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Judicial Departmentalism: An Introduction

Kevin C. Walsh

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JUDICIAL DEPARTMENTALISM: AN INTRODUCTION

KEVIN C. WALSH*

ABSTRACT

This Article introduces the idea of judicial departmentalism and argues for its superiority to judicial supremacy. Judicial supremacy is the idea that the Constitution means for everybody what the Supreme Court says it means in deciding a case. Judicial departmentalism, by contrast, is the idea that the Constitution means in the judicial department what the Supreme Court says it means in deciding a case. Within the judicial department, the law of judgments, the law of remedies, and the law of precedent combine to enable resolutions by the judicial department to achieve certain kinds of settlements. Judicial departmentalism holds that these three bodies of law provide the exclusive ways in which constitutional adjudication gives rise directly to binding constitutional law. This Article argues that our Justices should be judicial departmentalists rather than judicial supremacists.

* Professor of Law, University of Richmond School of Law. I presented earlier versions of this Article at faculty workshops at Wake Forest and Stetson in addition to this symposium at the William & Mary Law School. I thank the participants in all for helping me think through the ideas presented here. I also thank Josh Blackman, Samuel Bray, Jud Campbell, Paul Crane, Richard Fallon, Randy Kozel, Corinna Lain, Michael McConnell, Jeff Pojanowski, Jack Preis, and Howard Wasserman for useful suggestions and perspective.

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INTRODUCTION

This Article introduces the idea of judicial departmentalism and argues for its superiority to judicial supremacy. It contends that our Justices should be judicial departmentalists rather than judicial supremacists.

Judicial supremacy is the conventional designation for the idea that the Constitution means *for everybody* what the Supreme Court says it means in deciding a case.¹ Judicial departmentalism, by contrast, is the idea that the Constitution means *in the judicial department* what the Supreme Court says it means in deciding a case.²

Within the judicial department, the law of judgments, the law of remedies, and the law of precedent combine to enable resolutions by the judicial department to achieve certain kinds of settlements.³ To the extent that these judicial settlements remain undisturbed over time, judicial departmentalism enables a type of judicial supremacy to function as a practical matter. But this supremacy is legally limited by the boundaries around judicial resolutions imposed by the law of judgments, the law of remedies, and the law of precedent.⁴ Judgments are generally limited to parties, injunctions can be lifted, and precedents can be overturned, for example.⁵

Judicial departmentalism has not previously been presented as a conceptual framework for thinking about the authoritativeness of judicial determinations of constitutional law. But this Article argues that it already is our law, and that the conventional view that judicial supremacy is our law rests on much weaker foundations than commonly thought.

Part I quickly sets the stage for comparing judicial supremacy and judicial departmentalism. It does so through an overview of the

1. See, e.g., Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 455-56 (2000).

2. See Kevin C. Walsh, *Combating Judicial Supremacy Through Containment and Conversion*, LAW PROFESSOR BLOGS NETWORK: MIRROR OF JUST. (Oct. 9, 2015), <http://mirrorofjustice.blogs.com/mirrorofjustice/2015/10/combating-judicial-supremacy-through-containment-and-conversion.html> [<https://perma.cc/P6S9-CQ23>].

3. See *infra* Part II.

4. See *infra* Part II.

5. See *infra* Part II.

better known of the two ideas: judicial supremacy. It first presents the conventional doctrinal account of judicial supremacy's place in today's constitutional law. It then sketches the two most prominent normative arguments marshaled in support of the comparative superiority of judicial supremacy. These are the settlement-function argument for judicial supremacy⁶ and the collapse argument from the instability of alternatives.⁷ The exposition in Part I operates externally. It describes how nonjudicial officials are told they should regard the authoritativeness of Supreme Court determinations of constitutional law if they are judicial supremacists: as equivalent in authority to the Constitution itself.⁸

Part II provides an overview of judicial departmentalism. It operates from a detached perspective that describes how the bindingness of judicial determinations is generally understood to arise within our legal system through the law of remedies, the law of judgments, and the law of precedent.

Part III argues for the comparative superiority of judicial departmentalism to judicial supremacy. Its arguments are aimed at the internal point of view of Supreme Court Justices deciding how they should want the authoritativeness of their judicial determinations of constitutional law to be accepted by others.

I. THE CASE FOR JUDICIAL SUPREMACY: A SKETCH

There are three primary components to the case for judicial supremacy.⁹ I sketch them out briefly in this Part but do not provide full-blown renditions of the arguments. That has already been done well by people who actually adhere to judicial supremacy and aim to bring others into the fold. But because my case for judicial departmentalism as comparatively superior to judicial supremacy is, well, comparative, I begin by identifying some of the leading attractions of judicial supremacy.

6. See Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1631-32 (2005) (book review); *infra* Part I.B.

7. See Alexander & Solum, *supra* note 6, at 1610-11; *infra* Part I.C.

8. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1376-77 (1997).

9. See generally *id.* at 1369-77 (providing an in-depth analysis of the three components of the argument for judicial supremacy).

A. “*Judicial Supremacy Is the Law*”

The first, and most obvious, argument for being a judicial supremacist is that judicial supremacy is the law, and it is good to follow the law.¹⁰

Conventional renditions of doctrine identify *Cooper v. Aaron*¹¹ as the Supreme Court’s decisive adoption of judicial supremacy into constitutional law doctrine.¹² This was the school desegregation case out of Little Rock that the Supreme Court heard in a special session in late summer 1958 after President Eisenhower sent federal troops to enforce integration of Little Rock’s Central High School for the 1957 school year.¹³ In their decision agreeing with the NAACP that further delay of school integration should not be permitted, the Justices identified *Brown v. Board of Education*¹⁴ as the law of the land on par with the Constitution itself.¹⁵

The *Cooper* Court purported to find in *Marbury v. Madison*¹⁶ the principle that “the federal judiciary is supreme in the exposition of the law of the Constitution.”¹⁷ This principle, stated the opinion of the Court, is “a permanent and indispensable feature of our constitutional system.”¹⁸ And from this principle, “[i]t follows that the interpretation of the Fourteenth Amendment enunciated by this

10. See, e.g., Alexander & Solum, *supra* note 6, at 1630 (“[T]he Court essentially declared that although both officials and citizens may believe that the Court’s interpretations are incorrect, those interpretations function as supreme law ... unless and until the Court itself repudiates them.”).

11. 358 U.S. 1 (1958).

12. See, e.g., Frank I. Michelman, *Living with Judicial Supremacy*, 38 WAKE FOREST L. REV. 579, 600 (2003) (citing *Cooper v. Aaron* as authority for the claim that “the Supreme Court simply is the one and only boss of the country when it comes to deciding the content and bearing of constitutional law”).

13. See *Cooper*, 358 U.S. at 12 (“On September 25, [1957,] ... the President of the United States dispatched federal troops to Central High School and admission of the Negro students to the school was thereby effected. Regular army troops continued at the high school until November 27, 1957. They were then replaced by federalized National Guardsmen who remained throughout the balance of the school year.”).

14. 347 U.S. 483 (1954).

15. See *Cooper*, 358 U.S. at 18 (“[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land.”).

16. 5 U.S. (1 Cranch) 137 (1803).

17. *Cooper*, 358 U.S. at 18.

18. See *id.* This opinion was signed, personally, by the Chief Justice and each of the Associate Justices.

Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect ... ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’”¹⁹

In more recent years, *City of Boerne v. Flores* and the Court’s Section 5 case law more generally rest on a similar equation.²⁰ In *Boerne*, the Supreme Court held the Religious Freedom Restoration Act (RFRA) unconstitutional as applied to state and local governments because the statute exceeded Congress’s enforcement authority under Section 5 of the Fourteenth Amendment.²¹ Congress enacted the RFRA in response to the Supreme Court’s holding in *Employment Division v. Smith*²² that the Free Exercise Clause did not authorize judicially created exemptions from neutral and generally applicable laws that incidentally burden religious exercise.²³ In the few decades preceding *Smith*, the Court had purported to apply a more religion-protective test, and Congress sought by statute to restore a version of that test.²⁴ The Supreme Court held that Congress could not do this using its Section 5 authority because substitution of the earlier approach could not be understood as enforcing the Free Exercise Clause as interpreted in *Smith*.²⁵ Although the Court divided on other grounds in *Boerne*, no Justice dissented from the majority’s analytical framework equating the Free Exercise Clause and *Smith*.²⁶

Anyone interested in understanding judicial supremacy must also pay special attention to the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁷ This was the case in which the Court reaffirmed a constitutional right to abortion by preserving

19. *Id.* (quoting U.S. CONST. art. VI, cl. 2). Dispelling any doubt about the intended equation of the Supreme Court’s decision in *Brown* with the Constitution itself, Chief Justice Warren’s opinion for the Court continues: “Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3 ‘to support this Constitution.’” *Id.* (quoting U.S. CONST. art. VI, cl. 3).

20. *See* 521 U.S. 507, 529 (1997).

21. *See id.* at 536.

22. 494 U.S. 872 (1990).

23. *See Boerne*, 521 U.S. at 512-13; *Smith*, 494 U.S. at 885.

24. *See Boerne*, 521 U.S. at 512-14.

25. *See id.* at 534-36.

26. *See id.* at 539 (Scalia, J., concurring in part); *id.* at 545 (O’Connor, J., dissenting); *id.* at 565 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting).

27. *See* 505 U.S. 833 (1992) (plurality opinion).

what it called “the essential holding of *Roe v. Wade*.”²⁸ The controlling plurality opinion does not equate the Court’s opinions with the Constitution; it even professes some doubt about whether *Roe v. Wade* was rightly decided.²⁹ But the opinion raises the stakes even higher. It says that the American people’s “belief in themselves” as “a Nation of people who aspire to live according to the rule of law ... is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals.”³⁰ This is judicial supremacy on steroids.

B. The Settlement Function of Law

The leading normative defense of judicial supremacy is based on the settlement function of law.³¹ A well-developed and prominent account of the settlement-function argument for judicial supremacy has been provided by Professors Larry Alexander and Fred Schauer in coauthored law review articles.³²

Professors Alexander and Schauer explain that law provides the benefits of authoritative settlement and of coordinating social behavior.³³ These benefits provide reasons for following laws even when one disagrees with the content of those laws, for even mistaken laws serve settlement and coordination functions.³⁴ Alexander and Schauer contend that the benefits of settlement and coordination provided by stare decisis doctrine *within* the judicial domain are also provided by applying a norm of deference to prior Supreme Court determinations *outside* the judiciary as well.³⁵ This settlement

28. *See id.* at 846.

29. *See id.* at 853 (“[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.”).

30. *Id.* at 868.

31. *See* Alexander & Schauer, *supra* note 8, at 1371-72.

32. *See* Alexander & Schauer, *supra* note 1; Alexander & Schauer, *supra* note 8.

33. *See* Alexander & Schauer, *supra* note 8, at 1371-72.

34. *Id.*

35. *See id.* at 1373-74 (discussing the applicability of stare decisis as set forth in *Payne v. Tennessee*, 501 U.S. 808 (1991), to the nonjudicial branches of government).

function, they argue, is particularly important for constitutional law “because the Constitution governs all other law.”³⁶

To achieve the benefits of settlement and coordination over time, Professors Alexander and Schauer argue that “the Supreme Court’s interpretations of the Constitution should be taken by all other officials, judicial and non-judicial, as having an authoritative status equivalent to the Constitution itself.”³⁷ They acknowledge that “‘the Constitution is what the judges say it is,’ may well be bad jurisprudence because it is incomprehensible as an attempt to explain what it means to argue *to* the Supreme Court,” but they maintain that “it is nonetheless a desirable attitude for non-judicial officials to have towards the Court and its product, in much the same way, but far less controversially, that it is a desirable attitude for lower court judges to have towards the Court and its opinions.”³⁸

Professors Alexander and Schauer recognize that contestation over constitutional meaning can be not only legitimate but also beneficial, at least en route to authoritative resolution by the Supreme Court.³⁹ But once the Supreme Court has resolved a contest over constitutional meaning, the Court’s determination is to be treated by extrajudicial officials the same way that it is to be treated by lower court judges.⁴⁰ Officials remain free to express disagreement and to argue why the Supreme Court’s decision is wrong. But they cannot engage in an act of official resistance.⁴¹ In their official actions, nonjudicial officials are duty-bound to follow the Constitution as interpreted by the Supreme Court, not the Constitution as the officials themselves see it.⁴²

36. *Id.* at 1377.

37. Alexander & Schauer, *supra* note 1, at 455.

38. *Id.* (footnote omitted) (quoting Charles Evan Hughes, Speech Before the Elmira Chamber of Commerce (May 2, 1907), in *ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES* 133 (1908)).

39. *See* Alexander & Schauer, *supra* note 8, at 1385 n.98 (defending interjurisdictional non-deference).

40. *See id.* at 1387.

41. Alexander and Schauer describe the position that they challenge as “non-deference.” *See id.* at 1362 (“Non-deference occurs when a nonjudicial official who disagrees with a judicial decision on a constitutional question does not conform her actions to that decision and perhaps even actively contradicts it.”).

42. *See id.* at 1381 n.90 (arguing that, because judicial officials can be expected to subjugate their own interpretations of the Constitution to the judgment of the Supreme Court, “there is nothing more anti-textual about expecting nonjudicial officials to show the same

C. The Collapse Argument Against Departmentalism

A competitor approach to judicial supremacy is departmentalism.⁴³ This comes in a variety of forms.⁴⁴ For present purposes, we can consider “Lincoln-Meese” departmentalism, thus named because President Abraham Lincoln advanced this version of departmentalism in response to the *Dred Scott* case and because former Attorney General Edwin Meese championed it in the 1980s.⁴⁵ Lincoln-Meese departmentalists accept vertical stare decisis within the judiciary and also agree that judgments and remedies may bind those outside the judiciary.⁴⁶ But, they hold, nonjudicial officials are not bound by Supreme Court opinions themselves, and these officials do not violate their oath to the Constitution by following the Constitution as they see it rather than the Constitution as the Court sees it.⁴⁷

Professors Larry Alexander and Lawrence Solum view the primary defect of Lincoln-Meese departmentalism to be its instability.⁴⁸ If the Supreme Court renders a constitutional interpretation that the other branches disagree with, “Congress might continue passing laws of the type that the Court has held unconstitutional,” and “[t]he President may order the executive branch to continue enforcing laws the Court has held to be unconstitutional.”⁴⁹ But the courts will vindicate those against whom the laws are enforced if there are lawsuits, and “it is child’s play to get almost all constitutional questions about which there is interbranch disagreement into the form of a lawsuit fit for judicial resolution.”⁵⁰

Once these issues get into the courts, the Supreme Court’s interpretation “will ultimately prevail” over the other branches’ interpretations “unless the Supreme Court changes its mind about its own constitutional interpretations.”⁵¹ The argument comes to

deference”).

43. See Alexander & Solum, *supra* note 6, at 1599, 1609-10.

44. See, e.g., *id.* at 1609-10 (introducing the distinction between “divided departmentalism” and “overlapping departmentalism”).

45. See *id.* at 1614-15.

46. See *id.* at 1614.

47. See *id.*

48. See *id.* at 1614-15.

49. *Id.* at 1614.

50. *Id.*

51. *Id.*

this: because judicial supremacy “will emerge from Lincoln-Meese ... departmentalism, though only through the very time-consuming and costly process of litigating each act of resistance to the Court’s interpretation,” judicial supremacy is normatively superior to Lincoln-Meese departmentalism.⁵²

II. THE LEGAL FOUNDATIONS OF JUDICIAL DEPARTMENTALISM

This Part describes judicial departmentalism as an alternative to judicial supremacy. The basic idea behind it is the same claim that leads the case for judicial supremacy: judicial departmentalism is the law. Judicial departmentalism equates the authoritativeness of Supreme Court declarations of constitutional law with the authoritativeness of all other Supreme Court declarations of law.

Although the Supreme Court occasionally speaks as if judicial supremacy is the law,⁵³ reflection on the activity of constitutional adjudication reveals that judicial departmentalism is the law. What the Justices say and do both matter. But some of what they occasionally say contrasts with what they consistently do. The Justices’ occasional professions of judicial supremacy contrast with their pervasive judicial departmentalism.

We shall first look at this pervasive judicial departmentalism in practice, and then return to its significance for the Justices’ occasional professions of judicial supremacy. And we begin, as every federal court’s consideration of a case should begin, with jurisdiction.

A. Jurisdiction, the Law of Remedies, and the Law of Judgments

Jurisdiction is essential for everything that federal judges do. Like all other federal judges, the Justices of the Supreme Court insist on possessing jurisdiction before they act. This is a strict requirement. The Court will dismiss a jurisdictionally deficient case

52. *Id.* at 1614-15. While Professors Alexander and Solum formulate this collapse argument in opposition to Lincoln-Meese departmentalism specifically, it applies to any position that authorizes the sort of resistance to Supreme Court determinations of constitutional meaning that can result in litigation.

53. *See supra* Part I.A.

as improvidently granted even after it has been fully briefed and argued, for example, and even though the questions presented by the case need to be resolved to bring uniformity to the resolution of many other cases presenting the same questions.⁵⁴ That kind of waste in service of jurisdictional maintenance is just one manifestation, specific to the Supreme Court, of the recognition that a federal court simply cannot act on a matter without jurisdiction.⁵⁵

Jurisdiction comes in two varieties: jurisdiction over a particular subject matter, and jurisdiction over a person or thing. For federal courts, subject-matter jurisdiction has both constitutional and statutory limits. Article III, Section 2 of the Constitution specifies the limited categories of cases to which the federal judicial power extends.⁵⁶ And Congress has further specified the subject-matter jurisdiction of federal courts by statute. Apart from the Supreme Court's original jurisdiction, which is self-executing, a federal court cannot act on a matter except in accordance with a statutory grant of subject-matter jurisdiction.⁵⁷

The case or controversy requirement is another limitation on federal court jurisdiction.⁵⁸ The law implementing this requirement is voluminous and detailed.⁵⁹ But for present purposes, we can focus on just the third prong of the standing requirement. To be able to seek relief from a federal court, a litigant must have (1) an injury, (2) that is traceable to a defendant's actions, and (3) remediable by the court.⁶⁰ This last requirement, that the standing-conferring injury be one remediable by the court, points us directly to what the federal courts are necessarily in the business of doing when engaged in adjudication: providing remedies.

54. See, e.g., *Johnson v. California*, 541 U.S. 428, 431-32 (2004).

55. See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95-96 (1998).

56. See U.S. CONST. art. III, § 2 (defining the constitutional scope of the judicial power).

57. See James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 558 n.12 (1994).

58. See, e.g., Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (But Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1380-83 (2014).

59. See generally RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* ch. 2 (6th ed. 2009).

60. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

A remedy can be understood expansively as “anything a court can do for a litigant who has been wronged or is about to be wronged.”⁶¹ The range of remedies is broad, including money damages, injunctions, and declaratory judgments, as well as more specific relief provided by writs of habeas corpus or mandamus, for example.

Although broad, the range of remedies is not unbounded. The law of remedies limits the scope of permissible remedies and prescribes the conditions under which various remedies are appropriate.⁶² For instance,

[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.⁶³

It would be a legal error if a court were to order the remedy of a preliminary injunction if one or more of these requirements were not met. And this is but one example of what I mean by saying that the law of remedies limits the scope of permissible remedies. If you want to know whether a remedy should have been ordered, or whether it was overbroad, and so on, you look to the law of remedies.

By building “remediability” into the standing inquiry, our law focuses the front end of a case so that the result is the right kind of judicial output at the back end. But standing doctrine is not the only doctrine that connects remedies and jurisdiction in constitutional litigation. The two also connect through the doctrine of personal jurisdiction.

Personal jurisdiction is conceptually and practically unimportant when constitutional adjudication is defensive—that is, when someone is being prosecuted or sued and is arguing that the prosecution or suit is unconstitutional. By the time a court needs to decide whether to give effect to an allegedly constitutional law, it is already well past questions of personal jurisdiction and it is obvious that the question of whether to give effect to the allegedly unconstitutional

61. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 1 (4th ed. 2012).

62. *See id.* at 1-3.

63. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

law is in service of a determination about the respective legal rights of persons. But personal jurisdiction is conceptually important when constitutional adjudication is offensive—that is, when someone is bringing suit to have a law rendered unenforceable by the defendant official against the plaintiff.

A typical setting for offensive constitutional adjudication is a preenforcement action for declaratory and injunctive relief against the enforcement of an allegedly unconstitutional statute. As a practical matter, personal jurisdiction over the defendant is rarely a contested issue because the defendant in these preenforcement suits is the official with enforcement authority in the relevant jurisdiction.⁶⁴ But the idea of personal jurisdiction is important conceptually because the necessity of having personal jurisdiction over the defendant demonstrates the in personam nature of the litigation. And that is important because courts tend to lose sight of this feature of constitutional litigation when it comes to describing their authority with respect to allegedly unconstitutional statutes.

To put the point bluntly, courts often speak as if preenforcement constitutional adjudication puts the statute itself as a thing or *res* before the court.⁶⁵ The plainest example of this sort of speech is the metaphor of severance and excision—conceptual operations performed on the statute itself as a thing.⁶⁶ But constitutional litigation of the sort that I have been describing does not involve the statute as a *res*. It is in personam litigation in which the court is asked to decide the respective rights and duties of persons under law. If the plaintiff's preenforcement challenge is successful, the remedy issued runs against the defendant as a person. Declaratory relief will subsist between the plaintiff and the defendant, and the defendant will be subject to an injunction not to enforce the statute.

Attention to these structural features of constitutional adjudication reveals why Professor Richard Fallon was correct to state that all constitutional adjudication is “as applied.”⁶⁷ Because of the

64. The defendant in these cases is typically a person rather than an entity because states possess sovereign immunity while enforcement officials can be sued pursuant to *Ex parte Young* to prevent ongoing violations of federal law. See *Ex parte Young*, 209 U.S. 123 (1908).

65. See Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 746 n.29, 747 (2010).

66. See *id.* at 745-46.

67. See Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1337, 1368 (2000) [hereinafter Fallon, *As-Applied*].

structure of constitutional adjudication in the United States, federal courts do not issue judgments about statutes themselves but rather about the obligations and authority of persons under statutes.⁶⁸

When federal courts reach decisions in constitutional cases at the trial court level, the binding effect of those decisions is a function of the binding effect of the judgment in the case, together with whatever remedy a court has issued.⁶⁹ On our list of ways in which adjudication results in legally binding determinations, then, we need to include the law of judgments, or preclusion doctrine.⁷⁰ In some ways, this is the most fundamental way that adjudication results in legally binding determinations. As Professor William Baude has helpfully put it, the judicial power is the judgment power.⁷¹

This is not the place for a full rendition of the law of judgments. But a glance at the Table of Contents for the *Restatement (Second) of Judgments* provides a sense of what kind of law this is. The chapter headings include “Validity of Judgments,” “Former Adjudication: The Effects of a Judicial Judgment,” “Parties and Other Persons Affected by Judgments,” “Special Problems Deriving from the Nature of Forum Rendering Judgment,” and others.⁷² Section headings include “Requisites of a Valid Judgment,” “Subject Matter Jurisdiction,” “The Scope of ‘Claim,’” “Issue Preclusion,” “Effect of Declaratory Judgment,” “Effect of Criminal Judgment in a Subsequent Civil Action,” and “Effect of Federal Court Judgment in a Subsequent Action,” among others.⁷³ As these headings suggest, the law of judgments is both highly refined and legally dense. But it is

and Facial Challenges]. In a later article, Professor Fallon describes certain aspects of his earlier analysis as erroneous. See Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 917-22 (2011) [hereinafter Fallon, *Fact and Fiction*]. But he stands by the proposition that “all challenges are as-applied challenges” in that “all constitutional challenges to a rule of law—whether denominated as as-applied or facial—begin with a challenger who maintains that the Constitution forbids the enforcement of that rule against her.” *Id.* at 923.

68. See Fallon, *As-Applied and Facial Challenges*, *supra* note 67, at 1334. For an account of the confusion and disarray that can follow from neglecting this aspect of constitutional adjudication, see, for example, Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243 (2016).

69. See Fallon, *Fact and Fiction*, *supra* note 67, at 923 n.31.

70. Cf. Fallon, *As-Applied and Facial Challenges*, *supra* note 67, at 1339-40.

71. See William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1808-09, 1811, 1845 (2008).

72. RESTATEMENT (SECOND) OF JUDGMENTS, table of contents (AM. LAW INST. 1982).

73. *Id.*

the place we look at the back-end of litigation, when it is over, to identify the legally binding nature of determinations made in a case.

B. The Law of Precedent

Joining company with the law of judgments and the law of remedies is a third body of law on our list of law that defines the boundaries of legally binding determinations. This law applies only with respect to the decisions of appellate courts. It is the law of precedent, or *stare decisis* doctrine.

Stare decisis has both vertical and horizontal dimensions.⁷⁴ Vertical *stare decisis* refers to the binding effect of higher-court judgments on courts beneath that higher court in the judicial hierarchy.⁷⁵ Decisions of the United States Court of Appeals for the Fourth Circuit, for example, are binding on federal district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina. Horizontal *stare decisis* refers to the binding effect of an appellate court's judgment at the same level in the judicial hierarchy.⁷⁶ The rule that the decisions of one Fourth Circuit panel are binding on later Fourth Circuit panels, for instance, is a rule of horizontal *stare decisis*.

As a matter of legally binding effect, the biggest difference between decisions of the Supreme Court, on the one hand, and decisions of inferior federal tribunals, on the other hand, arises not from the law of judgments or the law of remedies, but rather from the law of precedent. There is no tribunal higher than the Supreme Court when it comes to questions of federal law, and all judicial tribunals in the United States deciding a question of federal law must follow the Supreme Court as a matter of vertical *stare decisis*.⁷⁷ Notice the limitation, though: "judicial tribunals." Precedent does not bind outside the judiciary.⁷⁸ Because it binds within, precedent shapes what can be plausibly argued and expected to happen in judicial

74. See Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLAL REV. 112, 135 n.144 (2011) (explaining the distinction between vertical *stare decisis* and horizontal *stare decisis*).

75. See *id.*

76. See *id.*

77. See, e.g., *id.*

78. See, e.g., John Harrison, Essay, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 509-13 (2000).

tribunals. But nonjudicial actors are not bound by precedent the way that judicial actors are.⁷⁹

This legal distinction may not seem that practically important. But it can be. Every good lawyer knows that precedents have varying degrees of strength and vitality. Our legal system's development of constitutional doctrine is influenced by forces analogous to momentum and inertia in the physical world.⁸⁰ The composition of the Supreme Court, and the federal judiciary more generally, changes. For any number of reasons, the law as formulated in yesterday's judicial opinions will not necessarily be the law formulated in tomorrow's. For intrasystemic reasons, lower court judges are not as free as potential and actual litigants to act as if a particular doctrine is no longer "good law" even though that doctrine appears to be on its last legs. But those outside the judiciary who know that the obituary of that doctrine has already been written, for example, violate no rule of law by acting as if it is already dead. This includes, by the way, executive officials and other government actors, such as legislators, considering whether to enact a law that would be unconstitutional under a precedent that looks vulnerable but has not yet been overruled. The point is that lower court judges are differently situated from everyone else by being bound in a way that those others are not.⁸¹

For those who believe we have a presumptive moral obligation to follow the law of a reasonably just society, it also makes a moral difference that precedent does not bind outside the judiciary. And

79. *See id.*

80. *See generally* Seth P. Waxman, Essay, *The Physics of Persuasion: Arguing the New Deal*, 88 GEO. L.J. 2399, 2399-40 (2000) (discussing the idea of constitutional physics).

81. Although generally accepted, the understanding that inferior courts deciding questions of federal law are bound by Supreme Court precedent is not universally accepted. The leading scholarly critic of this view is Michael Stokes Paulsen, who has argued that lower court judges are not bound by the Supreme Court's constitutional interpretations and should repudiate them when clearly erroneous. *See* Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIGION 33, 82-88 (1989). There are several strands to Paulsen's argument, and this symposium Article is not a fitting place to address them in full. One of Paulsen's key moves is to argue from the lower court judges' oath, which is to follow the Constitution, not the Supreme Court's interpretations of the Constitution. *See id.* at 82-83. Paulsen does not explain, though, why the displacement of *de novo* lower court interpretation by vertical *stare decisis* is impermissible while displacement by operation of some other rule of law, such as waiver or *res judicata*, remains permissible. In any event, if Professor Paulsen is right, it would still remain the case that Supreme Court precedents would not bind outside the judiciary.

this moral difference, in turn, can lead to any number of practical differences. A legislator who reasonably believes that the Supreme Court has incorrectly decided a question of constitutional law may be morally free to vote for legislation incompatible with Supreme Court case law, for example.

C. Putting the Pieces Together

We can now put together the pieces that have thus far been laid out to assemble the legal outlines of the world picked out by judicial departmentalism. The law of judgments, the law of remedies, and the law of precedent are three bodies of law that govern how judicial determinations give rise to a kind of binding law.⁸² Judicial departmentalism is the view that these three bodies of law provide the exclusive ways by which constitutional adjudication gives rise to binding constitutional law.

Put another way, a judicial determination can bind in three ways: as a judgment; as a remedy; and as a precedent. Judgments create obligations; their binding power is defined by the law of judgments or preclusion doctrine. Courts order remedies; their permissible scope is defined by the law of remedies. The decisions of appellate courts create precedents; their force is set by the law of precedent, or *stare decisis* doctrine. Judicial departmentalism holds that these are the only three ways that judicial determinations give rise to legally binding authority about the meaning of the Constitution.

Judicial supremacy claims there is another way, namely that the Supreme Court's opinions about the meaning of the Constitution are themselves binding law for everyone as of the moment of decision—as binding as the Constitution itself. These opinions are not only binding law from the moment they are made; they also remain so, undiminished, unless and until overturned. The purported binding force of judicial supremacy exceeds that of judicial departmentalism precisely insofar as it is not limited by the law of judgments, or the law of remedies, or the law of precedent.

82. See *supra* Parts II.A-B.

III. WHY AND HOW JUDICIAL DEPARTMENTALISM MATTERS

This Part explains how and why judicial departmentalism matters. Its arguments are aimed at the internal point of view of Supreme Court Justices considering how they should want the authoritativeness of their judicial determinations of constitutional law to be accepted by others. Appealing to this internal point of view, this Part argues for the comparative superiority of judicial departmentalism over judicial supremacy.

The case for judicial departmentalism proceeds in three steps. First, judicial departmentalism already is the law; it is rooted in the truth about what constitutional adjudication actually is in our legal system. Second, being self-aware about what constitutional adjudication actually is enables the Justices to do it better and more intelligently; judicial departmentalism focuses the Justices' attention on a range of important considerations that might otherwise receive insufficient attention. Third, conscious and explicit adoption of judicial departmentalism will not require significant changes to substantive doctrine.

A. Adjudication, Equilibration, and Implementation

By focusing on the peculiarly judicial manner in which constitutional adjudication gives rise to binding constitutional law of various types, judicial departmentalism highlights the distinctively judicial nature of the outputs of constitutional adjudication. One sense in which the outputs are distinctively judicial is that they bind within the judicial department, either by one's relationship to the judicial department as a party, or as the subject or object of a remedy.⁸³

There is also another, perhaps more important, sense in which the outputs of constitutional adjudication are distinctively judicial. That is the sense revealed by attending to the pervasive presence of factors related to judicial role in the identification and articulation of constitutional law in constitutional adjudication.

The content of constitutional law in constitutional adjudication is shaped throughout by the judicial setting in which it becomes

83. *See supra* Part II.

operative. It is sometimes analytically useful to distinguish justiciability determinations from merits determinations, and these two from remedial determinations, as phases of adjudication with particular doctrines governing each.⁸⁴ But the doctrines governing decisions in any one of these “phases” are formulated and developed with regard to the doctrines that govern in the other two.

The name coined by Professor Richard Fallon for the way these bodies of law develop interdependently is the Equilibration Thesis.⁸⁵ This is the idea that “courts, and especially the Supreme Court, decide cases by seeking what they regard as *an acceptable overall alignment* of doctrines involving justiciability, substantive rights, and available remedies.”⁸⁶ With an eye on the acceptability of the overall alignment of the doctrines in these three formally separate areas, courts formulate doctrine in a way that reveals substantial interdependencies among the categories. As Professor Fallon argues, “when the Court dislikes an outcome or pattern of outcomes, it will often be equally possible for the Justices to reformulate applicable justiciability doctrine, substantive doctrine, or remedial doctrine.”⁸⁷

If the Equilibration Thesis is correct that “justiciability, substantive, and remedial doctrines are substantially interconnected and that courts frequently face a choice about which doctrine to adjust in order to achieve acceptable results overall,”⁸⁸ then it seems odd to treat the meaning of the Constitution as equivalent with judicially formulated constitutional law. This is because the substantive constitutional law announced by the courts has been shaped by considerations related to justiciability and remedies.⁸⁹ A sense of what the courts deciding questions of constitutional law are for, and of how far they can go in ordering affairs such that government practice and constitutional meaning best align, informs these courts’ articulations of constitutional law.

This observation has special force for the Supreme Court. The Court’s expositions of constitutional law take place against a

84. See generally Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006).

85. *Id.* at 637.

86. *Id.* (emphasis added).

87. *Id.*

88. *Id.* at 683.

89. *Cf. id.* at 646-47.

backdrop understanding not only of the judicial role, but also of the distinctive role of the Supreme Court and the expected contribution of other courts to doctrinal elaboration. Thus situated, it makes sense to think of the Court's expositions of constitutional law as a kind of law designed for application by, and within, the judicial department—just as judicial departmentalism does.

Constitutional adjudication is not a stand-alone inquiry into the content of constitutional law, but an institutionally situated, distinctively judicial enterprise that unfolds over time. The constitutional law that emerges from constitutional adjudication shares these qualities: institutionally situated, distinctively judicial, and temporally impressed. And equilibration—by which judges attend to the overall alignment of justiciability, substantive, and remedial doctrines, rather than any of these considered in themselves—is just one component of what makes constitutional law distinctively judicial.

Another important aspect of what makes constitutional law distinctively judicial appears in the idea of constitutional implementation, as distinct from constitutional interpretation.⁹⁰ The distinction is real because judicial exposition of constitutional law includes not only inquiry into constitutional meaning (that is, interpretation), but also the fashioning of implementing doctrines to give legal effect to that constitutional meaning in judicial settings.⁹¹

Dormant Commerce Clause doctrine, for example, has different analytic tracks for discriminatory and nondiscriminatory legislation.⁹² Equal Protection Clause case law includes tiers of scrutiny, as (sometimes) does substantive due process case law, to pick some other easy examples.⁹³ These tracks and tiers are not, themselves, encoded into the Constitution, of course; they are used by judges as a means of giving effect to the Constitution with some level of stability, uniformity, and predictability.⁹⁴

90. See RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION*, at ix (2001) (focusing “attention on the role of Supreme Court Justices as practical lawyers, charged with implementing the Constitution” by “developing ... workable doctrinal structure[s]” that give legal effect to constitutional meaning but are not fully determined by it).

91. See *id.* at 41-42.

92. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

93. See FALLON, *supra* note 90, at 5-7.

94. See *id.*

When determining “what kinds of doctrinal protections are necessary, feasible, and appropriate,” the Justices not only appeal to legal authorities, but also “draw on psychology, sociology, and economics to craft doctrines that will work in practice, without excessive costs, and that will prove democratically acceptable.”⁹⁵ This includes making “practical, predictive, and sometimes tactical judgments.”⁹⁶ All of these inputs into our familiar doctrinal tests provide a “valuable window on the Court’s understanding of its own role, and of the limits of that role, within the constitutional scheme.”⁹⁷

In picking out equilibration and implementation as features of judicial expositions of constitutional law here, I do not offer full accounts of either concept. Instead, accepting them as accurate accounts of what constitutional adjudication involves, I point toward what acceptance of their truth should mean for one’s conception of the constitutional law that results. The pervasive effects of role considerations throughout the judicial practice of constitutional adjudication mean that judges engaged in that practice, especially, but not only, the Justices of the Supreme Court, do and should operate as judicial departmentalists.

To observe that constitutional adjudication as it takes place in the United States includes equilibration among justiciability, substance, and remedies, as well as implementation and interpretation, is not to untether external observation from how judges internally experience adjudication. To the contrary. The judicial role considerations that shape judicial exposition of constitutional law are not gauzy gestalt conceptions of what judges should do, but rather constellations of views cashed out in concrete choices over time regarding the full range of actual legal doctrines that define the federal judicial role. In and through application of doctrines like standing, ripeness, mootness, the political question doctrine, class certification requirements, statutory jurisdiction rules, court-made rules (such as Supreme Court Rule 10 which governs the grant of certiorari), procedural default rules, harmless error analysis, and so on, the Justices and all other judges engaged in constitutional adjudication

95. *Id.* at 77.

96. *Id.* at 111.

97. *Id.* at 76.

define the judicial role—and understand themselves to be doing precisely that.

By taking the next step and situating this self-understanding within the framework of judicial departmentalism, judges—especially the Justices of the Supreme Court—can adjudicate questions of constitutional law more intelligently. The main contribution made to constitutional adjudication by judges' conscious adoption of judicial departmentalism would be to align *ought* with *is*. Judges should be judicial departmentalists because the constitutional law formulated by the judicial department is a particular kind of law to be applied within the judicial department.

Suppose, though, that one finds this jurisprudential claim wrong or unpersuasive or uninteresting. There remain many practical benefits to the self-conscious adoption of judicial departmentalism, which are discussed in the next Part.

B. The Benefits of Self-Aware Judicial Departmentalism

The precise practical effects that self-conscious judicial departmentalism would have on constitutional law are impossible to identify with any detail. But there is good reason to believe that explicit adoption of judicial departmentalism could nevertheless have major beneficial effects on the development of constitutional doctrine going forward. That is because judicial departmentalism goes directly to the self-conception of the Justices as they inhabit their judicial role. That self-conception, in turn, influences the kinds of opinions they write and the kinds of settlements those opinions can, and cannot, accomplish.⁹⁸ To the extent that unstable settlements invite further litigation, judicial departmentalism points toward the use of the regular tools of legal settlement—judgments, remedies, and precedents—rather than a more insistent emphasis on obedience.

98. See LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 40 (2006).

1. Judicial Audience and the Dual Nature of Supreme Court Opinions

One direct effect of the Justices' adoption of judicial departmentalism would be on their opinion writing. Much of what they accomplish in constitutional adjudication is accomplished through writing. As anyone who writes for a living knows, the relationship between writer and audience matters a great deal to what is written, and how. Judges are no exception.⁹⁹ In particular, the writer's understanding of the kind of writing one is doing for one's audience influences both style and substance.¹⁰⁰

Judicial opinions have multiple audiences.¹⁰¹ A judicial departmentalist recognizes that the relationship between an appellate court and the others within the judicial department subject to its jurisdiction differs from the court's relationship to those outside the judicial department. This recognition, in turn, affects how the author of an appellate court opinion writes it.¹⁰²

For judicial opinions, many of these potential effects have been previously identified by Professor Thomas Merrill, who has described the probable differences in the "style of judicial decision making" under two different conceptions of judicial opinions: opinions as binding law versus opinions as explanations and aid to prediction.¹⁰³ Professor Merrill argues that a court that adopts the opinions-as-binding-law conception "will gravitate toward an authoritarian style of decision making" because "[a] judiciary that thinks its opinions are binding law is likely to be relatively indifferent to the views of the other branches about the meaning of the law."¹⁰⁴ By contrast, a court that adopts the opinions-as-explanations conception "will tend to view interpretation in more egalitarian terms" based on the recognition that "someone else may come along with a better or different explanation."¹⁰⁵

99. *See id.* at 46-47, 162-63.

100. *See id.* at 46-47.

101. *Id.* at 50.

102. *See id.* at 162-63.

103. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 75-78 (1993).

104. *Id.* at 75.

105. *Id.*

In further describing the differences that may flow from a change in the style of judicial decision-making, Professor Merrill notes Professor Robert Burt's claim that "a Supreme Court that sees itself as an authoritarian lawgiver is more likely to make major blunders that exacerbate social tensions and damage its own institutional reputation."¹⁰⁶ The Court's handling of slavery and abortion, as well as "the Court's pre-New Deal effort to outlaw redistributive social legislation," according to Professors Merrill and Burt, fit this description.¹⁰⁷ Professor Merrill speculates that a court that operates within an understanding of its opinions as explanations for judgments rather than binding law "may be more modest about [its] ability to coerce a solution to such intractable conflicts."¹⁰⁸

Another set of effects from adopting the opinions-as-explanations approach that Professor Merrill identifies relates to judicial perceptions of the importance of predictability. Professor Merrill explains that "[i]f the courts knew their decisions were viewed as only predictive of future judgments, their ability to exert influence over nonjudicial actors would depend on whether their future behavior was predictable."¹⁰⁹ This would then lead courts to "try to assure that their interpretations are ... perceived to be grounded in a faithful interpretation of enacted law using conventional tools of interpretation."¹¹⁰ Courts would not only "try to assure that judicial opinions are comprehensible," but they would also "be forced to adhere closely to their own past precedents."¹¹¹

106. *Id.* at 76 (citing ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 193 (1992)).

107. *Id.*

108. *Id.* at 76-77. Merrill also relies on James Bradley Thayer's claim that "an authoritarian style of legal interpretation may stultify the capacities of the politically accountable institutions to engage in interpretation." *Id.* at 77 (citing James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893)). As Richard Posner has argued, however, Thayer's claim rests on a seemingly unrealistic view of the legislative process. See Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 522 (2012). In any event, I place it aside because my focus here is on effects on judicial actors rather than nonjudicial actors.

109. Merrill, *supra* note 103, at 77.

110. *Id.*

111. *Id.* at 77-78. In formulating this last point, Merrill relies on Professor Henry Monaghan's observation that "if the Supreme Court does not take its own opinions seriously, eventually the rest of society will not either." *Id.* at 78 (citing Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979)).

A judicial departmentalist Justice would adopt a both/and approach to the two ways of understanding judicial opinions that Professor Merrill distinguishes. With respect to hierarchically inferior tribunals, opinions are binding law; with respect to everyone else, the opinions-as-explanations conception controls. The contrast should not be overdrawn, though. Even within the judicial department, judicial opinions would be understood as a particular *kind* of law, namely one that consists mostly of explanations and aids to prediction.

Although Supreme Court opinions would not be understood as binding law outside the judiciary, they would not be ignored. Instead, they would be understood as the Court's accounts for why the Justices did what they did, which in turn can help predict what they will do in the future. These opinions would possess the sociological stickiness that comes from widespread acceptance of whatever aspects of the opinion receive it, but no additional binding legal force. And the persuasive force of the Court's reasoning outside the judiciary would remain important to nonjudicial actors for the purposes of prediction and understanding. Those who anticipate having to operate within the judicial domain as a party or other participant would look to this doctrine for guidance, as would others with a particular interest in the development of doctrine more generally.

2. Bounded Legal Settlement

By marking the distinction between the binding authority of judicial expositions of constitutional law within the judicial department and their merely explanatory and predictive effects without, judicial departmentalism identifies the limits of one type of legal settlement—the kind that settles peremptorily. Parties may not be satisfied with the judgment in their case, but *res judicata* is *res judicata*. Those subject to an injunction may not wish to obey, but disobedience can be punished by contempt sanctions. Lower courts may disagree with Supreme Court doctrine, but they must work within it, like it or not.

“Like it or not” settlements are not the only kind that can result from legal determinations. Uneasy acquiescence, even in perceived error, can provide settlement of another sort. So, too, can actual

acceptance result as time reveals the inadequacy of alternatives once perceived as better.

Counterintuitive as it may initially appear, settlements of these other kinds can be more enduring than “it’s the law, like it or not” settlements. Judicial supremacy raises the stakes for Supreme Court decisions, magnifying the effects of five-to-four rulings, for example, and increasing pressure on the confirmation process for new Justices. When all it takes to change the law is to change the Justices, people who care about constitutional law will do all they can to affect those changes. And the settlements that result from Supreme Court decisions are only as lasting as the judicial coalitions that bring them about.

Judicial departmentalism counsels a broader mindset than one centered on the immediately and universally binding force of Supreme Court decisions across the nation that judicial supremacy claims. By foregrounding the limits of any particular legal settlement as within the judicial department, it focuses judicial attention on ways of ensuring stability over time for those kinds of settlements. Justices who know that settlements will only endure as long as the judicial department keeps providing the same answer, for example, are more likely to provide answers the first time that are likely to be appealing not solely to a bare majority of the current Court, but also to unknown future Justices. They are also more likely to explain the reasons for their opinions using methods of justification that merit respectful consideration of their conclusions as law even by those inclined to disagreement if considering the same issue as a matter of policy.

For better or for worse, the Supreme Court has substantial discretion to shape the particular questions for decision in a particular case before them. Concerned about the durability of their settlements in the system of bounded judicial supremacy marked out by judicial departmentalism, Supreme Court Justices might reasonably aim at other legal desiderata beyond short-term, maximum guidance. Consider the research finding that “opinions issued by broad coalitions will experience, on average, a lower incidence of negative treatment by subsequent courts.”¹¹² Armed with this

112. Stuart Minor Benjamin & Bruce A. Desmarais, *Standing the Test of Time: The Breadth of Majority Coalitions and the Fate of U.S. Supreme Court Precedents*, 4 J. LEGAL

knowledge, the Justices might reasonably prefer a unanimous decision settling some firm fundamentals in an area of the law while leaving a substantial amount to be worked out in the future by lower courts, over a vertically maximal, bare-majority decision that settles more questions but with less stability.¹¹³ Think, for instance, of the Supreme Court's unanimous decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* recognizing the "ministerial exception" for religious employers but leaving many of the contours of the doctrine to continue to be worked out by lower courts.¹¹⁴

3. Collapse into What?

These considerations about the bounded nature of legal settlements prompt reconsideration not only about the settlement argument for judicial supremacy, but also the argument based on the instability of alternatives. This is the collapse argument: failure to accept Supreme Court pronouncements of constitutional meaning as authority on par with the Constitution itself will just bring people into court; once brought into court, they will be brought into line; so judicial supremacy will result, but only after strife and expense; might as well have judicial supremacy from the get-go.¹¹⁵

Having considered the live possibility of judicial departmentalism as an alternative to judicial supremacy, however, the collapse argument appears in a different light. More specifically, judicial departmentalism provides a way for judges to operate effectively in a world in which judicial supremacy itself collapses. As discussed in more detail in the next Section, the Supreme Court has been most explicitly insistent on judicial supremacy in areas of constitutional law that have not shown significant stability over time.¹¹⁶ What stability there has been has come from judgments, remedies, and precedents, not from judicial supremacy. The judicial departmentalist would not be surprised at the practical inefficacy of claims of judicial supremacy. Although there is a sense that judicial say-so

ANALYSIS 445, 448 (2012).

113. *See id.* at 447.

114. 565 U.S. 171, 193, 196 (2012).

115. *Cf.* Alexander & Solum, *supra* note 6, at 1614-15.

116. *See infra* Part III.C.

makes it so in constitutional law, our legal system has doctrines defining boundaries around this say-so. The judicial departmentalist relies on those doctrines and does not reach further into claiming judicial supremacy. The law of judgments, the law of remedies, and the law of precedent are enough in every other area of the law. Why should constitutional law be any different?

Justices who know that their only tools for securing legal settlement through adjudication are judgments, remedies, and precedents are likely to judge in ways that lead to better judgments, better remedies, and better precedents. The truth of this claim is speculative, of course, and not susceptible of empirical demonstration. But it stands to reason that giving more careful consideration on the front end to the kinds of remedies and precedents that will result from one's judgments will lead to better judgments, precedents, and remedies.

The legal settlement tools of the judicial departmentalist may not seem as powerful as the blunt force of judicial supremacy. But for that very reason they are more widely accepted by others who operate from an internal point of view. And that should make judicial departmentalism attractive for the Justices, who should want to keep people playing the game that they referee. That is more likely when players know that a "blown call" can be overturned later rather than becoming the basis for a rule change.¹¹⁷

It is true that judicial departmentalism cedes constitutional turf that judicial supremacy seemingly allows the Justices to occupy. But the extent of their territory should not be the Justices' only, or even their primary, concern. They should also care, and care more, about how secure their legal control of it is. And that depends, in part, on the legitimacy of their claim to title.

The judicial supremacy that we have today has political foundations.¹¹⁸ The Justices should accordingly worry less that they will be

117. Cf. H.L.A. HART, *THE CONCEPT OF LAW* 141-44 (2d ed. 1994) (differentiating scoring errors from a rule of scorer's discretion).

118. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 4 (2007); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 512 (2002); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993). For a complementary account of the federal foundations of judicial supremacy, see Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Founda-*

allowed to occupy too little constitutional territory than that they will be induced to occupy too much. The forces that make legislative deferral and commitment-free position-taking attractive to political actors can cause those actors to foist on the judiciary matters that are not judicially resolvable in a way that appears more legal than political.¹¹⁹ Human nature being what it is, the Justices might not realize these gifts for what they really are. But the denizens of One First Street, Northeast, need to be more discerning than the citizens of Troy. These Trojan Horses do not spring open overnight. But over time, judicial supremacy will result more and more in supremacy that is less and less judicial.

That is a big problem ... at least for any Justice who worries about such things. And it should worry all of them. When judicial decisions lose their legal appearance, their acceptance as law is jeopardized. People may accept them out of habit or fear or indifference; or perhaps because they are judicial supremacists as a matter of political morality;¹²⁰ or maybe they just want to be on the right side of history. But all of that is different from accepting judicial decisions as expositions of law. That is the kind of acceptance that has traditionally justified treating the judicial resolution of a case as establishing some kind of going-forward law (whether through stare decisis, preclusion, or a remedy).¹²¹ The Justices either know or should know that they imperil that traditional justification at their own peril.

tion of Judicial Supremacy, 111 COLUM. L. REV. 1137 (2011).

119. See Graber, *supra* note 118, at 36-37.

120. See, e.g., WHITTINGTON, *supra* note 118, at 8-9.

121. See Charles B. Elliott, *The Legislatures and the Courts: The Power to Declare Statutes Unconstitutional*, 5 POL. SCI. Q. 224, 230-31 (1890), explaining this point of view:

Only a law-observing people will regard the decision of an action as equivalent to the repeal or enactment of a law. The American people were a constitutional people strongly imbued with the legal spirit.... They came from a race accustomed to settling difficulties on legal lines.... All questions of liberty and freedom have been argued as matters of law and not of expediency.... The people always felt that if the law could but be discovered, it must necessarily be sufficient for their protection. This legal spirit—this inborn habit of submission to law and the consequent respect for the courts—is essential to the success of a federal system of government; and when it exists, the prominence of the judiciary in the constitution is assured. The law courts become the pivots upon which the constitutional arrangements turn, and the judges become not only the guardians but the masters of the constitution.

In contrast with the political foundations of judicial supremacy, judicial departmentalism has jurisdictional foundations. One could take this one step further and point out that federal jurisdiction itself has political and structural foundations. But as Professor Tara Grove has argued, our system contains structural safeguards protecting federal jurisdiction from political attack.¹²² While the political foundations of judicial supremacy are themselves subject to collapse,¹²³ the jurisdictional foundations are more secure. What reason is there for a judiciary endowed with the jurisdictionally grounded tools of judicial departmentalism to accept the politically grounded power of judicial supremacy?

C. Revisiting Standard Supremacy Doctrine

We now return to where the case for both judicial supremacy and judicial departmentalism began—with the law. “Judicial supremacy is the law,” it has been said.¹²⁴ And nowhere is this more insistently urged than in connection with the Supreme Court’s desegregation decisions. *Cooper v. Aaron* is the standard citation for judicial supremacy as our law.¹²⁵

“And judicial supremacy is good law,” it has been further said.¹²⁶ What would we have done without judicial supremacy in a world in which state and local officials, as well as private persons in vast swaths of portions of the country, refused to accept *Brown v. Board of Education* as the law of the land? Do the Supreme Court’s desegregation decisions not show that judicial supremacy has to be the law?

Some version of these questions are the front line of defense for judicial supremacists when challenged by judicial departmentalists.¹²⁷ But in fact, the Supreme Court’s desegregation decisions

122. See Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 871 (2011).

123. See, e.g., WHITTINGTON, *supra* note 118, at 24 (noting that the Court is more vulnerable when a reconstructive President challenges its actions).

124. See *supra* Part I.A.

125. See 358 U.S. 1, 18 (1958); Michelman, *supra* note 12, at 600 (citing *Cooper v. Aaron* as the authority for the claim that the Supreme Court has the final say on the Constitution).

126. See generally Alexander & Schauer, *supra* note 1.

127. Indeed, one of the primary challenges raised by a leading law faculty member at my symposium presentation for this Article took precisely this form.

show the weakness of judicial supremacy in comparison with judicial departmentalism. Judicial supremacists have reflexive recourse to *Cooper v. Aaron* when challenged by judicial departmentalism. But what good did the Court's claim (overclaim, really) of judicial supremacy accomplish in *Cooper v. Aaron*?

In actuality, the Supreme Court's assertion of judicial supremacy was too little, too late—a sign of weakness more than anything else. An oft-ignored reason the case ended up at the Supreme Court was the Court's own prior failures to provide guidance about how to implement desegregation in elementary and secondary schools.¹²⁸

People often speak of *Brown v. Board of Education* as a transformative case, but when they do, they are usually thinking about *Brown I* rather than *Brown II*.¹²⁹ In *Brown I*, the Supreme Court deferred all the hard questions about actual remedies for desegregation.¹³⁰ And then in *Brown II*, the Court essentially delegated down to district courts to figure out what to do with the (in)famous guidance to proceed “with all deliberate speed.”¹³¹

When one looks closely at the situation in Little Rock after *Brown* and before *Cooper v. Aaron*, it is clear that the local school board in Little Rock and the federal district court dealing with it were both trying in good faith to desegregate the schools. Indeed, this comes through in the *Cooper* opinion itself.¹³² They were stymied from doing the right thing by state officials and others opposed to desegregation, of course, but they were also weakened by vague guidance from the Supreme Court.

If the problem is unclear guidance about what exactly *Brown* required, it certainly does very little help to simply continue to insist that *Brown* is the law of the land. Insisting on judicial supremacy compounds the problem rather than contributes to a solution.

128. Compare *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954) (failing to lay out any specific remedies for desegregation), with *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (requiring vaguely that schools desegregate “with all deliberate speed”), and *Cooper*, 358 U.S. at 7 (stating that the Little Rock School Board intended to comply with desegregation once the constitutional requirements were made clear).

129. See Denise Barnes, *Remembering Desegregation Landmark*, WASH. TIMES, May 18, 1994, at C14 (recognizing *Brown I* as the landmark decision that ended segregation in public schools).

130. See *Brown I*, 347 U.S. at 495.

131. *Brown II*, 349 U.S. at 301.

132. See *Cooper*, 358 U.S. at 8.

Contrast what the Court actually did with what the Justices would have done operating in a judicial departmentalist mindset. The Justices would have known that their power to bind was only as strong as their power to write clear precedents that supported decisive judgments and specific remedies. They would have known they could not rely on some unspecified power to just say what the law is. They would have seen the folly of thinking that *Brown I* and *Brown II* were sufficient to equip lower federal courts with the resources to hold recalcitrant officials' feet to the fire. And they would have faced up to the fact that this is precisely what was required: injunctions backed up by the coercive force of contempt sanctions. That is, after all, what our law provides for situations like this. And by the time *Cooper v. Aaron* arrived at the Supreme Court, Governor Faubus *was* personally bound by an injunction.¹³³ The Court's assertion of judicial supremacy was dictum, as the Court itself recognized in its opinion.¹³⁴

This dictum was not only gratuitous, but harmful. The Supreme Court's assertion of judicial supremacy in *Cooper v. Aaron* was just a paper proclamation after the fact, when the real work was done in Little Rock by boots on the ground before the decision. The Supreme Court asserted judicial supremacy in the summer of 1958 only after President Eisenhower had sent in the national guard at the beginning of the school year in fall 1957. The idea that courts alone can bring about social change through litigation is the "hollow hope" that the definitive study of this conceit features in its title.¹³⁵ And more widely, desegregation proceeded at a snail's pace through the late 1950s and into the early 1960s, picking up only after Congress and the Executive became invested.¹³⁶

To this day, it remains unclear exactly what *Brown v. Board of Education* actually required. Many schools remain racially segregated as a matter of fact, though not due to segregation as a matter

133. *See id.* at 12.

134. *See id.* at 17 ("What has been said, in the light of the facts developed, is enough to dispose of the case. However, we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case.").

135. *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008).

136. *Id.* at 70-71.

of law. And attempts to remedy this state of affairs have served to expose continuing rifts over what *Brown* actually meant.

Consider, for example, *Parents Involved in Community Schools v. Seattle School District No. 1*, decided by the Supreme Court more than half a century after *Brown*.¹³⁷ A five-to-four majority of the Supreme Court held unconstitutional, on the basis of *Brown* and subsequent cases requiring strict scrutiny for racial classifications, desegregation plans voluntarily adopted by school districts in Seattle and Louisville.¹³⁸ Writing for the Court, Chief Justice Roberts quoted the lawyers in *Brown* and asserted that “[t]he way to stop discriminating on the basis of race is to stop discriminating on the basis of race.”¹³⁹ Dissenting, Justice Stevens opened with the charge that the Chief Justice’s reliance on *Brown* was a “cruel irony,” and he concluded by expressing the “firm conviction” that no member of the Supreme Court when he joined it in 1975 would have joined with the Chief Justice’s opinion for the Court.¹⁴⁰

Most recently, the Supreme Court avoided a four-to-four deadlock on the issue of affirmative action in higher education only by Justice Kennedy’s execution of an about-face on the issue.¹⁴¹ Purporting to apply strict scrutiny, the Court upheld by a five-to-three vote an affirmative action program at the University of Texas that many observers reasonably thought was doomed under the Court’s more recent case law.¹⁴²

In addition to school desegregation, the other area of constitutional law in which the Supreme Court has been most insistent on judicial supremacy is abortion law. Almost two decades after *Roe v. Wade*, a plurality of the Court asserted in *Planned Parenthood of Southeastern Pennsylvania v. Casey* that *Roe* would remain the law of the land, even while the same plurality replaced the law of *Roe* with the law of *Casey*.¹⁴³ And over two decades after *Casey*, the Supreme Court still finds itself dealing with the constitutional law of abortion.

137. 551 U.S. 701 (2007).

138. *See id.* at 720-21.

139. *Id.* at 748.

140. *See id.* at 798, 803 (Stevens, J., dissenting).

141. Compare *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2204 (2016), with *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2414 (2013).

142. *See Fisher II*, 136 S. Ct. at 2210-15.

143. *See* 505 U.S. 833, 845-46, 860-61, 873 (1992).

Most recently, the Supreme Court by five-to-three vote held unconstitutional a Texas law regulating abortion facilities as ambulatory surgical centers and requiring abortion doctors to have admitting privileges at local hospitals.¹⁴⁴ Justice Breyer's opinion for the Court presented the decision as a straightforward application of the "undue burden" standard newly formulated by the Court twenty-four years earlier in *Casey*.¹⁴⁵ And some journalists and scholars described the case in the same terms.¹⁴⁶ But these presentations or descriptions work only by brushing under the rug the contradictions and complexities of the Court's post-*Casey* abortion jurisprudence. A clearer understanding of those can be gained by looking not at the opinions for the Court alone in those cases, but by looking at them in conjunction with the dissenting opinions and with the efforts of lower-court judges to apply the Court's shifting decisions.

The problems with the Supreme Court's abortion jurisprudence cannot all be laid at the feet of judicial supremacy, of course. And that is not the point of discussing this case law in conjunction with the Court's case law on race in education. The point, rather, is to highlight the poverty of judicial supremacy as a solution to the problem of constitutional disagreement. The Court most loudly insists on judicial supremacy in those areas of constitutional law where it speaks most confusingly. Like an American tourist abroad, it is as if the Court thinks that raising its voice is a substitute for speaking the language.

In other areas of its constitutional jurisprudence, by contrast, the Court recognizes a distinction between what the Constitution requires and what judicially developed doctrine has said that the Constitution requires. The most visible is qualified immunity jurisprudence. The doctrine of qualified immunity protects officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."¹⁴⁷ Official action that violates a constitutional right, accordingly, does not give rise to

144. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

145. See *id.* at 2309-18.

146. See, e.g., Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 *YALE L.J.* 1428, 1431-32 (2016).

147. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

damages liability unless the right was “clearly established.” The doctrine recognizes a gap between constitutional rights and that subset of constitutional rights that are “clearly established” in judicially elaborated doctrine. The Supreme Court has explained qualified immunity as a function of background common law principles in place when Congress enacted the statute, § 1983, that provides a cause of action for violations of federally guaranteed rights committed by individuals acting under color of state law.¹⁴⁸ Congress did not intend to abrogate those background protections from liability, says the Court.¹⁴⁹ This use of judicial doctrine interpreting the Constitution—as distinct from constitutional rights considered in themselves—can be understood as an example of judicial departmentalism in action.

One area of substantive constitutional law that would admittedly need to be revisited with a shift from judicial supremacy to judicial departmentalism is Congress’s enforcement authority under Section 5 of the Fourteenth Amendment. The Supreme Court’s current Section 5 doctrine rests upon an equation of Supreme Court doctrine implementing the Fourteenth Amendment with the Fourteenth Amendment itself.¹⁵⁰ The Court has not justified that equation by stand-alone reasoning specific to Section 5 but has instead relied on judicial supremacy.

In *City of Boerne v. Flores*, the Supreme Court held that Section 5 enforcement legislation must exhibit congruence and proportionality between the constitutional injury to be prevented or remedied, and the means adapted to that end—with Supreme Court doctrine providing the substantive standards for what counts as a constitutional violation.¹⁵¹ More specifically, the Court equated its prior decision in *Employment Division v. Smith* with the meaning of the Free Exercise Clause.¹⁵² That equation is a hallmark of judicial supremacy.

148. See, e.g., *Filarsky v. Delia*, 566 U.S. 377, 383-84, 387-89 (2012).

149. *Id.* at 389.

150. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

151. *Id.*

152. See *id.* at 534 (“The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.”).

In *Boerne*, the Court reasoned that Congress should not be permitted to arrogate enforcement authority to itself by using independent interpretive authority to determine what Section 1 of the Fourteenth Amendment requires and permits. The Court contrasted its “remedial” approach to Section 5 enforcement power with a “substantive” approach that would have enabled Congress itself to determine what counts as a constitutional violation.¹⁵³

The Court’s reasoning rests on a false dichotomy. As Professor Michael McConnell has argued, the Court’s forced choice between a “substantive” and a “remedial” understanding of Congress’s Section 5 power neglects an intermediate “interpretive” approach.¹⁵⁴ When evaluating the constitutionality of an exercise of Congress’s Section 5 power under this “interpretive” approach, the question for the Court would not be “whether Congress is enforcing the Fourteenth Amendment *as construed by the Court*, but whether it is enforcing a reasonable interpretation of the *Fourteenth Amendment*.”¹⁵⁵ Professor McConnell analogizes this type of interpretive authority to the range permitted by the *Chevron* doctrine.¹⁵⁶ Another analogy is the leeway that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires federal courts to provide when reviewing state court applications of Supreme Court doctrine in considering petitions for a writ of habeas corpus.¹⁵⁷

Notice how judicial departmentalism provides a framework for this “interpretive” approach. A judicial departmentalist approach could have underwritten an understanding of *Smith* as shaped by considerations of judicial role and concerns about judicial competence. A departmentalist Justice would have been open to the argument that *Smith*’s doctrinal implementation of the Free

153. *Id.* at 532 (“RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.”).

154. See Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 170-74 (1997).

155. *Id.* at 171.

156. *Id.* at 184 (“An analogy might be drawn to the *Chevron* doctrine, which holds that courts should not overturn agency interpretations of their governing statutes as long as they are within a reasonable range of interpretations of the statutory language. The underlying assumption is that the Constitution is designed to place outer bounds on government activity—not to impose a single ‘right answer’—and that ambiguities of language are a form of delegation to the body entrusted with the power to effectuate the law.” (footnotes omitted)).

157. See 28 U.S.C. § 2254(d) (2012).

Exercise Clause was just that—an implementation, rather than an interpretation—and very well could be an implementation that underenforces the best interpretation of the Free Exercise Clause.

The fit of Professor McConnell's interpretive approach and judicial departmentalism is a virtue for those who recognize both as constitutionally sound, as I do. But the interpretive approach is not embedded in current doctrine; the remedial approach resting on judicial supremacy is. That is not a knock-down argument against judicial departmentalism, but it is a doctrinal problem to be addressed.

Switching from the remedial approach to the interpretive approach is certainly not the only way to accommodate Section 5 doctrine with judicial departmentalism. Another possibility is to domesticate judicial supremacy's equation of doctrine and meaning to a home within the Section 5 context. While rejecting a general extension of the equation of constitutional law doctrine and the Constitution, the Court could limit Congress's Section 5 enforcement authority to the enforcement of the Fourteenth Amendment as construed by the Court, but only for reasons specific to the maintenance of separation of powers and federalism in the Section 5 context. Given how ill-fitting judicial supremacy is with the other doctrines defining the binding nature of judicial determinations, some domestication of Section 5's reliance to that doctrinal area would at least be legally appropriate.

CONCLUSION

Judicial supremacy exercises a distorting effect on all of constitutional law. But replacing judicial supremacy with judicial departmentalism would not require substantial change to substantive constitutional doctrine. The direct effects of removing judicial supremacy from constitutional law are limited to Section 5 doctrine. Yet the indirect effects of adopting judicial departmentalism would be substantial. How judges think about what they are doing when they decide questions of constitutional law matters to what they decide.

Judicial departmentalism counsels judges to think about what they are doing as resolving cases and controversies between parties while expounding constitutional law for application within the

judicial department. It counsels against equating what the Supreme Court says about the Constitution with the Constitution itself. Judges who follow this counsel will not be judicial supremacists—at least as that term is commonly understood now. But the supremacy their decisions command will be distinctively judicial. And that is just as it should be, both within and without the judicial department.