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ESSAY

JUDICIAL EXCLUSIVITY AND POLITICAL INSTABILITY

Neal Devins and Louis Fisher***

JUDICIAL supremacy is down but hardly out. Notwithstanding calls by interest groups that Congress "is now the court of last resort,"¹ the myth of judicial exclusivity nonetheless persists. The popular press treats United States Supreme Court rulings as definitive,² law school casebooks typically identify constitutional law as the work of the Court,³ and when a government official—make that Reagan Administration Attorney General Edwin Meese—argues that Supreme Court decisions are not "binding on all persons and parts of government,"⁴ editorialists and representatives of the *Washington Post*, *New York Times*, and American Bar Association are sent into a state of apoplexy.⁵ Among legal academics, however, it

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¹ W. John Moore, In Whose Court?, 23 Nat'l J. 2396, 2400 (1991).

² In a 1987 survey conducted by the Hearst Corporation and reported in the *Washington Post*, six out of ten respondents identified the Supreme Court as the "final authority on constitutional change." For the *Post*, those six were "correct[.]" Ruth Marcus, Constitution Confuses Most Americans: Public Ill-Informed on U.S. Blueprint, Wash. Post, Feb. 15, 1987, at A13. See also Joan Biskupic, The Shrinking Docket, Wash. Post, Mar. 18, 1996, at A15 (discussing the Supreme Court's shrinking docket and noting: "The importance of the Court, of course, is not in its numbers. It is in the Court having the last word. The justices are the final arbiter of what is in the Constitution.").

³ See Neal E. Devins, Correspondence: The Stuff of Constitutional Law, 77 Iowa L. Rev. 1795 (1992).

⁴ Edwin Meese III, The Law of the Constitution, 61 Tul. L. Rev. 979, 983 (1987).

⁵ Michael Kinsley, Meese's Stink Bomb, Wash. Post, Oct. 29, 1986, at A19; Anthony Lewis, Law or Power?, N.Y. Times, Oct. 27, 1986, at A23; Stuart Taylor Jr., Liberties Union Denounces Meese, N.Y. Times, Oct. 24, 1986, at A17 (quoting then-ABA president Eugene C. Thomas as saying that this disregard would "shake the foundations of our system").

is now commonplace to discuss constitutional law as something larger and more complex than merely court rulings.⁶ The degree to which some scholars now dismiss the Supreme Court as the exclusive source of constitutional law prompted Mike Paulsen recently to ask, somewhat plaintively: "Will nobody defend judicial supremacy anymore?"⁷

Fear not, Mike. Larry Alexander and Fred Schauer have heard your cry.⁸ In an analysis that is "neither empirical nor historical" (it cannot be), they derive judicial supremacy from "preconstitutional" norms.⁹ In particular, Alexander and Schauer believe that vesting in the Court the authority to interpret, with finality, the meaning of the Constitution contributes to political stability.¹⁰ Correspondingly, they claim that "an important—perhaps *the* important—function of law is its ability to settle authoritatively what is to be done."¹¹

Alexander and Schauer's argument is important, provocative, and unconvincing. To their credit, by grounding judicial supremacy on law's settlement function, they have reinvigorated the academic debate over democratic government's duty to obey Court edicts. Nevertheless, if stability is the problem, judicial exclusivity is not the answer. Their ahistorical analysis collides with everything we know about the Court as a political institution. In particular, Alexander and Schauer do not take into account how concentrating complete interpretive authority in the Court would create political instability and undermine the fragile foundation that supports and sustains ju-

⁶ See, e.g., Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (1988); Louis Fisher & Neal Devins, *Political Dynamics of Constitutional Law* (2d ed. 1996); Robert F. Nagel, *Judicial Power and American Character: Censoring Ourselves in an Anxious Age* (1994); Neal Devins, ed., *Elected Branch Influences in Constitutional Decisionmaking*, *Law & Contemp. Probs.*, Autumn 1993, at 1, 3-4; Barry Friedman, *Dialogue and Judicial Review*, 91 *Mich. L. Rev.* 577 (1993); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 *Va. L. Rev.* 1 (1996); Sanford Levinson, *Could Meese Be Right This Time?*, 61 *Tul. L. Rev.* 1071 (1987); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Geo. L.J.* 217 (1994); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 *Cardozo L. Rev.* 113 (1993); Robin West, *The Aspirational Constitution*, 88 *Nw. U. L. Rev.* 241 (1993).

⁷ Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 *Geo. L.J.* 385, 385 (1994).

⁸ Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *Harv. L. Rev.* 1359 (1997).

⁹ *Id.* at 1369.

¹⁰ *Id.* at 1375-77.

¹¹ *Id.* at 1377.

dicial power. Instead of suggesting that the judiciary can settle in any decisive way such contentious issues as abortion, affirmative action, federalism, privacy, race-based districting, and religious freedom, the record of the last two centuries points to a more modest and circumscribed role for the courts.¹² No doubt at various times in our history the Supreme Court has attempted a more ambitious agenda, but it has done so at great cost to itself and the nation.¹³

Perhaps we are being unfair. Alexander and Schauer “engage in direct normative inquiry,”¹⁴ considering democratic acceptance of what judicial supremacy “should” be.¹⁵ Yet, even if it was understood that the Court should have the last word on the Constitution’s meaning, judicial exclusivity would marginalize the Constitution by overwhelming the obligation to follow the Court’s constitutional judgments with the competing policy-driven “obligations” of government officials.¹⁶ In other words, absent the constraints imposed by social and political forces, the Court’s constitutional judgments will be less relevant and hence less stable. The tugs and pulls of politics therefore make the Constitution more relevant and more durable.

I. PRESERVING THE CONSTITUTION

Can the Constitution be preserved and honored without “a final interpretive authority for choosing among competing [constitutional] interpretations?”¹⁷ For modern-day defenders of judicial supremacy, such as Alexander and Schauer, this question is little more than rhetorical. Suggesting that the “settlement and coordination functions of law”¹⁸ are the Constitution’s “chief raison d’être,”¹⁹ judicial supremacy is heralded as the only way to protect “a single written constitution” from “shifting political fortunes.”²⁰ This conclusion, however,

¹² See *infra* Section II.A; notes 111-120 and accompanying text.

¹³ See *infra* notes 76-86, 101-104 and accompanying text.

¹⁴ Alexander & Schauer, *supra* note 8, at 1370.

¹⁵ *Id.* at 1369.

¹⁶ See *infra* Section II.B. Making matters worse, the Court might well attempt to demonstrate its last word status by purposefully distancing itself from populist sentiment through its decisions.

¹⁷ Alexander & Schauer, *supra* note 8, at 1381.

¹⁸ *Id.* at 1376.

¹⁹ *Id.* at 1381.

²⁰ *Id.* at 1376.

is not suggested in the text or structure of the Constitution, the framers' intent, historical development, or even Supreme Court declarations of its own status as the ultimate and final interpreter of the Constitution.²¹ Instead, the overriding value promoted by the framers was a system of checks and balances, with each branch asserting its own powers and protecting its own prerogatives.

Alexander and Schauer dodge this historical bullet by reminding us that their inquiry is "normative" and suggesting that, in any event, "[t]he present, and not the past, decides whether the past is relevant."²² For an essay on whether *a* constitution ought to have an authoritative interpreter, this bit of trickery might suffice. For an essay on "The Constitution of the United States," however, it is self-contradictory to argue that judicial supremacy is needed to defend the Constitution. Claiming a power for the Court that was never intended hardly preserves and defends the Constitution. Instead, this claim debases and threatens constitutional government.

The Constitution's text, its original intent, and intervening practice support a form of judicial review far more limited than that offered by Alexander and Schauer. Indeed, no specific language in the Constitution gives the Supreme Court the power to declare certain governmental conduct unconstitutional, let alone the exclusive authority to do so. Judicial review can be derived from some sections of the Constitution, but in almost every instance it is the power of federal courts to strike down state actions or to void congressional statutes that threaten judicial independence.²³ The debates that oc-

²¹ On Court declarations of its last word status, see *infra* text accompanying notes 58-75; see also Louis Fisher, *The Curious Belief in Judicial Supremacy*, 25 *Suffolk U. L. Rev.* 85 (1991) (discussing various Justices' interpretations of the Court's role).

²² Alexander & Schauer, *supra* note 8, at 1370.

²³ The specification that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby," U.S. Const. art. VI, makes clear that federal courts must review the actions of state governments. One might argue that congressional statutes not "in [p]ursuance" of the Constitution are subject to judicial nullification, but judicial review over the coequal branches represents a major aggrandizement and requires convincing evidence. Furthermore, in extending the judicial power to all cases "arising Under the Constitution," it was "generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature." 2 *The Records of the Federal Convention of 1787*, at 430 (Max Farrand ed., rev. ed. 1937) [hereinafter *Records*]. For example, cases of a "judiciary nature" would include congressional statutes that reduce the salaries of federal judges. However defined, the idea of cases of a "judiciary nature" is something far short of giving the Su-

current during state ratification conventions suggest that the framers believed judicial review of Congress was limited and the President had the power to independently interpret the Constitution.²⁴ Although there was some support for a broad conception of judicial review,²⁵ no one argued for judicial supremacy.²⁶

Early Court rulings confirm this understanding. From 1789 to 1803, several Justices wondered whether the power of judicial review would reach to congressional and presidential actions. They could not decide whether the power existed, whether it was vested in the Court, or under what conditions it might be invoked.²⁷

Certainly judicial supremacy would have been alien to the members of the First Congress. During the debate in 1789 on the President's removal power, James Madison saw no reason to defer to the judiciary on the constitutionality of what Congress was about to do.²⁸

preme Court ultimate control over the meaning of the Constitution. At the Virginia ratifying convention, for example, James Madison interpreted "arising under" to justify judicial review only against the states. 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 532 (Jonathan Elliot ed., 1968). Alexander Hamilton made the same point in Federalist No. 80. *The Federalist* No. 80, at 503 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). In addition, several delegates at the Philadelphia convention spoke in favor of judicial review when invoked against unconstitutional *state* laws. 2 *Records*, supra, at 92-93 (remarks by Gouverneur Morris and James Madison).

²⁴ See Paulsen, supra note 7, at 219-92; Frank H. Easterbrook, *Presidential Review*, 40 *Case W. Res. L. Rev.* 905, 921-22 (1990).

²⁵ See William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 *U. Pa. L. Rev.* 491 (1994).

²⁶ Sylvia Snowiss, *Judicial Review and the Law of the Constitution* 195-97 (1990).

²⁷ See *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (Chase, J.) (emphasizing that if the Supreme Court had such a power it should never be exercised "*but in a very clear case*"); see also comments in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J.) (stating that the authority of the court to declare a statute void is of a "delicate" nature and the Court will not use such power except in a "clear and urgent case"); *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (Chase, J.) (noting that while some circuits have decided the Supreme Court could declare an act unconstitutional, the Supreme Court itself has not so held). Moreover, when John Marshall provided the rationale for judicial review in *Marbury v. Madison*, it was through a chain of reasoning that presupposed presidential authority to interpret the Constitution. See Easterbrook, supra note 24, at 919-20.

²⁸ 1 *Annals of Congress* 500 (Joseph Gales ed., 1834). Yet in introducing the Bill of Rights in the House of Representatives, Madison predicted that once they were incorporated into the Constitution, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impene-trable bulwark against every assumption of power in the Legislative or Executive." *Id.* at 439.

While acknowledging that "the exposition of the laws and Constitution devolves upon the Judiciary," he begged to know on what ground "any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments?"²⁹

Early presidents also believed that each branch of government should act as an independent interpreter of the Constitution. George Washington's first veto was on constitutional grounds.³⁰ Thomas Jefferson, viewing the Alien and Sedition Acts (which criminalized speech critical of the government) as patently unconstitutional, used his pardon power to discharge "every person under punishment or prosecution under the sedition law."³¹ Andrew Jackson announced his own theory of coordinate construction in a message vetoing legislation to recharter the Bank of the United States.³² Since the Court had previously upheld the constitutionality of the Bank,³³ Jackson was under pressure to consider the matter as settled by precedent and judicial decision.³⁴ He disagreed: The Supreme Court's authority over Congress and the President would extend only to "such influence as the force of their reasoning may deserve."³⁵

Jackson's position has been followed by every other President. Abraham Lincoln, in repudiating *Dred Scott v. Sandford*,³⁶ argued that if government policy on "vital questions affecting the whole people is to be irrevocably fixed" by the Supreme Court, "the people will have ceased to be their own rulers."³⁷ Franklin Delano Roosevelt lashed out at the *Lochner* Court for taking the country back to the "horse and buggy" days.³⁸ Richard Nixon's campaign to undo

²⁹ *Id.* at 500.

³⁰ See Easterbrook, *supra* note 24, at 907.

³¹ Letter from Thomas Jefferson to Mrs. John Adams (July 22, 1804), in 11 *The Writings of Thomas Jefferson* 42, 43 (Andrew A. Lipscomb ed., 1905). See also Easterbrook, *supra* note 24, at 907 (noting that the effect of Jefferson's pardon was to nullify the statutes "as much as if the Supreme Court had held them unconstitutional").

³² 3 *A Compilation of the Messages and Papers of the Presidents* 1144-45 (James D. Richardson ed., 1897) [hereinafter *Compilation*].

³³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

³⁴ 3 *Compilation*, *supra* note 32, at 1144.

³⁵ *Id.* at 1145.

³⁶ 60 U.S. (19 How.) 393 (1857).

³⁷ 7 *Compilation*, *supra* note 32, at 3210.

³⁸ 4 *The Public Papers and Addresses of Franklin D. Roosevelt: The Court Disapproves*, 1935, at 209-10 (Samuel I. Rosenman ed., 1938) [hereinafter *Public Papers of*

Warren Court liberalism,³⁹ Ronald Reagan's attack on *Roe v. Wade*,⁴⁰ and Bill Clinton's embrace of efforts to "reverse" Court standards governing religious liberty⁴¹ also follow this pattern.

For its part, Congress has launched numerous challenges to the Court. In response to *Dred Scott*, Congress passed a bill prohibiting slavery in the territories.⁴² Disagreeing with the Court's 1918 ruling that the commerce power could not be used to regulate child labor,⁴³ Congress two decades later again based child labor legislation on the commerce clause.⁴⁴ Public accommodations protections contained in the 1964 Civil Rights Act similarly followed in the wake of a Supreme Court decision rejecting such protections.⁴⁵ More recently, lawmakers have challenged Court rulings on abortion, busing, flag burning, religious freedom, voting rights, and the legislative veto.⁴⁶

Judicial exclusivity, then, finds no support in Congressional and White House practices, in the debates surrounding the drafting and ratification of the Constitution, or in the Constitution itself. To the extent that language and tradition matter,⁴⁷ the argument for judicial supremacy is a nonstarter.

Alexander and Schauer, as well as others before them, have navigated this terrain, discounting the relevance of notoriously ambiguous texts and indications of intention which presuppose that the "intentions of long-dead people from a different social world should

Roosevelt].

³⁹ See Fisher & Devins, *supra* note 6, at 94-95, 247-48.

⁴⁰ 410 U.S. 113 (1973). See Fisher & Devins, *supra* note 6, at 184-94.

⁴¹ See Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 Pub. Papers 2000 (Nov. 16, 1993).

⁴² Act of June 19, 1862, c. 111, 12 Stat. 432 ("An Act to secure freedom to all Persons within the Territories of the United States").

⁴³ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

⁴⁴ This episode is recounted in Fisher & Devins, *supra* note 6, at 70-76.

⁴⁵ See *id.* at 87-94.

⁴⁶ See generally *id.* (discussing recent constitutional challenges before the Court).

⁴⁷ For an argument that language matters, see Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399 (1985). For the classic argument that tradition matters, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593-97 (1952) (Frankfurter, J., concurring); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 323-24 (1819) (contending that historical practices are relevant in determining the division of powers among the branches).

influence us."⁴⁸ When it comes to judicial exclusivity, however, the problem with "tak[ing] neither original intent nor intervening practice as authoritative"⁴⁹ is that there is not a scintilla of evidence supporting the Court's ultimate interpreter status.⁵⁰ Alexander and Schauer, for example, never explain how judicial exclusivity, a principle derived from "the nature of law" can trump, well, the supreme LAW of the land. Suggesting that "preconstitutional" norms and "meta-rules" are more important than the Constitution itself⁵¹ is, in the end, not enough to pull off the impossible feat of demonstrating fidelity to the Constitution by disregarding its basic command about the separation of powers.

II. PROMOTING POLITICAL STABILITY

There may be an element of unfairness in our efforts to link the Constitution's design with interpretive theories intended to make the Constitution the "supreme law of the land." We do not, for example, consider the central question which animates Alexander and Schauer's admittedly "normative inquiry," that is, "[w]hat . . . is law for?"⁵² Yet, even assuming—as they do—that law's principal function is to "settle [matters] authoritatively" and promote "stability,"⁵³ the argument for judicial supremacy falls short. Without the powers of purse and sword, "[t]he Court must take care to speak and act in ways that allow people to accept its decisions."⁵⁴ As such, rather than advance its institutional self-interest through claims of judicial supremacy, the Court understands its role in government

⁴⁸ Sanford Levinson, *Law as Literature*, 60 *Tex. L. Rev.* 373, 379 (1982). See also Alexander & Schauer, *supra* note 8, at 1370 (explaining "what in fact has the status of law, and what should have the status of law—can only be decided non-historically"). Moreover, as a matter of *realpolitik*, "non-deference is often good political strategy," and lawmakers and the President suffer "neither legally nor politically" for making "politically popular or otherwise attractive policy decisions . . . flatly inconsistent with established precedent." *Id.* at 1365-66.

⁴⁹ Alexander & Schauer, *supra* note 8, at 1370.

⁵⁰ Occasional claims by Supreme Court Justices that they speak the last word prove just the opposite; that is, the Court is extremely sensitive to social and political forces. See *infra* Part II.A.

⁵¹ Alexander & Schauer, *supra* note 8, at 1369, 1370.

⁵² *Id.* at 1370-71.

⁵³ *Id.* at 1371, 1376. Law actually has many different natures including flexibility, utility, and the service of human needs.

⁵⁴ *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992).

as limited. Correspondingly, even if Court decisions were viewed as final, elected officials would sublimate their "duty to obey the law" to allegedly overriding duties more consistent with their policy preferences. This marginalization of the Constitution is directly at odds with the settlement function of law. For the Constitution to truly operate as a stabilizing force, it must be relevant to the lives of democratic government and the American people. Judicial exclusivity cannot accomplish this task; rather, stability can only be achieved through a give-and-take process involving all of government as well as the people.

A. Settling Transcendent Values

The history of the Supreme Court has been a search for various techniques and methods that will permit the judiciary to limit and constrain its own power. Justices understand, either by instinct or experience, that the hazards are great when the Court attempts to settle political, social, and economic matters best left to the political process.⁵⁵ Despite occasional utterances from the Court that it is the "ultimate interpreter"⁵⁶ of the Constitution, Justices by necessity adhere to a philosophy that is much more modest, circumspect, and nuanced. Rather than settle transcendent values, Court decisions, at best, momentarily resolve the dispute immediately before the Court.

The strongest support for this proposition, ironically, comes from those cases in which the Court has defended its authority to bind government officials through its interpretation of the Constitution. *Marbury v. Madison*,⁵⁷ the supposed foundation of judicial supremacy,⁵⁸ nicely illustrates how political challenges to the Court's interpretive authority and claims of judicial supremacy are inextricably linked to each other. When *Marbury* was decided, the Supreme Court and its Chief Justice, John Marshall, were under attack. Court foe Thomas Jefferson had just been elected President and, at

⁵⁵ See *infra* notes 62, 78, 86, 94 and accompanying text.

⁵⁶ See *infra* notes 63-71.

⁵⁷ 5 U.S. (1 Cranch) 137 (1803).

⁵⁸ See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). *Marbury*, of course, did not rule that the Court's constitutional interpretations were final and definitive; instead, the Court simply declared that it had the power to invalidate unconstitutional Congressional action. 5 U.S. (1 Cranch) at 177-80.

his urging, Secretary of State James Madison openly challenged the Court's authority to subject executive officers to judicial orders.⁵⁹ Further complicating matters, were the Court to rule against the Jeffersonians, Marshall believed that his political enemies would push for his impeachment.⁶⁰ Unwilling to engage in a head-to-head confrontation with the Jeffersonians, the Court's supposed war cry in *Marbury*, that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"⁶¹ is window dressing for the Court's reasoning in ultimately ducking the *Marbury* dispute on jurisdictional grounds.⁶² As such, other than to assure that William Marbury did not get his job and to usher in a claim of judicial review debated ever since, *Marbury* settled very little, if anything.

On those few occasions when the Court does insist that it is the "last word" in interpreting the Constitution, such announcements must be understood within their political context. *Cooper v. Aaron*,⁶³ the decision that Alexander and Schauer embrace, exemplifies this practice. The Court's claim that federal court constitutional interpretations are "supreme"⁶⁴ was made in the face of massive Southern resistance to *Brown v. Board of Education*,⁶⁵ including Arkansas' enlistment of the National Guard to deny African-American school-

⁵⁹ Specifically, when William Marbury challenged Madison's failure to deliver him a judicial commission, Madison refused to present a defense, thereby forcing the Court to decide the case without the benefit of the executive's arguments. See Fisher & Devins, *supra* note 6, at 25-35.

⁶⁰ Marshall took the impeachment threat seriously, contending that it would be better for the elected branches to reverse a Court opinion by statute than to impeach Supreme Court Justices. See 3 Albert J. Beveridge, *The Life of John Marshall: Conflict and Construction, 1800-1815*, at 177 (1929) (citing letter from John Marshall, Chief Justice, to Samuel Chase, Associate Justice (Jan. 23, 1804)). Along these same lines, a modern day Court which regularly and unabashedly frustrated majoritarian preferences might find its members subject to the threat of impeachment.

⁶¹ 5 U.S. (1 Cranch) at 177.

⁶² As Chief Justice Warren Burger noted: "The [C]ourt could stand hard blows, but not ridicule, and the ale houses would rock with hilarious laughter" had Marshall issued a mandamus ignored by the Jefferson administration. Warren E. Burger, *The Doctrine of Judicial Review: Mr. Marshall, Mr. Jefferson, and Mr. Marbury*, in *Views from the Bench: The Judiciary and Constitutional Politics* 7, 14 (Mark W. Cannon and David M. O'Brien eds., 1985).

⁶³ 358 U.S. 1 (1958).

⁶⁴ 358 U.S. at 18. The best academic treatment of *Cooper* is Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. Ill. L. Rev. 387 (1982).

⁶⁵ 347 U.S. 483 (1954).

children access to Little Rock's Central High School.⁶⁶ *Planned Parenthood v. Casey*, which reaffirmed the "central holding" of *Roe v. Wade*, similarly underscores the Court's belief that "a surrender to political pressure" would result in "profound and unnecessary damage" to the Court.⁶⁷ The threat of resistance to its orders likewise animated invocations of judicial supremacy in *Baker v. Carr*,⁶⁸ *Powell v. McCormack*,⁶⁹ *United States v. Nixon*,⁷⁰ and *City of Boerne v. Flores*.⁷¹

The Supreme Court's practice of declaring itself the final word on the Constitution's meaning when it feels especially challenged by the other branches is anything but surprising. Invariably, the Court takes a bold stand because it fears that the political order will ignore its command. These sweeping declarations of power cloak institutional self-doubts, much as a gorilla pounds his chest

⁶⁶ See Fisher & Devins, *supra* note 6, at 242-56. Moreover, recognizing inherent limits on its power to compel Southern schools to comply with *Brown*, *Cooper* was the Court's only statement on school desegregation from 1955-64 (when Congress encouraged the Court to reenter the school desegregation fray through its enactment of the 1964 Civil Rights Act).

⁶⁷ 505 U.S. 833, 853, 867, 869 (1992). Refusing to bend to the stated desires of the presidents who appointed them and overrule *Roe* "under fire," Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter "call[ed] the contending sides of a national controversy to end their national division by accepting . . . the Court's interpretation of the Constitution." *Id.* at 867. The *Casey* plurality, however, validated political challenges to *Roe*'s rigid trimester standard by replacing it with a more deferential "undue burden" test. *Id.* at 873-79.

⁶⁸ 369 U.S. 186, 211 (1962). At oral arguments, counsel for Tennessee suggested that they might resist court-ordered reapportionment. Jack Wilson, Assistant Attorney General of Tennessee, advised the Court about the sovereign rights of his state. 56 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 656, 658-59, 666 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter Landmark Briefs].

⁶⁹ 395 U.S. 486, 549 (1969). In *Powell*, the House of Representatives signaled that it might resist a court order requiring it to seat Adam Clayton Powell. See Robert B. McKay, Comments on *Powell v. McCormack*, 17 UCLA L. Rev. 117, 125-29 nn.42-44 (1969).

⁷⁰ 418 U.S. 683, 705 (1974). During oral arguments, Nixon's attorney James St. Clair equivocated on Nixon's willingness to accept the Court's judgment on executive privilege as binding on the President. See 79 Landmark Briefs, *supra* note 68, at 861, 871-72, 879; Alexander & Schauer, *supra* note 8, at 1364 & nn.21-22.

⁷¹ 117 S. Ct. 2157 (1997). Invalidating congressional efforts to "overrule" *Employment Division v. Smith*, 494 U.S. 872 (1990), the *Boerne* Court told Congress that it "will treat its precedents with the respect due them" and that "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary." 117 S. Ct. at 2172, 2166.

and makes threatening noises to avoid a fight. Invocations of judicial supremacy, for example, often place few demands on the government (as in *Marbury*) or are linked with popular outcomes, as in *Cooper*, *Baker v. Carr*, *Nixon*, and *Casey*.⁷²

Lacking the power to appropriate funds or command the military,⁷³ the Court understands that it must act in a way that garners public acceptance.⁷⁴ In other words, as psychologists Tom Tyler and Gregory Mitchell observed, the Court seems to believe "that public acceptance of the Court's role as interpreter of the Constitution—that is, the public belief in the Court's institutional legitimacy—enhances public acceptance of controversial Court decisions."⁷⁵ This emphasis on public acceptance of the judiciary seems to be conclusive proof that Court decisionmaking cannot be divorced from a case's (sometimes explosive) social and political setting.

A more telling manifestation of how public opinion affects Court decisionmaking is evident when the Court reverses itself to conform its decisionmaking to social and political forces beating against it.⁷⁶

⁷² With respect to *Cooper*, although Arkansas Governor Orval Faubus' repudiation of *Brown* scored points with in-state voters, national public opinion favored President Eisenhower's decision to make *Cooper* a reality by sending federal troops into Little Rock. See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 78 (1991). Like *Cooper*, *Baker v. Carr* risked ill will with state officials in order to reach an outcome popular in the national political arena. "Of sixty-three leading metropolitan daily newspapers, thirty-eight favored the Court's disposition of the [*Baker*] case, ten opposed it, and the remainder expressed neutral or confused opinions." Richard C. Cortner, *The Apportionment Cases 144-47* (1970). With respect to *Nixon*, public opinion strongly supported the Court's authority to order the President to release the tapes. See Louis Harris, *President Should Obey Order to Give Up Tapes*, *The Harris Survey*, July 29, 1974. *Casey*, in upholding *Roe*, relied on an "undue burden" standard that matched public opinion. See Neal Devins, *Shaping Constitutional Values: Elected Government, the Supreme Court, and the Abortion Debate 73-74* (1996).

⁷³ Alexander & Schauer, *supra* note 8, at 1366 & n.34.

⁷⁴ See *Casey*, 505 U.S. at 965-66 (recognizing the connection between the Court's "legitimacy" and "people's acceptance").

⁷⁵ Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 *Duke L.J.* 703, 715 (1994).

⁷⁶ Recognizing the nexus between its authority and public acceptance, the Court is rarely out of step with prevailing mores. See, e.g., David Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 *Wis. L. Rev.* 790 (1973); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *J. Pub. L.* 279, 285 (1957); Richard Funston, *The Supreme Court and Critical Elections*, 69 *Am. Pol. Sci. Rev.* 795 (1975); Walter F. Murphy & Joseph Tanen-

Witness, for example, the collapse of the *Lochner* era under the weight of changing social conditions. Following Roosevelt's 1936 election victory in all but two states, the Court, embarrassed by populist attacks against the Justices, announced several decisions upholding New Deal programs.⁷⁷ In explaining this transformation, Justice Owen Roberts recognized the extraordinary importance of public opinion in undoing the *Lochner* era: "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy."⁷⁸

Social and political forces also played a defining role in the Court's reconsideration of decisions on sterilization and the eugenics movement,⁷⁹ state-mandated flag salutes,⁸⁰ the *Roe v. Wade* trimester standard,⁸¹ the death penalty,⁸² states' rights,⁸³ and much more.⁸⁴ It did not matter that some of these earlier decisions commanded an impressive majority of eight to one.⁸⁵ Without popular support, these decisions settled nothing. Justice Robert Jackson instructed us that "[t]he practical play of the forces of politics is such that judicial power has often delayed but never permanently defeated the persistent will of a substantial majority."⁸⁶ As such, for a Court that wants

haus, Publicity, Public Opinion, and the Court, 84 Nw. U. L. Rev. 985, 1023 (1990).

⁷⁷ On the role of the 1936 elections, see Michael Nelson, The President and the Court: Reinterpreting the Court-packing Episode of 1937, 103 Pol. Sci. Q. 267 (1988). On populist attacks, see Fisher, *supra* note 6, at 211. For an alternative explanation, see Barry Cushman, Rethinking the New Deal Court, 80 Va. L. Rev. 201 (1994).

⁷⁸ Owen J. Roberts, The Court and the Constitution: The Oliver Wendell Holmes Lectures, 1951, at 61 (1951).

⁷⁹ See Louis Fisher, Social Influences on Constitutional Law, 15 J. Pol. Sci. 7, 11-15 (1987).

⁸⁰ See David R. Manwaring, Render Unto Caesar: The Flag-Salute Controversy 154-60 (1962); H.N. Hirsch, The Enigma of Felix Frankfurter 152-53 (1981).

⁸¹ See Devins, *supra* note 72, at 56-77, 139-48.

⁸² See Fisher, *supra* note 6, at 75-76.

⁸³ See Mark Tushnet, Living in a Constitutional Moment?: *Lopez* and Constitutional Theory, 46 Case W. Res. L. Rev. 845 (1996).

⁸⁴ For a useful summary of instances where the Court overturned earlier precedent, see Michael J. Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68, app. (1991).

⁸⁵ See, e.g., *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (upholding mandatory flag salute), overruled by *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁸⁶ Robert H. Jackson, Maintaining Our Freedoms: The Role of the Judiciary, 19 Vital Speeches of the Day 759, 761 (1953).

to maximize its power and legitimacy, taking social and political forces into account is an act of necessity, not cowardice. Correspondingly, when the Court gives short shrift to populist values or concerns, its decisionmaking is unworkable and destabilizing.⁸⁷

The Supreme Court may be the ultimate interpreter in a particular case, but not in the larger social issues of which that case is a reflection. Indeed, it is difficult to locate in the more than two centuries of rulings from the Supreme Court a single decision that ever finally settled a transcendent question of constitutional law. When a decision fails to persuade or otherwise proves unworkable,⁸⁸ elected officials, interest groups, academic commentators, and the press will speak their minds and the Court, ultimately, will listen.⁸⁹

Even in decisions that are generally praised, such as *Brown*, the Court must calibrate its decisionmaking against the sentiments of the implementing community and the nation. In an effort to temper Southern hostility to its decision, the Court did not issue a remedy in the first *Brown* decision.⁹⁰ A similar tale is told by the Court's invocation of the so-called "passive virtues," that is, procedural and jurisdictional mechanisms that allow the Court to steer clear of politically explosive issues.⁹¹ For example, the Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it," not "formulate a rule of constitutional law broader than is

⁸⁷ This is not to say that Court decisions at odds with popular will are always destabilizing. Our point, instead, is that the Justices must be somewhat sensitive to social and political forces to avoid a destabilizing populist backlash or repudiation of the Court.

⁸⁸ The Court, for example, abandoned its decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), because it produced doctrinal confusion rather than created an intelligible principle for federalism. See Fisher & Devins, *supra* note 6, at 94-104.

⁸⁹ On the power of the press and academic commentators, see Lawrence C. Marshall, *Intellectual Feasts and Intellectual Responsibilities*, 84 Nw. U. L. Rev. 832, 842-50 (1990); Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 Yale L.J. 1537 (1996).

⁹⁰ See *Brown v. Board of Educ.*, 347 U.S. 483 (1954). More than a decade after *Brown*, a federal appellate court noted: "A national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. *The courts acting alone have failed.*" *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 847 (5th Cir. 1966), cert. denied, *East Baton Rouge Parish Sch. Bd. v. Davis*, 389 U.S. 840 (1967). For further discussion, see *infra* notes 124-129 and accompanying text.

⁹¹ See Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961).

required," nor "pass upon a constitutional question . . . if there is . . . some other ground," such as statutory construction, upon which to dispose of the case.⁹² This deliberate withholding of judicial power reflects the fact that courts lack ballot-box legitimacy and need to avoid costly collisions with the general public and other branches of government.⁹³

It is sometimes argued that courts operate on principle while the rest of government is satisfied with compromises.⁹⁴ This argument is sheer folly. A multimember Court, like government, gropes incrementally towards consensus and decision through compromise, expediency, and ad hoc actions. "No good society," as Alexander Bickel observed, "can be unprincipled; and no viable society can be principle-ridden."⁹⁵

Courts, like elected officials, cannot escape "[t]he great tides and currents which engulf" the rest of us.⁹⁶ Rather than definitively settling transcendent questions, courts must take account of social movements and public opinion.⁹⁷ When the judiciary strays outside and

⁹² *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (citations omitted).

⁹³ Correspondingly, the threshold tests of jurisdiction, justiciability, standing, mootness, ripeness, political questions, and prudential considerations are invoked regularly and deliberately to protect an unelected and unrepresentative judiciary. See Don B. Kates, Jr. & William T. Barker, *Mootness in Judicial Proceedings: Toward a Coherent Theory*, 62 Cal. L. Rev. 1385 (1974); David A. Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 Wis. L. Rev. 37 (1984); Gene R. Nichol, Jr., *Rethinking Standing*, 72 Cal. L. Rev. 68 (1984). A typical example of this strategy is the use of ripeness in 1955 to avoid deciding the constitutionality of a Virginia miscegenation statute. Coming on the heels of the desegregation case of 1954, the Court was concerned that striking down a law banning interracial marriages would confirm the imagined fears of critics of desegregation who warned that integrated schools would lead to "mongrelization" of the white race. Years later, after the principle of desegregation had been safely established and Congress and the President had forged strong bipartisan majorities to pass the Civil Rights Act of 1964, the Court was then politically positioned to strike down the Virginia statute. See *Loving v. Virginia*, 388 U.S. 1 (1967); *Naim v. Naim*, 350 U.S. 891 (1955).

⁹⁴ The classic statement of this position is Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 14-15 (1959). See also Earl Warren, *The Memoirs of Earl Warren* 6 (1977) (explaining that progress in politics "could be made and most often was made by compromising and taking half a loaf where a whole loaf could not be obtained. The opposite is true so far as the judicial process was concerned.").

⁹⁵ Bickel, *supra* note 91, at 49.

⁹⁶ Benjamin N. Cardozo, *The Nature of the Judicial Process* 168 (1921).

⁹⁷ A number of studies explain how courts generally stay within the political bounda-

opposes the policy of elected leaders, it does so at substantial risk. The Court maintains its strength by steering a course that fits within the permissible limits of public opinion. Correspondingly, "the Court's legitimacy—indeed, the Constitution's—must ultimately spring from public acceptance," for ours is a "political system ostensibly based on consent."⁹⁸

B. How Not to Marginalize the Constitution

"In urging officials to subjugate their constitutional judgments to those of the Supreme Court,"⁹⁹ Alexander and Schauer condemn the possible repudiation—by elected officials and the public—of Court decisions that operate outside of the societal mainstream. Under this account, courts should not bend to such lawless behavior; instead, elected officials ought to face up to their "obligation" to treat Supreme Court decisions as law. Accordingly, the current system, where courts take social and political forces into account, is seen as backward.

To say that the current system is, well, the current system does not answer Alexander and Schauer's admittedly normative inquiry. What if democratic government saw Supreme Court decisions as definitive statements of the Constitution's meaning? Would such a system, as Alexander and Schauer contend, "achieve a degree of settlement and stability" and "remove a series of transcendent questions from short-term majoritarian control?"¹⁰⁰

Of course not. A strict bifurcation—centering constitutional interpretation in the courts while allocating other policy decisions to nonjudicial actors—would put both sectors on widely divergent paths. Policymakers would believe the Constitution to be irrelevant, something to treat with indifference. Lawmakers would debate policy divorced from constitutional concerns. As a consequence, the Constitution would diminish in value and stature. If the Court viewed the Constitution as its exclusive domain, it would not moderate its

ries of their times. See *supra* notes 72, 76.

⁹⁸ Murphy & Tanenhaus, *supra* note 76, at 992. See also Tyler & Mitchell, *supra* note 75 (explaining that the public's acceptance of the Court's role as interpreter of the Constitution improves the chances of the public accepting the Court's controversial decisions).

⁹⁹ Alexander & Schauer, *supra* note 8, at 1382.

¹⁰⁰ *Id.* at 1380.

opinions to take account of social and political forces. The two sectors would come to speak different languages, with courts increasingly out of step with the political institutions. Judicial exclusivity creates disincentives for the courts to function within the governmental orbit and, as such, is destabilizing.

The failings of judicial exclusivity, we think, are best illustrated by *Dred Scott*,¹⁰¹ a heinous decision that demands disobedience. At the time the case was to be decided, the Court was sufficiently confident in its "high and independent character" that Justice John Catron advised President-elect James Buchanan that, in the matter of *Dred Scott*, the Court would "decide & settle a controversy which has so long and seriously agitated the country."¹⁰² Buchanan took the Court at its word: In his inaugural address, he assured the nation that the issue of slavery was before the Court and would be "speedily and finally settled."¹⁰³ The judicial settlement was certainly speedy but not final. Two days later, the Court issued *Dred Scott*, propelling the nation into a bloody civil war that left, out of a population of approximately 30 million, more than 500,000 dead and another 300,000 wounded.¹⁰⁴

Abraham Lincoln, through words and deeds, sought to countermand *Dred Scott*.¹⁰⁵ What if Lincoln, applying Alexander and Schauer's logic, treated the decision as definitive vis-à-vis the Constitution? The answer comes as a surprise: Lincoln, while having an "obligation to follow *Dred Scott* because of [the Supreme Court as] its source,"¹⁰⁶ could have repudiated the decision through actions directly at odds with it, say, his issuance of the Emancipation Proclamation. Court decisions, under Alexander and Schauer's view, are "overridable obligations"—legally binding but appropriately subject to civil disobedience in times of crisis.¹⁰⁷

¹⁰¹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

¹⁰² Letter from John Catron to James Buchanan (Feb. 19, 1857), in 10 *The Works of James Buchanan* 106 n.1 (John B. Moore ed., Antiquarian Press Ltd. 1960) (1908-11).

¹⁰³ 6 *Compilation*, supra note 32, at 2962.

¹⁰⁴ *The World Almanac and Book of Facts* 184, 380 (Robert Famighetti ed., 1997).

¹⁰⁵ For Lincoln, Court decisions were necessarily binding on the parties (*Dred Scott* and his "owner") but could not bind the elected government to judicially-imposed policymaking. 7 *Compilation*, supra note 32, at 3210.

¹⁰⁶ Alexander & Schauer, supra note 8, at 1382.

¹⁰⁷ *Id.*

Alexander and Schauer do not blink when making this argument. In language critical to their analysis, they answer "the challenge of *Dred Scott*":¹⁰⁸ "Given the inadvisability of designing a decision procedure around one case that might never be repeated, it is better to treat *Dred Scott* as aberrational, recognizing that officials can always override judicial interpretations if necessary, especially if they are willing to suffer the political consequences."¹⁰⁹

Try as they might, it will not do to treat *Dred Scott* as aberrational. The Supreme Court regularly confronts divisive, emotional issues, issues where lawmakers and the public may well find "overriding values" that warrant civil disobedience.¹¹⁰ Moreover, if policymakers treat Supreme Court rulings as final, some outlet will have to be found for expressing discontent with the consequences of disfavored Court rulings. In particular, knowing that they cannot engage in constitutional dialogues which challenge the underlying correctness of Court decisionmaking, policymakers may well engage in civil disobedience, especially when the voting public disapproves of the Court. Rather than "aberrations," such challenges may become an important part of public life.

Consider, for example, the willingness of democratic institutions to resist Court rulings on abortion, affirmative action, busing, child labor, the death penalty, flag burning, gay marriage, the legislative veto, school prayer, voting rights, and religious liberty.¹¹¹ Today, these challenges take place in the framework of give-and-take dialogues among the Court, elected officials, and the public. Were judicial supremacy to rule the day, however, some or all of these challenges might become "occasions for disobedience."¹¹² Indeed, when Supreme Court decisions on the minimum wage,¹¹³ abortion,¹¹⁴

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1383. In a provocative response to Alexander & Schauer, Emily Sherwin suggests that the Court ought to have the last word on all questions of constitutional interpretation, including slavery. See Emily Sherwin, *Ducking Dred Scott: A Response to Alexander and Schauer*, 15 *Const. Commentary* (forthcoming Spring 1998) (on file with the Virginia Law Review Association).

¹¹⁰ See *supra* note 46 and accompanying text; *infra* notes 111-115 and accompanying text.

¹¹¹ Several of these episodes are discussed in Fisher & Devins, *supra* note 6.

¹¹² Alexander & Schauer, *supra* note 8, at 1382.

¹¹³ See 4 *Public Papers of Roosevelt*, *supra* note 38, at 205.

¹¹⁴ See Ronald Reagan, *Abortion and the Conscience of the Nation* 15, 19-21

and religious liberty¹¹⁵ already have been analogized to *Dred Scott*, there is good reason to think that such challenges will, in fact, take place. Whether or not they succeed, it is difficult to see how judicial exclusivity would either promote stability or nullify majoritarian control of transcendent questions.

Even if *Dred Scott* is truly aberrational, judicial exclusivity is likely to marginalize the Court and, with it, the Constitution. Democratic institutions will only take the Constitution seriously if they have some sense of stake in it. Alexander and Schauer do not disagree; for them, a virtue of judicial exclusivity is that political discussion "might be richer precisely for its lack of reliance on ritualistic incantations of constitutional provisions."¹¹⁶ Yet, by fencing out politicized constitutional discourse, the Court's educative function will be severely limited as will the enduring values of the Constitution itself.¹¹⁷

Alexander and Schauer are hardly troubled by this state of affairs. If anything, they think policymakers ought to steer clear of all matters touched upon in Supreme Court rulings. In order to "generate[] a single conception of what the Constitution require[s],"¹¹⁸ for example, they would encourage lawmakers *not* to expand constitutional protections beyond the floor set by the Supreme Court.¹¹⁹ By this interpretation, Alexander and Schauer would then disapprove of legislation authorizing disparate impact proofs in voting rights and employment discrimination legislation; legislation and regulation authorizing the assignment of women to combat aircraft; legislation

(1984); see also Justice Scalia's dissent in *Casey*, 505 U.S. at 984 (Scalia, J. dissenting) (equating the Supreme Court's reaffirmation of abortion rights with *Dred Scott*).

¹¹⁵ See The Religious Freedom Restoration Act: Hearings on S. 2969 Before the Senate Comm. on the Judiciary, 102d Cong. 42 (1993) (statement of Oliver S. Thomas, General Counsel, Baptist Joint Committee on Public Affairs).

¹¹⁶ Alexander & Schauer, *supra* note 8, at 1385.

¹¹⁷ "At its best," the Supreme Court produces "reasoned opinions that justify its claim to be the resident philosopher of the American constitutional system." Richard Funston, A Vital National Seminar: The Supreme Court in American Political Life 217 (1978). See also Christopher L. Eisgruber, Is the Supreme Court an Educative Institution?, 67 N.Y.U. L. Rev. 961 (1992) (asserting that the Supreme Court sometimes uses its educative function to offer "lessons" to inspire citizens); Eugene V. Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193, 208 (1952) (describing Court's role in the discussion of problems, declaration of principles, and as an educational body).

¹¹⁸ Alexander & Schauer, *supra* note 8, at 1385.

¹¹⁹ See *id.*

and regulation allowing federal employees, including members of the armed services, to wear an item of religious apparel on their clothing; and other initiatives launched by democratic government in the face of Supreme Court decisions limiting individual rights.¹²⁰

By stifling public discourse in this way, the Constitution becomes less relevant. Constitutional arguments will no longer be used as a roadblock to stymie progressive reforms or, alternatively, to expand constitutional protections beyond the "floor" set by the Supreme Court. While Alexander and Schauer do not foreclose policymaking on matters that implicate constitutional values, elected officials are discouraged from doing so and, when they do, they are forbidden from discussing those fundamental values that underlie the Constitution and, with it, the United States itself. The virtues of "settlement for settlement's sake"¹²¹ pale in relation to these costs.

These costs are particularly acute in two categories of cases that are outside the radar of judicial supremacy proponents. One involves underenforced constitutional norms, that is, matters that for one reason or another are not likely to make their way into court.¹²² Here, it is left to democratic government to define the Constitution's meaning. Yet, if elected government is discouraged from thinking about the Constitution, it is unlikely that these matters will receive serious treatment, if any at all.¹²³

¹²⁰ See Fisher & Devins, *supra* note 6, at 256-88 (discussing employment and voting), *id.* at 305-16 (discussing women in the military); see also 10 U.S.C. § 774 (1994) (addressing religious apparel in military); Peter Baker, Workplace Religion Policy Due, *Wash. Post*, Aug. 14, 1997, at A1 (describing executive guidelines protecting religious expression in the federal workplace).

¹²¹ Alexander & Schauer, *supra* note 8, at 1385.

¹²² The best treatment of this topic is Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *Harv. L. Rev.* 1212 (1978). Examples of underenforced constitutional norms include the veto, the pocket veto, recess appointments, the incompatibility clause, war powers, and covert operations, discussed in Louis Fisher, *Separation of Powers: Interpretation Outside the Courts*, 18 *Pepp. L. Rev.* 57 (1990) (arguing that many separation of powers disputes are settled not in the courts, but through trade-offs and compromises between the President and Congress). See also William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *Colum. L. Rev.* 782, 885 (1995) (describing the property rights movement as illustrative of how political branches give serious treatment to underenforced constitutional norms).

¹²³ Alexander and Schauer are wrong in presuming that the political branches *never* give serious treatment to these matters. See Mark V. Tushnet, *The Hardest Question in Constitutional Law*, 81 *Minn. L. Rev.* 1 (1996) (discussing legislative consideration

The second category involves instances in which the Court sees itself as a partner with government in shaping constitutional values. As a way of minimizing error, miscalculation, and needless conflicts with society and coequal branches, the Court sometimes enlists the help of elected government.¹²⁴ School desegregation is a particularly telling example of this practice. More than a decade after *Brown*, the percentage of African-American children in all-black schools in the South stood at ninety-eight percent.¹²⁵ Through the 1964 Civil Rights Act and other federal initiatives, however, this figure had dropped to twenty-five percent in 1968.¹²⁶ More significant, with the President, congressional leadership, and the public committed to undoing Jim Crow laws, the Court was emboldened to attack discrimination and segregation "root and branch."¹²⁷

Herein lies the real danger of judicial exclusivity. In rejecting such constitutional decisionmaking by other branches, judicial exclusivity does little to promote stability. It encourages acrimony, not cooperation. Democratic government, rather than engage the Court in a constitutional dialogue, will give short shrift to the Court and the Constitution. For its part, the Court will neither enlist democratic government's help nor look to public opinion as a measure of its legitimacy. No longer constrained by its responsibilities as educator (Why educate if populist constitutional discourse is not a public good?) and certain of its status as final constitutional arbiter, the Court will see little value in calibrating its decisions against

of the "emoluments clause," a constitutional provision unlikely to be considered by the federal courts).

¹²⁴ The Court and Congress have acted jointly on many constitutional issues. See Fisher, *supra* note 6, at 247-51. An early example is Congress' response to the 1890 Supreme Court ruling in *Leisy v. Hardin*, 135 U.S. 100 (1890). In *Leisy*, the Supreme Court ruled that a state's prohibition of intoxicating liquors could not be applied to "original packages" or kegs, but qualified its opinion by saying that states could not exclude incoming articles "without congressional permission." *Id.* at 124-25. Congress quickly overturned the decision by allowing states, through their police powers, to regulate incoming liquor "in original packages or otherwise." Original Packages Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (1994)). A more recent example is Congress's prohibition of newspaper searches, 42 U.S.C. § 2000aa, in the wake of *Zurcher v. Stanford Daily*, a decision upholding such searches but inviting legislative efforts to protect "against possible abuses." 436 U.S. 547, 567 (1978). For further discussion, see Fisher & Devins, *supra* note 6, at 3.

¹²⁵ Gary Orfield, *Public School Desegregation in the United States, 1968-1980*, at 5 (1983).

¹²⁶ *Id.*

¹²⁷ *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968).

social and political forces.¹²⁸ Indeed, any such calibration would implicitly reject a decisionmaking model that equates stability with supremacy.

Pragmatism and statesmanship must temper abstract legal analysis. De Toqueville recognized in the 1830s that the judicial power "is enormous, but it is the power of public opinion. [Judges] are all-powerful as long as the people respect the law; but they would be impotent against popular neglect or contempt of the law."¹²⁹ Arguments to the contrary, that judicial exclusivity will have a stabilizing effect, won't do. To be stabilizing, court decisions must command respect and be generally acceptable and understandable.

C. Continuing Colloquies

Law, as Morris Raphael Cohen wrote in 1933, is anything but a "closed, independent system having nothing to do with economic, political, social, or philosophical science."¹³⁰ As this study reveals, courts cannot be separated from the social and political influences that permeate all aspects of constitutional decisionmaking. The question of whether three-branch interpretation is qualitatively better than judicial supremacy, however, remains. Alexander and Schauer consider this question irrelevant to their analysis. Focusing on the stabilizing and coordinating functions of law, they embrace judicial finality as the best and only means available to save the Constitution from "interpretive anarchy."¹³¹ We, of course, disagree with this claim. Perhaps more fundamentally, we think that the dialogue that takes place between the Court, elected government, and the American people is as constructive as it is inevitable and therefore more stable.

Constitutional decisionmaking is not well served by making challenges to Supreme Court decisions "more difficult," if not "futile."¹³² Complex social policy issues, especially those that implicate constitutional values, are best resolved through "the sweaty intimacy of

¹²⁸ On this point, see Eisgruber, *supra* note 117, at 1014-21.

¹²⁹ 1 Alexis de Tocqueville, *Democracy in America* 151 (Phillips Bradley ed., 1945).

¹³⁰ Morris R. Cohen, *Law and the Social Order: Essays in Legal Philosophy* 380-81 n.86 (1933).

¹³¹ Alexander & Schauer, *supra* note 8, at 1379.

¹³² *Id.* at 1386.

creatures locked in combat."¹³³ Judges and politicians sometimes react differently to social and political forces. Congress, for example, focuses its "energy mostly on the claims of large populous interests, or on the claims of the wealthy and the powerful, since that tends to be the best route to re-election."¹³⁴ Courts, in contrast, are less affected by these pressures, for judges possess life tenure.¹³⁵ Accordingly, because special interest group pressures affect courts and elected officials in different ways, a full-ranging consideration of the costs and benefits of different policy outcomes is best accomplished by a government-wide decisionmaking process. For this reason, courts and elected officials should both be activists in shaping constitutional values.

No doubt, this politicization of constitutional discourse will contribute to partisan, value-laden constitutional analysis.¹³⁶ Nevertheless, complex social policy issues are ill-suited to the winner-take-all nature of litigation. Emotionally charged and highly divisive issues are best resolved through political compromises that yield middle-ground solutions, rather than through an absolutist, and often rigid, judicial pronouncement.

Judicial supremacy yields unworkable solutions, not a more equitable world. "[G]overnment by lawsuit," as Justice Robert Jackson warned, "leads to a final decision guided by the learning and limited by the understanding of a single profession—the law."¹³⁷ Alexander Bickel puts the matter more directly—"doubt[ing] . . . the Court's capacity to develop 'durable principles'" and therefore doubting "that judicial supremacy can work and is tolerable."¹³⁸

Political realities and constitutional values require the judiciary to share with other political institutions and society at large the

¹³³ Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 261 (1962).

¹³⁴ Steven G. Calabresi, *Thayer's Clear Mistake*, 88 Nw. U. L. Rev. 269, 273 (1993).

¹³⁵ See *id.* As to what judges maximize, see Richard A. Posner, *What Do Judges and Justices Maximize?: (The Same Thing Everybody Else Does)*, 3 Sup. Ct. Econ. Rev. 1 (1993).

¹³⁶ See generally Louis Michael Seidman & Mark V. Tushnet, *Remnants of Belief: Contemporary Constitutional Issues* (1996) (discussing the effect of political influences on constitutional debates).

¹³⁷ Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics* 291 (1941).

¹³⁸ Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 99 (1970).

complex task of interpreting the Constitution. Constitutions do not govern by text alone or solely by judicial interpretation. They draw their life from forces outside the courts: from ideas, customs, society, and statutes. Through this rich and dynamic political process, the Constitution is regularly adapted to seek a harmony between legal principles and the needs of a changing society. Bickel described the courts as engaged in a "continuing colloquy with the political institutions and with society at large," a process through which constitutional principle has "evolved conversationally not perfected unilaterally."¹³⁹

III. CONCLUSION

The chief alternative to judicial exclusivity is not "interpretive anarchy,"¹⁴⁰ with each public official at every level of government making independent judgments of the Constitution. Nor is there any evidence that the main purpose of the Constitution was to vest a final interpretive authority in a single branch. The overriding value of the framers was a system of checks and balances that is antithetical to vesting in any branch a monopoly on constitutional values. The result, from the start, was "coordinate construction,"¹⁴¹ with each branch capable of and willing to make independent constitutional interpretations. That system has endured for more than two centuries without deteriorating into interpretive anarchy.

No single institution, including the judiciary, has the final word on constitutional questions. It is this process of give and take and mutual respect that permits the unelected Court to function in a democratic society. By agreeing to an open exchange among the branches, all three institutions are able to expose weaknesses, hold excesses in check, and gradually forge a consensus on constitutional values. By participating in this process, the public has an opportunity to add legitimacy, vitality, and meaning to what might otherwise be an alien and short-lived document. Therein lies true stability.

¹³⁹ Bickel, *supra* note 133, at 240, 244.

¹⁴⁰ Alexander & Schauer, *supra* note 8, at 1379.

¹⁴¹ See Fisher, *supra* note 6, at 231.