a full-frontal assault on the Court’s authority surely reflects the strength of the third branch’s claim to interpretive prominence.<sup>90</sup>

It is odd, second, to declare that either the Court’s general weakness during the Civil War or its relative strength compared to earlier Courts resulted primarily from varying levels of support by the executive or the legislature. *Dred Scott* itself deserves credit for the former. Capturing the mood in some segments of the country, the *New York Daily Tribune* wrote two days after the decision was handed down that “[i]f epithets and denunciation could sink a judicial body, the Supreme Court of the United States would never be heard of again.”<sup>91</sup> President Buchanan and a large chunk of the country supported the decision,<sup>92</sup> but they were drowned out first by a momentous presidential election and then by force of arms. The ebb and flow of the Court’s authority

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87. Abraham Lincoln, Speech at Sixth Debate with Stephen A. Douglas (Oct. 13, 1858), in 3 COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 80, at 245, 255.

88. 31 U.S. 515 (1832); *see supra* note 60.

89. *See* Graber, *supra* note 72, at 923-24 (discussing the role reversal between Lincoln and Douglas in an 1840 debate over the size of the Illinois Supreme Court).

90. *See* Friedman, *supra* note 77, at 429 (“[U]ltimately those opposing the supremacy of the Court’s pronouncement [in *Dred Scott*] had a problem, for they were stuck between adherence to the decision and arguing for open defiance, a position that by the time of *Dred Scott* they were unprepared to take. Something had changed since Jefferson’s time, or perhaps the nature of the issue brought the problem into sharp focus.”); *cf.* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 116 (2001) (“One could easily mistake Lincoln’s seeming timidity [in response to *Dred Scott*] as evidence of the extent to which judicial power had grown since Jefferson’s time. And in a sense it had, for Lincoln was clearly prepared to concede the Court more than were its opponents of fifty years earlier.”).

91. *The Latest News*, N.Y. DAILY TRIB., Mar. 7, 1857, at 5, *quoted in* Friedman, *supra* note 77, at 417. *See generally* Friedman, *supra* note 77, at 416 (“It would be difficult to overstate the vituperative reaction that met the Court’s decision in *Dred Scott*. Some of the more sedate critics made an observation common at the time: that the Court had lost the confidence of the people.”).

92. *See* FEHRENBACHER, *supra* note 80, at 229-43; Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 282-93 (1997).

in the 1850s and 1860s was determined by the dynamics of public confidence in the Court's decisions, not by the institutional needs of Congress and the executive.

Something changed with the Civil War. After striking down two federal statutes in the first seventy years of its existence, through *Dred Scott*, the Court struck down fifty-eight in the next seventy.<sup>93</sup> What explains the Court's swagger? Others have noted that explanations are wanting for the gradual rise of judicial supremacy during Reconstruction.<sup>94</sup> I doubt very much, though, that it has anything to do with the dearth of reconstructive presidencies over that period. To be fair, Whittington does not make that claim, at least not explicitly, but it is difficult to understand the implications of his macrotheory without it.

Whittington of course includes Franklin Delano Roosevelt in his pantheon of reconstructive presidents, but Roosevelt's impact on judicial supremacy is murky. Roosevelt was frustrated by the Court's disagreement with his constitutional vision, but he conspicuously avoided challenging the Court's interpretive authority or seeking to limit its jurisdiction. Marian McKenna counts more than one hundred legislative proposals offered by Roosevelt's congressional allies in early 1936 seeking to limit judicial power, including proposals to restrict the Court's appellate jurisdiction, to require a supermajority vote to invalidate acts of Congress, and to eliminate entirely the Court's power to invalidate federal legislation.<sup>95</sup> Roosevelt concluded, however, that the Court's makeup, not its authority, was the problem. Regarding the response of the Administration (of which he was part) to proposals to restrict the Court's appellate review, Robert Jackson wrote, "[N]either the President nor his advisers were prepared to go to such lengths. Deep as was their dissatisfaction, they felt it was men, not the institution, that needed correction."<sup>96</sup>

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93. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 37 (1941).

94. See Barry Friedman, *The History of the Countermajoritarian Difficulty* (pt. 2), 91 *GEO. L.J.* 1, 48 (2002).

95. See MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937*, at 173-74 (2002).

96. JACKSON, *supra* note 93, at 180; see WHITTINGTON, *supra* note 7, at 266-67; William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 *CHI.-KENT L. REV.* 967, 985 (2006) (referring to the New Dealers' "continued commitment to judicial finality" in their rejection of proposals to strip power from the Court). This sentiment is of a piece with Roosevelt's heavily criticized lament during the 1932 presidential election that "the Republican Party was in complete

Given that the election of 1936 had handed Roosevelt and the Democrats what Bruce Ackerman rightly calls “the greatest victory in American history,”<sup>97</sup> Roosevelt’s refusal to attack the Court’s institutional authority directly, and the subsequent failure of his Court-packing plan, are a remarkable testament to the Court’s strength and a challenge to Whittington’s macrotheory of reconstructive presidencies. Indeed, no sitting president since—whether reconstructive or not—has actually challenged the finality of the Court’s interpretive authority. Even Reagan, who did not conceal his hostility to the constitutional decisions of the Warren and Burger Courts, caved to judicial supremacy. Early in Reagan’s presidency, the Justice Department backed a series of court-stripping measures, including failed proposals to limit federal court jurisdiction over school prayer,<sup>98</sup> busing,<sup>99</sup> and abortion<sup>100</sup> cases and to repeal the incorporation doctrine, the exclusionary rule, and federal question jurisdiction in the district courts.<sup>101</sup> But Reagan and Attorney General Edwin Meese eventually settled on a strategy of promoting a jurisprudence of original intent.<sup>102</sup> Unable to muster the support needed to muzzle the Court’s interpretive voice (even within the Administration),<sup>103</sup> the Reagan Justice Department sought instead to change the Court’s tune. Meese’s originalism strategy, like Roosevelt’s Court-packing plan, was not just unopposed to judicial supremacy, but in fact was premised on it. Appointing originalists to the federal bench as a central plank of a political strategy assumes that the way to bring the courts in line is not to challenge them but to staff them properly.

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control of all branches of the Federal Government—the Executive, the Senate, the House of Representatives, and . . . the Supreme Court as well.” 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 837 (Samuel I. Rosenman ed., 1938), *quoted in* WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 83 (1995).

97. ACKERMAN, *supra* note 52, at 310.

98. H.R. 253, 98th Cong. (1983); H.R. 183, 98th Cong. (1983); Voluntary School Prayer Act of 1983, S. 784, 98th Cong. (1983).

99. Public School Civil Rights Act of 1983, S. 139, 98th Cong. (1983); H.R. 798, 98th Cong. (1983).

100. S. 210, 98th Cong. (1983); S. 26, 98th Cong. (1983).

101. Judicial Reform Act of 1982, S. 3018, 97th Cong. (1982); see Gerald Gunther, *Congressional Power To Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 895-96 (1984).

102. See Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465-66 (1986).

103. Former Deputy Solicitor General Paul Bator wrote that court stripping “is a technique of dealing with the Court that adopts the Court’s own disregard of the Constitution’s structural spirit.” Paul M. Bator, *Withdrawing Jurisdiction from Federal Courts*, 7 HARV. J.L. & PUB. POL’Y 31, 31 (1984).

These are inconvenient facts for someone seeking to demonstrate that the origins of judicial supremacy lie in the support of the political branches. Reconstructive presidents were to be our control group, after all. If they cannot serve that function, we must look elsewhere to establish a connection between political support and the advent and growth of judicial supremacy.

The prevalence of jurisdiction-stripping bills might be one promising avenue. Even if it appears that disaffected presidents such as Roosevelt and Reagan were capitulating as much as other presidents to the Court's interpretive supremacy, perhaps we can measure the political branches' relative support for judicial supremacy by assessing how hard Congress has tried to take it away. Here the record is mixed. Reconstructive presidencies have indeed been accompanied by legislative attempts to limit the Court's jurisdiction over certain constitutional questions. Roosevelt's and Reagan's administrations saw conspicuous court-stripping efforts, and the most famous such measure—the partial repeal of the Court's appellate jurisdiction in order to affect the disposition of *Ex parte McCardle*<sup>104</sup>—came as part of the reconstructive program started by Lincoln and continued by the Reconstruction Congresses.<sup>105</sup> And the fact that the court-stripping measures during the Roosevelt and Reagan administrations failed—most do—does not in itself indicate relative support for judicial supremacy. We will instead want to know how the level of court-stripping activity compares to other, nonreconstructive periods. If the political branches were no less sanguine about court stripping during affiliated and oppositional presidencies, then it is difficult to make confident claims about the relative strength of judicial supremacy during those periods.<sup>106</sup>

Historically, though, court-curbing rashes have hardly been unique to reconstructive eras. As Gerald Gunther wrote, “Jurisdiction-curbing proposals have surfaced in Congress in virtually every period of controversial federal court decisions.”<sup>107</sup> Following *Cohens v. Virginia*,<sup>108</sup> for example, several

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104. 74 U.S. (7 Wall.) 506 (1868).

105. During the pendency of the *McCardle* case, the House passed a measure that would have required a two-thirds supermajority of Justices in order to invalidate an act of Congress. The bill died in the Senate. See Friedman, *supra* note 94, at 28–29.

106. Our interest, moreover, extends beyond presidential initiatives, for the measure of judicial supremacy's infirmity comprises both executive and legislative support for jurisdiction stripping during reconstructive periods.

107. Gunther, *supra* note 101, at 896.

108. 19 U.S. (6 Wheat.) 264 (1821) (affirming the constitutionality of the Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85, which authorizes Supreme Court review of state court judgments).

amendments and resolutions were offered in state legislatures as well as in Congress proposing to relieve the Court of its appellate jurisdiction over state court decisions.<sup>109</sup> Prominent in recent memory is the 1957 Jenner bill, which among other things would have deprived the Court of appellate jurisdiction over cases involving the validity of the practices of congressional committees and certain government regulation of subversive activities.<sup>110</sup> The bill, defeated forty-nine to forty-one on the Senate floor,<sup>111</sup> was a direct response to Supreme Court decisions in Communism-related cases such as *Watkins v. United States*,<sup>112</sup> *Konigsberg v. State Bar of California*,<sup>113</sup> and *Cole v. Young*.<sup>114</sup> In 1964, in the immediate wake of the Court's controversial decision in *Reynolds v. Sims*,<sup>115</sup> the House passed a bill that would have eliminated federal court jurisdiction over reapportionment cases.<sup>116</sup> In the last several years, bills have been introduced to strip federal courts of jurisdiction over cases involving the pledge of allegiance, challenges to the Defense of Marriage Act, and government invocations of religion.<sup>117</sup>

Posturing aside, actual legislative contractions of the Supreme Court's jurisdiction are exceptionally uncommon. The only successful instance is the

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109. See Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States – a History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 16-30 (1913).
110. S. 2646, 85th Cong. (1957); see Sheldon D. Elliott, *Court-Curbing Proposals in Congress*, 33 NOTRE DAME LAW. 597, 598 (1958). Similar measures were also proposed and rejected by the eighty-fifth Congress. See Elliott, *supra*, at 601-02 (summarizing proposals).
111. 104 CONG. REC. 18,687 (1958).
112. 354 U.S. 178 (1957) (reversing a contempt conviction where a witness before the House Committee on Un-American Activities refused to answer questions related to certain persons' membership in the Communist Party); see also *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551 (1956) (reversing dismissal of a New York City municipal employee for his invocation of the right to self-incrimination in state proceedings related to past Communist Party membership).
113. 353 U.S. 252 (1957) (reversing the state bar's denial of a law license on the ground that the fact that an applicant attended Communist Party meetings did not equate with bad moral character); see also *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232 (1957) (same).
114. 351 U.S. 536 (1956) (reversing judgment against a civil servant who was dismissed for associating with Communists).
115. 377 U.S. 533 (1964).
116. H.R. 11926, 88th Cong. (1964). The bill died in the Senate. More than 130 bills aimed at limiting Court power over reapportionment were proposed in the House in the summer of 1964. See Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 573 n.26 (1996).
117. See James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 192 n.1 (2007) (collecting bills proposed to strip federal courts of jurisdiction).



statute that withdrew jurisdiction over *McCardle's* case.<sup>118</sup> There is political sense in this rarity. In 1965 David Easton introduced the concept of “diffuse support” into the political science lexicon.<sup>119</sup> Diffuse support refers to the “reservoir of favorable attitudes or good will that helps members [of a political system] to accept or tolerate outputs to which they are opposed or the effect of which they see as damaging to their wants”; diffuse support sits in opposition to “specific support,” which “flows from the favorable attitudes and predisposition stimulated by outputs that are perceived by members to meet their demands as they arise or in anticipation.”<sup>120</sup> We should expect agreement with the substantive holdings of the Supreme Court to determine specific support but to have only an indirect bearing on diffuse support.<sup>121</sup> The data show that diffuse support for the Court, and in particular support for a robust power to declare acts of Congress unconstitutional, achieves consistent and stable majorities.<sup>122</sup> As Larry Alexander and Lawrence Solum have written, “the idea that the judicial branch should act as the final and authoritative interpreter of the Constitution has been a profoundly popular one.”<sup>123</sup>

The evidence is shaky that the general favor of presidents is primarily or even significantly generative of our ethos of judicial supremacy or that

118. Ch. 34, 15 Stat. 44 (1868). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended at 28 U.S.C. §§ 2244-2266 (2000)), provides that the Court shall have no jurisdiction over denials of leave to file second or successive habeas petitions. *Id.* § 2244(b)(3)(E). That section does not constitute jurisdiction stripping because the gatekeeping system was itself created by AEDPA. The statute did not remove the Court’s jurisdiction to entertain habeas petitions. See *Felker v. Turpin*, 518 U.S. 651 (1996) (upholding the gatekeeping provision against an Exceptions Clause challenge). A provision of the Norris-LaGuardia Act withdrew federal court jurisdiction to issue labor injunctions but was not directed specifically at the Supreme Court. See 29 U.S.C. § 107 (1932).

119. DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* (1965).

120. *Id.* at 273.

121. See Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 LAW & SOC’Y REV. 357, 359 (1968) (“People who believe specific decisions are wrong, even wrongheaded, and individual judges unworthy of their office may still [offer diffuse support] if they respect the court as an institution that is generally impartial, just, and competent.”).

122. See Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM J. POL. SCI. 635, 641 tbl.1 (1992); Jeffery J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1116 (1997). Even during the Court-packing crisis, consistent majorities of Americans opposed limits on the Court’s power to invalidate acts of Congress. See PUBLIC OPINION 1935-46, at 148 (Hadley Cantril & Mildred Strunk eds., 1951).

123. Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1637 (2005) (reviewing KRAMER, *supra* note 2).

reconstructive presidents' relative lack of support for judicial supremacy has itself resulted in less judicial independence. More probably, reconstructive periods and episodes of weak judicial authority have jointly resulted from popular dissatisfaction with a prior regime. On this view, judicial supremacy has been threatened not by popular presidents but by unpopular judicial decisions. It likewise has been buoyed by the support of the people, not their politicians.<sup>124</sup>

### III. THE PEOPLE'S COURT?

This Review has hypothesized that members of the public, more than institutional political actors, have laid the foundations for judicial supremacy. This is a difference of degree, of course, and it resists empirical assessment. Whittington must be right that the support of most presidents most of the time matters, and indeed may be necessary, to the survival of judicial supremacy. To that extent, his detailed accounting of that support is helpful to the many seeking to better understand the phenomenon. But I doubt he is answering the most interesting question about judicial supremacy. Justice Scalia gets to the heart of the matter: why would we “want to leave these enormously important social questions to nine lawyers with no constraints?”<sup>125</sup> Whittington has told us why politicians support judicial supremacy. But why do so many of the rest of us?<sup>126</sup>

Easton offered several theoretical reasons why people lend diffuse support to a political system:

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124. See Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003) (arguing based on social science literature that the public generally supports judicial review); cf. Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1030 (2004) (“Because Article III lodges the composition of the federal judiciary in the political control of the President and the Senate, no judicial interpretation of the Constitution can withstand the mobilized, enduring, and determined opposition of the people.”).
125. Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, NEW YORKER, Mar. 28, 2005, at 42.
126. Whittington acknowledges the limited scope of his project: “Whereas this book has focused on the actions and words of elite political actors, public opinion scholars have emphasized the potential value of diffuse support in the mass public for shoring up the judiciary. . . . [T]he account offered here suggests one way in which courts have won that diffuse support.” WHITTINGTON, *supra* note 7, at 289; cf. *id.* at 102 (“Judges are subject to many of the same shifts in public mood and political and social circumstances that affect elected officials.”).

If we wish, the outputs here may be considered psychic or symbolic and in this sense, they may offer the individual immediate benefits strong enough to stimulate a supportive response. Members may get satisfaction, for example, from the promise of future greatness for their system and even some gratification from being made to feel an important part of a larger historical process that calls for present restraint on behalf of future benefits for the political system, an object which they come to identify in and for itself.<sup>127</sup>

Even granting that presidents and legislatures effectively convey the narrow political preferences of majorities in the here and now, those institutions may be ill-suited to respond to values that are less temporally contingent.<sup>128</sup> As with institutional support, no consistent subliminal motive runs through all the various reasons for public support for judicial supremacy. There is no single “public,” of course, either across time or at any historical moment. For example, the factions who supported judicial supremacy during the *Lochner* era, many of whom celebrated William McKinley’s victory over William Jennings Bryan in 1896, saw in the judiciary a different, more traditionally conservative set of political commitments than those who supported judicial supremacy during the Warren Court. And when we speak of public support, we are not supposing a democratic majority; rather we are speaking situationally, describing political actors by reference to their systemic relationship to other political institutions.<sup>129</sup> The public voice is a vector forged of sets of commitments and values that may be quite diverse individually. That is no less true, I suggest, of public support for the idea that the Court should have the final say in matters of constitutional interpretation. Consider the following four possibilities.

First, many of us might believe it particularly important to devote institutional resources to developing and sustaining a justice ethic. Courts might get all sorts of questions wrong, and they might do so often, but the federal judiciary’s commitment in constitutional cases is to achieving outcomes that are consistent with the Constitution. That commitment is unique among the branches, the other two of which (quite properly) serve political and

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127. EASTON, *supra* note 119, at 273-74.

128. See Friedman, *supra* note 124, at 2606.

129. It is safe to say that most people do not think about the business of the federal courts very much. See generally Frederick Schauer, *Foreword: The Court’s Agenda—and the Nation’s*, 120 HARV. L. REV. 4, 9 (2006) (“[N]either constitutional decisionmaking nor Supreme Court adjudication occupies a substantial portion of the nation’s policy agenda or the public’s interest . . .”).

constitutional masters alike. Most of us believe, moreover, that constitutional guarantees are generally consistent with justice.<sup>130</sup> We may wish the political balance to tilt more toward solicitude for constitutional rights as an end in itself—that is, as part of a substantive moral conception—or we may believe that protection of those rights is instrumentally important to democratic participation. Post and Siegel write, “Constitutional rights may instantiate the very values that democracy seeks to establish, and they may also be necessary to the discursive formation of popular will upon which democracy is based.”<sup>131</sup> Moreover, for some—to wit, those who are systematically in the minority—the idea that certain constitutional rights must be protected above and beyond the legislative process is not obviously inconsistent with their political preferences.<sup>132</sup>

This knight-gallant vision of the Court as a protector of individual rights is a historically contingent one. The Court did not by and large conceive of itself as institutionally concerned with minority rights prior to the New Deal era, and it has not generally been concerned with protecting individual economic rights since.<sup>133</sup> Footnote four of Justice Stone’s famous opinion in *United States v. Carolene Products Co.* articulated a nascent solicitude for the rights of minorities as such,<sup>134</sup> and World War II and the Cold War called for greater scrutiny of the relationship between unchecked majoritarianism and oppressive

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130. See J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703, 1704 (1997) (“Within our legal culture the idea of fidelity to the Constitution is seen as pretty much an unquestioned good.”). *But see* MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006); *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).
131. Post & Siegel, *supra* note 124, at 1036. Social scientific research has suggested that people assess the actions of public officials “based on how fair the outcomes are for themselves and others, rather than on the personal benefit or harm resulting from the decisions.” TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 74 (1990).
132. *Cf.* Caldeira & Gibson, *supra* note 122, at 640 n.7 (hypothesizing that positive feelings engendered by Warren Court decisions help explain consistent support for the Court among blacks).
133. See David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 *YALE L.J.* 741, 743 (1981). See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004) (arguing for a reinvigoration of the Necessary and Proper Clause, the Privileges or Immunities Clause, and the Ninth Amendment).
134. 304 U.S. 144, 152-53 n.4 (1938) (implying that more searching judicial review might be appropriate for “the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities” (citation omitted)).

hegemony. As Richard Primus writes, “In an attempt to ground their opposition to Nazi Germany and the Soviet Union, many Americans felt a need to articulate some set of normative precepts outside of and prior to positive law.”<sup>135</sup> The residue of the Warren Court’s commitment to that “set of normative precepts” continues to influence the contemporary conception of the role of constitutional courts in a democracy.

Second, the concern for justice may be generalized to other values that the ordinary political process is not designed to protect or maximize. Judicial review might, for example, correct for risk aversion within the polity. Tom Ginsburg has proposed what he calls the “insurance model of constitutional review.”<sup>136</sup> The model posits that political actors engaged in constitutional design will fashion mechanisms for judicial review to guard against the risk that they will be political losers in future elections.<sup>137</sup> Those incentives exist for ordinary citizens evaluating the system in place as much as for political architects designing constitutions prospectively. A risk-averse citizen who is consistently in the majority may still prefer to live within a system in which statutes require judicial approval, even if she is likely to disagree with the Court.<sup>138</sup>

Judicial review might also help correct for variations in intensity of preferences. We can hypothesize a universe of three issues: federal habeas, the death penalty, and campaign finance. I might not feel very strongly about, but generally favor, the enforcement of state death penalty laws and the habeas restrictions imposed under the Antiterrorism and Effective Death Penalty Act,<sup>139</sup> but I might vigorously oppose campaign finance restrictions such as the ones imposed by the BCRA.<sup>140</sup> I have legislative majorities on two of the three issues, but I will nonetheless support judicial review, and its close cousin

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135. RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 178 (1999). The direct relationship between the Cold War and the American civil rights movement is explored in great detail in MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

136. TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES* 25 (2003).

137. *Id.*

138. Cf. Matthew C. Stephenson, “*When the Devil Turns . . .*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 71 (2003) (constructing a model of institutional political dynamics suggesting that “judicial independence becomes more attractive as parties become more risk averse”).

139. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

140. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended at scattered sections of 2 U.S.C.).

judicial supremacy, because I am in the legislative minority on the issue I care about (campaign finance).

Third, the judiciary might provide a measure of predictability that people find not only psychologically attractive but also useful in arranging their personal and business affairs. Recall the FSIA example discussed earlier. Whittington's model encourages observers to view the impetus behind the statute in terms of the incentives on the State and Justice Departments. But the FSIA is also a story of interest group politics. At the hearings over the bill, Cecil Olmstead, a Texaco executive and chair of a lobbying group for transnational companies, testified that enactment of the FSIA "should substantially reduce certain risks of doing business with foreign governmental entities, reduce costly litigation over immunity issues, and thus benefit the American business community as a whole."<sup>141</sup> Similar testimony was offered by representatives of private litigants, economic policy consultants, and other business interests.<sup>142</sup> Citizens, especially corporate ones, cherish predictability. The courts' soft spot for settled understandings, the relative stability of the Supreme Court's membership, and the judicial commitment to consistent treatment of litigants all mean that affairs governed by courts rather than politicians are relatively likely to conform to prior expectations.<sup>143</sup>

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141. *Hearing, supra* note 24, at 80 (statement of Cecil J. Olmstead, Chairman, the Rule of Law Comm., and Vice President, Texaco Co.).

142. *See id.* at 58 (statement of Peter D. Trooboff, Cochairman, Comm. on Transnat'l Judicial Procedure, Am. Bar Ass'n) ("Private litigants will enjoy far greater certainty about the applicable criteria than possible today with the incomplete and sometimes divergent standards applied in State Department actions and court decisions."); *id.* at 71 (statement of Timothy W. Stanley, President, Int'l Econ. Policy Ass'n) ("[The FSIA] would regularize the determination of whether sovereign immunity can be appropriately invoked, lodging the determination in the courts on the basis of clearly set out standards, thus moving this function from the State Department where it was often handled inconsistently and affected by foreign policy considerations."); *id.* at 88 (statement of J. Roderick Heller, Partner, Wilmer, Cutler & Pickering) ("[The FSIA] will assist potential litigants and their counsel in appraising the effective contractual provisions, the extent to which negotiations can take into account the likelihood that a foreign state party could be subject to suit in the United States and have those specific contractual provisions enforced. I submit that this type of predictability is as important in negotiations as in litigation.").

143. *Cf.* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 878 (1975) ("The element of stability or continuity necessary to enable interest-group politics to operate in the legislative arena is supplied, in the first instance, by the procedural rules of the legislature, and in the second instance by the existence of an independent judiciary.").

In the end, much of our “support” for judicial supremacy may be inertial, deriving from an unexamined devotion to the status quo.<sup>144</sup> Judicial supremacy is the devil we know, announced as *ipse dixit* in judicial opinions, buttressed by self-interested politicians, and perpetuated in high school civics classes. Tushnet in particular has suggested that the Court is not well-suited to play the ambitious role that footnote four appeared to contemplate and that liberals continue to mythologize.<sup>145</sup> Long before Dahl formalized the observation, Mr. Dooley astutely remarked that “no matter whether th’ constitution follows th’ flag or not, th’ supreme court follows th’ iliction returns.”<sup>146</sup> If courts are so commonly instruments of the elected branches and yet lull us into deliberative complacency, is it not time to wonder whether judicial supremacy is a mistake?<sup>147</sup>

What Tushnet and others keen on rethinking judicial supremacy overlook is that inertia has its own set of virtues. Whittington describes political support for judicial supremacy as a concession to the complexities of government. But life, too, is complex. Amid the chores of our daily existence, who (besides political zealots and academic lawyers) has both the time and the inclination to devote mental energy to constitutional deliberation?

Resolving constitutional issues—including the rightful place of judges within our system—is a contentious business that can crowd out other priorities and that is not conducive to cooperation. Much social science evidence suggests that individuals generally prefer not to discuss politics with those who are not like-minded, and that when they do, it can lead to resentment and polarization and can diminish overall social welfare.<sup>148</sup>

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144. In their 1966 study of specific and diffuse support for the Court, Murphy and Tanenhaus found that even among those who could be classified as either having diffuse support or not having it, 39.1% “could not specify a single thing they liked or disliked about what the Court had done” and that 14.7% “could not offer any response at all when asked about the main job of the Court.” Murphy & Tanenhaus, *supra* note 121, at 373.

145. See TUSHNET, *supra* note 4, at 129.

146. FINLEY PETER DUNNE, MR. DOOLEY’S OPINIONS 26 (1901); see Dahl, *supra* note 47.

147. See TUSHNET, *supra* note 4, at 154 (arguing that the effect of eliminating judicial review entirely “would probably be rather small, taking all issues into account”).

148. See, e.g., DIANA C. MUTZ, HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY 9-10, 89-124 (2006). Bruce Ackerman and James Fishkin have argued that the various “pathologies” of deliberation may be assuaged by manipulating the deliberative context to reduce coercive influences. See BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY 63-65 (2004); cf. David Schkade, Cass R. Sunstein & Reid Hastie, *What Happened on Deliberation Day?*, 95 CAL. L. REV. 915 (2007) (concluding based on an experiment conducted in Colorado that deliberation increased consensus within groups of like-minded people and increased political polarization). Evaluating the virtues of deliberative passivity will require us to assess both the potential for constructing ideal

Matthew McCubbins and Daniel Rodriguez conducted a series of simple experiments, for example, from which they concluded that deliberation is least likely to improve social welfare when it is costly to speak and to listen to others, particularly as the size of the group increases.<sup>149</sup> John Hibbing and Elizabeth Theiss-Morse have concluded from extensive study of survey data that “people do not want to make political decisions themselves, . . . [and] would most prefer decisions to be made by . . . empathetic, non-self-interested decision makers.”<sup>150</sup> Within the popular consciousness, judges are those decision makers. Of course, the scope of their own authority is of more than passing interest to judges. But a deep reservoir of diffuse support suggests that we are not generally bothered by potential judicial self-dealing, or at the very least that any such concerns are dwarfed by the value judges provide as delegates in matters of constitutional interpretation. As Robert Jackson wrote without the benefit of empirical support, “It is certainly easier, and perhaps wiser, to let the Justices, when they have a will to do so, work out a corrected pattern of judicial restraint than to split our society as deeply as adoption of any formula for limiting judicial power would be likely to do.”<sup>151</sup>

To the extent that public support for judicial supremacy proceeds from little more than unexamined assumptions, Whittington’s account may be particularly useful. His model’s explanations for political support for courts do not situate presidents as mediators of citizens’ risk aversion, desire for stability, or solicitude for justice. Instead, and crucially for Whittington, a president is an independent political force, linked to the political commitments of his followers but uniquely able to act as “the ‘interpreter-in-chief,’ who can ‘make politics’ by redefining the political landscape.”<sup>152</sup> The less self-conscious the public’s reasons for supporting court finality, the less we should treat politicians as mere reflectors of the public’s preferences; we may assume with Whittington, in other words, that the incentives of institutional political players are indeed of independent significance. But the normal political process is not the only effective outlet for the expression of public sentiment about the judiciary, even if that sentiment is inchoate and little scrutinized. The levers of popular control over the judiciary remain a bit mysterious, to be sure, but as

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conditions for deliberation and the prevalence of subideal conditions in ordinary life experience. See MUTZ, *supra*, at 5.

149. See Matthew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9, 30-33 (2006).

150. See JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS’ BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 85-86 (2002).

151. JACKSON, *supra* note 93, at vii.

152. WHITTINGTON, *supra* note 7, at 17.



Judge Posner says, judges, like the rest of us, “like to be liked.”<sup>153</sup> They also of course experience and, as respected legal professionals, play an outsized role in shaping the constitutional zeitgeist. We should assume that judges’ self-conception will line up with the objective conception held by the culture of which they are part.<sup>154</sup>

## CONCLUSION

It should not be surprising that constitutional theorists have shifted their gaze from judicial review to judicial supremacy. Since the New Deal era, judicial activism had been in the service of liberal individualism, as the Warren and Burger Courts took aim at recalcitrant school boards, overzealous prosecutors, antipornography crusaders, and such. Like the New Deal Courts of old, the Rehnquist Court instead antagonized Congress, preventing it from legislatively overruling *Miranda v. Arizona* and *Employment Division v. Smith*;<sup>155</sup> from abrogating state sovereign immunity under Title I of the Americans with Disabilities Act;<sup>156</sup> from using state officials to help implement the Brady Act;<sup>157</sup> and from passing nationwide legislation providing a federal civil remedy for gender-motivated violence and banning gun possession near schools.<sup>158</sup> Just as many conservatives sought refuge from the individual rights decisions of the Warren and Burger Courts in a jurisprudence of original intent, some liberal academics have sought to rebut the Rehnquist Court’s structural critique by resort to popular constitutionalism in all its sundry guises.<sup>159</sup>

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153. RICHARD A. POSNER, *OVERCOMING LAW* 117 (1995).

154. See Barry Friedman, *The Politics of Judicial Review*, 84 *TEX. L. REV.* 257, 325 (2005) (“The Justices live on this planet and typically are aware of what happens on it.”).

155. See *Dickerson v. United States*, 530 U.S. 428 (2000) (striking down, in part, 18 U.S.C. § 3501(a) (2000), which sought to circumscribe application of the exclusionary rule in cases in which suspects had not received the warnings dictated by *Miranda v. Arizona*, 384 U.S. 436 (1966)); see also *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down portions of the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2000), as an invalid exercise of Congress’s power under Section 5 of the Fourteenth Amendment and an unconstitutional abrogation of *Employment Div. v. Smith*, 494 U.S. 872 (1990)).

156. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

157. *Printz v. United States*, 521 U.S. 898 (1997).

158. *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

159. See, e.g., KRAMER, *supra* note 2; TUSHNET, *supra* note 4; Post & Siegel, *supra* note 3; Waldron, *supra* note 5.

The turn to popular constitutionalism, though, entails a normative argument for a system that in a sense we already have. Judicial supremacy is born of a popular preference, perhaps the output of a give-and-take between competing political actors who generally support it,<sup>160</sup> but more likely a generally beneficial (if not particularly democratic) way of ordering our political affairs. It is, in other words, a “constitutional construction” that nicely illustrates the explanatory payoff of Whittington’s earlier work. That is not to say that our constitutionalism should not be more engaged, more deliberative, more popular, but those who would make that case must confront the possibility that the people have spoken and that they just do not like the answer.

There is another explanation beyond the political for a greater interest among legal scholars in judicial supremacy: the continuing maturation of constitutional theory as an academic discipline. The acculturation of we who are lawyers to the norms of legal practice fosters a certain fascination with the language of judicial opinions. Our existential engagement with the judicial system makes it more difficult for us, both normatively and positively, to evaluate judicial actors through the lens of institutional design rather than as authoritative constitutional interpreters.<sup>161</sup> The insights of political scientists such as Whittington are particularly valuable to that project. Whittington’s fixation on judicial supremacy as a descriptive political reality reflects his professional orientation. His book’s rigorous examination of the political motivations and machinations behind judicial supremacy is an important resource for anyone seeking to make normative claims about the phenomenon. As Whittington himself acknowledges, however, it is not a complete resource. Nor, I suspect, is it the most valuable. Understanding why we may prefer that professional elites make some of our most momentous decisions for us will ultimately require integrating law with insights from political science, sociology, and psychology alike; for if judicial supremacy fails to satisfy, the fault is not in our political stars, but in ourselves.

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160. See WHITTINGTON, *supra* note 7, at 76.

161. See generally Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511 (2007) (noting the traditional (but changing) tendency of legal academics to ignore the role of policy preferences and partisan alignment in explaining judicial behavior).