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Judicial Supremacy Revisited: Independent Constitutional Authority in American Constitutional Law and Practice

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JUDICIAL SUPREMACY REVISITED: INDEPENDENT CONSTITUTIONAL AUTHORITY IN AMERICAN CONSTITUTIONAL LAW AND PRACTICE

MARK A. GRABER*

ABSTRACT

The Supreme Court exercises far less constitutional authority in American law and practice than one would gather from reading judicial opinions, presidential speeches, or the standard tomes for and against judicial supremacy. Lower federal court judges, state court justices, federal and state elected officials, persons charged with administering the law, and ordinary citizens often have the final say on particular constitutional controversies or exercise temporary constitutional authority in ways that have more influence on the parties to that controversy than the eventual Supreme Court decision. In many instances, Supreme Court doctrine sanctions or facilitates the exercise of independent constitutional authority by persons other than Supreme Court Justices. Inflated claims about the role of the Supreme Court in American constitutional politics ignore significant institutional, legal, and political constraints on judicial power, conflate the judicial power to have the final say over the meaning of constitutional provisions with the judicial power to settle constitutional controversies at particular times and places, and confuse independent constitutional authority with nullification.

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INTRODUCTION

Proponents and opponents of judicial supremacy routinely assume that the Supreme Court settles (almost) all constitutional controversies that excite Americans. Law professors and students of public law ritually chant Tocqueville's catechism that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[1] Participants in the debate over the proper allocation of constitutional authority dispute whether an imperial judiciary with the power to resolve (almost) all constitutional disputes is desirable, but not whether the United States actually has an imperial judiciary with the power to resolve (almost) all constitutional disputes. Professor Larry Kramer, a proponent of popular constitutionalism, complains that "everyone nowadays seems willing to accept the [Supreme] Court's word as final ... regardless of the issue, regardless of what the Justices say, and regardless of the Court's political complexion."[2] Professor Ronald Dworkin, a more enthusiastic proponent of judicial supremacy, maintained that "practice has now settled" that "courts should take final authority to interpret the Constitution."[3] Claims of a "judicial monopoly on constitutional interpretation"[4] find substantial historical support in Professor Keith Whittington's study of American constitutional development.[5] He concludes, "institutional and coalitional pressures that push political actors to turn to the Court for constitutional leadership have become more pervasive over the course of American history. Political leaders have found increasing reason to support the Court, and decreasing capacity to resist the Court, over time."[6]

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1. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1945) (1835).

2. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 228 (2004).

3. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 12 (1996).

4. Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 960 (2004).

5. KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 232 (2007).

6. *Id.*

Supreme Court opinions, often supported by executive pronouncements, embrace this all-encompassing power to settle constitutional conflicts by claiming responsibility for every constitutional nook and cranny. Chief Justice Roger Taney's opinion in *Ableman v. Booth* stated:

> It was essential, therefore, to its very existence as a Government ... that a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a State court or a court of the United States, should be finally and conclusively decided.[7]

One hundred years later, every Justice on the Supreme Court signed Chief Justice Earl Warren's assertion in *Cooper v. Aaron* that the Justices had the final say in all controversies over the meaning and application of constitutional provisions.[8] Warren's unanimous opinion asserted:

> In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison* that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system....
>
> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery."[9]

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7. 62 U.S. (21 How.) 506, 518 (1858).

8. *See* 358 U.S. 1, 5 (1958).

9. *Id.* at 18 (citation omitted) (first quoting 5 U.S. (1 Cranch) 137, 177 (1803); and then quoting United States v. Peters, 9 U.S. (5 Cranch) 115, 136 (1809)).

During the Little Rock Crisis, President Eisenhower firmly defended the Supreme Court as the final arbiter for all constitutional controversies.[10] He declared, "[t]he very basis of our individual rights and freedoms rests upon the certainty that the President ... will support and insure the carrying out of the decisions of the Federal Courts."[11]

Justices on the contemporary Rehnquist and Roberts Courts are particularly prone to insist on judicial supremacy over the entire American constitutional universe.[12] Professor Kramer observes that the Supreme Court's "new jurisprudence rests explicitly on a claim that it is judges who are ultimately responsible for interpreting the Constitution and that this means the whole Constitution."[13] Chief Justice Rehnquist's opinion in *United States v. Morrison* asserted, "ever since *Marbury* [*v. Madison*] this Court has remained the ultimate expositor of the constitutional text."[14] "When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued," Justice Kennedy's opinion for the Court in *City of Boerne v. Flores* stated, "it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed."[15] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the plurality opinion suggested that constitutional debate outside the Court must cease when the Supreme Court speaks clearly and decisively on a constitutional issue.[16] Justices O'Connor, Kennedy, and Souter spoke of "the Court's interpretation of the Constitution call[ing] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[17]

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10. *See* Radio and Television Address to the American People on the Situation in Little Rock, PUB. PAPERS 689, 690 (Sept. 24, 1957).

11. *Id.* at 692

12. *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 241 (2002) ("[T]he Supreme Court's view in recent years [is] that it alone among the three branches has been allocated the power to provide the full substantive meaning of all constitutional provisions.").

13. KRAMER, *supra* note 2, at 225.

14. 529 U.S. 598, 617 n.7 (2000).

15. 521 U.S. 507, 536 (1997).

16. 505 U.S. 833, 866-67 (1992).

17. *Id.* at 867.

Closer examination reveals that the Supreme Court exercises far less constitutional authority in American law and practice than one would gather from reading judicial opinions, presidential speeches, or the standard tomes for and against judicial supremacy. Lower federal court judges, state court justices, federal and state elected officials, persons charged with administering the law, and ordinary citizens often have the final say on particular constitutional controversies[18] or exercise temporary constitutional authority in ways that have more influence on the parties to that controversy than the eventual Supreme Court decision.[19] In many instances, Supreme Court doctrine sanctions or facilitates the exercise of independent constitutional authority by persons other than Supreme Court Justices.[20] Inflated claims about the role of the Supreme Court in American constitutional politics ignore significant institutional, legal, and political constraints on judicial power, conflate the judicial power to have the final say over the meaning of constitutional provisions with the judicial power to settle constitutional controversies at particular times and places, and confuse independent constitutional authority with nullification.

Established Supreme Court doctrine frequently vests independent constitutional authority in persons other than Supreme Court Justices. The political question doctrine vests Congress and the President with the power to settle important constitutional disputes. Concrete judicial review vests persons outside the Supreme Court with temporary constitutional authority, often for extended periods of time, to provide provisional settlements for constitutional disputes. Elected officials, state judges, and ordinary citizens may reject Supreme Court doctrines when making constitutional decisions, as long as they do not act in ways forbidden by existing

18. *See, e.g.*, Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 716 (1985) ("Congressional and executive practices over a number of years can be instrumental in fixing the meaning of the Constitution."); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, LAW & CONTEMP. PROBS., Summer 2004, at 105, 115 ("Practice thus establishes that the political branches at times provide a necessary source of interpretation in the absence of judicial resolution and a valuable alternative or supplemental voice when the Court has spoken.").

19. Mark A. Graber, *Almost Legal: Disobedience and Partial Nullification in American Constitutional Politics and Law*, *in* NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT 146, 168 (Sanford Levinson ed., 2016).

20. *See, e.g.*, Anthony O'Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 409-10 (2013).

constitutional law.[21] A governor who believes that capital punishment violates the Eighth and Fourteenth Amendments may pardon all persons on the state's death row, even when the Supreme Court insists that the death penalty meets constitutional standards.[22] President Andrew Jackson refused to follow *McCulloch v. Maryland* when claiming the federal government had no power to incorporate a national bank.[23] Judicial deference to legislative and trial court fact-finding enables governing officials to disregard judicial precedents as long as they can plausibly describe the underlying circumstances in ways that make their conduct appear to be consistent with constitutional norms.[24] Police officers who know that trial judges are likely to purport to believe their testimony that some evidence was in plain view have the practical authority to determine the constitutional justifications for their searches.[25]

Supreme Court Justices would face insuperable legal, institutional, and political barriers should they actually attempt to secure a "monopoly on constitutional interpretation."[26] The constitutional text interpreted in light of long-standing precedents often mandates judicial decisions allocating constitutional authority elsewhere. The Justices have no legal power to punish jurors who disregard judicial statements of the law. *Printz v. United States* forbids the Supreme Court from correcting state governors who refuse to allow state police to implement federal laws they believe are unconstitutional.[27] The Supreme Court is incapable of learning about the vast majority of constitutional decisions that are made every day in the United States. Police officers patrolling the streets make numerous constitutional decisions about when searches are appropriate that are rarely reviewed by their superiors, much less appellate judges.[28]

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21. *See infra* Part II.

22. *See, e.g.*, Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES (Jan. 12, 2003), http://www.nytimes.com/2003/01/12/us/citing-issue-of-fairness-governor-clears-out-death-row-in-illinois.html [https://perma.cc/Z2B6-QNUD].

23. *See* 17 U.S. (4 Wheat.) 316 (1819); Andrew Jackson, Veto Message (July 10, 1832), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 576, 582 (James D. Richardson ed., 1896).

24. *See* Graber, *supra* note 19, at 158-59.

25. *See id.* at 158.

26. *See* Kramer, *supra* note 4, at 960.

27. *See* 521 U.S. 898, 925-26, 935 (1997).

28. *See, e.g.*, Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) (observing that many illegal searches never reach the courts); William J. Stuntz, *The Political*

State and lower federal courts have various means for keeping constitutional decisions beneath the Supreme Court's radar. Furthermore, the Justices have limited political capital.[29] The Supreme Court during the Civil War found various jurisdictional exercises for avoiding decisions on the constitutional status of legal tender and presidential suspensions of habeas corpus.[30] The Justices of the Ellsworth and Marshall Courts made a strategic decision when ruling that the Supreme Court could exercise appellate jurisdiction only when doing so was consistent with both Article III and a federal statute.[31]

Commentary that concentrates on which governing institution "ultimately" has the final say over the meaning of the Constitution misses important dimensions of constitutional law and practice. Most constitutional decision makers have shorter time horizons and are concerned with far narrower problems than the Supreme Court of the United States or professors who write about judicial supremacy. Police officers are very interested in who determines whether the person they see loitering near a jewelry store may be constitutionally stopped and frisked, less interested in who has the final say over whether that stop and frisk meets constitutional standards, and not at all interested in whether the Supreme Court hands down a decision settling the relevant constitutional questions after they are retired. Such police officers and many other government officials exercise considerable independent constitutional authority in particular times and places. This authority is sanctioned by the Supreme Court and is often exercised in ways that settle constitutional controversies.

We fail to appreciate the dispersal of independent constitutional authority in the United States by erroneously equating the exercise

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Constitution of Criminal Justice, 119 HARV. L. REV. 781, 782 n.4 (2006) (noting the incalculable number of police searches and seizures conducted each year).

29. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 138-40 (1980).

30. *See Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 251-52 (1864) (habeas corpus); Roosevelt v. Meyer, 68 U.S. (1 Wall.) 512, 513, 517 (1863) (legal tender). *See generally* Mark A. Graber, *Legal, Strategic or Legal Strategy: Deciding to Decide During the Civil War and Reconstruction*, *in* THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT 33 (Ronald Kahn & Ken I. Kersch eds., 2006).

31. *See* Graber, *supra* note 30, at 46-47.

of independent constitutional authority with nullification.[32] Persons exercise independent constitutional authority when they act or forbear from acting on the basis of constitutional understandings other than those promulgated by the Supreme Court. They may refrain from exercising powers and rights that existing doctrine permits them to exercise, or they may act or forebear from acting in ways forbidden by the Supreme Court. Persons attempt nullification only when they do the latter.[33] The difference between independent constitutional authority and nullification is most obvious in instances when no Supreme Court decision exists. Before *Obergefell v. Hodges*, governing officials had to exercise some independent judgment when deciding whether same-sex couples had a constitutional right to marry.[34] Even when Supreme Court precedent exists, elected officials, members of executive departments, and ordinary citizens are often able to act constitutionally on the basis of their belief that Justices have decided incorrectly without engaging in nullification. State governors do not have to accept conditional federal funds when they believe the underlying federal law is not sanctioned by

32. For one example of this confusion, see Ryan Card, Note, *Can States "Just Say No" to Federal Health Care Reform? The Constitutional and Political Implications of State Attempts to Nullify Federal Law*, 2010 BYU L. REV. 1795, 1799, 1811.

33. James Read and Neal Allen define nullification as the claim that a state "may legitimately rule that any federal act ... is unconstitutional; and, most important, that it may act on this judgment by blocking the implementation of that federal act within the state's boundaries." James H. Read & Neal Allen, *Living, Dead, and Undead: Nullification Past and Present*, 1 AM. POL. THOUGHT 263, 268 (2012). My emphasis on actions forbidden by the Supreme Court highlights how nullification consists of taking illegal action. States may on the basis of independent constitutional authority take legal steps to block the implementation of federal law. They may, for example, under *Printz v. United States*, 521 U.S. 898, 935 (1997), refuse to allow state officials to implement a federal law. *See* Read & Allen, *supra*, at 290-93.

34. 135 S. Ct. 2584, 2596-97 (2015). *Baker v. Nelson* complicates this particular analogy. 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810, 810 (1972) (indicating that the appeal from Minnesota's highest court's holding that the right to marry does not extend to homosexual couples was "dismissed for want of substantial federal question" at the Supreme Court). Arguably, there was a relevant constitutional precedent that other governing officials could use to guide their conduct. Still, the lack of Supreme Court guidance on same-sex marriage at least required governing officials to exercise independent judgment on whether *Baker v. Nelson* had precedential value and, if so, whether that decision had been undermined by more recent precedents on LGBT rights such as *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013) (holding that the exclusion of same-sex marriages from the federal statutory definition of marriage was unconstitutional).

Article I. Private persons may refrain from burning flags, because they believe *Texas v. Johnson*[35] was wrongly decided.

The following pages continue a project exploring how and in how many ways contemporary constitutional law and practice allocate independent constitutional authority outside the Supreme Court. Contrary to conventional wisdom, the Supreme Court does not have the final say on every political controversy that arises in the United States.[36] Indeed, many constitutional controversies arise on which the Supreme Court has no say.[37] As important, this judicial incapacity is often grounded in Supreme Court decisions that entail as a matter of law or practice that various constitutional controversies will be settled by other tribunals, other governing officials, or other citizens.

A previous paper elaborated on how fact deference, jury nullification, and temporary constitutional authority empower persons other than Supreme Court Justices to settle constitutional controversies.[38] Substantial fact deference occurs in American constitutional practice partly because American constitutional law mandates substantial fact deference and partly because Supreme Court Justices have "almost no capacity to supervise administrative, legislative, and state and lower federal court fact-finding."[39] The end result is that institutions other than the Supreme Court find the relevant facts underlying the vast majority of constitutional conflicts in the United States.[40] Given the fact sensitivity of most constitutional law doctrines, this independent constitutional authority to make fact-findings often amounts to independent authority to resolve constitutional conflicts.[41] Jury nullification, sanctioned by Supreme Court doctrine, prevents the Justices from examining jury decisions acquitting criminal defendants and severely curtails judicial examination of all other jury verdicts.[42] This legally mandated forbearance

35. *See, e.g.*, 491 U.S. 397 (1989).

36. *See* Frederick Schauer, *The Supreme Court, 2005—Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 53-54 (2006).

37. *See generally* Mark A. Graber, *Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited*, 21 CONST. COMMENT. 485 (2004).

38. *See* Graber, *supra* note 19, at 150.

39. *Id.* at 152.

40. *See id.* at 154.

41. *See id.* at 155.

42. *See id.* at 166.

has historically enabled juries to act on local constitutional understandings in defiance of existing judicial precedent and subvert judicially mandated constitutional protections for unpopular minorities, affecting persons of color in particular.[43] Supreme Court doctrine also allocates temporary constitutional authority to elected officials.[44] A system of concrete judicial review vests governing officials with the power to determine constitutional rights in the often substantial period of time before the Supreme Court settles a constitutional question.[45] Not infrequently, the Supreme Court "settles" a constitutional controversy long after that controversy has lost all, or considerable, political salience.[46]

This Article examines law deference constitutional doctrines or practices that empower persons other than Supreme Court Justices to settle or help settle disputes over the meaning of constitutional provisions. Part I discusses the political question doctrine, which vests Congress and the President with the authority to settle some constitutional disputes. Part I also considers how various "reasonable doubt" and related rules in constitutional law that give legal status to mistaken constitutional decisions made in "good faith" vest some constitutional authority in state and federal legislatures, as well as in state and federal courts. Part II considers the independent constitutional authority government officials and ordinary citizens have to reject on constitutional grounds the exercise of constitutional powers or rights that Supreme Court doctrine maintains they may constitutionally exercise. Part III notes how long-standing precedents that the Supreme Court may exercise appellate jurisdiction only when acting pursuant to a federal statute may vest ultimate constitutional authority for resolving (almost) all constitutional controversies in Congress. Part IV discusses how Supreme Court doctrines that facilitate settlements and arbitration, and exacerbate problems of economic disparities and access to justice, undermine judicial supremacy. Part V briefly looks at some of the ideological, legal, political, and pragmatic reasons for judicial doctrines that cede constitutional authority to persons outside the Supreme Court. This Article concludes by reconsidering how consti-

43. *See id.*
44. *See id.* at 167.
45. *See id.*
46. *See id.* at 167-68.

tutional authority is allocated in the United States and why this allocation should focus constitutional commentators on pervasive problems of access to justice.

Constitutional law and practice disperse the power to settle constitutional conflicts far more widely than most persons who participate in the debate over judicial supremacy assume.[47] Americans are not governed by an imperial judiciary that makes or determines the final decision on every constitutional dispute that arises in the United States.[48] Contemporary constitutional doctrine provides governing officials, state judges, and ordinary citizens numerous opportunities to resolve constitutional disputes on the basis of their interpretation of the relevant constitutional provisions.[49] Fact deference provides elected officials and other judicial tribunals with substantial influence over the resolution of particular constitutional debates.[50] Standing and other jurisdictional rules give these authorities de facto power over most constitutional controversies.[51] The result is that constitutional authority is far messier than the standard debates between judicial supremacy, departmentalism, and legislative supremacy might lead unwary readers to suspect.[52]

This messiness highlights the central role that access to justice concerns should play in debates over the allocation of constitutional authority in the United States and other constitutional democracies. If, as proponents of judicial supremacy believed, Tocqueville was making a normative as well as an empirical statement when he asserted, "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question,"[53] then proactive steps are necessary to ensure that all persons with plausible constitutional claims have the opportunity to have those claims adjudicated by courts and, where appropriate, appealed

47. *See id.* at 178.
48. *See id.*
49. *See id.*
50. *See id.* at 156.
51. *See id.* at 167.
52. *See id.* at 167-68.
53. TOCQUEVILLE, *supra* note 1, at 280. Tocqueville relied heavily on Joseph Story and James Kent, who did favor judicial supremacy, when making this assertion. *See* ANDRÉ JARDIN, TOCQUEVILLE: A BIOGRAPHY 202 (Lydia Davis & Robert Hemenway trans., Farrar, Straus & Giroux 1988) (1984).

to the Supreme Court of the United States.[54] Such opportunities are sadly lacking in the second decade of the twenty-first century.[55] Neither state nor federal judges resolve numerous constitutional (and legal) disputes because many victims of possible constitutional wrongs lack the knowledge necessary to recognize that they may have been victims of a constitutional wrong or lack the means necessary to file a lawsuit.[56] Less fortunate Americans with the requisite knowledge and the bare means to file a lawsuit often lack the resources necessary to ensure accurate fact-finding and a full development of the constitutional issues.[57] *Gideon v. Wainwright*, from this perspective, should be understood as setting out the preconditions for judicial supremacy as well as granting some possible victims of legal wrongs a right to an attorney.[58]

I. CONSTITUTIONAL AUTHORITY OVER LAW

Contemporary constitutional law and practice divide responsibility for determining the legal dimensions of constitutional conflicts between the Supreme Court, other judicial tribunals, elected officials, and private persons. For example, the Supreme Court acknowledges a set of "political questions."[59] These are constitutional questions that the Justices think must be resolved by other governing institutions.[60] In addition, the Justices on the Supreme Court occasionally insist that federal courts should declare unconstitutional only those laws that no reasonable person might think constitutional.[61] The Justices also share constitutional authority in some Fourth Amendment and habeas corpus cases when they treat as final police actions and state court decisions based on good faith, mistaken interpretations of constitutional law.[62] The Supreme Court

54. *See* DEBORAH L. RHODE, ACCESS TO JUSTICE 11 (2004).

55. *See id.*

56. *See id.* at 32-33, 52, 57, 103.

57. *See* Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 873 (2009).

58. *See* 372 U.S. 335, 344 (1963).

59. *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1, 46-47 (1849) (holding that some constitutional questions are nonjusticiable); *see also* Part I.A.

60. *See, e.g.*, *Luther*, 48 U.S. (7 How.) at 46-47.

61. *See infra* Part I.B.

62. *See infra* Part I.B.2.

almost never interferes when individuals or governing officials give constitutional reasons for refusing to exercise what judicial majorities believe are their constitutional rights and powers.[63] All Americans have the power to act on the basis of their independent understanding of constitutional provisions, as long as they do not take actions the Supreme Court believes are constitutionally forbidden.[64] The Supreme Court may permit Congress to relocate constitutional authority in part or entirely by limiting or abolishing federal judiciary power to adjudicate constitutional cases.[65]

A. Political Questions

The political question doctrine is the best known legal means by which contemporary constitutional law allocates constitutional decision-making to elected officials.[66] The Constitution, the Justices maintain, entrusts the President or Congress with the power to settle certain controversies over constitutional rights and powers.[67] "Underlying the political question doctrine," Rachel Barkow writes, "is the recognition that the political branches possess institutional characteristics that make them superior to the judiciary in deciding certain constitutional questions."[68] These political questions have at least one of the following six characteristics:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the

63. *See infra* Part II.
64. *See infra* Part II.
65. *See infra* Part III.
66. *See* Barkow, *supra* note 12, at 239.
67. *See id.*
68. *See id.* at 240.

> potentiality of embarrassment from multifarious pronouncements by various departments on one question.[69]

Contemporary constitutional law regards as raising nonjusticiable political questions constitutional controversies concerning many issues of foreign policy,[70] the war status of the United States,[71] the rules for passing constitutional amendments,[72] the constitutional procedures for impeaching federal officials,[73] the federal policy toward Native Americans,[74] and the proper interpretation of the Guaranty Clause.[75] At least four Justices on the Supreme Court also maintain that partisan gerrymanders raise constitutional questions that are allocated to other governing officials.[76]

The political question doctrine cuts a wide swath through the domains of American constitutionalism, even if the scope of that doctrine has recently been narrowed.[77] Constrained by the political question doctrine, the Supreme Court has not intervened in the two centuries old struggle between the President and Congress over executive power to order troops into foreign combat.[78] During a time when threats of impeachment play an increased role in political warfare,[79] federal courts have steadfastly remained committed to the proposition that the constitutionality of those procedures is for elected officials to determine.[80] Frederick Schauer's survey of American constitutional politics at the turn of the twenty-first century concluded that the Supreme Court of the United States operates on

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69. Baker v. Carr, 369 U.S. 186, 217 (1962).

70. *See* Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853).

71. *See* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 29-30 (1827).

72. *See* Coleman v. Miller, 307 U.S. 433, 453-54 (1939).

73. *See* Nixon v. United States, 506 U.S. 224, 235 (1993).

74. *See* United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1865).

75. *See* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149-51 (1912).

76. *See* Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (plurality opinion).

77. *See* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012). *See generally* Barkow, *supra* note 12, at 267-68.

78. *See* LOUIS FISHER, PRESIDENTIAL WAR POWER 302 (3d ed. 2013); STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION 11-12 (2013).

79. *See* BENJAMIN GINSBERG & MARTIN SHEFTER, POLITICS BY OTHER MEANS: POLITICIANS, PROSECUTORS, AND THE PRESS FROM WATERGATE TO WHITEWATER 38 (3d ed. 2002); DAVID E. KYVIG, THE AGE OF IMPEACHMENT: AMERICAN CONSTITUTIONAL CULTURE SINCE 1960, at 2-3 (2008).

80. *See* Nixon v. United States, 506 U.S. 224, 235 (1993).

the political margins[81] in large part because many issues that excite Americans, most notably presidential policy on terrorism, either do not raise constitutional questions or raise constitutional questions that contemporary constitutional law allocates to elected officials.[82]

The Supreme Court's decisions on justiciability have practical impact on the allocation of constitutional authority in the United States. For example, recent Supreme Court decisions refusing to rule on the constitutional standards for partisan gerrymandering are enabling some state legislatures to nullify the Seventeenth Amendment in part.[83] The Seventeenth Amendment abolished state legislative elections of senators in favor of popular elections.[84] In the absence of judicially mandated standards, state legislatures determine the partisan composition of the state delegation to the House of Representatives and, through threats of redistricting, exercise some pressure over state members of that legislative chamber.[85] "[P]olitical party gerrymandering," Max Stearns details, "'restores' state legislative control over congressional delegations, but switches control relative to the original Constitution from the Senate to the House."[86]

The political question doctrine of *Baker v. Carr* is not the political question doctrine of *Marbury v. Madison*.[87] Both limit judicial power in the United States, but in different ways. *Baker* speaks to the allocation of constitutional authority.[88] Justice William Brennan's majority opinion divided the constitutional universe into constitutional questions fit for judicial resolution and constitutional questions allocated to other branches of the national government.[89] In

81. *See* Schauer, *supra* note 36, at 11 ("[T]he Court ... operates overwhelmingly in areas of low public salience.").

82. *Id.* at 31-32 ("[T]he public is concerned about Iraq more than anything else, but neither the wisdom nor the legality nor the conduct of that conflict constituted any part of the Court's work.").

83. *See* Maxwell L. Stearns, *The Economics of Constitutional Law*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 991, 1002 (Mark Tushnet et al. eds., 2015).

84. *Id.*

85. *See id.*

86. *Id.*

87. *Compare Baker*, 369 U.S. 186, 210 (1962), *with Marbury*, 5 U.S. (1 Cranch) 137, 165-66 (1803). The Supreme Court in *Baker* may have confused the two. *See* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1937-38, 1968 (2015).

88. *See Baker*, 369 U.S. at 210.

89. *See id.* at 210-11.

contrast to *Baker*, *Marbury* speaks to the allocation of authority more generally. Chief Justice John Marshall drew a line between constitutional and political questions when asserting: "[b]y the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion" and that, therefore, "there exists ... no [judicial] power to control that discretion" because "[t]he subjects are political."[90] This passage divides the universe of official decisions into legal questions about the meaning of the Constitution, which courts could resolve, and policy choices between constitutionally permitted alternatives, which courts may not resolve. The latter category presently encompasses almost all tax, spending, and foreign policy problems that do not raise separation of powers issues.[91] The *Baker* political question doctrine demonstrates that the Supreme Court does not have a monopoly on constitutional interpretation.[92] The *Marbury* political question doctrine demonstrates the Supreme Court is a far less salient participant in American politics than the literature on judicial supremacy suggests.[93]

B. Reasonable Doubt and Good Faith Rules

Powerful traditions in American constitutionalism insist that Supreme Court Justices should share constitutional authority with elected officials on all constitutional controversies. Supreme Court opinions dating from the late eighteenth century and influential commentaries on the judicial function maintain that the Justices should permit elected officials to make close constitutional judgments, only declaring unconstitutional legislation that is a plain abuse of constitutional power. Although this practice is largely honored only in the breach, related sub-traditions exist in contemporary constitutional law. The Burger, Rehnquist, and Roberts Courts apply reasonableness or good faith standards when determining when government officials may be sued for committing certain constitutional wrongs, when federal courts in habeas corpus cases may correct certain constitutional wrongs, and when unconstitutionally

90. *See Marbury*, 5 U.S. at 165-66.
91. *See* Schauer, *supra* note 36, at 32.
92. *See Baker*, 369 U.S. at 210-11.
93. *See* Graber, *supra* note 37, at 493-95; Schauer, *supra* note 36, at 11-12.

obtained evidence may be excluded at trial. Each good faith or reasonableness rule in practice allocates constitutional authority to settle certain questions to governing officials outside the Supreme Court.

1. The Rule of Reasonable Doubt

James Bradley Thayer developed a particularly influential conception of shared constitutional authority when he insisted that Justices are not authorized to strike down legislation after "conclud[ing] that upon a just and true construction the law is unconstitutional."[94] Judicial review was legitimate, he believed, only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."[95] Elected officials and federal judges had different obligations when determining when a proposal is constitutional.[96] Elected officials made contested constitutional choices.[97] Justices provided a check only on abuses of constitutional authority.[98] "[O]ne who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional," Thayer stated, "and, being subsequently placed on the bench, when this measure, having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion, to declare it constitutional."[99] Justices who sustain a congressional ban on homegrown wheat that a reasonable person might think is a legitimate exercise of the federal commerce power leave for the national legislature the authority to determine whether the Commerce Clause is best interpreted as permitting Congress to ban homegrown wheat.

Many Supreme Court Justices insist that they are guided by this rule of reasonable doubt when considering the allocation of constitu-

94. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

95. *Id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *Id.*

tional authority in the United States.[100] Justices before the Civil War often asserted that they would declare laws unconstitutional only in a clear case.[101] "[T]o authorise this Court to pronounce any law void," Justice William Paterson stated, "it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication."[102] Thayer's conception of the judicial function in constitutional cases influenced many proponents of judicial restraint during the first two-thirds of the twentieth century.[103] "I think that the word liberty in the Fourteenth Amendment is perverted," Justice Holmes wrote when dissenting in *Lochner v. New York*, "unless ... a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[104] Some contemporary judicial opinions suggest that elected officials are empowered to make borderline constitutional judgments. "Respect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality," Justice Anthony Kennedy asserted in *Salazar v. Buono*.[105]

Sincere, across-the-board application of the rule of no reasonable doubt licenses substantial independent constitutional authority. On the perhaps generous assumption that the vast majority of federal and state justices, elected officials, and persons who teach constitutional law meet minimal qualifications for rationality, Thayer's principle would require the Supreme Court to defer to elected officials on almost every major constitutional controversy that has arisen or is likely to arise in the United States. Very few Supreme Court decisions declaring unconstitutional politically salient state and federal laws are unanimous. Such decisions as *Roe v. Wade* survive Thayerite scrutiny only on the assumption that Justices Rehnquist and White, majorities in forty-six state legislatures, and prominent commentators on both the right and left had taken leave of their senses when disputing the judicial majority's conclusion

100. *See* Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71, 72 (1978).

101. *See, e.g.*, Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800) (opinion of Paterson, J.).

102. *Id.*

103. *See* Mendelson, *supra* note 100, at 71.

104. 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

105. 559 U.S. 700, 721 (2010) (plurality opinion).

that the Due Process Clause of the Fifth and Fourteenth Amendments protect abortion rights.[106] Unanimous Supreme Court opinions are not immune to the rule of no reasonable doubt. That an exceptionally respected scholar and an exceptionally respected judge, both of whom opposed segregation as a matter of policy, concluded that *Brown v. Board of Education* was wrongly decided,[107] provides powerful grounds for concluding that Supreme Court Justices committed to the rule of no reasonable doubt should have deferred to state legislative judgments on the best way to educate children of different races. Congressional and state legislative majorities could nullify *Roe v. Wade* by pointing to the numerous reasonable experts in constitutional law who think the Fourteenth and Fifth Amendments do not protect abortion rights.[108]

The rule of no reasonable doubt allocates independent constitutional authority only to the elected branches of the national government. Thayer endorsed law deference only when courts were determining whether a coordinate branch of government had made a constitutional mistake. He thought the rule of reasonable doubt should not be applied when federal courts were reviewing state legislation.[109] Although early Supreme Court opinions invoked the rule of the clear case when adjudicating states cases,[110] contemporary Supreme Court Justices follow Thayer by restricting invocations of the no reasonable doubt rule to congressional legislation. "When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President," several opinions assert, "it should only do so for the most compelling constitutional reasons."[111] No similar language appears in any contemporary Supreme Court opinion considering the constitutionality of state laws.

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106. *See generally* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

107. LEARNED HAND, THE BILL OF RIGHTS 54-55 (Atheneum 1972) (1958); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32-34 (1959).

108. *See* Ely, *supra* note 106, at 935-37.

109. Thayer, *supra* note 94, at 154-55.

110. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 395 (1798) (opinion of Chase, J.); Thayer, *supra* note 94, at 140-42.

111. Mistretta v. United States, 488 U.S. 361, 384 (1989) (quoting Bowsher v. Synar, 478 U.S. 714, 736 (1986) (Stevens, J., concurring)).

Whether Supreme Court majorities ever actually deferred to congressional interpretations of constitutional provisions is controversial. Professor Sylvia Snowiss insists that antebellum Justices took seriously the obligation to declare laws unconstitutional only in a clear case.[112] And Professor Robert Clinton claims that early Supreme Court Justices believed they were authorized to declare unconstitutional only laws that touched on the Article III powers of federal courts.[113] These understandings of the judicial function allocate substantial independent constitutional authority to Congress. Other commentators maintain that Justices before the Civil War rarely did more than pay lip service to the Thayerite conception that constitutional authority rested in Congress, unless the national legislature clearly abused its powers.[114] The Marshall Court does not appear to have applied the rule of reasonable doubt in *Marbury v. Madison* when declaring unconstitutional Section 13 of the Judiciary Act, given the strong argument that the provision was constitutional.[115] Evidence that the Supreme Court declared unconstitutional far more laws restricting property and other rights before the Civil War than previously thought also casts considerable doubt on claims that antebellum Justices believed the judicial power was limited to laws of a judiciary nature.[116]

Few commentators think contemporary judicial practice is at all deferential to Congress on matters of constitutional law. No Justice on the Burger, Rehnquist, or Roberts Courts has demonstrated much restraint when declaring federal laws unconstitutional.[117] Professor Michael Klarman observed that "we have a Supreme Court that engages in unparalleled activism—from the left and the

112. SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 59-63 (1990).

113. ROBERT LOWRY CLINTON, *MARBURY V. MADISON* AND JUDICIAL REVIEW 76, 256 n.88 (1989).

114. For a particularly sharp criticism of Snowiss and Clinton, see Dean Alfange, Jr., Marbury v. Madison *and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 329-30, 335-49, 385-413.

115. *See* William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 16-33.

116. *See* Mark A. Graber, *The New Fiction:* Dred Scott *and the Language of Judicial Authority*, 82 CHI-KENT L. REV. 177, 180-81 (2007); Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1257-59 (2009).

117. *See generally* THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 107-253 (2004).

right simultaneously!"[118] The last week of the 2013 term was typical. On June 25, Justice Kennedy and the four more conservative Justices declared unconstitutional a crucial provision of the Voting Rights Act.[119] The next day, Justice Kennedy and the four more liberal Justices declared unconstitutional a crucial provision of the Defense of Marriage Act.[120] No member of the Roberts Court was willing to accede any constitutional authority to Congress when considering federal legislation inconsistent with their cherished constitutional values.

City of Boerne v. Flores provides a particularly vivid example of the present judicial abandonment of law deference.[121] That case concerned the constitutionality of the Religious Freedom Restoration Act (RFRA) of 1993,[122] bipartisan legislation that sought to restore the compelling interest test in free exercise cases that the Supreme Court rejected in *Employment Division v. Smith*.[123] The Justices in *City of Boerne* disputed whether RFRA correctly interpreted constitutional free exercise rights. Justice Kennedy's majority opinion held that the First and Fourteenth Amendments forbade only state laws that discriminated against religious believers.[124] Justice O'Connor's dissent maintained that the congressional test was constitutionally correct and that the Free Exercise Clause prohibits state laws that burden religious practice as well as state discriminations against religious believers.[125] Justice O'Connor nevertheless agreed with the majority's view that Congress lacked authority to interpret independently the meaning of any constitutional provision.[126] Constitutional interpretation was strictly the province of federal courts. In sharp contrast to his rhetoric in *Salazar v. Buono*, Justice Kennedy's majority opinion in *City of Boerne* asserted, "If Congress could define its own powers by altering the

118. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 548 (1997).

119. *See* Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013).

120. *See* United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

121. *See generally* 521 U.S. 507 (1997).

122. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4).

123. 494 U.S. 872, 888-89 (1990).

124. *See City of Boerne*, 521 U.S. at 534-35.

125. *See id.* at 546-48 (O'Connor, J., dissenting).

126. *See id.* at 519 (majority opinion); *id.* at 545 (O'Connor, J., dissenting).

Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, ... alterable when the legislature shall please to alter it.'"[127] Justice O'Connor disputed Justice Kennedy's interpretation of religious freedom under the First and Fourteenth Amendments, but she wholeheartedly endorsed Kennedy's assertion that Congress had no independent authority to determine the meaning of those or any other constitutional provisions: "[W]hen it enacts legislation in furtherance of its delegated powers," her dissent asserted, "Congress must make its judgments consistent with this Court's exposition of the Constitution and with the limits placed on its legislative authority by provisions such as the Fourteenth Amendment."[128]

2. Good Faith Mistakes

Variations on the rule of reasonable doubt have a limited operation in discrete areas of contemporary constitutional law. The Supreme Court presently treats as legally significant certain constitutional decisions made by police officers, state judges, and other governing officials that are based on what the Justices believe are mistaken interpretations of Supreme Court precedents. Trial courts

127. *Id.* at 529 (majority opinion) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (alteration in original)).

128. *Id.* at 545-46 (O'Connor, J., dissenting). Other constitutional commentators have proposed other means by which the Supreme Court may share constitutional authority. Some maintain that Supreme Court Justices may employ only some forms of constitutional logic when determining the meaning of constitutional provisions. Keith Whittington insists that aspirational arguments are legitimate means for legislative efforts to construct the Constitution, but not for Justices engaged in constitutional interpretation. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 108-09 (1999). In his view, a judicial decision sustaining capital punishment as consistent with the original meaning of "cruel and unusual punishment" leaves for elected officials to decide whether capital punishment is consistent with the best constitutional understanding of justice. *See id.* at 182-87. Possible distinctions between the judicially enforceable Constitution and the legal Constitution provide related limitations on Supreme Court decision-making. Lawrence Sager contends, Justices must "underenforce" such constitutional norms as equal protection because they lack the capacity to determine and enforce all the policies necessary for Americans to become fully equal citizens. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221, 1226-27 (1978). Little evidence exists, however, that contemporary constitutional law relies on either of these two means for sharing constitutional authority.

may admit unconstitutionally seized evidence as long as police officers believed in good faith that the search met constitutional standards. "[T]he marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant," Justice White's majority opinion in *United States v. Leon* asserted, "cannot justify the substantial costs of exclusion."[129] The Supreme Court gives legal status to state court rulings in some habeas corpus proceedings that the Justices believe are mistaken on points of federal constitutional law.[130] Justice Powell's majority opinion in *Stone v. Powell* concluded, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."[131] Litigation may be "full and fair," Powell stated, even when the state court failed to apply the correct constitutional rules as articulated by the Supreme Court.[132] State court judges in habeas corpus cases may interpret ambiguous federal precedents as they think best. The Supreme Court will not reverse a mistaken interpretation of a constitutional provision "on collateral review unless the decision was dictated by precedent existing at the time the petitioner's conviction became final."[133] Good faith rules also affect remedies for constitutional wrongs. Governing officials who violate constitutional rights cannot be constitutionally sued when their behavior was based on a reasonable interpretation of the relevant constitutional decisions. In *Safford Unified School District No. 1 v. Redding*, the Supreme Court ruled, "A school official searching a student is 'entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment.'"[134]

Little if any difference exists between most good faith rules and Thayer's rule of reasonable doubt. The good faith exception to the exclusionary rule relies on "objectively reasonable reliance" rather

129. 468 U.S. 897, 922 (1984).
130. Stone v. Powell, 428 U.S. 465, 494 (1976).
131. *Id.* (footnote omitted).
132. *Id.*
133. Butler v. McKellar, 494 U.S. 407, 409 (1990).
134. 557 U.S. 364, 377 (2009) (quoting Pearson v. Callahan, 555 U.S. 223, 243-44 (2009)).

than subjective mental states.[135] The Supreme Court, when determining what constitutes "clearly established law"[136] or decisions "dictated by precedent,"[137] gives legal standing to any reasonable interpretation of constitutional law. "The relevant, dispositive inquiry in determining whether a right is clearly established," Justice Kennedy maintained in *Saucier v. Katz*, "is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[138] Justices White and Souter asserted, "The result in a given case is not dictated by precedent if it is 'susceptible to debate among reasonable minds,' or, put differently, 'if reasonable jurists may disagree.'"[139] This statement is Thayer's rule of no reasonable doubt, minus any citation to Thayer.

These variations on the rule of no reasonable doubt highlight an unappreciated distinction between the authority to decide a particular constitutional dispute and the authority to have the final say on what constitutional provisions mean. Good faith and reasonableness rules are consistent with the Supreme Court being the ultimate constitutional interpreter. Judicial decisions on the exclusionary rule, habeas corpus appeals, and qualified immunity do not permit police officers, state judges, and other governing officials to knowingly challenge judicial authority. These governing officials nevertheless retain the power to have the final say on particular constitutional controversies that arise before the Supreme Court clarifies the relevant constitutional law. Under *United States v. Leon*, a police officer's good faith judgment that a search warrant meets the probable cause standard settles all constitutional questions about the admissibility of evidence obtained during the subsequent search, even if the Supreme Court later clarifies that a search based on an identical warrant is subject to the exclusionary rule.[140] Similarly, the fact that the Texas Court of Criminal Appeals in *Graham v. Collins* thought that state law provided constitutionally adequate procedures for presenting mitigating evidence in

135. *See* United States v. Leon, 468 U.S. 897, 922 (1984).
136. *Pearson*, 555 U.S. at 243.
137. *Butler*, 494 at 409.
138. 533 U.S. 194, 202 (2001).
139. Graham v. Collins, 506 U.S. 461, 476 (1993) (quoting Stringer v. Black, 503 U.S. 222, 238 (1992) (Souter, J., dissenting)).
140. *See Leon*, 468 U.S. at 922.

capital cases settled the dispute between Gary Graham and Texas officials over the constitutionality of Graham's death sentence even though, after Graham's conviction became final, the Supreme Court required Texas officials to adopt different procedures in future capital cases.[141]

The constitutional authority vested by good faith rules is limited in substance and scope. State officials must offer reasonable interpretations of existing federal precedent. A state court that found a search to be constitutional on the ground that the Fourth Amendment is not incorporated by the Due Process Clause of the Fourteenth Amendment would not satisfy the "full and fair" requirement of *Stone v. Powell*.[142] Many good faith and reasonableness rules affect constitutional remedies rather than substance of the right. Savana Redding could not sue the school officials who subjected her to an unconstitutional search because those officials made an honest error of constitutional law.[143] Nevertheless, the Supreme Court held that those school officials could not suspend Redding on the basis of the contraband they found during their unconstitutional search. A state court ruling that unconstitutionally obtained evidence is admissible at trial does not preclude a civil lawsuit for damages.[144] The effectiveness of such alternative remedies varies. Police officers, magistrates, and state judges who mistakenly decide a search was constitutional have the final say for all practical purposes on the constitutional disputes over the admissibility of the evidence obtained, given the impracticality of the alternative remedy: the civil lawsuit.[145]

Good faith rules enable state actors to exercise independent constitutional authority with the legal permission of the Supreme Court. Police officers, state judges, and other governing officials cannot directly defy federal mandates, but they can give them the most favorable interpretation possible confident that their judgment will be the final word on a particular constitutional incident or, at

141. *See Graham*, 506 U.S. at 467-77.

142. *See* 428 U.S. 465, 494 (1976).

143. *See* Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 377-79 (2009).

144. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 35-36 (1997).

145. *See* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 848-49 (1994).

the very least, that they will not be personally held responsible for making a constitutional mistake. State judges hostile to what they perceive as more liberal trends in constitutional criminal procedure are constitutionally authorized by the Supreme Court to deny any rights claim in habeas corpus proceedings, unless such a ruling is a flagrant violation of existing law.[146] Given the importance of habeas corpus for vindicating constitutional rights, particularly for less fortunate persons who cannot afford trial counsel that devote full attention to their defense, this empowerment provides state judges substantial opportunities to frustrate the implementation of federal rules protecting persons suspected of criminal offenses. Police officers need not worry whether the evidence they present to a judge or a magistrate actually meets the constitutional standards for a search warrant because a favorable decision issuing such a warrant automatically immunizes whatever evidence they subsequently obtain from suppression.[147] Justice Brennan noted in his *Leon* dissent,

> [T]he Court's "reasonable mistake" exception to the exclusionary rule will tend to put a premium on police ignorance of the law. Armed with the assurance provided by today's decisions that evidence will always be admissible whenever an officer has "reasonably" relied upon a warrant, police departments will be encouraged to train officers that if a warrant has simply been signed, it is reasonable, without more, to rely on it. Since in close cases there will no longer be any incentive to err on the side of constitutional behavior, police would have every reason to adopt a "let's-wait-until-it's-decided" approach in situations in which there is a question about a warrant's validity or the basis for its issuance.[148]

On this premise, magistrates and judges who believe that fighting crime is more important than protecting rights are constitutionally authorized by the Supreme Court to grant any constitutionally plausible police request for a search warrant.

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146. *See Stone*, 428 U.S. at 494.
147. *See* United States v. Leon, 468 U.S. 897, 922 (1984).
148. *Id.* at 955 (Brennan, J., dissenting).

3. Unreasonable Mistakes?

The Supreme Court in *Utah v. Strieff* ceded constitutional authority to police officers who had engaged in conceded unconstitutional behavior under any interpretation of the relevant precedents.[149] *Strieff* explores when courts may constitutionally admit evidence obtained as the result of an unconstitutional stop because "the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression."[150] In this case, the officer made an unconstitutional stop, learned that the defendant had an outstanding traffic warrant, and then discovered illegal drugs after arresting the defendant pursuant to that warrant.[151] When considering the relationship between the unconstitutional stop and the discovery of the incriminating evidence, Justice Clarence Thomas's majority opinion declared "'particularly' significant ... 'the purpose and flagrancy of the official misconduct.'"[152] Neither the state nor any Justice in the majority claimed that the stop was based on a reasonable, if mistaken, interpretation of existing constitutional law. Justice Elena Kagan's dissent bluntly observed that the stop "was a calculated decision, taken with so little justification that the State has never tried to defend its legality."[153] The only "good-faith" mistakes the majority identified was the officer's failure to obtain the evidence for a stop required by clear, established constitutional law.[154] Nevertheless, although the stop had no reasonable constitutional foundation, Justice Thomas's majority opinion insisted that the resulting evidence could be admitted because the police did not self-consciously violate constitutional rights.[155] He wrote, there was "no indication that this unlawful stop was part of any systemic or recurrent police misconduct," but was, instead, "an isolated instance of negligence."[156] Justice Thomas's logic suggests that evidence discovered by a police officer acting on that

149. *See* 136 S. Ct. 2056, 2063 (2016).

150. *Id.* at 2059.

151. *Id.*

152. *Id.* at 2062 (quoting Brown v. Illinois, 422 U.S. 590, 604 (1975)).

153. *Id.* at 2072 (Kagan, J., dissenting); *see id.* at 2062 (majority opinion) (noting the state's concession that the stop had no constitutional basis).

154. *See id.* at 2063.

155. *See id.*

156. *Id.*

police officer's interpretation of the rules for constitutional searches, no matter how divorced those rules are from the official constitutional rules established by the Court, is admissible as long as the police do not know the actual constitutional rules.[157]

The constitutional authority vested in police officers conducting searches by virtue of the good faith and attenuation exceptions to the exclusionary rule is now broader than the constitutional authority vested in state judges conducting habeas corpus hearings by virtue of the clear precedent rule. The Supreme Court gives legal status to the constitutionally mistaken judgments state judges make only when those judgments are reasonable interpretations of existing precedent.[158] *Strieff* gives legal status to the constitutionally mistaken judgments police officers make as long as the officers do not self-consciously or, perhaps, recklessly violate existing constitutional law.[159] That the police behavior was inconsistent with a line of clear judicial precedents does not require suppressing evidence that was later discovered as a result of that misbehavior. Police officers, unlike state judges (and those they arrest), may plead ignorance of the law. Contrary to Justice Sonia Sotomayor's dissent, the contemporary "Fourth Amendment does ... tolerate an officer's unreasonable searches and seizures just because he did not know any better."[160]

II. INDEPENDENT AUTHORITY TO REJECT SUPREME COURT DECISIONS INTERPRETING THE CONSTITUTION

Persons other than Supreme Court Justices exercise independent constitutional authority when they reject Supreme Court decisions on the meaning of constitutional provisions as a guide to their behavior and then act in ways forbidden by those precedents. Supreme Court decisions holding that states are constitutionally permitted to exercise certain powers and individuals are constitutionally permitted to exercise certain rights cede to the relevant state officials and individuals the ultimate constitutional authority to decide whether they may constitutionally exercise those powers

157. *See id.*
158. *See* Stone v. Powell, 428 U.S. 465, 494 (1976).
159. *See Strieff*, 136 S. Ct. at 2063.
160. *But see id.* at 2068 (Sotomayor, J., dissenting).

and rights. If the Supreme Court rules that the Constitution sanctions capital punishment,[161] state officials who conclude that the death penalty violates the Eighth and Fourteenth Amendments may refrain from executing murderers. If the Supreme Court rules that persons have a constitutional right to compensation when government regulations destroy the economic value of their property,[162] persons who believe the Takings Clause of the Fifth Amendment forbids only physical takings may refrain from seeking compensation when they are victims of regulatory takings.

Federal and state officials, state judges, and private persons on the basis of their independent constitutional judgment often refrain from exercising a constitutional power or right vested in them by the relevant federal judicial precedents. The Supreme Court in *McCulloch v. Maryland* held that the federal government had the power to incorporate a national bank.[163] Andrew Jackson subsequently vetoed a bill rechartering the national bank on the ground that he believed the federal government was not authorized to establish such an institution.[164] The Supreme Court in *Gregg v. Georgia* and *McCleskey v. Kemp* held that state procedures for imposing death sentences met constitutional standards for fundamental fairness.[165] Governor George Ryan of Illinois subsequently commuted the death sentences of all persons on death row in Illinois, because he concluded that the procedures for imposing death sentences did not meet constitutional standards for fundamental fairness.[166] The Supreme Court has held in a series of cases that universities may not consider race in the admissions process when there are race-neutral alternatives that adequately serve the compelling interest of a diverse student body.[167] Rejected college applicants who believe the Constitution permits admissions officers to use race to compensate for historical disadvantages may never-

161. *See* Gregg v. Georgia, 428 U.S. 153, 174-76 (1976) (plurality opinion).

162. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1007 (1992).

163. 17 U.S. (4 Wheat.) 316, 370 (1819).

164. Andrew Jackson, Veto Message, *supra* note 23, at 576.

165. *See generally* McClesky v. Kemp, 481 U.S. 279 (1987); *Gregg*, 428 U.S. 153.

166. *See* Wilgoren, *supra* note 22.

167. *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420 (2013); Gratz v. Bollinger, 539 U.S. 244, 270, 275 (2003); Grutter v. Bollinger, 539 U.S. 306, 323-25, 339-40 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318-20 (1978).

theless refrain from suing a university whose admissions policies do not meet Supreme Court standards.

Supreme Court rulings vesting government officials and individuals with certain powers and rights cede to those officials and individuals the independent constitutional authority to settle particular constitutional controversies. Chief Justice Marshall was mistaken in *McCulloch* when he asserted, "[o]n the Supreme Court of the United States has the constitution of our country devolved th[e] important duty" of settling whether the federal government may incorporate a national bank.[168] President Jackson's decision to veto the bill rechartering the Second Bank of the United States ended the constitutional controversy over that measure.[169] Supreme Court Justices who disagreed with Jackson's constitutional analysis could neither force Jackson to sign the bank bill nor compel him to confine his objections to matters of public policy. Governor Ryan's decision to commute the sentences of all persons on death row in Illinois settled whether their individual death sentences met constitutional standards for fundamental fairness.[170] Similarly, Supreme Court Justices who disagreed with Ryan's decision could neither force Ryan to sign execution warrants nor compel him to confine his objections to state constitutional concerns. State prosecutorial decisions not to pursue the death penalty in a particular case that are based on convictions that capital punishment in that instance violates the Eighth and Fourteenth Amendments similarly settle any constitutional controversy over whether that defendant ought to be executed. Private citizens exercise this independent constitutional authority to settle constitutional controversies when they refrain for constitutional reasons from behaviors permitted by existing constitutional law. Courts have no power to interfere when persons refuse to burn a flag or terminate a pregnancy on the ground they believe the Supreme Court decisions striking down laws forbidding these actions are null and void. Persons who refuse to sue after being rejected from law school end any controversy over whether they had a constitutional right to be accepted or at least experience a different admissions process. Supreme Court Justices

168. *McCulloch*, 17 U.S. (4 Wheat.) at 401.
169. *See* Andrew Jackson, Veto Message, *supra* note 23, at 576.
170. *See* Wilgoren, *supra* note 22.

who disagree with these private constitutional choices may neither force persons to exercise their judicially announced constitutional rights nor successfully sue institutions that have denied those rights.

Persons who reject Supreme Court decisions holding that they have certain constitutional powers or rights are exercising independent constitutional authority and not simply making policy decisions the Justices permit them to make. President Jackson and Governor Ryan gave constitutional reasons for their decisions not to take actions permitted by existing precedent.[171] These and related exercises of independent constitutional authority settle constitutional controversies, large and small. Existing constitutional law regards as final state gubernatorial decisions to refuse conditional federal health care funds that the governor believes, contrary to Supreme Court precedent,[172] the federal government is not constitutionally empowered to allocate.[173] Existing standing law regards as final decisions by rejected law school applicants not to sue a law school that uses racial quotas in the admissions process that the rejected applicants believe, contrary to Supreme Court precedent,[174] do not violate the constitutional right to a race-neutral admissions process.[175]

Governing officials and individual citizens are exercising independent constitutional authority, even when their decisions are local and possibly temporary. As noted above, governing officials and individual citizens are often constitutionally authorized to resolve specific constitutional disputes, even when they are not authorized to settle the meaning of constitutional provisions outside their jurisdiction.[176] The Mississippi legislature may decide on constitutional grounds whether that state will accept federal healthcare funds, but Mississippi officials may not compel the Governor of Alabama to abide by their constitutional verdict. Decisions by persons on death row not to challenge the constitutionality of their sentences settle

171. *See* Andrew Jackson, Veto Message, *supra* note 23, at 582-88; Wilgoren, *supra* note 22.

172. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012).

173. *See* Printz v. United States, 521 U.S. 898, 925-26 (1997).

174. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978).

175. *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (holding that litigants must demonstrate concrete and particularlized injuries).

176. *See, e.g.*, *supra* notes 164-65 and accompanying text.

controversies over whether they may be constitutionally executed but not controversies over whether other persons on death row may constitutionally suffer the same fate. State governors exercise independent constitutional authority when determining that the capital sentencing process in their state is unconstitutional, even though they may change their minds or be replaced by governors with a different view on the constitutionally acceptable procedures for imposing the death penalty. Supreme Court decisions are no more etched in stone than constitutional decisions made by other officials.[177] Nevertheless, no one thinks that a Supreme Court decision sustaining a particular federal funding program is not a constitutional decision just because the Justices might change their mind, or new Justices in the future might make a different decision.[178]

Whether these exercises of independent constitutional authority nullify Supreme Court decisions depends on the meaning of nullification.[179] If nullification requires governing officials to challenge the Supreme Court's authority to have the final say over the meaning of constitutional provisions and take actions forbidden by federal constitutional law,[180] then neither President Jackson nor Governor Ryan nullified a Supreme Court decision. Neither took actions forbidden by federal constitutional law. *McCulloch* did not compel the federal government to incorporate a national bank. The Supreme Court has never insisted that states must punish murder by death. If, however, nullification consists only of challenging the Supreme Court's authority to have the final say over the meaning of constitutional provisions, then Jackson and Ryan were nullifiers. Both maintained that they had a right to make an independent constitutional judgment when determining, respectively, whether the national bank was constitutional and whether existing procedures for imposing the death penalty met Eighth and Fourteenth Amendment standards. *McCulloch* was not the law of the land while Jacksonian presidents were in office.[181] *Gregg* and *McCleskey* had no

177. *See generally* Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002).

178. Or, for that matter, because that decision might have been made on nonconstitutional grounds.

179. *See* Read & Allen, *supra* note 33, at 268.

180. *See* Graber, *supra* note 19, at 168.

181. *See* GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES 85-86 (2007).

legal status in Illinois while Governor Ryan reigned. Some contemporary practice is rooted in this more lenient standard for nullification. Several states during the twenty-first century declared federal laws null and void, even when state authorities are merely exercising their constitutional power to refuse conditional federal funds or refraining from having state officials implement federal law.[182]

Michigan v. Long challenged state judicial power to engage in independent constitutional interpretation.[183] That case reversed a state court decision holding that police officers had unconstitutionally engaged in a warrantless search of an automobile.[184] The Supreme Court of Michigan erred, a Burger Court majority ruled, by interpreting Fourth and Fourteenth Amendment rights more broadly than did the Supreme Court of the United States.[185] Overturning such state rulings was necessary, Justice Sandra Day O'Connor's majority opinion declared, to "preserve the integrity of federal law"[186] given the "important need for uniformity."[187] Justice O'Connor left state courts free to interpret individual rights provisions in the state constitution more broadly than identical provisions in the Federal Constitution. Her opinion acknowledged that state judges are constitutionally authorized to give state constitutional justifications for decisions forbidding state officials to behave in ways the Supreme Court of the United States has ruled are permitted by the Federal Constitution.[188] Nevertheless, Justice O'Connor insisted that state court constitutional judgments be limited to interpretations of the state constitution.[189] "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions," she wrote, "[b]ut it is equally important that ... state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action."[190]

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182. *See* John Dinan, *Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism*, 74 ALB. L. REV. 1637, 1643-46 (2011).

183. 463 U.S. 1032, 1040-42, 1044 (1983).

184. *See* People v. Long, 320 N.W.2d 866, 869-70 (Mich. 1982).

185. *See Long*, 463 U.S. at 1051-52.

186. *Id.* at 1041.

187. *Id.* at 1040.

188. *See id.* at 1040-42.

189. *See id.* at 1043-44.

190. *Id.* at 1041 (quoting Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940)).

Long is anomalous. The Supreme Court does not correct state governors, prosecutors, and police officers who interpret their powers more narrowly or individual rights more broadly than warranted by existing precedent. Had the Attorney General of Michigan refused to appeal the state court decision in *Long* on the ground that the Supreme Court of Michigan correctly interpreted the Fourth and Fourteenth Amendments, the Supreme Court of Michigan's decision in *Long* would have settled all disputes in Michigan over whether the Constitution of the United States sanctioned certain warrantless searches. The Supreme Court of the United States would not have intervened had the Chief of Police in Detroit banned all warrantless searches of automobiles and the State District Attorney forbade state prosecutors from introducing at criminal trials the fruits of any warrantless search of an automobile the day after *Long* was decided. The federal judiciary would have remained on the sidelines even if Michigan officials stated that their only reason for banning the fruits of warrantless searches of automobiles was that the Supreme Court of the United States in *Long* erroneously interpreted the Fourth and Fourteenth Amendments. Although Justice O'Connor spoke of the need to ensure that federal constitutional law be the same in all states,[191] these examples highlight that state courts after *Long* are the only state governing institutions that may not independently interpret the Constitution of the United States as protecting more rights than the Supreme Court of the United States.

Long fits existing constitutional practice only as a prophylactic means for ensuring that state judicial attempts to exercise independent constitutional authority are actually independent. Justice O'Connor's opinion worried that state judges might be handing down overly broad interpretations of federal constitutional rights only because the judges "believed that federal law required [them] to do so" rather than because they had independently reached the conclusion that the Supreme Court was too narrowly interpreting the constitutional right in question.[192] So understood, the logic of *Long* is consistent with the general principle that governing officials may exercise independent constitutional authority as long as they

191. *See id.*
192. *Id.* at 1041.

are not attempting to justify what the Supreme Court of the United States has ruled are constitutionally forbidden actions. *Michigan v. Long* merely enables the Supreme Court to distinguish state judicial attempts to exercise independent constitutional authority from mistaken state judicial interpretations of Supreme Court precedents.[193]

Still, *Long* so understood does little more than mask state court exercises of independent constitutional authority. State judges, who fear that the United States Supreme Court will reverse their decisions broadly interpreting federal constitutional rights, have the option of "interpreting" their state constitution consistently with what they regard as the correct interpretation of the United States Constitution.[194] State judicial opinions striking down state procedures for imposing capital punishment may repeat verbatim Justice William Brennan's constitutional arguments against the death penalty,[195] editing only the constitution that the death penalty is said to violate. Justice Thomas Kavanagh, of the Michigan Supreme Court, applied this logic when he switched from federal to state constitutional grounds after the Supreme Court of the United States remanded *Long* to his bench.[196] Kavanagh's opinion, declaring unconstitutional the police action in controversy, stated:

> When in Const. 1963, art. 1, § 11 the citizens of Michigan eschewed warrantless searches, they might have been confident that the United States Constitution forbade them. Our first opinion in this case no doubt should have made it clearer that whether or not the United States Constitution be later read to allow them, the Michigan Constitution does not.[197]

193. Contemporary constitutional law does not clearly indicate what the Supreme Court would do when confronted with an obstinate state court whose members insisted that they were correcting the Supreme Court's mistakenly narrow interpretation of federal constitutional rights rather than basing their decision on broader state constitutional rights. For reasons noted in the next paragraph, state courts are unlikely to take that route, given that they can easily immunize any such decision from judicial review by claiming to rely exclusively on the state constitution.

194. *See Long*, 463 U.S. at 1040-41.

195. *See* McCleskey v. Kemp, 481 U.S. 279, 320 (1987) (Brennan, J., dissenting).

196. *See* People v. Long, 359 N.W.2d 194, 201 (Mich. 1984) (Kavanagh, J., concurring).

197. *Id.*

Kavanagh made no effort to explain why provisions in the Michigan Constitution should be interpreted differently than similar provisions in the United States Constitution.[198] *Long* did not compel him to take that step.[199] All that precedent demanded was that Kavanagh instruct his word processing program to replace the relevant references to "the Constitution of the United States" with "the Michigan Constitution."[200] These verbal gymnastics suggest that the rule more consistent with constitutional practice in the United States is that state judges may interpret constitutional powers more narrowly and constitutional rights more broadly than does the Supreme Court of the United States, as long as the state judges make clear that they are exercising independent constitutional authority rather than anticipating how Federal Justices are likely to rule on the constitutional issue in question.[201]

The aftermath of *Michigan v. Long* suggests that Federal Justices and other proponents of judicial supremacy should acknowledge that the Supreme Court of the United States is the ultimate constitutional authority only when the Justices declare that particular actions are forbidden by the Constitution.[202] *Long* aside, the Supreme Court makes no effort to correct what the Justices believe are mistaken interpretations of constitutional provisions when those interpretations are not made for the purpose of attempting to justify what the Justices have ruled are constitutionally forbidden actions. The Michigan Supreme Court's response to *Long* demonstrates that all the Justices can do in these circumstances is change the verbal formulas that other governing officials use when publicly justifying decisions reached on the basis of those officials' independent interpretation of the Constitution of the United States. Americans from Thomas Jefferson to Governor George Ryan have had the final say on constitutional controversies, ranging from the constitutionality of convictions obtained under the Alien and Sedition Acts[203] to the

198. *See id.*

199. *See Long*, 463 U.S. at 1041-42.

200. *See id.*

201. Neal Devins, *How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1635-36 (2010).

202. *See id.* at 1637.

203. *See* Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* 8 THE WRITINGS OF THOMAS JEFFERSON, 1801-1806, at 310, 310-11 (Paul Leicester Ford ed., 1897).

constitutionality of the death penalty in Illinois,[204] when they asserted that their independent interpretations of the Constitution compelled them to refrain from exercising powers that earlier Supreme Court decisions constitutionally empowered them to take.[205] Theories of constitutional authority should not pretend otherwise by labeling as mere policy choices the decisions of elected officials and others that settled constitutional disputes are publicly justified by claims that the Supreme Court misinterpreted the relevant constitutional provisions.

Constitutions empower and limit.[206] Courts, subject to numerous qualifications,[207] may have the final say when the Justices attempt to limit government. Other governing officials and ordinary citizens, however, have the final say after Supreme Court decisions empower government or protect individual rights. Judicial decisions that permit Congress to adopt a particular spending program, state judges to admit certain evidence, and citizens to make certain criticisms of government officials allocate the ultimate constitutional authority to Congress, state judges, and citizens, respectively, to settle the constitutional status of these matters. Supreme Court Justices are powerless to force states to exercise powers that state officials believe forbidden by the Constitution, contrary to Supreme Court precedent, or to compel individuals to exercise rights that the individual believes are not protected by the Constitution, contrary to Supreme Court precedent.

III. JURISDICTION

Long-standing judicial precedent holds that the appellate jurisdiction of the Supreme Court exists by legislative grace. Within a decade after the Constitution was ratified, the Justices on the Supreme Court agreed, "[i]f Congress has provided no rule to regulate

204. *See* Wilgoren, *supra* note 22.

205. Or in Jefferson's case, pardoning on constitutional grounds persons the federal judiciary had ruled were constitutionally convicted. Letter from Thomas Jefferson to Abigail Adams, *supra* note 203, at 310-11.

206. *See* STEPHEN HOLMES, PASSIONS AND CONSTRAINTS: ON THE THEORY OF LIBERAL DEMOCRACY 161-64 (1995).

207. In addition to the qualifications noted in this Article, see generally Graber, *supra* note 19.

our proceedings, we cannot exercise an appellate jurisdiction."[208] Chief Justice John Marshall in 1810 maintained that the "affirmative description" of jurisdiction laid out in the Judiciary Act of 1789 "has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it."[209] Most famously, in *Ex parte McCardle*, the Justices declined to determine the constitutionality of federal legislation imposing martial law in the post-Civil War South after Congress repealed the statute vesting the Justices with jurisdiction over the case.[210] Chief Justice Chase bluntly declared, "Without jurisdiction the court cannot proceed at all in any cause."[211] By preventing the Justices from adjudicating *McCardle*, Congress retained the final say over the constitutional status of military rule in the South during Reconstruction. Congress did not vest the federal judiciary with jurisdiction over all cases raising federal questions until the Judiciary Act of 1875.[212]

In sharp contrast to such decisions as *Ableman*, *Cooper*, and *Boerne*, the Supreme Court made no pretense of being the ultimate interpreter of the Constitution when handing down *Wiscart v. Dauchy*, *Durousseau v. United States*, and *McCardle*. Read in light of these jurisdictional decisions, *Ableman*, *Cooper*, and *Boerne* hold only that the Supreme Court has the final say over those constitutional controversies for which Congress has decided to vest the Supreme Court with the final say. The Supreme Court in *Cooper* settled whether Arkansas had to desegregate public schools in the wake of *Brown* only because Congress maintained the federal laws permitting litigants to challenge the constitutionality of state actions in federal courts.[213] Had Congress repealed section 25 of the Judiciary Act of 1789 and related measures, state courts during the 1950s would have determined the constitutional status of Jim Crow. Before 1875, state courts that sustained federal laws or declared state laws unconstitutional had the final say on those constitutional

208. Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796) (opinion of Elsworth, C.J.).
209. Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810).
210. 74 U.S. (7 Wall.) 506, 513-15 (1868).
211. *Id.* at 514.
212. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.
213. *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87.

controversies.[214] Federal law permitted appeals from state courts to the Supreme Court of the United States only when the state court sustained a state law, declared a federal law unconstitutional, or rejected an assertion of a federal constitutional right.[215] In contrast, the constitutionally mandated Supreme Court of the Confederacy exercised no constitutional authority because the Confederate Congress failed to pass laws establishing that institution.[216]

The constitutional law of federal jurisdiction belies the Supreme Court as the ultimate allocator of constitutional authority, as well as the Supreme Court as ultimate arbiter of constitutional meaning. Congress dispenses constitutional authority when determining the scope of federal jurisdiction. The national legislature decided which national institution determined the constitutional status of military rule during Reconstruction by stripping the Supreme Court of the relevant jurisdiction[217] and which institution determined the constitutional status of same-sex marriage during the second decade of the twenty-first century by keeping the relevant jurisdictional rules on the books.[218] Long-standing Supreme Court precedent limits only how Congress may allocate constitutional authority to the courts. For example, when Congress cedes constitutional authority to the national judiciary, the national legislature may not dictate how the Justices will rule on constitutional questions[219] or retain the capacity to reverse Supreme Court decisions.[220] Congress must vest the Supreme Court with the final say over constitutional controversies when vesting the Justices with jurisdiction over those controversies, but the national legislature determines the constitutional controversies on which the Supreme Court will have that final say.

The precise power Congress holds over federal jurisdiction has been the subject of a running constitutional debate for more than two hundred years. Justice Joseph Story and Professor Akhil Amar

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214. *See* Roosevelt v. Meyer, 68 U.S. (1 Wall.) 512, 517 (1863).

215. Judiciary Act of 1789 § 25.

216. *See* MARSHALL L. DEROSA, THE CONFEDERATE CONSTITUTION OF 1861: AN INQUIRY INTO AMERICAN CONSTITUTIONALISM 104-05 (1991).

217. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513-15 (1868).

218. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2596-97 (2015).

219. *See* Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792).

220. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 146-47 (1871). *See generally* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998).

maintain that Congress must vest the federal courts with jurisdiction over all questions of federal law.[221] Professors James Liebman and William Ryan assert that Congress must vest federal courts with "effective" power to review all questions of federal law but that this may be done without vesting the federal courts with full federal question jurisdiction.[222] Other commentators suggest that Congress must make at least one federal court available to hear any matter of federal law.[223] In 1861, Senator John Hale of New Hampshire insisted that Congress had the power to abolish the entire Supreme Court,[224] a position that entails the congressional power to deprive the Court of all appellate jurisdiction (and more).

A general consensus does exist that federal courts cannot enforce whatever congressional constitutional obligation exists to vest the federal judiciary with full federal question jurisdiction. The Supreme Court does not have the final say over whether Congress must create a Supreme Court. Justice Story, when urging Congress to provide the federal court system with jurisdiction over all cases mentioned in Article III and complaining about the "serious mischiefs ... already arisen" when Congress failed to take his advice, acknowledged that jurisdiction withholding is not justiciable.[225] He confessed, "This court has no jurisdiction, which is not given by some statute."[226] Then-representative James Buchanan, when leading the successful fight in Congress against the repeal of section 25 of the Judiciary Act,[227] never hinted in his report defending federal appellate jurisdiction over state court decisions that a federal court could declare unconstitutional a congressional repeal of that jurisdiction.[228] While Congress has never tested the limits of the legislative power over federal courts, existing Supreme Court doctrine empowers elected officials, subject to numerous qualifica-

221. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 334-35 (1816); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 215 (1985).

222. Liebman & Ryan, *supra* note 220, at 884-85.

223. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953).

224. CONG. GLOBE, 37th Cong., 2d Sess. 26 (1862).

225. White v. Fenner, 29 F. Cas. 1015, 1015-16 (C.C.D.R.I. 1818) (No. 17,547).

226. *Id.* at 1015.

227. *See* Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 OR. L. REV. 95, 99-100 (2009).

228. *See* Counter Report Upon the Judiciary, 7 REG. DEB. app. at lxxxi-lxxxvi (1831).

tions,[229] to reallocate constitutional authority by stripping the Supreme Court and lower federal courts of their jurisdiction over the vast majority of cases raising constitutional issues. Chief Justice Melville Fuller declared, "[I]t has been held in an uninterrupted series of decisions that this court exercises appellate jurisdiction only in accordance with the acts of Congress upon that subject."[230]

The constitutional law of federal jurisdiction confounds persons seeking the ultimate constitutional authority in the United States. Judges accept the constitutional authority of elected officials, who in turn accept the constitutional authority of judges. The Supreme Court consistently rules that the Justices may declare laws unconstitutional only when federal law gives them jurisdictional permission.[231] These precedents vest Congress with the final say over the allocation of constitutional authority.[232]

Members of Congress, when defending federal laws granting the Supreme Court broad or full jurisdiction over federal questions, consistently insist that the Supreme Court is responsible for settling national constitutional controversies. James Buchanan in 1831 maintained that "the General Government would be deprived of the power, by means of its own judiciary, to give effect ... to the constitution" if Congress repealed section 25 of the Judiciary Act of 1789.[233] These legislative precedents vest the Supreme Court with the final say on constitutional questions, a power which seems to include the power to allocate constitutional authority.[234] Perhaps some theoretical solution exists to this apparent chicken and egg problem, but the best approach may be to acknowledge that constitutional authority in the United States is shared in ways not captured by any position elaborated in the debates over judicial supremacy.[235]

229. *See supra* Part II.

230. Colo. Cent. Consol. Mining Co. v. Turck, 150 U.S. 138, 141 (1893).

231. *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 513-15 (1868).

232. *See id.*

233. Counter Report Upon the Judiciary, 7 REG. DEB. app. at lxxxiii.

234. In 1831, Buchanan endorsed Story's position that Congress had a constitutional obligation to vest the Supreme Court with full federal question jurisdiction. *Id.* at lxxxiv.

235. *See* MARK A. GRABER, A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM 121-39 (2013).

IV. SETTLEMENTS AND ACCESS TO JUSTICE

In 1984, Professor Owen Fiss created a stir when condemning movements that promote legal settlements through mediation and arbitration. "Settlement," he asserted, "is a capitulation to the conditions of mass society and should be neither encouraged nor praised."[236] Professor Fiss opposed alternative dispute resolutions because he was committed to judicial supremacy. "Adjudication," he contended, is a process designed "to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle."[237] Settlements are particularly problematic because the law of the parties more likely reflects "imbalances of power" than the law of the land as articulated by federal courts.[238] Professor Fiss maintained, "[T]he distribution of financial resources, or the ability of one party to pass along its costs, will invariably infect the bargaining process, and the settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant."[239]

Proponents of alternative dispute resolution challenge Professor Fiss's celebration of adjudication,[240] but his observation that settlements undermine judicial supremacy is correct. The Supreme Court resolves constitutional conflicts only when the parties litigate. When parties settle their constitutional differences, they determine the constitutional rules that govern their behavior, even when they "bargain in the shadow of [constitutional] law."[241] The settlement agreement between Sharon Taxman and the Piscataway Board of Education[242] left most communities free to determine whether they

236. Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

237. *Id.* at 1085.

238. *See id.* at 1076.

239. *Id.* at 1076.

240. For a flavor of the debate, see generally Symposium, Against Settlement*: Twenty-Five Years Later*, 78 FORDHAM L. REV. 1117 (2009).

241. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

242. Joan Biskupic, *Rights Groups Pay to Settle Bias Case*, WASH. POST (Nov. 22, 1997), http://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/wp112297.htm [https://perma.cc/QD8X-4RN4]. This example would work better if the settlement occurred before the Court of Appeals, because the Third Circuit had declared the race-conscious termin-

have sufficient constitutional reasons to use race when deciding what teachers to terminate during a recession.[243] Had the Supreme Court weighed in, the judicial majority would have almost certainly severely curtailed any use of race when school boards lay teachers off.[244] The temporary independent constitutional authority that school boards exercise in the wake of *Taxman* may be permanent. If the constitutional use of race depends on the conditions in a particular school district,[245] then the Supreme Court will never provide standards to guide districts similar to Piscataway should the Justices ever adjudicate a case with similar facts to *Taxman*. Even if not permanent, the independent temporary constitutional authority that school boards and other officials exercise is consequential. School boards, state courts, and lower federal courts have had the final say on whether a particular school district has a constitutionally sufficient justification for using race when laying off teachers during the almost thirty years since the *Taxman* settlement occurred, because the Supreme Court has not subsequently clarified what constitutes a constitutionally sufficient reason for using race in the hiring and firing of public school teachers. The settlement may also have altered the path of constitutional law. By taking the constitutional decision away from the Rehnquist Court, which during the 1980s and 1990s never sustained a state affirmative action program,[246] the parties to the *Taxman* settlement may have placed that authority in the hands of a future Roberts Court, augmented by another liberal justice, that is more likely to sustain affirmative action programs.[247]

The Supreme Court is far more enthusiastic than Professor Fiss is about alternative dispute resolutions that vest legal authority in private persons rather than in federal or state judges. Justices who

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ation program unconstitutional. *See* Taxman v. Bd. of Educ., 91 F.3d 1547, 1550 (3d Cir. 1996).

243. The Supreme Court in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986), declared that "[t]his Court never has held that societal discrimination alone is sufficient to justify racial classification," but did not elaborate on what might constitute a sufficient justification for using race when deciding which teachers to lay off. *Id.*

244. *See id.* at 283-84; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492, 497 (1989).

245. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419-20 (2013).

246. *See, e.g.*, *J.A. Croson*, 488 U.S. at 511.

247. *See Fisher*, 133 S. Ct. at 2418-19, 2421.

routinely preach judicial supremacy nevertheless also routinely sustain laws and private agreements that mandate mediation or arbitration. Supreme Court opinions speak of the "liberal federal policy favoring arbitration agreements," and insist that under federal law "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[248] Supreme Court Justices support alternative dispute resolution even when mediation agreements practically compel persons to waive legal and constitutional rights. Although "practices such as arbitration and mediation empower both private individuals ... and nonjudicial actors within the government to resolve disputes that would otherwise be adjudicated by judges and juries," Professor Sarah Staszak notes, the Supreme Court interprets federal law as "preempt[ing] state laws designed to promote litigation" and as "compel[ling] mandatory arbitration in lieu of traditional legal hearings, often even in the case of constitutional claims."[249] The Supreme Court in *DIRECTV, Inc. v. Imburgia* prevented the judiciary from having the final say on disputes over cable television fees by ruling that federal law preempted state laws making certain binding arbitrary clauses in contracts unenforceable.[250] Justice Ginsburg's dissent recognized that legal authority was being transferred from judges to private parties.[251] She quoted a *New York Times* investigation that found, "[b]y inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies [have] devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices."[252]

Professor Fiss was also correct when he emphasized how inequalities of wealth threaten judicial supremacy.[253] Judicial supremacy,

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248. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625-26 (1985) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)).

249. SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT 11-12 (2015).

250. *See* 136 S. Ct. 463, 471 (2015).

251. *See id.* at 478 (Ginsburg, J., dissenting).

252. *Id.* at 477 (alteration in original) (quoting Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/V8PH-TG35]).

253. *See* Fiss, *supra* note 236, at 1076-78.

Professor Fiss claimed, is grounded in the judicial capacity to rule on constitutional principle unbiased by the superior capacity of one party to make claims based on constitutional principle.[254] Constitutional rights that "depend on the outcome of no elections"[255] should not depend on who had the better lawyer or could hire the better experts. "Judgment aspires to an autonomy from distributional inequalities, and it gathers much of its appeal from this aspiration," Professor Fiss declared.[256] Constitutional decision-making in the United States fails to meet this standard. Professor Fiss admitted, "Imbalances of power ... distort judgment" because "[r]esources influence the quality of presentation, which in turn has an important bearing on who wins and the terms of victory."[257] Judicial efforts to compensate for economic disadvantage, Professor Fiss confessed, "are likely to make only a small contribution toward moderating the influence of distributional inequalities."[258] When capacities to litigate influence how Justices interpret constitutional provisions and settle constitutional conflicts, well-heeled litigants share with Justices the power to determine the path of constitutional law. Even if Professor Fiss rightly judges that adjudication is less vulnerable than mediation or arbitration to economic disparities,[259] the impact of wealth on all of these processes transfers constitutional authority from judges, arbiters, and mediators to economically powerful individuals and institutions.

Consider a society committed to giving the judiciary the final say on all constitutional controversies in which a Board of Litigation oversees the constitutional litigation process. Before parties make claims of constitutional wrong in court or even hire attorneys, they must present their claims to the Board. When the Board approves, the parties are given substantial resources to pursue their claims. The alleged constitutional wrongdoer is required to use an attorney as overworked as the average public defender in the United States and is forbidden from spending more than a minimal amount on the defense. When the Board disapproves the lawsuit, the defendant

254. *See id.*
255. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).
256. Fiss, *supra* note 236, at 1078.
257. *Id.* at 1077.
258. *Id.* at 1077-78.
259. *See id.* at 1076-78.

receives unlimited resources, and the plaintiff is forbidden from using any resources that are not mandated by the Due Process Clause and from hiring a lawyer more competent than the minimum requirements of the Sixth Amendment. The Constitution may mean what the Supreme Court in this regime says the Constitution means,[260] but most commentators would like that the Board of Litigation and the Supreme Court share constitutional authority, with the Board probably having far more influence on the path of constitutional law.

Access to justice problems compound the ways in which settlements and wealth disparities undermine judicial supremacy. The Supreme Court does not have the final say when parties settle claims of constitutional wrong or when parties do not litigate claims of constitutional wrong, because they do not know they are victims of a constitutional wrong, lack the resources to litigate a constitutional wrong, or fear reprisals if they litigate the constitutional wrong. When parties do not litigate or do not adequately litigate claims of constitutional wrong, constitutional authority flows from courts to those parties who have the resources to make or deny claims of constitutional wrong, litigate claims of constitutional wrong, and prevent reprisals when they litigate constitutional wrongs. These access to justice problems are substantial. Professor Douglas Colbert observes, "four out of five low-income litigants [are] without counsel in housing, family, and immigration proceedings."[261] Some cash-strapped communities also experience access to justice problems. Many localities abandon defending Takings Clause claims against land use regulations because they cannot afford extensive litigation.[262]

In the absence of a strong support structure for litigation, the Supreme Court rarely has the final say on constitutional matters. Before Congress provided funds for the Legal Services Program, state and local officials established the constitutional rules regulat-

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260. *See* Charles Evans Hughes, Speech Before the Elmira Chamber of Commerce (May 3, 1907), *in* ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES 133, 139 (1908) ("We are under a Constitution, but the Constitution is what the judges say it is.").

261. Douglas L. Colbert, *Clinical Professors' Professional Responsibility: Preparing Law Students to Embrace Pro Bono*, 18 GEO. J. ON POVERTY L. & POL'Y 309, 314 (2011).

262. *See* Mark A. Graber, *Does It Really Matter? Conservative Courts in a Conservative Era*, 75 FORDHAM L. REV. 675, 700-01 (2006).

ing state welfare policies without much federal judicial input.[263] In the absence of litigants of color with substantial litigation resources, southern states and private mobs determined the constitutional status of Jim Crow. The Supreme Court had few opportunities to protect the rights of persons of color until the National Association for the Advancement of Colored People (NAACP) began sponsoring constitutional attacks on long-standing government practices.[264] The NAACP tended to bring lawsuits only in such border states as Kansas and Maryland, because Klan activity and other mob violence in the Deep South suppressed litigation by persons of color.[265] The Supreme Court remained largely on the sidelines when other rights controversies arose until the national government passed laws that overcame access to justice problems. Professor Sarah Staszak notes that "the rights revolution was not just about the passage of landmark legislation like the Civil Rights Act, but was also necessarily fueled by a dramatic expansion of procedural mechanisms, causes of action, and a deep support structure to enable disadvantaged groups to get their day in court."[266]

The ways in which controversies over the rights of African-Americans were settled at the turn of the twentieth century illustrate how access to justice issues influence—and do not influence—the allocation of constitutional authority and path of constitutional law in the United States. An African-American community fully capable of recognizing and litigating plausible claims of constitutional wrong would not have converted the Waite, Fuller, and White Courts into the Warren Court. The Supreme Court in *Plessy v. Ferguson* sustained racial segregation even though the African-American community in New Orleans was aware of potential constitutional problems with racial segregation, fully litigated those constitutional claims, and did not fear reprisals from that litigation effort.[267]

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263. *See* SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING 31 (1990).

264. *See* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 44-70 (1998).

265. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 164 (2004) ("Most civil rights litigation in the 1930s took place in border states and the peripheral South, because challenging the racial status quo in the Deep South, even through the courts, remained too dangerous.").

266. STASZAK, *supra* note 249, at 210.

267. 163 U.S. 537, 544, 550, 552 (1896). For a good account of the backstory of *Plessy*, see

Nevertheless, the Waite Court's willingness to protect voting rights in *Ex parte Yarbrough* and *Ex parte Siebold* suggests that far more African-American claims of race discrimination in the voting process would have been resolved favorably had all African-Americans had the capacity to engage in the litigation necessary to give the Supreme Court of the United States the final say over whether they were unconstitutionally denied the right to vote.[268] Federal and state courts, however racist, were far more inclined to protect the rights of those African-Americans whose constitutional claims were finally settled by lynch mobs.

Supreme Court Justices who are vigilant to prevent legislation that directly reverses judicial decisions[269] are more tolerant when elected officials deny persons the resources they need to litigate and enforce what may be their constitutional rights. Persons accused of criminal offenses who are not sentenced to jail have no right to an attorney.[270] Persons bringing or defending civil suits have no right to an attorney in almost all cases, even when they are claiming constitutional rights. "[A]n indigent's right to appointed counsel" several decisions hold, "has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation."[271] Defendants in capital cases under certain conditions have a right to a state-financed psychiatrist[272] and may under certain circumstances have a right to state-financed DNA testing.[273] Litigants are otherwise left to their own resources when defending against criminal charges. Lawyers who do little more than conduct

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generally CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION (1987).

268. *Ex parte* Yarbrough, 110 U.S. 651, 665, 667 (1884); *Ex parte* Siebold, 100 U.S. 371, 399 (1879). For a good survey of Waite Court decisions on race discrimination, see PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 129-60 (2011). Similar claims could be made with respect to White Court decisions declaring unconstitutional state laws that had the effect of practically reenslaving persons of color. *See* United States v. Reynolds, 235 U.S. 133, 150 (1914); Bailey v. Alabama, 219 U.S. 219, 238, 241, 244-45 (1911).

269. *See* City of Boerne v. Flores, 521 U.S. 507, 519, 536 (1997).

270. *See* Scott v. Illinois, 440 U.S. 367, 373-74 (1979).

271. Turner v. Rogers, 564 U.S. 431, 442 (2011) (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25 (1981)).

272. *See* Ake v. Oklahoma, 470 U.S. 68, 74, 86-87 (1985).

273. *See* Dist. Attorney's Office v. Osborne, 557 U.S. 52, 63-64 (2009).

perfunctory investigations and stay conscious throughout the trial meet constitutional standards for effective assistance of counsel.[274]

Teachers and scholars of American constitutionalism unfortunately place decisions that deny potential litigants access to attorneys, effective attorneys, and the resources they need to fully litigate claims of constitutional wrong in different constitutional categories than decisions concerning the allocation of constitutional authority. Participants in the debates over judicial supremacy focus on such cases as *Boerne v. Flores* to the exclusion of such cases as *Gideon v. Wainwright*. Persons in the debate over the right to an attorney in civil cases focus on such cases as *Gideon* to the exclusion of such cases as *Boerne*. *Boerne* is taught in the constitutional law classes. *Gideon* is usually reserved for courses in constitutional criminal procedure.[275] These practices ignore the important connections between *Boerne* and *Gideon*, between cases concerned explicitly with judicial supremacy and cases concerned explicitly with access to justice. Justice George Sutherland in *Powell v. Alabama* recognized that the judicial capacity to have the final say over constitutional controversies depended on all persons being able to fully litigate their claims of constitutional wrong when he declared, "left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible."[276] A regime in which one cannot litigate plausible claims of constitutional wrong is not a regime in which the judiciary settles all, or even most, constitutional controversies.

V. THE REASONS WHY

Justices who loudly trumpet the importance of judicial supremacy in the American constitutional regime have ideological, legal, polit-

274. *See* Strickland v. Washington, 466 U.S. 668, 673, 700 (1984); Burdine v. Johnson, 262 F.3d 336, 349 (5th Cir. 2001) (holding that sleeping counsel was per se ineffective under the Sixth Amendment, but that defendants would have to prove specific prejudice when represented by drunk or high counsel).

275. No Supreme Court decision has ever discussed possible relationships between *Boerne* and *Gideon*. My Westlaw search failed to find a single article that discussed possible relationships between *Boerne* and *Gideon*. No prominent constitutional law casebook excerpts *Boerne* and *Gideon* in the same section or chapter.

276. Powell v. Alabama, 287 U.S. 45, 69 (1932).

ical, and pragmatic reasons for more quietly ceding constitutional authority to persons outside of the Supreme Court. Law (and fact) deference enables Justices to reach what they believe are right constitutional results without having to overrule precedent. Long-standing legal practices compel law (and fact) deference in some circumstances. Justices concerned with political backlash prefer that other institutions resolve some constitutional issues. Supreme Court Justices cannot in practice, even if they want to in theory, have the final say on the vast majority of constitutional controversies that arise in the United States.

Some law deference reflects judicial support for the underlying legislative or state court decision. The Justices who think partisan gerrymanders are nonjusticiable reject justiciable constitutional attacks on legislative apportionments unless race is involved.[277] Support for good faith exceptions in cases raising constitutional questions about the exclusionary rule and federal habeas corpus is highly correlated with opposition to a broad exclusionary rule and broad access to federal habeas corpus.[278] These examples suggest Justices support good faith and equivalent rules that require some deference to "mistaken" state and lower court judgments, because they do not believe those judgments are mistaken, but they do not want to overrule—or overrule immediately—the offending Supreme Court precedent. Professor Neil Siegel notes how Supreme Court Justices sometimes employ "federalism reasoning and rhetoric both to temporize and to facilitate constitutional change" in what they believe are favorable constitutional directions.[279] At least some judicial conservatives may have thought the "full and fair" hearing standard in *Stone v. Powell* was a "way station"[280] on the path to the judicial abandonment of the exclusionary rule.

Legality explains other instances of law deference. For example, long-standing Supreme Court precedents hold that the motives or justifications that government actors have or give for some official

277. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 492-93 (2006) (Roberts, C.J., dissenting). *But see* Miller v. Johnson, 515 U.S. 900, 910-17 (1995).

278. *See generally* McCleskey v. Zant, 499 U.S. 467 (1991); United States v. Havens, 446 U.S. 620 (1980); Wainwright v. Sykes, 433 U.S. 72 (1977); United States v. Calandra, 414 U.S. 338, 347-51, 354 (1974).

279. Neil S. Siegel, *Federalism as a Way Station:* Windsor *as Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS 87, 91 (2014).

280. *Id.* at 93.

action cannot convert a government decision that the Supreme Court may not reverse into a government decision that the Supreme Court may reverse.[281] This line of decisions, which date from 1810, prevent the Court from considering, for example, whether governors who refuse to assist the federal government enforce laws mandating standardized drivers' licenses do so because they disagree with Supreme Court decisions holding the federal law constitutional or because they simply believe that state personnel have more important tasks to perform.[282] The unanimous decision in *United States v. Nixon* strongly suggests that the Justices sincerely believed that the Constitution vested the Senate with the power to determine the processes for impeaching federal judges[283] and jury nullification, discussed in the previous paper, which is deeply rooted in American constitutionalism.[284]

Politics explains some law deference. The Supreme Court has, or is thought to have, limited political capital. Bickel urged the Justices to avoid making decisions that exposed "the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from."[285] While Justices almost never admit publicly that political considerations constrain them, some public decisions and private correspondence suggest the Justices had anticipated or taken Professor Bickel's advice when the political stakes were too high or the problem of backlash too great. One year after Chief Justice Marshall in *McCulloch v. Maryland* claimed "[o]n the Supreme Court of the United States has the constitution of our country devolved this important duty"[286] of settling constitutional controversies, he "escaped on the construction of the [state law]" when asked to determine whether Virginia was constitutionally empowered to imprison all sailors of color while their ships were docked in Virginia harbors.[287] Chief Justice Marshall

281. *See* Palmer v. Thompson, 403 U.S. 217, 224, 228 (1971); *see also* United States v. O'Brien, 391 U.S. 367, 383 (1968); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

282. *See, e.g.*, Dinan, *supra* note 182, at 1643-45.

283. 506 U.S. 224, 233-34 (1993).

284. *See* Graber, *supra* note 19, at 168.

285. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (1962).

286. 17 U.S. (4 Wheat.) 316, 401 (1819).

287. Letter from John Marshall to Joseph Story (Sept. 26, 1823), *in* 9 THE PAPERS OF JOHN MARSHALL 338, 338-39 (Charles F. Hobson ed., 1998).

avoided making a constitutional decision in that instance because he was "not fond of butting against a wall in sport."[288] Justice Samuel Miller provided one explanation for *McCardle* and related Supreme Court decisions during the Civil War and Reconstruction, in which the Court refrained from ruling on constitutional issues,[289] when he privately bragged that he "did more to prevent interference" with administration policies "than perhaps any other member" of the Court.[290] The Supreme Court in 1955 found a phony excuse to avoid settling the constitutional status of laws banning interracial marriages because "[i]n view of the difficulties engendered by the segregation cases it would be wise judicial policy to duck this question for a time."[291]

Practical realities also compel law and fact deference. Supreme Court Justices cannot be present to give authoritative commands to all admissions officers on the extent to which they may consider a particular applicant's race. The Justices do not sit at the dinner table to advise rejected applicants on whether their equal protection rights were violated. This gives admissions officers the final say for all practical purposes over the precise weight given to the race of a particular applicant. Similarly, police officers are largely immune from Supreme Court scrutiny. The nine Justices cannot advise every police officer on whether contemplated searches are constitutional or inform all persons searched by a police officer whether the police officer violated their constitutional rights. The legality of most police searches in the United States is determined by the police officer's belief that the search was constitutional, the searched person's belief that the search was constitutional,[292] or the police officer's capacity to present the relevant facts to superiors or courts in ways

288. *Id.* at 338.

289. *See generally Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1864) (finding that the Court lacked jurisdiction to review the jurisdiction and proceedings of a military tribunal); Roosevelt v. Meyer, 68 U.S. (1 Wall.) 512 (1863) (finding that the Court lacked jurisdiction to review a decision of the highest court in New York).

290. CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890, at 89 (1939).

291. Christopher W. Schmidt, Essay, Brown *and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 223 (2008) (quoting the Certiorari Memorandum authored by Justice Harold Burton's law clerk in *Naim v. Naim*, 87 S.E.2d 749 (Va.), *vacated and remanded*, 350 U.S. 891 (1955), *reaff'd on remand*, 90 S.E.2d 849 (Va. 1956)).

292. Or the searched person's inability to challenge an unconstitutional search, which, in effect, makes the police officer the final arbiter of the legality of that search.

that make the search appear constitutional. The Supreme Court may provide broad outlines ("do not admit or reject applicants solely because of their race") that structure the literally billions of interactions between persons and government officials every day, but the fine tuning (how much weight to give race) that settles constitutional matters, for the most part, is done by the parties involved rather than nine very distant Justices.

CONCLUSION

The common claim that the United States is governed by an imperial judiciary rests on two foundations. The first is the coverage thesis. On this view, the Supreme Court resolves almost every question of political importance in the United States. Tocqueville set forth the canonical account of the coverage thesis when he famously asserted, "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[293] The second is the supremacy thesis. In that view, the Supreme Court, as a matter of law and practice, has the authority to settle every constitutional question that arises in the United States. Chief Justice Earl Warren set forth the canonical account of the supremacy thesis when he asserted in *Cooper v. Aaron* that "the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since [*Marbury v. Madison*] been ... a permanent and indispensable feature of our constitutional system."[294] Combined, the coverage and supremacy theses suggest judicial absolutism. If all political questions became judicial questions and the federal judiciary provided the final answers to all judicial questions, then the Supreme Court would be authorized to determine the standards that guide all of American politics.

Most challenges to the imperial judiciary focus on the supremacy thesis. Critics claim that the Supreme Court, as a matter of practice and law, has not had and should not have the authority to settle every constitutional question that arises in the United States. Empirical work details how some constitutional policy making is a consequence of dialogues between Justices and other governing

293. TOCQUEVILLE, *supra* note 1, at 280.
294. 358 U.S. 1, 18 (1958).

officials.[295] Not infrequently, governing officials perform solos. The Supreme Court played almost no role settling the constitutional issues raised by American expansionism or the processes by which national officials are impeached.[296] Normative works question whether the Constitution requires courts to have the final word on constitutional matters. Some Americans champion a departmentalism approach in which all governing officials determine for themselves the best interpretation of the Constitution.[297] Mark Tushnet urges elected officials to "tak[e] the Constitution away from the courts."[298]

The coverage thesis has come under fire. Scholars who blithely cite Tocqueville fail to notice that, at the time Tocqueville was writing, very few political questions were resolved into judicial questions. During the 1830s, congressional votes and presidential vetoes settled the most important constitutional questions dividing the nation.[299] Professor Frederick Schauer documents a similar pattern in contemporary politics. His study compares the agenda of the Rehnquist Court to those issues that Americans during the 1980s and 1990s thought most important. Professor Schauer concludes that, for the most part, the Supreme Court resolves only issues of peripheral interest to most Americans.[300]

This and the companion study of how contemporary constitutional doctrine allocates constitutional authority further weakens both the coverage thesis and the supremacy thesis.[301] The Supreme Court

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295. *See* SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES, at ix-x (1992); LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 8 (1988); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653-54 (1993).

296. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 141 (1999); Mark A. Graber, *Settling the West: The Annexation of Texas, the Louisiana Purchase, and* Bush v. Gore, *in* THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803-1898, at 83, 89 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005).

297. *See* JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 10 (1984) (arguing that constitutional interpretation is not solely within the judiciary but rather an interactive system of mutual oversight and combined interpretation); Neal Devins & Louis Fisher, Essay, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 106 (1998).

298. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, at x-xi (1999).

299. Graber, *supra* note 37, at 486, 503, 534-35.

300. *See* Schauer, *supra* note 36, at 63-64.

301. *See generally* Graber, *supra* note 19. The next two paragraphs summarize the conclu-

does not claim to resolve every political or even every constitutional question that excites Americans. The political question doctrine allocates to national officials the authority to resolve many questions of constitutional law. The Supreme Court refrains from intervening when governing officials or ordinary citizens give constitutional reasons for not exercising what the Justices insist are their constitutional powers or constitutional rights. Governing officials and private persons are free to settle their constitutional disputes on whatever constitutional basis they think right, regardless of any Supreme Court precedent on the matter. The Supreme Court's commitment to concrete judicial review vests many governing officials with temporary authority to resolve constitutional questions. On some matters, the Justices defer in part to constitutional judgments made by other governing officials through the use of various good faith or reasonableness rules. The Justices allocate substantial authority over constitutional controversies by deferring to legislative, administrative, or lower court fact findings. Jury verdicts of not guilty are unimpeachable and nearly unimpeachable otherwise, even when strong evidence exists that jurors have ignored constitutional instructions or made unconstitutional use of racial and other factors when making their decisions. Whether the Supreme Court may prevent Congress from stripping the federal judiciary of all appellate jurisdiction or from abolishing the Supreme Court altogether remains an open constitutional question.

Contemporary constitutional doctrine provides far more opportunities than proponents and opponents of judicial supremacy realize for governing officials other than Supreme Court Justices to exercise independent constitutional authority. Existing precedents vest governing officials other than Supreme Court Justices with the final say on all controversies that are nonjusticiable or where Congress has not provided federal courts with jurisdiction. The rules for standing and bringing appeals to the Supreme Court enable federal and state elected officials, state and lower federal judges, and private persons to exercise temporary constitutional authority during the often lengthy time between when a constitutional controversy erupts and when the Supreme Court is able to weigh in on that controversy. Police officers and state courts take advantage of

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sions of both essays.

precedents mandating fact deference by tailoring their testimony and findings in ways that undermine what they believe are mistaken Supreme Court decisions on the constitutional rights of persons suspected of crime. Existing constitutional law leaves governing officials free to act on their constitutional beliefs when they think the Supreme Court has construed their powers or rights too broadly.

Judicial supremacy understood as the judicial power to allocate constitutional authority does not describe the American constitutional regime more accurately than judicial supremacy understood as the judicial power to settle all constitutional controversies. Congress allocates constitutional authority when creating the federal judiciary and vesting federal courts with jurisdiction over some or all constitutional questions. Clear constitutional commands, politics, and practical realities guarantee that governing officials other than Supreme Court Justices will exercise constitutional authority even when Congress has provided the Court with jurisdiction over the constitutional issue in question. Long-standing constitutional practices provide persons outside the Supreme Court with numerous opportunities to make meaningful constitutional decisions. The Sixth Amendment's provision for jury trials,[302] as well as Article III's case or controversy requirement,[303] can be judicially tinkered with only at the margins. Powerful political actors often compel Supreme Court Justices to make decisions limiting judicial power to settle constitutional controversies. The Marshall Court probably made a strategic decision in *Durousseau v. United States* when the Justices, in a young Republic dominated by Jeffersonians who were skeptical of judicial power, announced that they could exercise appellate review only when Congress had vested the Court with such jurisdiction by statute.[304] Numerous political actors settle, help settle, or temporarily settle most constitutional controversies because Supreme Court Justices lack adequate supervisory capacities. Supreme Court Justices can rarely determine constitutional facts accurately and cannot mandate that governing officials outside the Court exercise what the Justices believe are constitutional powers

302. *See* U.S. CONST. amend. VI.
303. *See* U.S. CONST. art. III, § 2, cl. 1.
304. *See* Graber, *supra* note 30, at 47.

when those governing officials believe the Supreme Court has mistakenly interpreted the Constitution.

The judicial allocation of constitutional authority suggests that coherence is as great a constitutional problem as countermajoritarianism.[305] The literature on the imperial judiciary presents the United States as a regime largely run by nine Justices who are politically unaccountable. This allocation may be undemocratic, but the Justices more often than not pursue a relatively consistent course of decisions.[306] The ways in which contemporary constitutional doctrine allocates constitutional authority suggests that multiple decision makers influence how controversies over the meaning of constitutional provisions are settled in the United States. This constitutional pluralism is a more democratic allocation of constitutional authority but risks constitutional chaos as different constitutional authorities settle controversies on the basis of radically different constitutional principles. Sometimes, constitutional pluralism promotes constitutional values. That elected officials in Congress and in the states may construe their constitutional powers more narrowly and constitutional rights more broadly than the Supreme Court provides a floor for constitutional rights and permits local experimentation. In other cases, constitutional pluralism threatens the rule of law.[307] One consequence of the Supreme Court's use of good faith or reasonableness rules in such cases as *Stone v. Powell* is that state courts must use relatively liberal standards to judge the constitutionality of police searches when a criminal defendant is fortunate enough to have a lawyer astute enough to make the proper objection at trial; however, state courts may use relatively conservative standards to judge the constitutionality of the same police searches in habeas corpus appeals when less experienced counsel representing a less fortunate defendant fails to make the proper constitutional objections at trial. Having one institution determine the relevant constitutional facts

305. *See* Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425, 428 (2005); Mark A. Graber, Review Essay, *Introduction to* Law's Allure *Symposium: Law and Politics—An Old Distinction, New Problems*, 35 LAW & SOC. INQUIRY 1025, 1026 (2010).

306. Though not recently. *See* Mark A. Graber, *Judicial Supremacy and the Structure of Partisan Conflict*, 50 IND. L. REV. 141 (2016).

307. *See* GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 152-74 (2009).

and another determine the relevant constitutional law is a recipe for practices that neither institution thinks have any merit. Often this division of constitutional labor makes constitutional rights depend on whether a police officer is a good liar or on the trier of fact's propensity to believe police perjury. More often, judicial doctrines that permit wealth disparities and access to justice to influence the path of constitutional law cede constitutional sway to economically powerful individuals and corporations while weakening the power of Justices to settle controversies involving less fortunate persons.

This incoherence may be the price of a very rough constitutional pluralism. Rather than dispense constitutional authority formally by clear rules that specify what institutions have responsibility for which constitutional controversies and provisions, the American constitutional order dispenses constitutional authority informally through a set of rules and practices that enable numerous political actors to influence how constitutional controversies are settled. As time goes to infinity, the Supreme Court may have the final say over what every provision in the Constitution means. Nevertheless, constitutional powers and rights at any particular time depend on constitutional decisions made by private persons, state and federal legislatures, state and federal administrators, state courts, and lower federal tribunals. Americans may play at judicial supremacy only because constitutional doctrine throughout American history provides them with numerous opportunities to game the system when they know or suspect that particular Supreme Court rules are not to their liking.