

LINKING THE QUESTIONS: JUDICIAL SUPREMACY AS A MATTER OF CONSTITUTIONAL INTERPRETATION

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ABSTRACT

This Article explains that what has been missing from the debate between advocates of popular constitutionalism and defenders of judicial supremacy is any account of the practice of constitutional interpretation. Without a clear sense of what constitutional interpretation involves, one cannot assess the prevailing assumption that the Supreme Court is uniquely positioned to interpret the Constitution or explore an expertise-based justification for its claim to finality. This Article, therefore, revisits the debate about judicial supremacy by starting, not with history or politics, but with constitutional interpretation itself.

Having explored the conventions of argument that constitute the practice of constitutional interpretation, this Article concludes that the Supreme Court can claim expertise with respect to determining constitutional meaning, but that its expertise has limits. It proceeds to explore whether and how this insight might be translated into limits to judicial supremacy. Toward that end, this Article develops a framework for assessing when the work of constitutional interpretation should be shared between the Supreme Court, the other branches of government, and the public itself. Finally, it uses the Court's doctrine with respect to race-conscious legislative districting to illustrate how the proposed framework might work.

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INTRODUCTION

Two questions lie at the heart of constitutional theory: How do we determine what the Constitution means? And who should decide?¹ This Article argues that these two questions are linked. The question of who should be given final authority to decide what the Constitution means critically depends on *what* is required to determine constitutional meaning. Normative limits to the Supreme Court's claim to a monopoly over constitutional meaning lie, if anywhere, in limits to its expertise with respect to constitutional interpretation, should they exist.

Today, most people take it for granted that the Supreme Court is in the best position to interpret the Constitution and thus is entitled to do so for all of us. But that consensus has not always existed in the United States, and, in recent years, a number of prominent constitutional scholars have challenged us to reexamine this assumption.² These scholars have reopened the debate about *who* should decide what the Constitution means.

1. Stephen M. Griffin, *The Age of Marbury: Judicial Review in a Democracy of Rights*, in *ARGUING MARBURY V. MADISON* 104, 105 (Mark Tushnet ed., 2005) (noting the centrality of these two questions to the field even as debates have raged as to which deserves primacy).

2. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (demonstrating that during the founding and for much of American history judicial supremacy was rejected); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 33 (1999) (arguing that "people acting outside the courts can ignore what the courts say about the Constitution, as long as they are pursuing reasonable interpretations of the *thin* Constitution") (emphasis added).

The popular constitutionalism literature has been as rigorous as it has been provocative.³ Yet, it has largely failed to generate a widespread shift in attitudes about judicial supremacy.⁴ For instance, neither President Obama nor his administration has asserted that the Executive (or Congress) is entitled to determine independently the First Amendment's constraints on corporate political spending, or that they will continue to refuse to enforce the Defense of Marriage Act ("DOMA") should the Court find it constitutional.⁵ In fact, these scholars tend to be disheartened about whether American citizens are likely to reassert "their right . . . as republican citizens to say finally what the Constitution means."⁶

In the legal academy, the popular constitutionalism literature has been much criticized, occasionally even disparaged.⁷ Many see nothing to fear

3. The literature on popular constitutionalism is discussed at length in Part I. For now, popular constitutionalism defines "a space within which the people" (typically understood in their represented form) "deliberate about the meaning of the Constitution and how its commitments guide and bind them in democratic self-government as well as their agents in governmental office." James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 *FORDHAM L. REV.* 1377, 1391 (2005).

4. This was recently made apparent in the public reaction to Newt Gingrich's overblown challenge to judicial supremacy. See, e.g., Adam Liptak, *Among Legal Ranks, Shrugs for Gingrich's Tough Talk*, *N.Y. TIMES*, Dec. 20, 2011, at A24 ("The American legal establishment is not sure what to make of Newt Gingrich's mounting attacks on the independence of the federal judiciary. Reactions vary from amusement to alarm. What is hard to find is approval."); see also Scott Brown, *Gingrich Off Base on the Judiciary*, *BOSTON GLOBE*, Jan. 4, 2012, available at http://articles.boston.com/2012-01-04/opinion/30584432_1_judges-court-system-judiciary.

5. President Obama did cause controversy when he publicly criticized the Court's campaign finance decision, *Citizens United v. FEC*, 130 S. Ct. 876 (2010), which held that corporations are persons with First Amendment rights to express their views on political candidates. See Noah Feldman, *Imagining a Liberal Court*, *N.Y. TIMES MAG.*, June 27, 2010, at MM38, MM42. Obama's State of the Union address was likely informed by his familiarity with this scholarship through his ties to the law schools at Harvard and the University of Chicago. Cf. Jeffrey Toobin, *Bench Press: Are Obama's Judges Really Liberals?*, *NEW YORKER* 43, 47-48 (Sept. 21, 2009), available at http://www.newyorker.com/reporting/2009/09/21/090921fa_fact_toobin (tying President Obama's skepticism about relying on public interest litigation to effect social change to the turn toward democratic constitutionalism, with its belief that "judges don't own the Constitution," in progressive legal academic circles). The Department of Justice's changed stance on DOMA was arguably another gesture at independent constitutional interpretation. See Charlie Savage & Sheryl Gay Stolberg, *In Turnabout, U.S. Says Marriage Act Blocks Gay Rights*, *N.Y. TIMES*, Feb. 24, 2011, at A1 (revealing that the Obama administration had outpaced the Court in concluding that discrimination based on sexual orientation was equivalent to discrimination based on race or gender and thus should be afforded the protection of strict scrutiny).

6. KRAMER, *supra* note 2, at 227.

7. See, e.g., Larry Alexander & Lawrence B. Solum, Book Note, *Popular? Constitutionalism?*, 118 *HARV. L. REV.* 1594, 1629 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)) (arguing that judicial supremacy is preferable to popular constitutionalism because it preserves the rule of law); L. A. Powe, Jr., Book Note, *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 *TEX. L. REV.* 855, 884, 888 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)) (arguing that while popular constitutionalism "appears to be alive and

in judicial supremacy and firmly believe that the Court is better suited to the task of principled constitutional interpretation than any other branch of government.⁸ “Isn’t it likely that you and I will hate the public’s view of the Constitution?,” they ask.

What has been missing from the debate between advocates of popular constitutionalism and defenders of the Court is any account of the practice of constitutional interpretation. This absence is particularly glaring since it is relatively uncontroversial that the Court’s expertise with respect to constitutional interpretation would justify giving it the final say as to constitutional meaning.⁹

Without a clear sense of what constitutional interpretation involves, however, one cannot assess the prevailing assumption that the Court is uniquely positioned to interpret the Constitution or explore an expertise-based justification for its claim to finality. This Article, therefore, revisits the debate about judicial supremacy by starting, not with history or politics, but with constitutional interpretation itself. The Article uses the work of Phillip Bobbitt to provide a thorough account of how constitutional meaning is derived in practice.¹⁰ Bobbitt has identified a set of conventions with respect to constitutional argument and illustrated how they confer legitimacy on interpretations of the Constitution within the legal field.¹¹

well,” it is neither attractive nor necessary so long as the Court remains the majoritarian institution it is); Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT 405, 420–35 (2003) (offering an array of criticisms of Michael Stoakes Paulsen’s and Larry Kramer’s critiques of judicial supremacy).

8. See, e.g., Powe, Jr., *supra* note 7, at 893 (asserting a preference for judicial supremacy because “the Supreme Court has been reasonably good on the upside and nowhere near as bad on the downside” as compared to populist constitutionalist “mass movements of the twentieth century”).

9. See *infra* notes 69–76 and accompanying text.

10. PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991).

11. For a useful exegesis of the concept of legitimacy, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005). Legitimacy comes in three forms: legal, sociological, and moral. For the purposes of this Article, where the term is used, I will be referring to sociological legitimacy. Sociological legitimacy exists where “the relevant public regards” a practice or argument as “justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.” *Id.* at 1795. Political scientists and legal academics usually use sociological legitimacy as shorthand to refer to a particular instance of sociological legitimacy—the public’s confidence in the Court as an institution, although the measure of confidence is disputed. See Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 243 (2011) (reviewing the literature and explaining that sociological legitimacy “is a concept that aims to describe [the] institutional capital” among members of the public or the public’s “institutional loyalty”). The public, however, is not the appropriate “relevant audience” when the question is the legitimacy of the Court’s constitutional interpretations *as constitutional interpretation*. In such cases, the relevant audience is the legal profession. When I speak of sociological legitimacy, therefore, the relevant community is the legal profession.

A close analysis of the conventions of constitutional interpretation reveals that there are indeed limits to the Court's interpretive expertise. While the Court is generally more competent than other branches of government or the public in interpreting the Constitution, its "[i]nterpretive authority has internal limits."¹²

The Court's claim to supremacy is strongest when its decisions are based on interpretive methods in which it is uniquely expert. These tend to be methods for which lawyers are specifically trained and the judicial forum is specifically well suited. By contrast, the Court's claim to supremacy is at its lowest ebb when its views are ultimately determined by methods for which it cannot claim unique expertise.

Some constitutional questions, however, are ultimately resolvable *only* based on interpretive methods for which the Court cannot claim unique expertise. Moreover, some of these questions, for a variety of reasons, would be better resolved in conversation with other constitutional actors. They are issues with respect to which the other branches of government and the public itself are, at the very least, equally capable of undertaking constitutional interpretation.

As such, there may be times when judicial supremacy should be abandoned and interpretive authority should be shared. This, of course, leaves us with an obvious question: Even if this is right, is it possible (let alone desirable) to translate this theoretical insight into practical limits on judicial authority over the Constitution? The Article suggests that it is.

It proceeds to develop a framework that would enable one to decide when the default rule of supremacy should be revoked. The framework is designed to take into account two key points: first, the Court's relative expertise will vary in important respects depending on the question to be resolved; second, whether it is desirable to revoke the default rule will also turn on countervailing concerns, including an interest in settlement and in having a clear forum for decisionmaking.

In the first instance, the framework seeks to address how one would decide whether the Court's claim to expertise is at its lowest ebb. Briefly, where the Court's interpretations do not ultimately turn on forms of interpretation for which it has special expertise, its views are less worthy of deference and more open to challenge.

In light of the systemic advantages to granting a single institution the authority to resolve constitutional conflict, however, it would be foolish to

12. Alexander & Solum, *supra* note 7, at 1609 (noting the Court could not abolish the presidency on constitutional grounds).

allow for shared interpretive authority every time the Court reached a conclusion that could not be attributed to its special competence. As such, the framework also offers an account of the kinds of considerations that should inform whether the default rule of supremacy should be revoked if the Court's claim to expertise is found to be at its lowest ebb.

Revoking the default rule of judicial supremacy depends ultimately on a determination that the Court has failed to resolve constitutional ambiguity over time and that, *all things considered*, shared interpretive responsibility is preferable. All of this requires close analysis of a series of decisions wrestling with a specific constitutional question as well as careful consideration of contextual factors.

The analysis offered here seeks to persuade the reader that it is possible to transfer issues out of the Court's exclusive domain.¹³ At the same time, it seeks to explain why we generally are right to accept the Court's views even when we disagree with them. That is, it offers an account of why judicial supremacy is appropriate in most cases—one that is grounded in the nature of constitutional interpretation itself.

To be clear, the paradigm proposed here does not rob the Court of its constitutional say. Judicial review will remain, and the Court will continue to get the first shot at constitutional issues, so long as they can be properly presented. The framework does not allow challenges to judicial supremacy simply because one disagrees with particular outcomes, or advocate that one is permitted to “simply ignor[e] or overrid[e]” the Constitution.¹⁴ Merely disagreeing with the Court's interpretation is not a sufficient basis for revoking judicial supremacy because it would transform all constitutional law into constitutional politics—a line that while empirically difficult to draw is central to the internal account of the legal profession.¹⁵

Because the analysis is context specific and depends on a close reading of specific decisions, this Article includes a case study. It is not unlikely that the Supreme Court will soon strike down two core provisions of the

13. Cf. Robin West, *Ennobling Politics*, in *LAW AND DEMOCRACY IN THE EMPIRE OF FORCE* 58, 76 (H. Jefferson Powell & James Boyd White eds., 2009) (discussing the limits of the “adjudicative constitution,” i.e., one entirely interpreted by courts).

14. Alexander & Solum, *supra* note 7, at 1602.

15. See Vicki C. Jackson, *A Democracy of Rights: The Dark Side? A Comment on Stephen M. Griffin*, in *ARGUING MARBURY V. MADISON* 147, 148 (Mark Tushnet ed., 2005) (noting that “[a]lthough it is surely harder to insist on the distinction between ‘judgment’ and ‘will’ in a post-realist world . . . [M]ost judges continue to see this difference as essential to the legitimacy of their judgments”).

Voting Rights Act.¹⁶ Were that to happen, the Court would effectively have put an end to efforts to give racial minorities a voice in legislatures through the creation of majority-minority legislative districts.¹⁷ The Article uses this highly contested interpretive question—whether the Fourteenth Amendment prohibits States from acknowledging race as they structure our democratic institutions—to flesh out how the analytic framework offered here could be used.

Finally, this Article offers more speculative ideas about how revocation might be triggered and what a regime of shared interpretive authority would entail. Although it is beyond the scope of this project to defend popular constitutionalism as such, this Article seeks to show the problem is not that shared interpretive authority is unworkable.

A normative framework that places limits on the Court's final say is preferable to a simple rule of judicial supremacy for several institutional reasons that compete with our desire for settlement. For one, a system that allows for principled opposition to the judiciary, in some circumstances, creates better checks and balances.¹⁸ Blind faith in judicial supremacy, as Thomas Jefferson recognized, "make[s] the judiciary a despotic branch."¹⁹ For another, the system of shared interpretive authority sketched here aims to facilitate broad engagement with the Constitution and constitutional reasoning, encouraging additional and more competent spaces for constitutional deliberation outside of the Court. Finally, by lessening the stakes in court-centered constitutionalism, it might even encourage the depoliticization of the Court.

16. *Cf.* *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504, 2506 (2009) (commenting that the original Voting Rights Act was justified by the "exceptional conditions" prevailing in certain parts of the country" at the time but questioning whether given that "we are now a very different Nation . . . conditions continue to justify such legislation"). Two cases, which squarely raise the issue of unconstitutionality, are currently working their way toward the Supreme Court. *See, e.g., LaRoque v. Holder*, No. 10-0561, 2011 WL 6413850 (D.D.C. Dec. 22, 2011); *Shelby Cnty., Ala. v. Holder*, No. 10-0651, 2011 WL 4375001 (D.D.C. Sept. 21, 2011).

17. This result would be on constitutional grounds and arises out of the Court's jurisprudence with respect to considering race in the process of creating legislative districts. *See infra* notes 161–73 and accompanying text.

18. *Cf.* Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 145–47 (noting that the Court's current stature among both the public and elected officials significantly lessens whatever majoritarian checks on the Court may have existed in previous centuries).

19. Thomas Jefferson, *Letter to Abigail Adams*, Sept. 11, 1804, 8 THE WRITINGS OF THOMAS JEFFERSON 311 (Worthington Chauncey Ford ed., 1897) ("But the opinion which gives to the judges the right to decide what laws are constitutional, and what are not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch.").

Part I reviews the popular constitutionalism debate, arguing that what has been missing from this debate is a close examination of the practice of constitutional interpretation. Part II explains the significance of this gap and proceeds to give an account of what is involved in constitutional interpretation. Part III contains the central theoretical contribution of the paper, arguing that the analysis of the practice of constitutional interpretation enables us to see that there are limits to the Court's alleged expertise. Part III then develops a framework for analyzing whether the Court's claim to expertise is at its lowest ebb and whether the default rule of supremacy should be revoked as well as addressing how the process of revocation might work. Part IV applies that framework to the Court's affirmative action jurisprudence—specifically the Court's views on race and democratic representation—to illustrate how the proposed framework might work. Finally, Part V argues that a framework such as the one offered here—a framework that involves a default rule of supremacy and an account of when that default rule should be revoked—goes a long way toward addressing the major concerns that have been raised about popular constitutionalism.

I. JUDICIAL SUPREMACY: THE DEBATE

It is considered axiomatic in most circles today that the Supreme Court's unique function in our government is to determine what the Constitution requires and that once it has made a determination, the matter is settled.²⁰ This view, among constitutional theorists, is called *judicial supremacy*. As Keith H. Whittington explains, “a model of judicial supremacy posits that the Court does not merely resolve particular disputes involving the litigants directly before it . . . it also authoritatively interprets constitutional meaning for the nation as a whole.”²¹

Judicial supremacy is conceptually distinguishable from judicial review. The latter entails only that courts are entitled to rule on the constitutionality of legislative and executive action when properly

20. See, e.g., William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967, 969 (2006) (arguing that since the New Deal, conservatives and liberals alike have been “believers in the indispensability of judicial finality”).

21. Keith H. Whittington, *The Political Foundations of Judicial Supremacy*, in CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE 261, 271 (Sotirios A. Barber & Robert P. George eds., 2001).

presented.²² The crucial difference between judicial supremacy and judicial review is that “[f]or the judicial supremacist, *other government officials are bound not only by the Court’s disposition of a specific case but also by the Court’s constitutional reasoning.*”²³ Judicial review is what enables the Court to decide *Citizens United* whereas judicial supremacy is what limits Congress’ potential responses to passing laws that the Court is likely to accept as constitutional, e.g., disclosure laws.

Acceptance of judicial review does not necessarily entail acceptance of judicial supremacy, although contemporary lawyers often find it difficult to imagine how the distinction would manifest in practice.²⁴ This is because mainstream constitutional theorists frequently import an element of supremacy into judicial review, no doubt a result of the fact that our understanding of judicial review has incorporated over time the concept of supremacy.²⁵ Later, the Article will explore what a world of judicial review without supremacy might look like.²⁶

While the Supreme Court has forcefully asserted that the Constitution requires judicial supremacy,²⁷ in recent years, a number of prominent scholars have argued that the Constitution is highly ambiguous in this regard. Nowhere in the text of the Constitution is the Court designated as

22. See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759 (1997) (clarifying that judicial review goes well beyond invalidating statutes and is instead “the practice of invalidating (state and federal) statutes, rules, orders and official actions on direct constitutional grounds”).

23. Whittington, *supra* note 21, at 271 (emphasis added); accord Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 352 (1998) (explaining that the “concept of judicial supremacy[, mean[s] that a Supreme Court interpretation binds parties beyond those to the instant case, including other state and national governmental actors”).

24. In fact, authors often mistakenly write as if the choice were necessarily between judicial review and popular constitutionalism. See, e.g., Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASH. U. L. REV. 313, 354 (2008) (arguing for a version of popular constitutionalism in which “the ultimate authority to interpret the Constitution [would be] shifted from the courts to the political domain”).

25. See Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 87 (1998) (noting that “[j]udicial review, like all of constitutional law, has itself been the subject of sedimentary evolution” and, in particular, that “[j]udicial supremacy in interpretation has built up beneath us”); accord Griffin, *supra* note 1, at 107–17 (recounting the evolution of our understanding of judicial review and the emergence of supremacy as a core feature of the concept).

26. Cf. Friedman & Smith, *supra* note 25, at 43 (arguing that while one cannot erase constitutional developments “we can . . . construct . . . new . . . understanding atop old ones”).

27. See *City of Boerne v. Flores*, 521 U.S. 507, 523–24 (1997) (asserting supremacy over meaning of the Fourteenth Amendment and denying Congress independent authority to interpret it); *Cooper v. Aaron*, 351 U.S. 1, 18 (1958) (declaring that “the federal judiciary is supreme in the exposition of the law of the Constitution, and that [this] principle . . . [is] a permanent and indispensable feature of our constitutional system”); accord Whittington, *supra* note 21, at 261 (noting Court’s assertion of judicial supremacy in the mid-twentieth century).

the exclusive interpreter of the Constitution.²⁸ Larry Alexander and Frederick Schauer have argued that the existence of a final interpreter of the Constitution “is preconstitutional”—a “logical[] antecedent to the written constitution.”²⁹ Whatever the merits of Alexander and Schauer’s argument that a written Constitution logically requires a final interpreter, it does not resolve the critical question of whether the Court should exercise that role.

Scholars of popular constitutionalism have turned to history to show that judicial supremacy was not inevitable. The question, they explain, was contested for, at least, the first century of the nation’s existence.³⁰ When the practice of judicial review first emerged, it did not entail supremacy: “Courts exercising judicial review in the 1790s made *no claims of special*

28. In fact, the text of the Constitution does not even explicitly authorize judicial review. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 130 (1893). Thayer explained:

So far as the grounds for this remarkable power are found in the mere fact of a constitution being in writing, or in judges being sworn to support it, they are quite inadequate. Neither the written form nor the oath of the judges necessarily involves the right of reversing, displacing, or disregarding any action of the legislature or the executive which these departments are constitutionally authorized to take, or the determination of those departments that they are so authorized.

Id. For an extensive discussion of judicial review during the Convention and ratification debates see KRAMER, *supra* note 2, at 73–92 (explaining that judicial review was not a topic of sustained discussion at the convention, that the delegates arrived with a wide variety of views, that they clearly anticipated judicial review of state laws, but that there was no similar endorsement of judicial review for federal legislation, and that political not structural safeguards dominated during the ratification debates). Nevertheless, the practice of judicial review was fairly settled by the late 1790s. *See id.* at 7, 105, 114–27. That said, given the various silences and in the face of some early objections, the precise origins and timing of its acceptance remain the subject of much scholarly debate. *Compare* Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 503, 511 (2006) (arguing that judicial review was a genealogical outgrowth of colonial judicial practices and as such was presumed by the founding generation), *with* Morton J. Horwitz, *A Historiography of the People Themselves and Popular Constitutionalism*, 81 CHI.-KENT L. REV. 813, 821 (2006) (criticizing Kramer for being too quick to concede that judicial review was well-established prior to the Civil War given the infrequency with which it was exercised by the Supreme Court), *with* William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 554–58 (2005) (demonstrating that judicial review by state courts was both more intense, at least with respect to statutes regulating juries and court procedures, and more commonly exercised than scholars have thought); *see also* Mary Sarah Bilder, *Idea or Practice: A Brief Historiography of Judicial Review*, 20 J. POL’Y HIST. 6 (2008) (recounting competing nineteenth-century accounts of the origins of judicial review in America and explaining how this rich debate became obscured in the mid-twentieth century).

29. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1369 (1997).

30. *See, e.g.*, Whittington, *supra* note 21, at 262 (noting that our constitutional tradition “is littered with debates over judicial authority and constitutional meaning” and “judicial authority has often been contested by important segments of the populace, from abolitionists to labor unions to segregationists”); KRAMER, *supra* note 2, at 229, 234 (same).

or exclusive responsibility for interpreting the Constitution.”³¹ Following James B. Thayer, they argue that even judicial review was limited—applying only to situations where the constitutional violation was blatant.³²

These scholars acknowledge that arguments for judicial supremacy surfaced as early as the ratification debates and that key Federalists frequently espoused theories of judicial supremacy by the late 1790s, but they tend to interpret these Federalist views as outliers.³³ The only widely accepted view, at the time, according to Larry D. Kramer, was the view that as a by-product of the Justices’ oath of office and the Court’s duty to decide cases within its jurisdiction, the Court might sometimes need to declare certain actions on the part of other governmental bodies unconstitutional, i.e., judicial review.³⁴

Nineteenth-century actors who denied judicial supremacy typically understood the people themselves as having the final say regarding the meaning of the Constitution.³⁵ Kramer explains the perspective of that tradition:

Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution. Final interpretive authority

31. KRAMER, *supra* note 2, at 98 (emphasis added); *see also* Griffin, *supra* note 1, at 113–15 (arguing that judicial review, as practiced in the early years, little resembles the current practice because, among other things, it did not entail supremacy); *accord* William M. Meigs, *The Relation of the Judiciary to the Constitution*, 19 AM. L. REV. 175, 202 (1885) (recounting the origins of judicial review but explaining that the judiciary could not “conclusively settle the meaning of the constitution”). It is worth acknowledging, in all this, that it was not until the mid-twentieth century that litigants regularly turned to the courts for rulings that another branch of government was acting unconstitutionally.

32. *See* Thayer, *supra* note 28, at 144 (emphasizing that judicial review was only thought appropriate where the constitutional violation was blatant); *accord* Meigs, *supra* note 31, at 193–94 (explaining that the early cases asserting judicial review went “no further than to say that, as the judiciary was a co-ordinate department of government,” the judges must “adhere to their oaths of office”).

33. *See* KRAMER, *supra* note 2, at 104 (noting that early on “[v]ery conservative Federalists . . . [began] to articulate a theory recognizable today as judicial supremacy”); *see also id.* at 134, 147.

34. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing the doctrine of judicial review); *see generally* Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look Like Victory*, in CONSTITUTIONAL LAW STORIES 13 (Michael C. Dorf ed., 2004) (explaining the historical context of *Marbury v. Madison* and why the decision is not an argument for supremacy, despite Justice Marshall’s personal belief in supremacy); *accord* KRAMER, *supra* note 2, at 99–100 (discussing Justice James Wilson’s view that courts engage in constitutional interpretation because judges must uphold the Constitution like other institutional actors).

35. KRAMER, *supra* note 2, at 107 (explaining that “[i]n a world of popular constitutionalism, government officials are the regulated, not the regulators, and final interpretive authority rests with the people themselves”) (emphasis in original).

rested with “the people themselves,” and courts no less than elected representatives were subordinate to their judgments.³⁶

How the public would manifest its final say was debated and evolved over time. By the early nineteenth century, the departmental theory emerged as the dominant answer.³⁷ From James Madison to Franklin Delano Roosevelt, a series of Presidents and prominent constitutional thinkers took the view that each department of government had been granted an independent responsibility to interpret the Constitution.³⁸ The coordinate branches of government were, therefore, equally obliged to engage in independent constitutional analyses.³⁹ If a co-equal department concluded that the Court’s interpretation of the Constitution was wrong, it was “not only their right, but their duty as well, to decline to follow the judiciary’s opinion.”⁴⁰ Each branch would be a check against the potential tyranny of the others, and the public would ultimately adjudicate, including at the polls.⁴¹

Whittington nicely summarizes the difference between judicial supremacy and departmentalism as follows:

A departmentalist president may well agree with John Marshall that in conducting its own duties the Court is not obliged to follow a law that it believes to be unconstitutional. *The departmentalist would simply claim a similar authority for the other branches, limiting the generative force of judicial pronouncements.* The departmentalist does not deny the Court’s authority to decide cases. But he does deny the Court’s authority to articulate constitutional norms or to settle questions of constitutional meaning for everyone.⁴²

36. *Id.* at 8.

37. *Id.* at 106–07.

38. *See, e.g.*, Andrew Jackson, Veto Message, July 10, 1832, 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576 (James D. Richardson ed., 1896) (explaining departmental theory in context of his decision to veto the re-chartering of the Bank of the United States); Jefferson, *supra* note 19, at 311 (explaining the departmental theory in the context of the controversy over the constitutionality of the Sedition Act); *see also* Meigs, *supra* note 31, at 192 (listing Presidents through 1885 that espoused the departmental theory). Whittington’s work is particularly interesting in this regard as it seeks to explain the political circumstances likely to give rise to challenges to the Court’s authority. Based on a review of American political history, he theorizes challenges to judicial supremacy depend on the political power of the executive. *See* Whittington, *supra* note 21, at *passim* (arguing judicial supremacy is “politically constructed” and theorizing a typology of American presidents and the incentives each has to challenge the Court’s authority to interpret the Constitution).

39. *See* Whittington, *supra* note 21, at 271.

40. Meigs, *supra* note 31, at 202.

41. *See* KRAMER, *supra* note 2, at 110.

42. Whittington, *supra* note 21, at 272 (emphasis added).

As Andrew Jackson put it: “The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.”⁴³ Thus, Jefferson argued that the Executive could release anyone sentenced under the Sedition Act, not as a matter of clemency but as a constitutional matter.⁴⁴ If the departmental theory were accepted today, Congress would re-pass limits on corporate spending, though it might, to the degree it was persuaded by aspects of the Court’s reasoning, clarify that its scope would not reach parties that made documentary movies or materials distributed through video-on-demand.

In addition to the historical arguments, a number of scholars have offered normative critiques of our exclusive reliance on the Supreme Court for constitutional interpretation. Two of the most comprehensive critiques are those of Mark Tushnet and Jeremy Waldron.⁴⁵

In *Taking the Constitution Away from the Courts*, Tushnet argues that judicial review should be abandoned entirely and replaced with populist constitutionalism because “courts actually have not done such a wonderful job” with constitutional interpretation such that they can say they are significantly better than legislatures would be.⁴⁶ He proceeds to advocate for constitutional law which is “oriented to realizing the principles of the Declaration of Independence and the Constitution’s Preamble,” which helps us define ourselves as a nation, and which is not “something in the hands of lawyers and judges.”⁴⁷ His call is for populist constitutionalism.

Meanwhile, Waldron has argued that from a philosophical perspective, in a reasonably functioning democracy with a strong rights-based culture, ordinary legislative procedures are capable of resolving questions of constitutional rights; these procedures are also more democratically legitimate than courts as a mechanism for enforcing rights.⁴⁸ To emphasize

43. Jackson, *supra* note 38, at 582. Jackson continued: “The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.” *Id.*

44. Jefferson, *supra* note 19, at 311 (“The judges, believing the [Sedition Act] constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because the power has been confided to him by the Constitution.”).

45. A third is the work of Michael Stokes Paulsen. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (arguing that the President “has co-equal interpretive authority” and is not bound by the legal view of the other branches of government when engaged in executing the law).

46. TUSHNET, *supra* note 2, at 129.

47. *Id.* at 181–82.

48. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006). Waldron does not refute judicial review of executive action, especially low-level executive officers. *Id.*

that judicial supremacy is not necessary for the rule of law to prevail, both authors have pointed to comparative constitutional systems, in particular Great Britain's.⁴⁹

Prominent constitutional theorists have not been shy in their normative criticisms of the new popular constitutionalism literature.⁵⁰ The details of Kramer's historical account have also come under significant fire. While Kramer suggests that the American public repeatedly chose departmentalism over judicial supremacy through the New Deal, others have argued that judicial supremacy was accepted much earlier.⁵¹

Barry Friedman and Erin F. Delaney, in a recent article, have usefully intervened in the historical debate by emphasizing the distinction between "'vertical' supremacy—the supremacy of the Supreme Court over state and local governments" and "'horizontal' supremacy—the binding effect of judicial pronouncements over the coordinate branches of the national government."⁵² They show that while vertical supremacy was firmly established by the time of Reconstruction, horizontal supremacy was not established until the late nineteenth century.⁵³

Despite dating the establishment of horizontal supremacy significantly earlier than Kramer, Friedman and Delaney's work essentially confirms Kramer's central historical claim: at the Founding, and for an extended period thereafter, judicial review did not entail judicial supremacy. The latter emerged incrementally and after much contest.⁵⁴

at 1353–54 n.20. Stephen Griffin similarly situates his argument against judicial supremacy in democratic theory. *See* Griffin, *supra* note 1, at 140 (arguing that our constitutional democracy has evolved into a "democracy of rights" and that this justifies normative limits to judicial review, a concept that today is defined by judicial supremacy).

49. *See* TUSHNET, *supra* note 2, at 163; Waldron, *supra* note 48, at 1349–50.

50. *See, e.g.*, Alexander & Solum, *supra* note 7, at 1594 (expressing adamant opposition to popular constitutionalism). The concerns of critics are explored in Part V.

51. *Compare* KRAMER, *supra* note 2, at 207–18 *with* Forbath, *supra* note 20, at 969–70, 984–85 (arguing that judicial supremacy was well established by the early twentieth century and that FDR's attack on the Court was one of his least popular platforms).

52. Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1188 (2011) (arguing that the dynamics of a federal system explain the rise of judicial supremacy).

53. *Id.* at 1157–58, 1164–65, 1169 (suggesting horizontal supremacy was firmly established by the 1920s).

54. *Id.* at 1149–50; *accord* Mary Sarah Bilder, *Why We Have Judicial Review*, 116 YALE L.J. POCKET PART 215, 217 (2007). Bilder concludes that:

[B]ecause judicial review grew out of prior practice rather than an idea or conception of separation of powers, it was easy for the Founders to accept the judiciary's power to invalidate legislation . . . without resolving the question of whether the judiciary was the ultimate interpreter of the Constitution.

Id. *See also* Friedman, *supra* note 23, at 342–43, 358, 374–79 (noting "that judicial supremacy was not widely accepted" during the Jeffersonian period and was quite limited through the Jacksonian period).

What has been glaringly absent on both sides of the debate is any account of the practice of constitutional interpretation itself. Alexander and Schauer's defense of judicial supremacy, for example, enumerates the benefits of settlement, ignoring entirely the nature of constitutional interpretation.⁵⁵ Richard Fallon's case for judicial review, as a direct response to Waldron, accepts for purposes of argument Waldron's assumption "that debates about constitutional rights at bottom are or ought to be debates about moral rights."⁵⁶

While other advocates of judicial supremacy have emphasized the advantages of the judicial forum, their assertions are typically divorced from any account of how constitutional meaning is derived in practice.⁵⁷ Instead, they have enumerated an abstract set of advantages possessed by the judiciary as an institution. It is the quality of the Court's decisionmaking process, as compared to the legislative or executive forums, for instance, that is said to justify the judicial monopoly over constitutional meaning. Alternatively, we are told that "[j]udges probably are at least as good as non-Article III actors at interpreting legal texts, and quite likely better" because, among other things, the judicial forum facilitates "reason-giving."⁵⁸

Such accounts of the relative merits of the judicial process are longstanding, as William Meigs' comments, from 1885, illustrate:

Nor should it be forgotten that the opinions of the courts are, unquestionably, entitled to great respect as evidence of the truth; they decide cases of an important nature, *only after the most elaborate argument and consultation. They give more consideration to the subject than the executive often can, or ever is likely to; and, though they are largely influenced, still they are less likely to be*

55. Alexander & Schauer, *supra* note 29, at *passim* (discussing at length the value of settlement with little to no mention of the practice of constitutional interpretation).

56. Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1696, 1698 (2008) (arguing that the best justification for judicial review is that both courts and legislatures should be given the opportunity to veto legislation that might compromise individual rights out of a concern to tip the scales in favor of individual rights).

57. For example, although Alexander and Solum emphasize the distinction between interpretation and lawmaking and note that interpretation has internal limits, they offer only implicit references to the nature of constitutional interpretation. See Alexander & Solum, *supra* note 7, at 1609, 1619–21.

58. Kermit Roosevelt III, *Judicial Supremacy, Judicial Activism: Cooper v. Aaron and Parents Involved*, 52 ST. LOUIS U. L.J. 1191, 1196 (2008).

*directed by the heats and violences of party strife, than is Congress.*⁵⁹

Waldron has summarized the judicial supremacy position:

[T]hree outcome-related advantages . . . [are] claimed for courts (a) that issues of rights are presented to courts in the context of specific cases; (b) that courts' approach to issues of rights is oriented to the text of a Bill of Rights; and (c) that reasoning and reason-giving play a prominent role in judicial deliberation.⁶⁰

None of these justifications for judicial supremacy explores the nature of constitutional interpretation itself.

Advocates of shared interpretive authority have taken issue with each of these claims. Yet, they too gloss over the practice of constitutional interpretation.⁶¹ While Tushnet meticulously compares congressional processes to judicial processes in order to rehabilitate the institutional capacity of legislatures to engage in constitutional interpretation, he is virtually silent about how the Constitution is interpreted.⁶² Tushnet's silence is not terribly surprising given that his "[p]opulist constitutional law" is meant to "return[] constitutional law to the people, acting through politics."⁶³ That is, it is intentionally structured to look nothing like what constitutional law and interpretation actually looks like as practiced.⁶⁴

Meanwhile, Waldron goes further, proclaiming the practice of constitutional interpretation a distraction from important conversations about moral rights: "In the United States, what is called 'reason-giving' is usually an attempt to connect the decision the court is facing with some antique piece of ill-thought-through eighteenth- or nineteenth-century prose."⁶⁵

59. Meigs, *supra* note 31, at 202 (emphasis added). William M. Meigs was one of three nineteenth-century legal figures to recount the origins of judicial review. For more on Meigs, see Bilder 2008, *supra* note 28, at 10–11.

60. Waldron, *supra* note 48, at 1379.

61. This is also true of the work of Larry Kramer and Stephen Griffin.

62. See TUSHNET, *supra* note 2, at 54–70 (describing a set of procedural arguments against populist constitutional law which focus on the processes of courts and legislatures).

63. *Id.* at 186.

64. *Id.* at 185. Tushnet further states:

As I have described it, populist constitutional law might seem pretty thin compared to the rich body of constitutional law inside the courts: No three-part tests, no balancing of interests, no distinctions between content-neutral and subject-matter-based regulations of free expression Just the Declaration of Independence and the Preamble.

Id.

65. Waldron, *supra* note 48, at 1383. Waldron has been criticized for this position by many, including now Justice Elena Kagan. *Id.* at 1385 n.110. This comment was made in the context of

The ways in which we “connect the decision” to be made with “some antique piece of . . . eighteenth- or nineteenth-century prose,” however, is precisely the practice of constitutional interpretation.⁶⁶ Only Michael Stoakes Paulsen addresses constitutional interpretation itself, albeit briefly. At the conclusion of his lengthy article, he spends three pages explaining that in order for an interpretation of the Constitution to be legitimate it “must be constrained by a legitimate interpretive method,” specifically, textualism, originalism, precedent, or inferences from constitutional structure.⁶⁷ Based on this, he concludes that the independent interpretive authority of the Executive should also be constrained by these methods.⁶⁸ In sum, what has been glaringly absent in the contemporary debate about judicial supremacy is a thorough account of the practice of constitutional interpretation itself.

II. CONSTITUTIONAL INTERPRETATION AS PRACTICE

Without a thorough account of how constitutional meaning is derived in practice, one is unable to assess the prevailing assumption that the Court is uniquely positioned to interpret the Constitution. Assessing the comparative advantage of the judicial forum is frankly difficult without knowing what interpretation involves.

This gap is particularly critical to the normative debate over judicial supremacy insofar as, implicitly at least, both sides agree that the Court’s expertise with respect to constitutional interpretation would, or could, justify its having the final say over constitutional meaning. That is, it is not particularly controversial to assert that the judiciary ought to get the final say to the degree that it is well positioned to engage in constitutional interpretation.

For advocates of judicial supremacy, “the courts of justice are . . . the bulwarks of a limited Constitution.”⁶⁹ Moreover, the judiciary’s unique competence with respect to legal interpretation is offered as a primary justification for judicial supremacy. These scholars invoke the work of

Waldron’s argument that “legislators give reasons for their votes” and that legislative reasons are frequently more robust than judicial reasons. *Id.* at 1382. Waldron argues: “There are things about legislatures that sometimes make them vulnerable to the sorts of pressures that rights are supposed to guard against; but there are also things about courts that make it difficult for them to grapple directly with the moral issues that rights-disagreements present.” *Id.* at 1376. To illustrate this point, he recounts the British parliamentary debate over legalizing abortion. *Id.* at 1384.

66. *Id.* at 1383.

67. Paulsen, *supra* note 45, at 340–42.

68. *Id.*

69. THE FEDERALIST NO. 78, at 428 (Alexander Hamilton) (E.H. Scott ed., 1898).

early Federalists, despite the fact that those authors were more equivocal than contemporary scholars tend to be. Thus, the starting point tends to be Alexander Hamilton's assertion:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred: in other words the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.⁷⁰

It, therefore, follows that "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁷¹

The starting point for popular constitutionalists, by contrast, is democracy: the Supreme Court's position as the exclusive and final interpreter of the Constitution can only emerge from the consent of the public. Consent, as it happens, is typically granted.⁷² The Supreme Court turns out to be the department "in which questions of constitutionality, as well as of legality, generally find their *ultimate discussion* and *operative decision*."⁷³ The public's consent to the Court having the final say must therefore be explained.

70. *Id.* at 427. Hamilton proceeded to argue that it would not be reasonable to assume that the "[l]egislative body are themselves the [final] Constitutional judges of their own powers" because it would "enable the representatives of the people to substitute their *will* to that of their constituents." *Id.* at 426–27. His concern, however, was primarily the agency problem that Congress cannot be trusted to privilege the intentions of the people (the Constitution) over the intentions of their agents (the representatives). Hamilton, thus, followed this passage with the following:

Nor does the conclusion *by any means suppose a superiority of the judicial to the legislative power*. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter rather than the former.

Id. at 427 (emphasis added).

71. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.); *see supra* note 34 (discussing the *Marbury* case as an assertion of judicial review rather than a claim to judicial supremacy).

72. *See* Whittington, *supra* note 21, at 262 (showing that as an empirical matter the Court generally has the final say and that throughout U.S. history "powerful federal officials have usually acceded to the Court's" interpretations of the Constitution).

73. Letter from James Madison to Mr. _____ (1834), in *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 349, 349–50 (1865) (emphasis added).

Departmentalists have long explained the public's consent to the Court's having the final say as arising out of the public's confidence in the Court's unique competence as an expositor of constitutional meaning. As James Madison explained in 1834:

But notwithstanding this abstract view of the co-ordinate and independent right of the three departments to expound the Constitution, *the Judicial department most familiarizes itself to the public attention as the expositor, by the order of its functions in relation to the other departments; and attracts most the public confidence by the composition of the tribunal.*⁷⁴

Confidence in the Court derives, in particular, from “the qualities” of the Justices and “the gravity and deliberation of” their decisionmaking.⁷⁵

In sum, the idea that the judiciary should get the final say because it is well positioned to engage in constitutional interpretation is neither new nor controversial. Even popular constitutionalists accept that to the degree the Court is relatively more capable when it comes to interpreting the Constitution, its views warrant deference—or more precisely, that the public is both likely and rational to grant the Court the final say in such circumstances.⁷⁶

Any normative limits to the Supreme Court's claim to a monopoly over constitutional meaning would seem, therefore, to lie in limits to its relative competence with respect to constitutional interpretation.⁷⁷ The insight here is analogous to that in administrative law where the division of labor between courts and administrative agencies turns on their relative

74. *Id.* at 349–50 (emphasis added). Madison was an intermittent skeptic of judicial supremacy. See KRAMER, *supra* note 2, at 187–88 (noting that Madison's adjustments to judicial supremacy were incremental; he first recognized the need for finality where conflicts arose between states and national governments).

75. Letter from James Madison, *supra* note 73, at 350. Contemporary judicial supremacists, such as Justice O'Connor, basically agree: “[t]he Court's power [lies] in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (O'Connor, J.).

76. *Cf.* TUSHNET, *supra* note 2, at x (noting that “[j]udicial interpretations may have added weight because they come from experts who have thought seriously about the interpretive questions over a long period”); accord Paulsen, *supra* note 45, at 335 (arguing that the judiciary's unique competence with respect to legal interpretation suggests deference to its views would be appropriate even in a regime of shared interpretive authority).

77. Christopher L. Eisgruber, in his response to Professor Paulsen, recognizes this point, though again it is “structural characteristics” of the judiciary not a grounded analysis of interpretive expertise that is discussed. See Christopher L. Eisgruber, *The Most Competent Branch: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 353 (1994) (accepting that “interpretive authority belongs to the branch that, by virtue of its structural characteristics, is best able to interpret the Constitution”).

expertise.⁷⁸ A core justification for “*Chevron* deference” is the recognition that, in the face of ambiguity, courts should refrain from determining statutory meaning in situations where policy considerations will be critical.⁷⁹ Agencies have greater expertise about the policy consequences of one statutory interpretation rather than another while the judiciary lacks special competence with respect to policy.⁸⁰

Ambiguity is a constitutive fact of constitutional law. It arises not only because language is imprecise and the future is hard to imagine, but also because the founding fathers were pragmatists who saw themselves as establishing a framework or blueprint for the project of self-governance.⁸¹ Acknowledging ambiguity is particularly important since the desire to interpret the Constitution differently from the Court will only arise where there is genuine room for debate.

The fact that “it is not always clear what the Constitution means” entails neither that the Constitution is wholly indeterminate nor that it just means what particular people want it to mean.⁸² Simply put, if it did, it would not be law.⁸³ The line between law and politics is certainly amorphous, but it is central to the practice of law and the internal

78. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 143–44 (1938) (noting that “the extent of judicial review” of agency action “is being shaped . . . by reference to an appreciation of the qualities of expertness for decision that the administrative may possess”); cf. Alexander & Solum, *supra* note 7, at 1633–34 (explaining that one of three relevant considerations in making the case for judicial supremacy is the “distinction . . . between those questions that a court is more likely to answer correctly (‘judicial questions’) and those questions that a majoritarian body is more likely to answer correctly (‘legislative questions’)”).

79. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* ties this expertise argument to congressional intent (or at least a statutory presumption of congressional intent). *Id.* at 865. Interestingly, the development of “*Chevron* deference” was anticipated early in the New Deal. See LANDIS, *supra* note 78, at 144 (“The interesting problem as to the future of judicial review over administrative action is the extent to which judges will withdraw, not from reviewing findings of fact, but conclusions upon law.”).

80. Paulsen makes a slightly different use of *Chevron*, arguing for executive restraint in the form of deference to the constitutional interpretations of co-equal branches of government by analogy. In doing so, he notes that *Chevron* stands, at least partially, for a desire to locate interpretive power with the body that possesses specialized expertise. Paulsen, *supra* note 45, at 334–36.

81. See THE FEDERALIST No. 37, at 198 (James Madison) (E.H. Scott ed., 1898) (explaining the various sources of ambiguity, including the limitations of language, as well as the Founders’ belief that “equivocal” language would “be liquidated and ascertained by a series of particular discussions and adjudications”); see also Friedman & Smith, *supra* note 25, at 62–65 (arguing that constitutional meaning accrues over time like sediment through established practices, which include but are not limited to, the trends in judicial decisionmaking).

82. BOBBITT, *supra* note 10, at xiv.

83. See Friedman & Smith, *supra* note 25, at 78 (“Without the juxtaposition between present-day preferences and more enduring values, the idea of constitutionalism is meaningless. If there is no difference between present desires and these other values, then the very idea of constitutionalism collapses upon itself and we are left with nothing but popular preferences . . .”).

perspective of law; more importantly, judges must operate as if the line exists.⁸⁴ In fact, much of the skepticism about the ability of nonjudicial actors to engage in constitutional interpretation arises precisely out of a shared sense that the Constitution is law and the unrobed are incapable of distinguishing law from politics.⁸⁵

Constitutional interpretation, therefore, is at bottom a practice wherein ambiguity is resolved through conventions of argument. These conventions create the line between law and politics. No one has described the conventions of the practice of constitutional interpretation better than Philip Bobbitt.

In *Constitutional Interpretation*, Bobbitt seeks to explain how something becomes a valid constitutional interpretation since, as lawyers recognize, “not just anything can count as an interpretation of the Constitution.”⁸⁶ That is, he seeks to explain what is required for an interpretation to have sociological legitimacy within the relevant interpretive community (i.e., lawyers).⁸⁷

His answer is that lawyers and judges share a *praxis*—deeply embedded professional norms, habits, and practices—in which “some interpretations are better than others” because they “correspond to the various legitimat[e] modalities” of constitutional interpretation.⁸⁸ Six modalities of argument are at the core of the practice.⁸⁹ These are:

- *historical* (relying on the intentions of the framers and ratifiers of the Constitution);
- *textual* (looking to the meaning of the words of the Constitution alone . . .);

84. See Jackson, *supra* note 15, at 147–48 (noting judges operate as if a “distinction between ‘judgment’ and ‘will’” exists because the “difference [is] essential to the legitimacy of their judgments”).

85. See, e.g., Pettys, *supra* note 24, at 343 (“[I]f the interpretive power were somehow placed in the popular domain, citizens would not distinguish between their interpretation of the Constitution’s fundamental demands, on the one hand, and their raw political desires, on the other.”).

86. Alexander & Solum, *supra* note 7, at 1609.

87. See Fallon, *supra* note 11, at 1806 (noting that sociological acceptance can confer validity on constitutional norms—enumerated or accrued).

88. BOBBITT, *supra* note 10, at xiv–xv (emphasis added); see also *id.* at 11–12.

89. Other legal scholars define the grounds of agreement in constitutional interpretation more narrowly. For instance, it would seem that Fallon believes that the only territory of agreement is precedent. Fallon, *supra* note 11, at 1793, 1821–23 (arguing that precedent-based decisionmaking is unanimously accepted by the Justices; even originalists accept that judicial precedents can legitimately ground further, future claims of legitimate judicial authority, including when the original decision was itself erroneously decided). This tendency, however, results from conflating normative and sociological legitimacy, illustrating further that all six modalities regularly appear together.

- *structural* (inferring rules from the relationships that the Constitution mandates among the structures it sets up);
- *doctrinal* (applying rules generated by precedent);
- *ethical* (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and
- *prudential* (seeking to balance the costs and benefits of a particular rule).⁹⁰

As a matter of practice, all of the modalities of argument Bobbitt identifies are regularly utilized and accepted forms of constitutional argument.⁹¹ In fact, each of the six modalities identified by Bobbitt is familiar to any American lawyer⁹²—surely an indication that “the relevant public regards” these modalities of argument as legitimate as a sociological matter.⁹³

Looking carefully at each of these modalities, it will become apparent that the Court’s claim to unique expertise with respect to each varies considerably. First, a few words of explanation about the modalities are required.

The textual modality is easiest to understand. This modality seeks to use the language of the Constitution itself to answer questions as to its meaning. Although constitutional interpretation frequently begins with the text, textualist arguments are rarely able to resolve ambiguities fully.

The other modalities are also means to resolve ambiguity. The historical modality, in its classic form, seeks to settle ambiguity by reference to the original meaning or understanding of the language or constitutional commitment.⁹⁴ For an example, in *Regents of the University of California v. Bakke* (1978), Justice Marshall used the original history of the Fourteenth Amendment to explain why it did not prohibit affirmative action in education.⁹⁵ As we will see in Part IV, the historical modality is

90. BOBBITT, *supra* note 10, at 12–13 (emphasis and formatting added); *see also id.* at 13–22 (elaborating on these forms).

91. The close analysis of the Court’s affirmative action cases in Part IV amply supports this proposition.

92. BOBBITT, *supra* note 10, at xiv (arguing that we must “understand[] the forms of constitutional arguments as the way in which a constitutional proposition is true rather than the reason it is true”) (emphasis in original).

93. Fallon, *supra* note 11, at 1795.

94. BOBBITT, *supra* note 10, at 12.

95. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 396–98 (1978) (Marshall, J., concurring).

often broader than the views “of the framers and ratifiers of the Constitution.”⁹⁶

Doctrinal arguments seek to settle meaning by reference to previously agreed settlement of ambiguity. The important point is that “doctrinal arguments are not confined to arguments originating in caselaw; there are also precedents of other institutions, e.g., the practices of earlier Presidents.”⁹⁷

Ethical arguments use shared cultural commitments to resolve ambiguity. The “principal error,” Bobbitt warns, “one can make regarding ethical argument is to . . . equate[] ethical argument, a constitutional form, with moral argument generally.”⁹⁸ Ethical arguments are not simply normative. Instead, they “appeal to those elements of the *American cultural ethos* that are reflected in the Constitution . . . [e.g.,] the idea of limited government.”⁹⁹ For example, in explaining why Harvard’s affirmative action program would likely be held constitutional whereas Davis’ was not, Justice Powell made a classic ethical argument:

[Davis’] program will be viewed as inherently unfair by the public generally as well as by applicants for admission to state universities. *Fairness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic. Indeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual.*¹⁰⁰

Finally, in the prudential modality, “[t]he legal rule . . . is derived from a calculus of costs and benefits” after the facts have been taken into account.¹⁰¹ In other words, prudential arguments are ones that resolve meaning by considering the consequences of one or another alternative and tend to be “actuated by facts.”¹⁰²

It is adherence to the six modalities that renders certain constitutional interpretations sociologically legitimate within the legal field.¹⁰³ Arguing

96. Compare BOBBITT, *supra* note 10, at 12, with *infra* notes 212–13 and accompanying text.

97. *Id.* at 18; accord THE FEDERALIST No. 37, *supra* note 81, at 198 (suggesting “equivocal” language would “be liquidated and ascertained by . . . [political] discussions” as well as judicial decisions).

98. BOBBITT, *supra* note 10, at 20–21.

99. *Id.* at 20.

100. *Bakke*, 438 U.S. at 319 n.53 (emphasis added).

101. BOBBITT, *supra* note 10, at 17.

102. *Id.* at 16.

103. Bobbitt’s approach to constitutional interpretation arises out of a Wittgensteinian tradition insofar as it recognizes that “law-statements” have validity not because they correspond to some truth

within the modalities creates a phenomenological experience in which law is experienced as distinct from politics: “The moves within each of the modalities are not political[;] indeed . . . a move within a mode is not even legitimate if it cannot be rationalized on a non-political basis.”¹⁰⁴

Advocates and judges rarely, if ever, depart from these modalities. Departure from these forms would open one up to charges of political activism.¹⁰⁵ As Bobbitt explains: “Outside these forms, a proposition about the U.S. Constitution can be a fact, or be elegant, or be amusing or even poetic, and although such assessments exist as legal statements in some possible legal world, they are not actualized in our legal world.”¹⁰⁶

While legal theorists may believe that only certain of these methods are legitimate and may complain that others are thoroughly illegitimate, in practice, lawyers and judges, whatever their theoretical persuasions, make arguments of all forms. Moreover, the only way to turn a political question into a legal question is through these ritual forms of constitutional interpretation.¹⁰⁷ Normative theories of constitutional interpretation, in seeking to elevate one modality above all others and to explain why it alone is legitimate, fail to describe the practice of constitutional interpretation—the ways that courts actually decide constitutional issues and lawyers write briefs for those courts.¹⁰⁸

III. LINKING JUDICIAL SUPREMACY TO CONSTITUTIONAL INTERPRETATION

With this account of the practice of constitutional interpretation, we are finally in a position to assess the Court’s interpretive expertise and to

in the world but because they sound reasonable to those within the language community (practitioners of constitutional interpretation). *Cf. id.* at xii–xiv, xvi. Thus, he explains a “modality” as “the way in which we characterize a form of expression as true,” *id.* at 11 while the “constitutional modalit[y]” is “the way[] in which legal propositions are characterized as true from a constitutional point of view.” *Id.* at 12. Further, “the legitimacy of judicial decisions [is] maintained by adherence to certain conventional methods of constitutional construction.” *Id.* at xix; *see also id.* at 12–13.

104. *Id.* at 41.

105. *Id.* at xiv–xv. In this regard, it is worth noting that both *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), and *Roe v. Wade*, 410 U.S. 113 (1973), both of which were (and are) quite controversial, are remarkable for how little the constitutional interpretations offered conform to the modalities Bobbitt describes. *Cf.* Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 30 (1990) (noting that the ethical modality of constitutional interpretation “can be the platform for a special form of leadership (as in *Brown*), or . . . the cause of the most unhappy form of vulnerability (as in *Roe v. Wade*)”).

106. BOBBITT, *supra* note 10, at 22 (emphasis added).

107. *See id.* at 41 (explaining that the ritual form of constitutional interpretation, with its modes of argument, is “how political questions are transmuted into legal questions in the United States”).

108. *Cf. id.* at 31–42.

explore its implications for judicial supremacy. The preceding account enables us to see that there are, in fact, limits to the Court's alleged expertise. The judiciary is uniquely situated only with respect to some of these modalities of constitutional argumentation. This Part explains this claim and uses it to develop a framework for analyzing when it would be reasonable for the public to revoke its consent to the Court's final interpretive authority and, thus, for the other branches of government to reassert shared responsibility for constitutional interpretation. Finally, this Part explores how the process of revocation might work as a practical matter.

A. The Court's Claim to Interpretive Expertise

The Court's claim to expertise is strongest when it is engaging in interpretive modalities for which lawyers are uniquely trained and the judicial forum is particularly well suited. As James M. Landis once noted regarding the division of legal labor between judges and administrators: "*Our desire to have courts determine questions of law is related to a belief in their possession of expertness with regard to such questions.*"¹⁰⁹ Similarly, constitutional questions should be left to courts where they possess relative expertise with regard to constitutional interpretation.

Where constitutional meaning is elaborated through textual, historical, structural, and doctrinal argument, the Court's claimed expertise is solid, and deference to its views makes sense. Arguments based on text, structure, and doctrine depend on close analyses of language or ideas within a limited universe of texts. More importantly, this universe of texts with its accompanying stories is precisely what is taught in law school. "[I]n the last analysis," these are modalities "that lawyers are equipped to decide."¹¹⁰

The competence of judges with respect to the historical modality—especially in its traditional, originalist form—is also credible. As others have argued before me, "[t]he telling of history is an evidentiary exercise"—one that "requires judges to sift through competing evidence offered by litigants."¹¹¹

Moreover, the judicial forum—including brief writing and the work in judicial chambers—is particularly conducive to the sort of reading,

109. LANDIS, *supra* note 78, at 152 (emphasis in original).

110. *Id.*

111. Friedman & Smith, *supra* note 25, at 88.

writing, and research that is required by these four modalities.¹¹² By contrast, the legislative forum is ill suited to such arguments, especially those requiring a careful analysis of precedent.¹¹³

The Court's claim to interpretive expertise is at its lowest ebb when it resolves constitutional ambiguity through interpretive modalities for which lawyers are not uniquely trained.¹¹⁴ Specifically, where the Court's interpretations of the Constitution ultimately rest on prudential and ethical argument, it lacks a special claim to interpretive expertise.

Nonjudicial actors are at least as good at making these sorts of arguments about the Constitution, if not better. To take each in turn, prudential arguments are essentially policy arguments. They are arguments about the consequences of competing constitutional rules, and they turn on empirical facts. Policy arguments are a regular feature of legislative hearings as well as official and private legislative debates. Similarly, the Executive, especially its administrative arm, has both expertise and experience in empirical, consequentialist reasoning as well as established procedures and forums in which these types of arguments are regularly made (e.g., notice and comment rulemaking).

Democratically accountable bodies have another competitive advantage as places for debates about constitutional constraints to the degree that those debates turn on prudential considerations. This is because final decisions in policy matters frequently turn on value judgments. Heterogeneous, modern societies generally default to the democratic process to make such value judgments in recognition of the fact that moral consensus is frankly impossible.¹¹⁵

112. The Court's unique competence with respect to these modalities is only plausibly contested by the legal offices of the Executive, particularly the Office of Legal Counsel, which issues its own opinions on constitutional matters. See Office of Legal Counsel, *Opinions by Date and Title*, available at <http://www.justice.gov/olc/memoranda-opinions.html> (last visited May 21, 2012). However, even here the Court has the advantage of relative structural neutrality.

113. See TUSHNET, *supra* note 2, at 63–65 (using the Bork hearings to illustrate the incongruence of reasoning about precedent in the legislative forum).

114. One might have thought that the natural direction of the argument would be that the Court's constitutional interpretations are not worthy of deference when they fail to comport with these six modalities of constitutional interpretation. This, however, would be to transform the six modalities from a practice into a justification. If the argument had gone in this direction, it would have been a new variant of the argument that judges must apply a consistent interpretive rule (here a set of six interpretive approaches); otherwise, it is not possible to see them as doing anything other than advancing their personal preferences. Cf. BOBBITT, *supra* note 10, at 119; see also Post, *supra* note 105, at 27 (arguing that it is a mistake to seek to ground constitutional authority outside the process of interpretation itself).

115. The democratic process must, however, be appropriately inclusive and procedurally fair.

Judges, by contrast, are not particularly well positioned to adjudicate policy debates, lacking both technical expertise and democratic accountability.¹¹⁶ Moreover, the adversarial system and the rules of evidence undermine the reliability and scope of empirical evidence that comes before the courts, and judges are generalists.

Several of the Court's own doctrines acknowledge this, calling for deference to other branches when a question turns on the weighing of empirical evidence or policy consequences.¹¹⁷ These same doctrines recognize a democratic accountability rationale for deference. To the degree that policy questions frequently cannot be resolved entirely on objective scientific grounds and instead require value judgments, courts have recognized that these decisions are best left to democratically accountable actors.

Make no mistake, the claim, here, is not that “[j]udicial decisions inconsistent with the people’s will should be resisted” simply because they are anti-majoritarian.¹¹⁸ Rather, the point is that since value judgments are typically left to the democratic process, and policy decisions always involve value judgments, our democratic institutions should have a voice in constitutional interpretation that turns on prudential reasoning, absent some countervailing concern.

The capacity of nonjudicial actors with respect to the ethical modality is similarly robust. As we have seen, the ethical modality is not an assessment of morality. Instead, it seeks to resolve ambiguity by reading the Constitution in light of fundamental tenets of American culture.¹¹⁹

Once again, democratically elected bodies have the advantage of accountability (and relatedly exposure) to a wide range of perspectives on our national commitments. This is essentially Mark Tushnet’s point when he suggests that “disagreements over the thin Constitution’s meaning are best conducted *by the people*, in the ordinary venues for political

116. On the question of technical expertise, *see, e.g.*, *Ethyl Corp. v. EPA*, 541 F.2d 1, 67 (D.C. Cir. 1976) (Bazelon, C.J., concurring) (noting “substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable”).

117. *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (explaining deference to Congress in terms of both institutional competence and democratic accountability); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (rationalizing deference to agencies in terms of both democratic accountability and expertise); *see also* Eisgruber, *supra* note 77, at 355–57 (discussing other doctrines in which judicial deference is established in recognition of the unique competence of other branches).

118. *Cf.* Neal Devins, *Tom Delay: Popular Constitutionalist?*, 81 CHI.-KENT L. REV. 1055, 1055–56 (2006).

119. *See* Post, *supra* note 105, at 26 (explaining a modality of constitutional interpretation which “engages in an ongoing process of national self-definition [and] appeals to the authority of the Constitution as, for lack of a better word, ethos”).

discussion” (where the “thin Constitution” refers to the Constitution’s “fundamental guarantees of equality, freedom of expression and liberty.”)¹²⁰

Judges, by contrast, are intentionally insulated from the democratic process by our Constitution through the grant of life-tenure.¹²¹ Moreover, judges, as a group, turn out to be highly unrepresentative of the American public.¹²²

Another underappreciated advantage that nonjudicial actors have with respect to the ethical modality is that they are not constrained by the legal profession’s limited notion of what constitutes a relevant text from which to discern our nation’s fundamental ethical commitments. Presidential speeches, the speeches of Frederick Douglass, Martin Luther King, Elizabeth Cady Stanton or advocates of the Seventeenth Amendment, even monuments on the National Mall, are all arguably relevant to understanding our nation’s fundamental moral commitments and the ways they have changed. Such texts are, nevertheless, awkward bases for judicial decisionmaking within the conventions of legal practice.¹²³

None of this is to say that the Justices (or other judges) should be precluded from engaging in the ethical modality. Justices, over time, accrue vast knowledge of important legal texts that reveal our ethical commitments. As such, it is important to have their voice in any debate.

At the same time, we should not preclude others from speaking simply because there are benefits to hearing the Court’s views. This is especially so given that when the Court “purport[s] to speak for the fundamental ethos of the contemporary community,” it is likely to find itself in “an

120. TUSHNET, *supra* note 2, at 14, 11.

121. *See, e.g.*, Federalist No. 78, *supra* note 69, at 430. Hamilton famously stated:

That inflexible and uniform adherence to the rights of the constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by temporary commission. Periodical appointments, however regulated . . . would . . . be fatal to their necessary independence. If the power of making them was committed either to the Executive or Legislature, there would be danger of improper complaisance to the branch which possessed it . . . if to the people . . . there would be too great a disposition to consult popularity . . .

Id.

122. *See* Fallon, *supra* note 56, at 1697 (noting that “[v]irtually without exception, judges and Justices are well-educated members of the upper or upper-middle classes who have been socialized to accept professional norms”); John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 369 (1999) (noting that judges “are likely to bring to their work the perceptions of an upper middle class, educated, largely male, and largely white elite”).

123. *But see* Friedman & Smith, *supra* note 25, at 75–76 (praising *Washington v. Glucksburg*, 521 U.S. 702 (1997), for utilizing “numerous sources of constitutional history, including statutes, state and federal court decisions, executive actions, *activity by mobilized citizens*, [and] *professional task forces*”) (emphasis added).

exposed position” since its positions are “justified in the end only by the wisdom of its own insight.”¹²⁴

B. Theorizing Limits to Judicial Supremacy

The Supreme Court’s claim to supremacy is strongest when it is engaging in interpretive methods in which it is uniquely expert. When the Court’s decisions turn on prudential or ethical judgments, however, its claim to expertise is at its lowest ebb. Interpretive questions that ultimately depend on the ethical and prudential modality are precisely the questions with respect to which the other branches of government and the public itself are, at the very least, equally capable of engaging.

In order to imagine, how the limits of judicial expertise with respect to constitutional interpretation might inform a discussion of judicial supremacy, a number of considerations must first be explored. Most importantly, we must recognize the significant systemic advantages to granting a single institution the authority to resolve constitutional conflicts.

The primary advantage of a bright-line rule of judicial supremacy is that it provides a clear forum for the ultimate resolution of controversies. The first advocates of judicial supremacy argued precisely this point. In the early 1830s, for instance, Justice Story urged that the Constitution required a single interpreter, whose interpretations would be final, in order to further the central benefits of all law: uniformity, certainty, predictability, and stability.¹²⁵ This same argument was recently expanded upon by Alexander and Schauer, who warn against shared interpretive authority on the grounds that the “settlement of contested issues is a crucial component of constitutionalism” that requires “an authoritative

124. Post, *supra* note 105, at 30. In fact, a good number of normative theorists have severely criticized the legitimacy of constitutional judgments derived from the ethical mode on the ground that the Court can provide “no particularly persuasive response to the counter-majoritarian difficulty” when it relies on this modality. *Id.* at 25. Some, therefore, are likely to conclude that a simple solution would be to banish the prudential and ethical modalities from the legitimate repertoire of constitutional interpretation while leaving judicial supremacy in tact. Even if it were desirable, it strikes me as exceptionally impractical to imagine that one can change established professional practices and habits by theoretical fiat—a fact that perhaps offers a more charitable explanation of Justice Scalia’s observed inconsistencies. See, e.g., David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1420–21 (1999) (arguing that “the ‘as applied’ critique[s] provide powerful evidence that, consciously or unconsciously, Scalia’s values affect his analysis” and that “those studies that retrace Scalia’s historical steps or parse Scalia’s logic do much to undermine his claims of judicial neutrality”).

125. KRAMER, *supra* note 2, at 184–85 (describing Justice Story’s argument for judicial supremacy in the 1830s).

interpreter whose interpretations bind all others.”¹²⁶ In light of this consideration, the public would be foolish to revoke consent every time the Court reached a conclusion that could not be attributed to its special competence.

Judicial supremacy is appropriate where indeterminate meaning is stabilized despite critical reliance on modalities for which the Court cannot claim special competence. Put differently, where the Court succeeds in resolving constitutional ambiguity (i.e., deciding questions unanimously, or nearly unanimously, and consistently over time), it makes sense to defer to it.¹²⁷ *Brown v. Board of Education* (1954) is a prime example.¹²⁸ In light of this same systemic concern, the judiciary should get the first shot at resolving all constitutional questions that can be presented to it.

On the other hand, contexts in which the Court, over extended periods, has failed to resolve constitutional debates may be appropriate subjects for shared interpretive authority. Judicial supremacy may reach its normative limits where the Court’s interpretations arise out of modalities of argument for which it lacks special competence and it has failed to resolve ambiguity and bring settlement with respect to constitutional meaning.

In this more limited but by no means insubstantial universe of cases, there is a plausible argument that the work of constitutional interpretation should be shared between the Supreme Court, the other branches of government, and the public itself *unless* there are countervailing concerns.

As with other normative decisions, the ultimate decision of whether to revoke judicial supremacy is a matter of good judgment in the true Aristotelian sense.¹²⁹ It cannot be delineated by rule or decided out of context. Still, it is worth listing the types of considerations that are likely to recur in our assessment of whether it would, all things considered, be wise to revoke the default rule of supremacy.¹³⁰

126. Alexander & Schauer, *supra* note 29, at 1359. They argue further that “the Supreme Court can best serve this role.” *Id.*

127. One does not need to agree with Justice Story or Professors Alexander and Schauer’s precise assessment of the value of settlement to accept this proposition.

128. *Cf.* Griffin, *supra* note 1, at 121 (discussing how the plausibility of Alexander Bickel’s defense of the comparative advantage of the Court in constitutional interpretation depended on the unanimity of the desegregation decisions and noting that “[p]ersistent disagreement . . . discredit[s] the proposition that the five justices who prevailed were enforcing fundamental values”). *Brown*’s unanimity, and the fact it continued through *Brown II* and *Cooper v. Aaron* is particularly remarkable in light of the fact that between 1946 and 2010 only 31 percent of the Court’s decisions involving constitutional questions were decided unanimously. See Harold J. Spaeth, *The Supreme Court Database*, <http://scdb.wustl.edu/index.php> (last visited May 19, 2012).

129. See generally ALASDAIR MACINTYRE, *AFTER VIRTUE* 146 (3d ed. 2007) (describing the Aristotelian tradition of virtue-based ethics).

130. Balancing the various considerations, discussed below, will be highly context-specific and

We are likely to be extremely reluctant to abandon judicial supremacy where the rights of minorities—discrete, insular and politically isolated ones—are at stake.¹³¹ The presence of individual rights, however, does not necessarily have to preclude shared interpretive responsibility. For instance, while the traditional affirmative action contexts of employment and higher education involve individual rights, it is not at all clear that the Court is the only hope for these rights-bearers.¹³² The political process is similarly a viable option for the protection of women's rights, though not necessarily for gay rights or the rights of prisoners.

We are likely to find shared interpretive responsibility desirable where it would foster accountability through checks and balances or where it would enhance other aspects of democratic governance. Relevant values of American democracy in this regard include not only political participation and government responsiveness but also a tradition of federalism. By contrast, we should be wary of views of the co-equal branches of government where they are likely to be structurally tainted—*e.g.*, the Executive's views on constitutional constraints on its prosecutorial role.

We may also want to take into account the historical context. That is, we might ask whether the historical period is one of turmoil and instability in which decentralized decisionmaking risks constitutional crisis or a

will certainly be subject to debate. Nevertheless, I believe it would be a mistake to offer a framework that failed to account for the fact that there will be situations where, notwithstanding the fact that the Court's claim to expertise is at its lowest ebb, it would be unwise to revoke the default rule of supremacy.

131. Whittington, *supra* note 21, at 261 (noting salience of belief that the Court, as our only unelected institution, is uniquely positioned to protect the rights of individuals and minority groups against the darker sides of democracy); *but see* BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 56 (2009); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1934 (1995) (expressing frustration with those who refuse to acknowledge that the Court "inevitabl[y] capitulat[es] to the dominant social norms"). This work is an elaboration of the work of political scientist Robert Dahl in the middle of the twentieth-century. *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). It has been criticized at some length recently. *See* Pildes, *supra* note 18, at 105.

132. If recent experience proves anything, it is that citizens who feel burdened by affirmative action programs in education and employment have been successful at organizing and campaigning to repeal such efforts. *See, e.g.*, Dan Frosch, *Vote Results Are Mixed On a Ban On Preference*, N.Y. TIMES, Nov. 8, 2008, at A19 ("In Nebraska, a proposed ban on affirmative action passed easily with nearly 58 percent of the vote."); Ethan Bronner, *U. of Washington Will End Race-Conscious Admissions*, N.Y. TIMES, Nov. 7, 1998, at A12 ("Washington is the second state, after California, to pass a voter initiative banning preferential treatment."); Robert Pear, *In California, Foes of Affirmative Action See a New Day*, N.Y. TIMES, Nov. 7, 1996, at B7 (reporting that Californians approved a constitutional amendment prohibiting affirmative action "by a vote of 54 percent to 46 percent").

period of ossification in which we would benefit from the dissenting voices of the co-equal branches.

Finally, we are likely to find that judicial supremacy is particularly problematic where the Court has come to operate as a forum for partisan politics. As Justice Stewart once noted:

A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.¹³³

It is not controversial that politicization undermines the judiciary's comparative advantage in constitutional interpretation.¹³⁴

C. Developing a Framework for Analyzing a Claim to Supremacy

Pulling these various threads together, a framework for assessing when it is appropriate to revoke the default rule of finality is now imaginable. First, we will want to determine whether the Court is failing to provide resolution to constitutional ambiguity. If so, two further considerations arise: the Court's expertise relative to others, and the wisdom of challenging its determinations, *all things considered*. More specifically, two sets of questions emerge: (1) Is the Court's doctrine potentially open to challenge because the Supreme Court's claim to expertise is at its lowest ebb? Are the Court's views largely explained by ethical and prudential judgments? and (2) Would shared interpretive responsibility, all things considered, be a good idea? A preliminary list of considerations for the second question includes: implications for individual rights, especially those unlikely to be protected by the political process, implications for checks and balances, implications for political values, and implications for political stability.

Notice that politicization has not made the list of considerations. Politicization cannot provide a neutral principle upon the basis of which to withdraw the default rule. If we could all agree that the Court had come to operate as a forum for brash politics over an issue, or in general, there is

133. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting).

134. *See, e.g.*, Griffin, *supra* note 1, at 126 (noting that "politicization undermines theories that assert that the Supreme Court has a comparative advantage over the elected branches in matters of principle").

no question that its claim to supremacy would be weak. In fact, the normative grounds for judicial *review* would also be radically undermined. The problem is that we cannot. People from different places along the political spectrum fundamentally disagree about when the Supreme Court is operating in an inappropriately politicized fashion. This is not surprising. The very purpose of the modalities of constitutional argumentation is to offer apolitical explanations for constitutional outcomes.

The next obvious question is: How will the framework be operationalized? In particular, what should be the object of analysis?

Although the framework could be applied to individual opinions, there are a number of reasons to focus on a chain of decisions addressing what the Constitution means with respect to the same issue. First, given the benefits of knowing where to go to resolve constitutional conflicts, the Court should get the first shot. In fact, the judiciary should be given more than one chance to resolve the interpretive question, given the radical consequences of revoking the default rule (discussed below). We ought to be certain that the Court has not just made a bad choice in one case. There will always be bad decisions, ones that are poorly reasoned or explained. The judiciary should be allowed to make mistakes.¹³⁵ It should also have the first opportunity to correct its own errors.¹³⁶ This is not to say that individual opinions cannot be criticized. It is only to say that it would be absurd to revoke the default rule of judicial supremacy based on a single opinion.

Any doctrinal chain of decisions could work, but doctrinal chains of divided decisions are the places where the default rule is least valuable. For one, fractured decisions are an important indication that the default rule of supremacy is failing to provide the benefits of settlement. In any given case, the Court will have resolved the dispute, but it cannot be said to have brought closure to the underlying constitutional question. This is particularly true for cases that turn on the independent views of a single Justice. For another, a focus on doctrinal lines replete with fractured opinions allows us to address partially legitimate concerns about

135. In this regard, I am in (partial) agreement with Alexander and Schauer that officials and citizens should (sometimes) obey directives from mistaken courts. *See* Alexander & Schauer, *supra* note 29, at 1361, 1369, 1378–79.

136. *See* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985) (Blackmun, J.) (rejecting “as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional’” because “[a]ny such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and . . . breeds inconsistency”).

politicization. Fractured decisionmaking is an objective (albeit imperfect) proxy for politicization.¹³⁷

The central task is to decide whether the Court's views and conclusions ultimately derive from ethical or prudential modalities. Therefore, we will need to read carefully the opinions for the reasons they offer for their judgments.¹³⁸ The particular focus will be on those parts of the opinions that directly address *what* the Constitution means.¹³⁹

This task, though laborious, has the added advantage of encouraging reflection on constitutional issues by nonjudicial actors. Those who disagree with the Court must actually read, analyze, and reflect on the arguments the Court has employed to justify its positions.

If it turns out that the Court's competing views arise out of competing prudential and ethical arguments, we would turn to the question of whether, all things considered, shared interpretive authority is desirable in this context. Here, the analysis will turn on the considerations previously identified, although certain contexts may give rise to additional considerations.

D. Imagining a Process for Revocation and a World Without Supremacy

Finally, questions remain about how revocation would work. Who would make the determination that the Court's claim to supremacy was at its lowest ebb? Who would decide if shared interpretive authority was appropriate? How would such a decision be implemented? And, what would shared interpretive authority entail? There is no question that the mechanics would have to be worked out and a full answer to these questions would require an entire article. Still, some preliminary thoughts are in order.

137. It is true that unanimous decisions are not necessarily apolitical. It is also true that not all instances of divisions on the Court are political. Nevertheless, it is certainly plausible to worry that chains of five to four decisions are the most likely sites for judicial politics, if it exists.

138. For a useful conceptual framework for thinking about judicial products, see Roosevelt III, *supra* note 58, at 1191–93 (distinguishing between judgments and opinions).

139. As Roosevelt explains, constitutional decisionmaking is a three-step process:

First, the Court must decide what the Constitution means . . . for instance, that the meaning of the Equal Protection Clause is that states may not discriminate in ways that stigmatize or contribute to the existence of a caste system. . . . Second, the Court must create a doctrinal test to implement this meaning. . . . Last, [the Court] applies this test to a particular set of facts.

Id. at 1193–94. Roosevelt is not interested in how the Court reaches its account of meaning, and in polar opposition to my position here, he ultimately argues that “the argument for judicial supremacy is straightforward” for determinations of constitutional meaning because “[t]he Constitution is a legal text [and] [i]nterpreting legal texts is the work of lawyers and judges.” *Id.* at 1196.

The most pragmatic approach would be to require a formal trigger wherein the co-equal branches of government would undertake to revoke formally the default rule of judicial supremacy. A formal trigger ensures democratic accountability because challenges to judicial supremacy could not be made under the radar. Any public declaration of disagreement with the Court would most definitely be newsworthy. More importantly, it would require explanation. Perhaps most importantly, formal declarations are likely to involve an internal deliberative process.

A range of existing structures could be used. The most uncontroversial option would be to require Congress to pass a joint resolution specifying the particular issue on which the co-equal branches were reinstating their independent authority to interpret the Constitution. Joint resolutions are, with minor technical exceptions, subject to the normal legislative process, including bicameralism and presentment, and go through its normal forums for debate, discussion, and input from the public.¹⁴⁰

The joint resolution process would allow Congress to explain the basis for the decision according to the proposed framework.¹⁴¹ One key distinction between a joint resolution and a bill is that the former may include a preamble.¹⁴² The preamble could be used to include findings to show that the Supreme Court had been given the first shot at resolving a difficult constitutional question, had failed to do so over time as evidenced by a series of split decisions based on competing understandings of the Constitution's meaning, and that the various positions on the Court largely turned on modes of interpretation that, while valid, are not uniquely within

140. Joint resolutions are subject to the constitutional requirement of bicameralism and presentment. *See* U.S. CONST. art. I, § 7; *accord* 7 DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES Ch. 24, § 4; *see also* H.R. DOC. NO. 108-93, at 7 (2003) ("Joint resolutions, with the exception of proposed amendments to the Constitution, become law in the same manner as bills."). Congress could, of course, opt to pass a statute defying the prevailing judicial interpretation of the Constitution and include a similar declaration as part of a preamble to the Act. The risk of this approach as a triggering mechanism is that Congress will presumably have a much greater incentive to revoke the default rule when it has already decided on a substantive course. As such, the framework analysis required is likely to be less of a priority than deliberations over the substance of the provisions. Put simply, the risk is that there will be sufficient support for the statute in Congress that it will forge ahead, asserting its independent authority to interpret the Constitution in unwarranted situations.

141. Note that what would not be acceptable are justifications along the lines of "Enough has been done for those who murder and rape and rob! It is time to do something for those who do not wish to be murdered or raped or robbed." Powe, Jr., *supra* note 7, at 874 (attributing statement to Senator Sam Ervin during the congressional debate on the 1968 Omnibus Crime Control and Safe Streets Act).

142. *See* H.R. DOC. NO. 108-93, *supra* note 140, at 7 (noting that the resolving clause in a joint resolution "is frequently preceded by a preamble consisting of one or more 'whereas' clauses indicating the necessity for or the desirability of the joint resolution").

the judiciary's expertise.¹⁴³ It is also not uncommon for a joint resolution to be accompanied by a legislative report, which could add support and explanation to the legislatively adopted findings in the preamble.¹⁴⁴

While obviously legitimate, a joint resolution, insofar as it requires united opposition to the Court, may set the bar too high. Another option would be to allow Congress to set out its views in an unsigned joint resolution. This would have added symbolic value, as such joint resolutions are how constitutional amendments are proposed.¹⁴⁵ With less symbolism, Congress could simply pass a concurrent resolution. Although concurrent resolutions do not create binding law, they do provide Congress the ability to stake out a constitutional position for the public to consider.¹⁴⁶ Thereafter, Congress could try to legislate consistent with its views.

Similarly, the President could sign an executive order articulating his decision to reassert authority over constitutional interpretation in a particular area. Executive orders are subject to an established, uniform process in which, first, the Director of the Office of Management and Budget must approve the proposed order and, second, the Attorney General must consider both the form and legality of it.¹⁴⁷ Only after both have approved the draft language will it be presented to the President. Proposed executive orders that have not received the approval of these two senior officials may only be presented to the President if they are "accompanied by a statement of the reasons for such disapproval."¹⁴⁸ As

143. 7 DESCHLER'S Ch. 24, § 4 n.18 (noting further that the findings in the preamble of a joint resolution "are amendable after engrossment and prior to third reading of the joint resolution").

144. See, e.g., H.R. REP. NO. 111-448 (2010).

145. Cf. 7 DESCHLER'S Ch. 24, § 4 (explaining that joint resolutions amending the Constitution are not presented to the President).

146. See generally RIDDICK'S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, 442-48, 1202-13 (explaining, *inter alia*, that concurrent resolutions are passed by both Chambers in identical form but are not presented to the President and thus are not binding law); Louis Fischer, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 276 (1993) (noting that it is uncontroversial that absent presentment, a simple or concurrent resolution lacks legislative, i.e., binding legal, force). This process would essentially be the same as a "Sense of Congress" resolution, which are frequently undertaken to express opinions about subjects of current national interest. See generally Paul S. Rundquist, CONG. RESEARCH SERV., 98-82, "SENSE OF" RESOLUTIONS AND PROVISIONS (2003). There is also the possibility that each chamber of Congress could express its independent "Sense" of the constitutional question using a simple resolution, but it strikes me that this would encourage politicization of the interpretive process at the same time that it would not be the constitutional position of a co-equal branch of government.

147. 1 C.F.R. § 19.2(a)-(b) (2011).

148. *Id.* § 19.2(e).

with a resolution, an executive order would be public and subject to congressional ratification or challenge.¹⁴⁹

Each of these formal mechanisms utilizes forums capable of analysis and deliberation and thus could accommodate the type of analysis required by the proposed framework. Moreover, the publicity that any would provoke would trigger constitutional interpretation and argument in the public sphere.

The public's voice in the revocation process would generally mirror the public's current voice in our elected branches of government. There would be room for constituents (including lawyers and academics) to lobby for and against the need to revoke judicial supremacy and to justify or criticize revocation after the fact.¹⁵⁰

Assuming that revocation occurs, what would shared interpretive authority look like? The first thing to reiterate is that shared interpretive authority is not a matter of denying the Court a say. It is a matter of denying the Court the *final* say.

Judicial review would remain even for issues where the default rule of supremacy had been revoked. Cases involving constitutional issues subject to shared interpretive authority would continue to filter through the court system. Courts would continue to get their say.

The critical difference would be that since those "judicial decisions [would] not [be] supreme, they [could] be ignored or defied."¹⁵¹ On the part of Congress, we would expect, therefore, exactly the behavior to which the Court in *City of Boerne v. Flores* (1997) objected: The enacting or reenacting of legislation vindicating a competing view of the Constitution.¹⁵² On the part of the Executive, we might expect to see the President refuse to enforce legislation that the Court had held constitutional.¹⁵³ Inversely, the Department of Justice might continue to

149. See 44 U.S.C. § 1505(a)(1) (2011) (requiring publication of executive orders so long as they have "general applicability and legal effect").

150. For example, although executive orders typically originate from within the Executive Branch, either from agencies or directly from the White House, outside parties occasionally propose draft language. See Robert C. Wigton, *Recent Presidential Experience with Executive Orders*, 26 PRESIDENTIAL STUD. Q. 473, 476–77 (1996) (noting that the executive order that promulgated the "Don't Ask, Don't Tell" policy for the military involved negotiations including the President, Congress and the military).

151. Friedman, *supra* note 23, at 431.

152. For a detailed discussion of the *Boerne* Court's views, see *infra* notes 166–71, 181 and accompanying text.

153. Cf. Paulsen, *supra* note 45, at 272 (arguing that if co-equal interpretive authority exists, it applies both in the absence and in the presence of a contrary judicial interpretation).

enforce legislation that the Court has struck down.¹⁵⁴ Now and again, we might have a replay of *Marbury*, with the President ordering his officials to refuse to show up to Court.

At the same time, we are likely to continue to see a lot of what we currently see. Congress, the President, political candidates, and members of the public will continue to assert constitutional views and analyses both inside and outside of court. Congress will refuse to pass measures that it considers unconstitutional, and the President will exercise his veto power on those grounds. The Executive may also refuse to enforce statutes it considers unconstitutional. All the while, advocates will seek to persuade the courts, and the other branches, of the soundness of their interpretations.¹⁵⁵

What would not be appropriate would be the kind of judicial intimidation recently proposed by Newt Gingrich.¹⁵⁶ Violence or threats of violence on the part of the public or government officials obviously would be off limits. Court-packing plans and jurisdiction-stripping efforts are also inappropriately coercive.¹⁵⁷

The Court, as a co-equal branch of government, is entitled to an independent view of the Constitution. Any effort to coerce the Court to change its views or to compromise its relative independence from politics is illegitimate. Concerted efforts to skew judicial appointments to ensure particular reversals are questionable in this regard.¹⁵⁸ The Court was established as a countermajoritarian institution, intentionally insulated from current political predilections. So long as there are majoritarian constitutional avenues, there is no countermajoritarian difficulty, only a functioning system of checks and balances.

In all this, the public is left with an important role. Conflict between the co-equal branches will have to be resolved in the political process—both at elections and in the public sphere. The editorial and opinion pages

154. *See id.* at 267–68 (describing longstanding presidential practice of refusing to execute statutes considered unconstitutional).

155. *Cf.* Roosevelt III, *supra* note 58, at 1195 (noting currently various actors “try[] to persuade the Court, through appointments or arguments in the course of litigation”).

156. *See* Eric Posner, *Newt Gingrich and the Supreme Court: The Liberal Scholars Who Support His Critique on Judicial Supremacy*, SLATE MAG., Dec. 20, 2011 (noting that Gingrich’s position paper “argue[s] that when the president and Congress believe that the judiciary has rendered decisions that violate the Constitution, they should be willing to impeach judges, strip them of jurisdiction, haul them before congressional committees, and abolish courts”), available at http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/newt_gingrich_and_the_supreme_court_the_liberal_scholars_who_support_his_critique_on_judicial_supremacy_.html (last visited May 30, 2012).

157. *Cf.* Powe, Jr., *supra* note 7, at 872–74 (discussing the impact of a failed effort to strip the judiciary of jurisdiction over anticommunist programs on the Supreme Court’s jurisprudence).

158. *Cf. id.* at 881 (discussing judicial appointments strategy of abortion foes).

of major newspapers, magazines, certain radio programs, and at least some blogs, including some quite exceptional blogs on constitutional issues, would have an important role to play in educating the voting public and keeping all three branches in line.

The New Departmentalism proposed here is both more pragmatic and normatively superior to mechanisms that advocate the adoption of some form of national referendum.¹⁵⁹ Direct democracy is not up to the task of constitutional interpretation. It is decidedly un-deliberative, even anti-deliberative, with commercials and polls driving the political process. Referenda, moreover, suffer from all of the legitimacy concerns that plague the rest of American politics, not least of which include chronically low voter turnout and the role of money in campaigns and recently even (“Astroturf”) political movements. With all this in mind, it is time to illustrate how the proposed framework might be used.

IV. RACE AND REPRESENTATION—APPLYING THE FRAMEWORK

The Supreme Court’s recent jurisprudence with respect to race and democratic representation is on a collision course with progressive understandings of the constitutional promise of the civil rights movement. The Roberts Court has positioned itself to declare unconstitutional key provisions of the Voting Rights Act (“VRA”)—the most venerated and effective piece of civil rights legislation to date.¹⁶⁰ Were that to happen, states would be prohibited from acknowledging the importance of race in political life by intentionally creating integrated legislative bodies. This is because without the VRA, race-conscious districting, which is already on precarious constitutional footing, would become effectively impossible to justify under existing doctrine.

Constitutional constraints on a state’s ability to consider race as a relevant axis for political representation pose a host of theoretically interesting questions for any theory of decentralized interpretive authority. While most contemporary constitutional fights are either about individual rights or about the structure of government, questions regarding race and democracy sit at the intersection of structure and rights. Moreover, as a practical matter, these questions arise in the context of redistricting, which

159. *But see* Tom Donnelly, *The ‘People’s Veto’: A Way to Keep the Courts in Check*, WASH. POST, Dec. 29, 2011, at A17. (advocating for the revival of Progressive reforms to allow the recall of judicial decisions); Tom Donnelly, *Making Popular Constitutionalism Work* 7, 27–30 (Harvard Public Law, Working Paper No. 11-29 Nov. 21, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1962580.

160. *Cf. NAMUDNO*, 129 S. Ct. 2504, 2506 (2009).

is typically undertaken by state officials—thereby raising the particularly thorny question of whether state legislatures should be entitled to entertain independent views of the Constitution.

The impending controversy arises out of two intersecting lines of precedent: *Shaw v. Reno* (1993) and its progeny, which define the constitutional limits of race-conscious legislative districting, and *City of Boerne v. Flores* (1997) and its progeny, which narrowly construe Congress' power under § 5 of the Fourteenth Amendment to enforce the Amendment's substantive guarantees.¹⁶¹

In *Shaw*, the Court established, over four dissents, a cause of action under the Fourteenth Amendment's Equal Protection Clause, where a redistricting plan "is so bizarre on its face that it is 'unexplainable on grounds other than race.'"¹⁶² Despite a significant degree of uncertainty about the doctrine, a majority of the Court has taken the position post-*Shaw* that where a state engages in race-conscious legislative districting, its actions will be subject to strict scrutiny so long as it is established that consideration of race was the predominant factor explaining the state's choices.¹⁶³ A state can only prevail under strict scrutiny if it: (1) offers a compelling interest for having allowed racial considerations to predominate and (2) demonstrates that racial demographics were only considered to the degree necessary to further the stated compelling interest.¹⁶⁴

To date, a need to comply with the VRA has been the only compelling interest that this same majority has been willing to entertain.¹⁶⁵ The

161. See *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Shaw v. Reno*, 509 U.S. 630 (1993). See also U.S. CONST. amend. XIV, § 5 (explicitly empowering Congress to enforce the Amendment's substantive provisions, including the Equal Protection Clause, "by appropriate legislation").

162. *Shaw*, 509 U.S. at 644.

163. The controversy primarily revolves around the nature of the cause of action. See *Miller v. Johnson*, 515 U.S. 900 (1995) (clarifying that a constitutional violation occurs when race is the "predominant factor" in the drawing of district lines and it cannot be justified under strict scrutiny). That districts subject to a *Shaw* challenge would be subject to strict scrutiny was never disputed within the majority. See *Shaw*, 509 U.S. at 643–44 (holding that plans covered by the new cause of action would be subject to strict scrutiny).

164. See *Miller*, 515 U.S. at 920–21.

165. From the beginning, the suggestion that compliance with VRA could qualify as a compelling state interest has come with numerous caveats. See, e.g., *id.* at 921 ("Whether or not in some cases compliance with the [VRA], standing alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here."); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 908 n.4, 911, 915 (1996) (hedging as to whether compliance with VRA would qualify as a compelling state interest). Even Justice O'Connor (the most sympathetic member in the conservative coalition at the time) offered mixed signals when she addressed the issue in *Bush v. Vera*. See 517 U.S. 952, 992, 990 (1996) (O'Connor, J., concurring) (equivocating by ultimately asserting that "[w]e should allow States to assume the constitutionality of § 2 of the VRA, including the 1982

constitutionality of the two central provisions of the VRA, however, is shrouded in doubt, in light of *Boerne*.

In *Boerne*, the Court considered the constitutionality of the Religious Freedom Restoration Act, a law enacted by Congress to restore a judicial interpretation of the Free Exercise Clause that the Court had recently overturned.¹⁶⁶ The Court held the Act unconstitutional.¹⁶⁷ In doing so, the Court significantly narrowed the scope of Congress' § 5 powers, declaring that Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."¹⁶⁸ In particular, while Congress may enact "[l]egislation which deters or remedies constitutional violations . . . even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States,"¹⁶⁹ it may do so *only* where it is enforcing the Court's interpretation of the Fourteenth Amendment.¹⁷⁰ The decision, in other words, was also a clear statement of judicial supremacy, with the Court asserting exclusive and final interpretive authority over the Constitution.¹⁷¹

The congruence and proportionality test established to police Congress, in this regard, has proven very difficult to meet, and it is unlikely that the evidence of racial discrimination before Congress when it renewed either § 2 or § 5—the primary substantive provisions—of the VRA would survive a *Boerne* challenge.¹⁷²

Section 5 requires certain covered jurisdictions—those that by various measures had suppressed electoral turnout between 1964 and 1972—to

amendments" even though the Court had only "assum[ed] but never directly address[ed] its constitutionality") (emphasis added).

166. *Boerne*, 521 U.S. at 512–15.

167. *Id.* at 511.

168. *Id.* at 519.

169. *Id.* at 518 (internal quotation marks and citation omitted).

170. *Id.* at 519 (rejecting "the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States" because "Congress does not enforce a constitutional right by changing what the right is").

171. *Id.* at 545 ("Congress lacks the 'power to decree the *substance* of the Fourteenth Amendment's restrictions on the States."); *see also id.* at 535–36. *Boerne* must be seen as extending *Cooper v. Aaron* (1958), which only involved supremacy over state officials' interpretations of the Fourteenth Amendment. Only Justice Breyer asserted that there was no need to reach this issue and expressed hesitation regarding the position. *See id.* at 566.

172. *Id.* at 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."); *see, e.g., Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *but see Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

seek preclearance for any changes related to voting.¹⁷³ Preclearance is only permissible where the change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”¹⁷⁴ The significant constitutional problem for § 5 is that the Court is unlikely to see the current provision, which was recently reenacted, as a lawful exercise of Congress’ enforcement power. Under *Boerne*, § 5 is only constitutional if it was enacted to remedy racial discrimination that the Court would recognize as unconstitutional.¹⁷⁵ The record of intentional discrimination against minority voters, *because of* their race, which Congress relied on in 2006 in reenacting § 5, is unlikely to seem robust to the Court.¹⁷⁶ Even if this hurdle could be cleared, the Court is unlikely to find that the record justifies either the scope of the intrusion or intruding on the sovereignty of the particular states covered.¹⁷⁷

The constitutionality of § 2 is similarly vulnerable. Section 2 operates nationwide and forbids any “standard, practice, or procedure” that “results in a denial or abridgment of the right of any citizen of the United States to

173. Covered jurisdictions are defined by § 4 of the Act. *See* 42 U.S.C. § 1973b(b) (defining covered jurisdictions as ones that used a test or device as a prerequisite to voting and failed either to register or turn out 50 percent of eligible voters in the definitional years).

174. *Id.* § 1973a(c).

175. *See* *Washington v. Davis*, 426 U.S. 229, 239–42 (1976) (holding that evidence of a discriminatory purpose is required to prove an equal protection violation where the government action is otherwise facially neutral).

176. In 2009, the constitutionality of § 5 was presented to the Court. While it opted to decide the case on narrower statutory grounds given the unique and limited facts of the case, the Court strongly signaled openness to the constitutional challenge:

Some of the conditions that we relied upon in upholding this statutory scheme . . . have unquestionably improved. Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels. These improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success. Past success alone, however, is not adequate justification to retain the preclearance requirements. It may be that these improvements are insufficient and that conditions continue to warrant preclearance under the Act. But the Act imposes current burdens and must be justified by current needs.

NAMUDNO, 129 S. Ct. at 2511–12 (internal citations omitted).

177. The Court explicitly questioned the coverage formula:

The evil that § 5 is meant to address *may no longer be concentrated in the jurisdictions singled out for preclearance*. The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions. For example, the racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide.

See id. at 2512; accord Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 *YALE L.J.* 174, 208 (2007) (“The most one can say in defense of the [coverage] formula is that it is the best of the politically feasible alternatives or that changing the formula would . . . disrupt settled expectations.”).

vote on account of race or color.”¹⁷⁸ Once again, it is unclear whether the record of intentional discrimination before Congress when it amended § 2 in 1982 would be considered sufficient to justify its remedial obligations or its national application.¹⁷⁹ Section 2 is additionally vulnerable because there is a good deal of (albeit ambiguous) evidence in the legislative record that Congress sought to reverse a recent Court decision.¹⁸⁰ The *Boerne* Court specifically rebuked Congress for debating the merits of its most recent religion case and articulating among the Act’s purposes a desire to reestablish the Court’s previous interpretation of the Free Exercise Clause.¹⁸¹

Were the Supreme Court to strike down either or both of these core provisions of the VRA, there is a real risk that Congress and state legislatures would return to being as white as they were in 1965.¹⁸² This might give pause to the American public as well as our elected officials, who might wonder whether they should consent to the Court’s having the final word on this particular issue after all.

The desire to revoke the default rule need not arise out of certainty that race-conscious districting is either constitutional or desirable.¹⁸³ Various

178. 42 U.S.C. § 1973(a).

179. See Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2346 (2003) (noting that “the constitutionality of section 2 of the Voting Rights Act is currently an open question”); Luke P. McLoughlin, *Section 2 of the Voting Rights Act and City of Boerne: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39, 43 (2006) (noting that there has not been “a direct *City of Boerne* challenge to section 2”). Lower courts have uniformly upheld the amended § 2 against constitutional attack. See, e.g., *United States v. Blaine Cnty., Mont.*, 363 F.3d 897 (9th Cir. 2004) (affirming on the basis of the Court’s summary affirmance in *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984)). See *Bush v. Vera*, 517 U.S. 952, 1034–35 (Stevens, J., dissenting) (clearly summarizing the controversy).

180. See *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. at 1010–11 (Rehnquist, J., dissenting). In particular, Congress expressed some concern about *City of Mobile v. Bolden*, 446 U.S. 55 (1980), a case that extended *Washington v. Davis*, 426 U.S. 229 (1976), to voting rights.

181. *City of Boerne v. Flores*, 521 U.S. 507, 515 (1997).

182. See, e.g., Heather K. Gerken, *Race, Voting Rights, and the Genius of Justice Souter*, THE AMERICAN PROSPECT, May 1, 2009, available at http://prospect.org/cs/articles?article=race_voting_rights_and_the_genius_of_justice_souter (“In a world of racial bloc voting, race-blind districting is simply a recipe for disempowering racial minorities.”); Pamela S. Karlan, *Our Separatism? Voting Rights as an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 97 (1995) (“Without the Voting Rights Act and race-conscious districting, then, the complexion of the American legislative branches would be decidedly lighter, and in the Deep South would be virtually all white.”).

183. Race-conscious districting is highly controversial, even among liberals, who recognize the tradeoff between facilitating descriptive representation and electing legislative bodies willing to pass the substantive agendas supported by a majority of minority voters. For a variety of views, compare Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734 (2008), with Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291 (1997), with David Ian Lublin, *Race, Representation, and Redistricting*, in CLASSIFYING BY RACE 111 (Paul E.

actors might simply believe that the question of whether the Constitution constrains our ability to address the continued salience of race in America, as we create our representative institutions, is one that would benefit from wider constitutional and political debate.

Our question is whether it would be appropriate to revoke the default rule of supremacy. For the purposes of the framework set out in Part III, the key line of cases to review are those in which the Court has addressed the question of whether the Equal Protection Clause prohibits affirmative action, defined broadly as race-conscious programs designed to alleviate or remedy disadvantages experienced by racial minorities whatever their cause (i.e., present state action, past state action, or private preference).¹⁸⁴ This is because *Shaw* is an outgrowth of that line of precedent.¹⁸⁵

Since 1977, when the Court first confronted the question of the degree to which the Constitution constrains the government's ability to remedy racial inequality through race-conscious policies, it has issued eighteen decisions on the merits, in the contexts of voting, employment, government contracts, and education.¹⁸⁶ All of these cases involved

Petersen ed., 1995). See also Bernard Grofman & Lisa Handley, *1990s Issues in Voting Rights*, 65 *Miss. L.J.* 205 (1995).

184. To clarify, for purposes of this Article, it is the foundation of the Court's views about race-conscious districting and the Equal Protection Clause that is being studied. This is a separate question from the foundation of its views about whether the Equal Protection Clause only prohibits intentional racial discrimination on which its ultimate views on the constitutionality of the VRA partially depend. That said, this entire Article challenges the Supreme Court's understanding of judicial supremacy, articulated in *Boerne*, and as such may have some bearing on the appropriateness of holding the VRA unconstitutional pursuant to the currently accepted narrow interpretation of Congress's § 5 power.

185. See T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after Shaw v. Reno*, 92 *MICH. L. REV.* 588, 650 (1993) (noting that "*Shaw* follows its doctrinal progenitors, most notably *Bakke*"). Although the Fifteenth Amendment explicitly prohibits disenfranchisement on the basis of race, it does not address second-order questions of political representation, such as the structuring of legislative districts, and the Supreme Court has decided to use the Fourteenth Amendment's Equal Protection Clause as the basis of its jurisprudence in this area. *But see* *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (finding racial gerrymander in question constituted a violation of the Fifteenth Amendment).

186. *United Jewish Orgs. of Williamsburg v. Carey*, 430 U.S. 144 (1977) (voting); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (education); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (government contracts); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (employment); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (employment); *United States v. Paradise*, 480 U.S. 149 (1987) (employment); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (government contracts); *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) *overruled, in part, by Adarand Constructors, Inc. v. Pena*, 515 U.S. at 227 (licensing); *Shaw v. Reno*, 509 U.S. 630 (1993) (voting); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (government contracting); *Miller v. Johnson*, 515 U.S. 900 (1995) (voting); *Shaw II*, 517 U.S. 899 (1996) (voting); *Bush v. Vera*, 517 U.S. 952 (1996) (voting); *Hunt v. Cromartie (Shaw III)*, 526 U.S. 541 (1999) (voting); *Easley v. Cromartie (Shaw IV)*, 532 U.S. 234 (2001) (voting); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (education); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (education); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1*, 551 U.S. 701 (2007) (education). Excluded from this list are cases where the

challenges to race-conscious remedial policies, and in each, the Court wrestled with “the proper meaning of the Equal Protection Clause” in some way.¹⁸⁷

These eighteen cases have produced a total of eighty-six opinions. Only one was decided unanimously, although even there the Court fractured in its reasoning.¹⁸⁸ Twelve of these decisions (or 67 percent) were decided five to four.¹⁸⁹ By way of comparison, 24 percent of the Court’s decisions involving constitutional questions during this period were decided five to four.¹⁹⁰

Divisions regarding constitutional meaning run deep and confusion is rampant. It is not uncommon for both the majority and the dissent to be fractured—with Justices signing onto only some parts of the primary majority or dissent or writing separately. These are not cases in which the Court agrees about core constitutional values but disagrees about how to apply them or cases where it has settled on an unworkable doctrinal test.

Although the most common modality of argument in this set of cases is doctrinal, the volume of precedent invoked appears to be inversely related to its ability to determine the outcome.¹⁹¹ This was all too apparent in the

issue was found to be moot, the plaintiffs were found to lack standing or in which certiorari was denied over dissent. *See, e.g.*, *DeFunis v Odegaard*, 416 U.S. 312 (1974) (dismissed on grounds of mootness) (education); *Tex. v. Lesage*, 528 U.S. 18, 22 (1999) (per curiam) (upholding district court’s grant of summary judgment where the individual student’s alleged discrimination claim was not viable on the facts). Additionally, *Morton v Mancari*, 417 U.S. 535 (1974), was also excluded given the Court’s emphasis on the special constitutional powers conferred on Congress with respect to regulating Indian tribes and its determination that the classification was not racial insofar as the preference was for members of federally recognized tribes. 417 U.S. at 454–55.

187. *Bakke*, 438 U.S. at 355 (Brennan, J.) (beginning his analysis by declaring that “the position that such factors [including color or creed] must be ‘constitutionally an irrelevance,’ summed up by the shorthand phrase ‘[o]ur Constitution is colorblind’ has never been adopted by this Court as the proper meaning of the Equal Protection Clause”) (emphasis added) (internal citations omitted). In the areas of education and employment, affirmative action takes the form of explicit racial classifications. In the context of legislative districting, the statutes are formally neutral but are designed to create majority-minority districts and thus are race-conscious. *See, e.g.*, *Shaw*, 509 U.S. at 643.

188. That decision was *Shaw III*, in which the Court held that the district court’s grant of summary judgment was inappropriate because factual questions remained as to the motivation of the legislature. *Shaw III*, 526 U.S. at 553. *Shaw III*, like *Shaw IV*, arguably should have been excluded from the sample; however, I decided to err on the side of inclusion, because the divisions on the Court in these two cases were a product of each wing’s desire to reify a particular reading of *Shaw*. The fight over constitutional meaning is now fought through competing characterizations of precedent.

189. Among the seven cases relating to voting, all have involved race-conscious legislative districting. Five were decided five to four; one was decided seven to one; and one was unanimous.

190. *See Spaeth, supra* note 128 (showing that, between 1977–2009, 24 percent of Supreme Court decisions involving a constitutional question were split five to four).

191. Each of these opinions was read, analyzed, and coded according to Bobbitt’s six modalities. Every decision, frequently every opinion within a decision, involved multiple paragraphs of doctrinal analysis. Nondoctrinal forms of argument that appeared with case citations were coded as both.

Court's most recent affirmative action decision, *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), in which the Justices split over the appropriate level of scrutiny. For one side, Justice Breyer chastised, "[N]o case—not *Adarand*, *Gratz*, *Grutter*, or any other—has ever held that the test of 'strict scrutiny' means that all racial classifications—no matter whether they seek to include or exclude—must in practice be treated the same."¹⁹² Chief Justice Roberts responded that the Court's precedent clearly required all racial classifications to be subject to a uniform strict scrutiny standard.¹⁹³ Justice Kennedy, however, refused to join this part of Roberts' opinion.¹⁹⁴ This fight over the appropriate level of scrutiny first surfaced thirty years earlier in *Bakke*,¹⁹⁵ and the persistence of the disagreement had been foreshadowed in *Grutter v. Bollinger* (2003).¹⁹⁶

Profound disagreement about the import of prior precedent runs through the eighteen cases. In *United Jewish Organizations of Williamsburg v. Carey* (1977), the first of these cases, the Justices fought over the true meaning of *Gomillion v. Lightfoot* (1960).¹⁹⁷ A year later, in *Bakke*, the fight was over the true meaning of *United States v. Carolene Products Co.* (1938).¹⁹⁸ In *Parents Involved*, the Justices were also at odds

192. 551 U.S. 701, 832 (2007) (Breyer, J., dissenting). Breyer continued: "Indeed, in its more recent opinions, the Court recognized that the 'fundamental purpose' of strict scrutiny review is to 'take relevant differences' between 'fundamentally different situations . . . into account.' . . . That is, it is *not* in all circumstances 'strict in theory, but fatal in fact.'" *Id.* at 832–33 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228, 237 (1995)).

193. *Id.* at 741–43 (plurality) (Roberts, C.J.).

194. *Id.* at 707 (noting Justice Kennedy did not sign on to Part III.C, the plurality's discussion of the standard of review); *see also id.* at 787–88 (Kennedy, J., concurring) (articulating disagreements with the plurality's perspectives).

195. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287–91, 300–05, 356–62 (in which the parties asked the Court to choose between strict scrutiny and rational basis review and four Justices adopted intermediate scrutiny while Justice Powell argued for strict scrutiny).

196. *Grutter v. Bollinger*, 539 U.S. 306, 346 n* (2003) (Ginsburg, J., concurring) (noting that the case "[did] not require the Court to revisit whether all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review" and indicating that there might be additional state interests that "rank as sufficiently important to justify a race-conscious government program").

197. *Compare* 430 U.S. 144, 165 (1977) (White, J.) (noting that unlike in *Gomillion* and other similar cases "there was no fencing out of the white population from participation in the political process"), *with id.* at 181 (Burger, C.J., dissenting) (arguing that the case should be controlled by *Gomillion* which stood for the proposition "that [the] drawing of political boundary lines with the sole, explicit objective of reaching a predetermined racial result cannot ordinarily be squared with the Constitution").

198. *Compare* 438 U.S. 265, 290 (1978) (plurality) (Powell, J.) (arguing that footnote 4 of *United States v. Carolene Prods. Co.*, "has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny" (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938))), *with id.* at 357 (arguing that strict scrutiny is not the appropriate level of scrutiny

over the true meaning of *Brown* and the subsequent school desegregation cases.¹⁹⁹

Doctrine completely fails to serve its purpose of stabilizing meaning—despite being the most frequent modality of constitutional interpretation in these cases.²⁰⁰ Justice Stevens implicitly acknowledged this in his separate dissent in *Parents Involved* when he stated that the Court’s “only justification for refusing to acknowledge the obvious importance of [the] difference” between racial classifications that impose burdens in order to stigmatize and exclude and those that do not “*is the citation of a few recent opinions—none of which even approached unanimity—grandly proclaiming that all racial classifications must be analyzed under ‘strict scrutiny.’*”²⁰¹

The three remaining modalities of constitutional interpretation for which the Justices are uniquely competent (textual, historical, and structural) are relatively infrequently invoked. They have not been the primary source of division on the Court.

Textual arguments are surprisingly infrequent.²⁰² The most extensive textual arguments were offered by Justice Powell’s separate opinion in *Bakke*, in which he quoted the text of the Fourteenth Amendment to demonstrate that the rights it establishes are individual rights and thus “cannot mean one thing when applied to one individual and something else when applied to a person of another color.”²⁰³ In doing so, he

because whites do not suffer “any of the ‘traditional indicia of suspectness’” identified in *Carolene Prods. Co.*).

199. Compare 551 U.S. at 747 (Roberts, C.J.) (arguing that the majority’s position was faithful to the NAACP’s primary contention in *Brown* “that no state has any authority under the equal protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens”) (quoting Transcript of Oral Argument at 7, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)), with *id.* at 798–99 (Stevens, J., dissenting). Justice Stevens stated:

There is a cruel irony in THE CHIEF JUSTICE’s reliance on our decision in *Brown v. Board of Education*. . . . THE CHIEF JUSTICE fails to note that it was only black school children who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, THE CHIEF JUSTICE rewrites the history of one of this Court’s most important decisions.

Id.

200. Cf. *Citizens United v. FEC*, 130 S. Ct. 876, 921–22 (2010) (Roberts, C.J., concurring) (noting that precedent is a valuable means of interpreting the Constitution only to the degree that it has the “ability to contribute to the stable and orderly development of the law”).

201. 551 U.S. at 799–800 (Stevens, J., dissenting) (emphasis added).

202. While every decision involved a doctrinal argument, just under half of the decisions involved any textual discussion. This was frequently in only one opinion. Even this statement overestimates the prevalence of textual arguments since where they were present, they were extremely brief. See *supra* note 191 (describing coding process).

203. 438 U.S. at 289–90. The textual argument appears in a single paragraph with two subsequent references to it brought up while responding to competing interpretations. The argument was offered to

emphasized that the text of the Amendment makes no “reference to color, ethnic origin, or condition of prior servitude.”²⁰⁴ The other opinions in the decision did not respond in the textual modality. Powell’s textual argument has occasionally been replicated in subsequent cases.²⁰⁵

The infrequent resort to a textual modality can be explained by the fact that the Equal Protection Clause states only: “nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”²⁰⁶ It thus provides little guidance, especially when the question is narrowed to, for example, whether the Fourteenth Amendment constrains a state from considering the salience of race in politics when it creates its representative institutions.

While the historical modality is invoked more frequently, little weight has been placed on it.²⁰⁷ Even the Justices who are theoretically committed to originalism only rarely make use of the historical arguments. Justice Thomas devoted a single footnote in *Parents Involved* to respond to the available historical evidence.²⁰⁸

This is likely because the legislative history of the Fourteenth Amendment is sparse on the import of its substantive provisions,²⁰⁹ and we know virtually nothing about the views of the ratifiers.²¹⁰ To the degree that there is any evidence regarding the original understanding of the constitutionality of race-conscious remedial state action, the evidence is

diffuse the objection that “the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white ‘majority.’” *Id.* at 293.

204. *Id.* at 293.

205. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (O’Connor, J.) (restating Powell’s textual argument).

206. U.S. CONST. amend. XIV, § 1.

207. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 396–98 (1978) (Marshall, J., concurring) (reviewing the history of the Fourteenth Amendment). Just over half of the decisions include arguments in the historical modality. See *supra* note 191 (describing coding process).

208. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772 n.18 (2007) (Thomas, J., concurring) (arguing that race-based measures in Reconstruction were consistent with his view of the Constitution insofar as they were enacted “to remedy state-enforced slavery”).

209. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 957 (1995) (“The legislative history of the Fourteenth Amendment contains surprisingly little discussion of the meaning of the substantive provisions of Section One, with respect to segregation or anything else.”). In fact, the only thing that is clear from the legislative history of the Fourteenth Amendment is that no one (framers and ratifiers) intended it to grant African-Americans political rights. *Id.* at 1024 (explaining that the Fourteenth Amendment was intended to confer on former slaves “such civil rights as the right to contract, own property, and sue, but not political rights such as the right to vote, hold office, or serve on a jury”).

210. See Klarman, Brown, *Originalism, and Constitutional Theory*, *supra* note 131, at 1921 (“Unfortunately for an originalist approach to the Fourteenth Amendment, one authoritative source of original understanding—the ratifying state legislatures—is also a source concerning which little information is available, because of the general absence of extensive recorded debates.”).

from legislative actions taken by the Republican-dominated Congress during Reconstruction and likely supports such programs.²¹¹

As an aside, the close analysis of these cases reveals a broader scope to the historical modality than Bobbitt describes. In several opinions, written by a range of Justices, it was the history of race relations, from Reconstruction to Jim Crow to *Brown* that was invoked to settle constitutional meaning. For example, in *Bakke*, Justice Marshall explored at great length the history of racial oppression, emphasizing the Court's complicity in that history both before and after the Civil War, as part of his constitutional interpretation.²¹² Perhaps more surprisingly, in *Parents Involved*, Justice Thomas justified his colorblind interpretation of the Constitution, in part, by reference to the NAACP's aspirations in *Brown*:

Most of the dissent's criticism of today's result can be traced to its rejection of the color-blind Constitution. . . . But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy*. . . . And my view was the rallying cry for the lawyers who litigated *Brown*.²¹³

While these were not classic instances of the historical modality, they were all arguments where history was invoked to settle ambiguity.

In less than a handful of cases were structural considerations even raised. The only case with an extensive structural argument was *Adarand Constructors, Inc. v. Peña* (1995), which involved a challenge to a federal statute and thus the question of whether Congress, a co-equal branch of

211. Compare Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430–31 (1997) (noting that the Thirty-Ninth Congress, the same Congress that passed the Fourteenth Amendment and sent it to the states for ratification, passed several race-conscious statutes, including one appropriating money for “the relief of destitute colored women and children”) (emphasis in original) (citing Act of July 28, 1866, ch. 296, 14 Stat. 310 at 317), and Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 759 (1985) (using, *inter alia*, the legislative history of the passage of the Freedmen's Bureau, as evidence that the framers of the Fourteenth Amendment countenanced the constitutionality of race-conscious affirmative action programs), with Paul Moreno, *Racial Classifications and the Reconstruction Legislation*, 61 J. S. HIST. 271, 273 (1995) (arguing that “the evolution of Reconstruction policy, from the Freedmen's Bureau to the Fourteenth Amendment, was guided by a central principle—to prohibit discrimination based on color” and that this is evident in the race-neutral language in which remedial statutes were passed).

212. 438 U.S. 265, 387–94 (1978) (Marshall, J., concurring in part); see also *id.* at 291–92 (Powell, J.) (recounting the history of how “[t]he Equal Protection Clause . . . was ‘virtually strangled in infancy by post-civil-war judicial reactionism’”); *id.* at 326 (Brennan, J., concurring in part and dissenting in part) (recounting how long it took for the nation to establish “the principle that ‘all Men are created equal’”).

213. 551 U.S. at 772 (Thomas, J., concurring).

government, deserved special deference in light of the explicit remedial powers granted to it by § 5 of the Fourteenth Amendment.²¹⁴

Ultimately, the competing interpretations on the Court derive from differing assessments of the consequences of one interpretation over another (arguments in the prudential mode).²¹⁵ In offering these assessments, the Justices frequently suggest that the Constitution must be interpreted in line with the nation's fundamental ethical commitments (arguments in the ethical mode).²¹⁶ It is the prudential and ethical modalities that, in the last instance, determine the (contending and multiple) interpretive conclusions reached.

While all the Justices aspire to a nation "in which race no longer matters,"²¹⁷ they differ in their assessments of the best means to that end.²¹⁸ Some Justices are wary of race consciousness because they believe that a range of negative consequences will result if the government is allowed to distinguish between its citizens based on race.²¹⁹ These Justices frequently rehearse the concerns originally identified by Justice Brennan

214. *Compare* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228, 230 (1995) (O'Connor, J.) ("[R]equiring that Congress, like the States, enact racial classifications only when doing so is necessary to further a 'compelling interest' does not contravene any principle of appropriate respect for a coequal branch of the Government."), *with id.* at 252 (Stevens, J., dissenting) (arguing that the States and Congress are not similar with respect to equal protection both because "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment" and because it represents the entire nation) (quoting *City of Richmond v. J. A. Croson* 488 U.S. 469, 490 (1989) (O'Connor, J.)).

215. Extensive prudential arguments appear in about 89% of these cases, appearing in multiple opinions. *See supra* note 191 (describing coding process).

216. Ethical commitments are invoked in about 78 percent of the cases, appearing in multiple opinions. Most often, they are invoked in a few sentences in combination with a policy argument. *See supra* note 191 (describing coding process).

217. *See, e.g., Shaw v. Hunt*, 509 U.S. 630, 657 (1993) (O'Connor, J.); *see also* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring) ("The enduring hope is that race should not matter; the reality is that too often it does."); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 403 (1978) (Blackmun, J. concurring) ("I yield to no one in my earnest hope that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past.").

218. *Compare* *Parents Involved*, 551 U.S. at 748 (Roberts, C.J.) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."), *with id.* at 788 (Kennedy, J., concurring) (assenting to Justice Harlan's aspiration in theory, but noting that "[i]n the real world, it is regrettable to say, it cannot be a universal constitutional principle"), *with* *Grutter v. Bollinger*, 539 U.S. 306, 344-46 (2003) (Ginsburg, J., concurring) (endorsing the view that race-conscious programs must eventually sunset while "document[ing] that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land" and thus justify the use of affirmative action programs for the foreseeable future).

219. *See, e.g., Shaw*, 509 U.S. at 643 (O'Connor, J.) ("Classifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.") (internal quotations and citations omitted).

in *Carey* and Justice Powell in *Bakke*: that “the white ‘majority’ itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination” and that this raises the risk that the burdens of affirmative action programs will fall disproportionately on these ethnic minorities; that it may not always be clear when race consciousness is benign; that “preferential programs may only reinforce common stereotypes” including ones of inferiority; and that “there is a measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making” and this is likely “to exacerbate racial and ethnic antagonisms.”²²⁰ Justice Thomas is currently the most vocal about the negative consequences of race-conscious policymaking, arguing that it promotes balkanization and resentment.²²¹

These Justices also tend to believe that race-conscious programs undermine two central ethical commitments of our nation: individualism and the American “melting pot.” As Justice Kennedy expressed: “To be forced to live under a state mandated racial label is inconsistent with the dignity of individuals in our society.”²²² Moreover, race-conscious policymaking undermines our aspirations for a single American nation: “Allowing racial balancing as a compelling end in itself would effectively assure that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being’s race will never be achieved.”²²³

Other members of the Court are less wary of race-consciousness *per se*.²²⁴ Following Justice Stevens, they emphasize that not all race-consciousness is the same:

220. *Bakke*, 438 U.S. at 298–99 (Powell, J., plurality); *accord* *United Jewish Orgs. of Williamsburg v. Carey*, 430 U.S. 144, 172 n.2 (1977) (Brennan, J., concurring in part); *see also Parents Involved*, 551 U.S. at 746 (Roberts, C.J.). Justice Roberts stated:

Government action dividing us by race is inherently suspect because such classifications promote notions of racial inferiority and lead to a politics of racial hostility, reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin, and endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.

Id. (internal quotations and citations omitted). *See also Shaw*, 509 U.S. at 657 (O’Connor, J.) (arguing that race-conscious districting is particularly suspect because it “balkanize[s] us into competing racial factions”).

221. *See Parents Involved*, 551 U.S. at 759 (Thomas, J., concurring) (cautioning that such policies “pit[] the races against one another, exacerbat[ing] racial tension, and provok[ing] resentment among those who believe that they have been wronged by the government’s use of race”) (internal quotations, citations, and alterations omitted).

222. *Id.* at 797 (Kennedy, J., concurring).

223. *Id.* 551 U.S. at 730 (internal quotations, citations, and alterations omitted).

224. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 305 n.11 (2003) (Ginsburg, J., dissenting) (“In my view, the Constitution, properly interpreted, permits government officials to respond openly to the

The consistency that the Court espouses . . . disregard[s] the difference between a “No Trespassing” sign and a welcome mat. It . . . treat[s] a Dixiecrat Senator’s decision to vote against Thurgood Marshall’s confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson’s evaluation of his nominee’s race as a positive factor. . . . An interest in “consistency” does not justify treating differences as though they were similarities.²²⁵

With respect to democracy, in particular, they emphasize that “[a] majority’s attempt to enable the minority to participate more effectively in the process of democratic government should not be viewed with the same hostility that is appropriate for oppressive and exclusionary abuses of political power.”²²⁶

These Justices tend to emphasize classic prudential concerns such as measurable continued inequality and the retrogressive effects on our democracy of treating all forms of race-consciousness similarly.²²⁷ They acknowledge that in contemporary society race, like ethnicity, is frequently a good proxy for political viewpoints and worry about the costs of interpreting the Constitution to ignore this fact:

If Chinese-Americans and Russian-Americans may seek and secure group recognition in the delineation of voting districts, then African-Americans should not be dissimilarly treated. Otherwise, in the name of equal protection, we would shut out the very minority

continuing importance of race.”).

225. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245 (1995).

226. *Shaw II*, 517 U.S. 899, 918 (1996) (Stevens, J., dissenting).

227. For example, when Justice White explained his objections to the newly established cause of action in *Shaw*, he complained that it “[would] unnecessarily hinder . . . a State’s voluntary effort to ensure a modicum of minority representation.” *Shaw*, 509 U.S. at 673 (White, J., dissenting). More significantly, he emphasized salient facts about redistricting (*e.g.*, that minority populations are sometimes geographically dispersed and that political parties like to protect their incumbents) explaining how they were likely to contribute to this effect. *See id. Accord Gratz*, 539 U.S. at 298–300 (Ginsburg, J., dissenting). Justice Ginsburg stated:

This insistence on ‘consistency’ would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law In the wake ‘of a system of racial caste only recently ended,’ large disparities endure. Unemployment, poverty, and access to healthcare vary disproportionately by race. Neighborhoods and schools remain racially divided. . . . Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education.

Id. (internal citations omitted).

group whose history in the United States gave birth to the Equal Protection Clause.²²⁸

These Justices also emphasize a different set of ethical commitments. They believe that there is a national commitment to integration post-*Brown*.²²⁹ This commitment, moreover, entails a commitment to a modicum of substantive equality:

Finally, what of the hope and promise of *Brown*? . . . It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation’s cities and schools. It was about the nature of a democracy that must work for all Americans.²³⁰

Further, these Justices believe that the ideals of integration and pluralist democracy require tolerance in the public sphere, and that it is appropriate for the state to create educational settings that foster racial tolerance.²³¹

With all this in mind, the answer to the first question—whether the Court’s doctrine is potentially open to challenge because its claim to expertise is at its lowest ebb—is surely “Yes.” The close examination of these fractured decisions shows that the Court’s views come down to arguments about the consequences of affirmative action (prudential) and its relationship to the fundamental norms of our constitutional tradition (ethical).

Not only have these modalities of constitutional interpretation divided the Court, creating continued uncertainty about the import of the Equal Protection Clause, but they are also precisely the ones for which the Court has no claim to unique expertise. This is strikingly evident in the redistricting context since the crux of the ethical concern of the *Shaw* majority was that race-conscious legislative districting might be

228. *Miller v. Johnson*, 515 U.S. 900, 947 (1995) (Ginsburg, J., dissenting) (internal quotations and citations omitted).

229. *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1*, 551 U.S. 701, 803–04 (2007) (Breyer, J., dissenting) (noting an aspiration for integrated education).

230. *Id.* at 867 (Breyer, J., dissenting).

231. *Id.* at 864 (Breyer, J., dissenting) (“[T]he fate of race relations in this country depends upon unity among our children, for unless our children begin to learn together, there is little hope that our people will ever learn to live together.”) (internal quotations and citations omitted); *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (O’Connor, J.) (noting with approval that “the Law School’s admissions policy promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”); *accord Miller*, 515 U.S. at 932 (Stevens, J., dissenting); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 247–48 n.5 (1995) (Stevens, J., dissenting).

unconstitutional because of its expressive import.²³² The social meaning of any action is always debatable. As such, expressive harms would seem to be exactly the kinds of constitutional questions that are particularly appropriate to share with democratically accountable interpreters.²³³ The democratic public is in a better position to determine “whether the message conveyed is a distressing endorsement of racial separatism, or an inspiring call to integrate the political process.”²³⁴ At the very least, this is an arena where the argument that constitutional law is too complicated for non-lawyers is weakest.

This leaves us with the second question: whether, all things considered, the question of constitutional limits with respect to race and democratic representation should be opened to shared interpretive authority. There are good reasons to believe the answer, again, is “Yes.”

For over thirty years, the Court has been unable to settle, let alone reach consensus, on the question of whether and how much the Constitution constrains affirmative action. The Justices cannot agree, even in the majority. The divisions on the Court have forced government officials to develop programs in the shadow of uncertainty, and litigators to strategize about how to swing the fifth vote—once Justice O’Connor, now Justice Kennedy. As such, there is no settlement to undermine by revoking the default rule of judicial supremacy.

The second strongest argument in favor of judicial supremacy—that the Court is the only institution capable of protecting individual rights against majoritarian institutions—is also not implicated. In the context of race and redistricting, no one is denied the right to vote.²³⁵ In fact, “the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others.”²³⁶

232. *Cf. Shaw II*, 517 U.S. 899, 922 (1996) (Stevens, J., dissenting) (noting that the alleged harm was the “message [conveyed] to voters across the State”); accord Richard H. Pildes & Richard G. Niemi, *Expressive Harms: “Bizarre Districts,” and Voting Rights, Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993) (arguing that the harm being recognized in the doctrine is not an individualized material harm but rather a political expressive harm).

233. *Cf. Shaw II*, 517 U.S. at 925 (Stevens, J., dissenting) (criticizing the majority for engaging in “speculative judicial suppositions about the societal message that is to be gleaned from race-based districting”).

234. *Id.* at 925 (Stevens, J., dissenting).

235. *Id.* at 921 (Stevens, J., dissenting) (noting counsel’s concession that plaintiffs had not been prohibited from voting).

236. *Shaw v. Reno*, 509 U.S. 630, 681–82 (1993) (Souter, J., dissenting); accord *id.* at 663–64 (White, J., dissenting) (noting that unlike in the employment and educational context, “the classification based on race” does not “discriminate[] against anyone by denying equal access to the political process”).

If anything, the presence of the fundamental right to vote is a distraction. Redistricting is a context in which the entire orientation toward individualism and rights is arguably incoherent. No one is ever treated as an individual in the redistricting process.²³⁷ It is invariably a process in which demographic variables are used as proxies for political preference.

Our constitutional commitment to federalism, meanwhile, weighs heavily in favor of revoking the default rule. Federalism properly understood is a system that seeks “to preserve the regulatory authority of state and local institutions to legislate policy choices” distinct from the regulatory authority of the national government.²³⁸ The value of states is that they provide a diversity of political options to the nation’s citizens.²³⁹

The ability of the people of the several States to structure their representative institutions, therefore, is at the heart of the system of federalism. Any nationalization of the options available to states in creating their representative institutions undermines federalism.

Judicial efforts to restructure state governments “necessarily press the boundaries of federal-court jurisdiction, if they do not surpass it.”²⁴⁰ The Court has long recognized this point: “[F]ederalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions.”²⁴¹ Where the constitutional constraint is clear or settled, this is just what our constitutional democracy requires.²⁴² Absent constitutional constraint, however, our Constitution favors experimentation. As such:

237. See *Miller v. Johnson*, 515 U.S. 900, 947 (1995) (Ginsburg, J., dissenting). Justice Ginsburg stated:

In adopting districting plans, however, States do not treat people as individuals. Apportionment schemes, by their very nature, assemble people in groups. States do not assign voters to districts based on merit or achievement Rather, legislators classify voters in groups—by economic, geographical, political or social characteristics

Id. *Accord Shaw*, 509 U.S. at 646 (1993) (O’Connor, J.) “[R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors.”)

238. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222 (2000).

239. See Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493, 1498–1500 (1987) (offering an updated normative defense of our system of dual sovereignty that emphasizes, among other things, the value of laboratories of democracy).

240. *Shaw II*, 517 U.S. 899, 922 (1996) (Stevens, J., dissenting).

241. *Miller*, 515 U.S. at 934–35 (Ginsburg, J., dissenting) (citing *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)).

242. *Cf.* *Bush v. Vera*, 517 U.S. 952, 1047 (1996) (Souter, J., dissenting) (noting that states’ constitutionally protected interest in controlling their citizens’ representation in Congress can be limited when there is “a strong constitutional justification and a reasonably definite standard for doing so”).

When a federal court is called upon . . . to parse among varying legislative choices about the political structure of a State, and when the litigant's claim ultimately rests on "a difference of opinion as to the function of representative government" rather than a claim of discriminatory exclusion, there is reason for pause.²⁴³

In conclusion, all things considered, there are legitimate reasons to take the question, whether and to what degree the Constitution constrains policies that seek to account for the continued salience of race in the construction of representative institutions, out of the Court's exclusive domain. There is no particular reason to believe the Court is uniquely positioned to consider this question. It has failed to resolve the issue over the past thirty years. As such, it would be reasonable for the public to revoke its consent to judicial supremacy and for our elected officials to reassert their interpretive authority under the Constitution.

Finally, a word about who should share interpretive authority. Although the question of whether states and their officials ought to be able to share in constitutional interpretation has been a fraught one, it would seem that if there is any context where it would be appropriate, it would be here. If, as Herbert Wechsler pointed out, the rights of states are preserved by their control over the House of Representatives through their "control of voters' qualifications, on the one hand, and districting, on the other,"²⁴⁴ then states surely have an even greater interest in this controversy, and they probably should be given a voice in the matter. On the other hand, Congress and the Executive could conceivably protect states' interests, and perhaps it would be wise to push this question off once more.

Who knows how a broader constitutional discussion might turn out. It might be that one of the views expressed on the Court is adopted. The debate outside the judiciary (like the debate within) might focus on the potential costs and benefits of majority-minority districting as a policy matter assessed in light of our ethical commitments as a nation. On the other hand, the discussion might take an entirely different turn. The public

243. *Shaw II*, 517 U.S. at 923 (Stevens, J., dissenting) (quoting *Baker v. Carr*, 369 U.S. 186, 333 (1962) (Harlan, J., dissenting)).

244. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 548 (1954). It is worth noting that Kramer agrees with Wechsler that these two structural features of the Constitution tie the House of Representatives to states as States. See Kramer, *supra* note 238, at 226 (noting that "[t]he only political safeguards Wechsler identifies that do not suffer from this conflating of state interests and state institutions are those he attaches to the House of Representatives"). Kramer's concern is that these controls—particularly the former—are no longer present as a practical matter, partly thanks to the Supreme Court. *Id.* at 224–27.

and the elected branches of government, free from the institutional constraints of the judicial forum, might be convinced that the Guarantee Clause, with its emphasis on the nature of political institutions and the people's collective right to self-governance, rather than the Equal Protection Clause, is the appropriate constitutional frame for analyzing this problem.²⁴⁵

While the broader constitutional discussion was occurring, courts could still be petitioned for review. The Executive, however, might conduct elections, pursuant to districts it considered constitutional, notwithstanding pending litigation.²⁴⁶ It might even refuse to abide by preliminary injunctions. Meanwhile, Congress might seat members elected pursuant to allegedly unconstitutional districting schemes,²⁴⁷ or it might invoke its constitutional authority over the time, place and manner of elections to establish congressional districts, preempting state redistricting efforts.²⁴⁸

Whatever the co-equal branches did, they would first have to reassert formally their independent constitutional entitlement to interpret the Constitution on this question and explain to the public why shared interpretive authority was appropriate. The public, meanwhile, would have to listen and judge, informed by a variety of knowledgeable (and less knowledgeable) participants in the public sphere.

V. WHY BOTH ARE BETTER THAN EITHER

Critics of popular constitutionalism have articulated myriad reasonable concerns about shared interpretive authority. A few words about how the framework developed here is likely to withstand similar criticisms is, therefore, appropriate.

The framework offered here preserves many of the advantages of judicial supremacy at the same time that it shores up both our institutional

245. Cf. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 106, 116 (2000) (arguing that while "a government is not 'republican' if a minority faction maintains control, and the majority has no means of overturning it," there is no similar constitutional worry where the majority opts to give a minority proportional representation).

246. Cf. Paulsen, *supra* note 45, at 277 ("To the extent judgments require execution, the *executive*, not the judiciary, has the last interpretive word.")

247. U.S. CONST. art. I, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members.")

248. U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.")

checks on the Court and the public's engagement with the Constitution.²⁴⁹ As such, it goes a long way toward addressing the concerns of those who are generally skeptical about shared interpretive authority. Furthermore, the arguments offered here actually justify our widespread confidence that the Court is better at constitutional interpretation, even as they point to limits to its expertise.

The framework is not a wholesale rejection of judicial review. The Court will always get the first shot. In fact, those who are disgruntled with the Court must wait out a series of cases before resisting. The Court's legitimacy, as an institution that should be obeyed, is not up for wholesale reconsideration.

The form of shared interpretive authority advocated here, moreover, is not even a wholesale rejection of judicial supremacy. By setting up a revocable default rule of supremacy, it preserves for the Court a final say with respect to a great number of constitutional questions. The default rule is only revocable in cases where the Court's claim to expertise is at its lowest ebb *and* it is failing to bring closure to constitutional ambiguity. Even then, it may not be appropriate. Where the Court does in fact exercise its unique interpretive expertise or otherwise settle constitutional ambiguity, its views will be final. As such, any rejection of judicial supremacy would be issue limited, and the Court would never be deprived wholesale of finality. By delineating and limiting the appropriate bases for challenging judicial supremacy, the framework has taken off the table challenges whose only justification is a political disagreement with the outcome.

The Court, moreover, retains a say even if the default rule is revoked. This offsets any second-order decisional costs for the Court: The framework does not require the Court to decide whether it can decide in the first place. It can always consider constitutional issues properly before it. The only thing that changes is that sometimes its view may be considered advisory, so to speak.

In these various ways, the framework developed seeks to limit the settlement costs associated with shared interpretive authority and to conserve many of the substantive benefits of a judicially interpreted Constitution. That said, whenever one allows for shared interpretive authority, there will be more uncertainty compared to the bright-line

249. Cf. KRAMER, *supra* note 2, at 111 (indicating aim of popular constitutionalism is to enhance "the people's active control of their government and their Constitution").

alternatives—giving the Constitution entirely to the Court or taking it entirely from it.

Any rejection of wholesale judicial supremacy will require us to accept a constitutionalism “willing to tolerate ongoing controversy over competing plausible interpretations of the constitution.”²⁵⁰ There is no point in denying that there will be less coherence or that any turn to the political process these days risks paralysis. Still, there is space for optimism.

Shared interpretive authority, while theoretically unstable, has as a historical matter resulted in a great deal of stability.²⁵¹ For much of our history, judicial supremacy was contested. As such, our constitutional history is replete with examples of “constitutional disagreement among different groups of officials.”²⁵² Yet, these conflicts rarely dissolved into civil war or significant unrest.²⁵³

Elements of shared interpretive authority remain part of our system. Between the political question doctrine and the Court’s limited enforcement powers, the U.S. Constitution is already a shared project.²⁵⁴ And, we already regularly turn to the political process. It is just that we focus on judicial appointments rather than emphasizing interpretive discussions in which reasons and explanations must be offered and the Court must be engaged on its own terms.

If we look honestly at the system we have, we must acknowledge that we already live with a great deal of constitutional uncertainty. With respect to a good number of issues, the Justices divide year in and year out. In fact, some might be surprised to learn that between 1977 and 2010, only 39 percent of Supreme Court cases involving a constitutional issue were decided either unanimously or with only one dissent.²⁵⁵

250. *Id.* at 30.

251. *Cf.* Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 789 (2002); KRAMER, *supra* note 2, at 234 (noting that as an empirical matter “[u]ncertainty and instability will exist even in a regime of total judicial supremacy, while we will find a considerable degree of finality and resolution even without it”).

252. Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 757–58 (2006) (noting that four axes of constitutional disagreement emerge in reviewing our history—departmental, partisan, regional, and state-federal).

253. *Id.* at 783 (noting that, among other things, “the scope of national power,” the existence of unenumerated rights, judicial supremacy, and an agreed upon method of constitutional interpretation have all been disputed since the Civil War). I, therefore, respectfully, but fundamentally, disagree with those who argue that absent judicial supremacy, there will be unpredictability, anarchy even.

254. *Cf.* GERALD ROSENBERG, *THE HOLLOW HOPE* (1991).

255. That percentage only increases to 42 percent if one lengthens the timeframe to 1946–2010; allowing for two dissents, brings the percentages to 54 percent and 58 percent respectively. *See* Spaeth, *supra* note 128.

Increased uncertainty is a price worth paying to shore up public engagement with the Constitution and our system of checks and balances.²⁵⁶ From the perspective of checks and balances, judicial supremacy is far from optimal. As many in the founding generation understood too well, judicial supremacy creates an unaccountable and all too powerful Court.²⁵⁷

Shoring up our institutional checks is particularly important at the moment.²⁵⁸ The amendment process is defunct.²⁵⁹ A range of previously relied upon checks have disappeared, and there are increasing reasons to worry about the efficacy of the appointments process.²⁶⁰ By making clear that consent to judicial supremacy can be revoked, the framework offered here brings the Court closer to heel.²⁶¹ Congress and the Executive, even the public, need to feel entitled to independent views on the Constitution in order to serve as a check on the Court. Moreover, if the Court was worried that it had to earn its claim to finality, it might be more likely to act within its sphere of expertise and to work toward unanimity and, therefore, moderation.²⁶² All of which would likely enhance the legitimacy of the Court and decrease the likelihood that the default rule of judicial supremacy would be revoked.

The framework proposed here also serves fundamental deliberative values. The disgruntled must engage with the Court on its own terms. Further, if the default rule is revoked, non-Article III actors are required to

256. For a thoughtful explanation of why these checks may need to be shored up see Pildes, *supra* note 18. Richard Pildes explains how a host of changes, from divided government to the acceptance of judicial supremacy, to the increasingly paralyzed political process, have created “greater . . . space for Supreme Court independence” and exacerbated the countermajoritarian difficulty. *Id.* at 157.

257. See Jefferson, *supra* note 19, at 311; *accord* Meigs, *supra* note 31, at 190 (cautioning that if Hamilton’s position that the Court is the institution whose “peculiar function” is “to decide finally and conclusively upon the question of the meaning of our constitution” is adopted, then “there is no limit to [the Court’s] power”).

258. See, e.g., KRAMER, *supra* note 2, at 231 (“[A] people that accedes to the Court’s pretensions in this respect will permit the Justices to go farther and do more than a people that does not.”).

259. See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 167 (2006) (arguing that “[t]he functional impossibility of amending the Constitution with regard to anything truly significant” fundamentally undermines our constitutional tradition); *accord* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 609 (2008); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

260. See, e.g., Pildes, *supra* note 18, at 136–42, 151–59.

261. Cf. KRAMER, *supra* note 2, at 253 (“Indeed, a great irony of making clear that we can and should punish an overreaching Court is that it will then almost never be necessary to do so.”).

262. See Waldron, *supra* note 48, at 1391–92 (implicitly criticizing judicial decisions that lack unanimity by noting that while a normative defense of a majority decisional rule can be made for legislatures, majority voting in judicial decisionmaking lacks “any moral basis”); Paulsen, *supra* note 45, at 325–29 (using game theory to explain why “shared interpretive power” often leads to “compromise, accommodation, or partial resolution”).

engage in “[i]nterpreting a written constitution,” defined as the act of “resolv[ing] ambiguities in constitutional meaning”—a separate endeavor from “changing a constitution.”²⁶³

Judicial supremacy, by contrast, has a tendency to discourage constitutional interpretation outside the Court. It undermines the incentives of legislators and executive officials to take their constitutional oaths seriously.²⁶⁴ Over a hundred years ago, Thayer observed that overzealous judicial review “has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows,” with the result that “they have felt little responsibility” to consider constitutional questions, knowing they can pass the buck to the Court.²⁶⁵ More recently, Tushnet has made this same point, explaining how “the judicial overhang can deflect legislators from considering constitutional questions.”²⁶⁶ He complains that the result is irresponsibility.²⁶⁷ Judicial supremacy may also undermine the public’s engagement with the Constitution.²⁶⁸

The widespread acceptance of judicial supremacy and the increased politicization of the appointments process have also created undesirable pressures on the Court itself.²⁶⁹ When the Court is the only forum to resolve high-stakes constitutional fights, the incentives to politicize the Court are magnified. By reopening avenues for constitutional argument outside the Court and rejecting a *per se* rule of supremacy, the proposed

263. Alexander & Solum, *supra* note 7, at 1602–03. A deliberative constraint on popular constitutional interpretation is of longstanding pedigree. KRAMER, *supra* note 2, at 25 (explaining that in the late eighteenth century, when denouncing unconstitutional acts, the public was expected to explain why it thought the government’s actions were unconstitutional) (citing PAULINE MAIER, FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765–76, 74–75, 114–38, 251–53 (1992)).

264. *See, e.g.*, TUSHNET, *supra* note 2, at 66 (suggesting that the degree to which actors in Congress do not consider the Constitution a high priority may be a product of the Court’s dominance over constitutional questions).

265. Thayer, *supra* note 28, at 155–56.

266. TUSHNET, *supra* note 2, at 58.

267. *Id.* at 59–61 (arguing that an excessive focus on Court doctrine, in particular, the level of judicial review, leads too frequently to laws that are superficially in compliance but easily struck down as unconstitutional and unreasoned).

268. KRAMER, *supra* note 2, at *passim*.

269. The politicization of the appointments process followed shortly after the acceptance of judicial supremacy. *See* Griffin, *supra* note 1, at 123–29. By politicization I mean both partisan politics and a comfort with policymaking on both sides of the partisan line. Judicial supremacy is obviously not the only institutional feature that encourages politicization. *See id.* at 116 (pointing to the Court’s near total control over its docket, which coincided with the expansion of its jurisdiction as another institutional factor).

regime lowers the political stakes in the judicial forum. The appointments process, in particular, should become less important.

Judicial supremacy, in sum, undermines constitutional argument in all relevant forums. Justice Jackson once proclaimed: “The vice of judicial supremacy, as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts.”²⁷⁰ This vice extends to closing off avenues for civil deliberation about our profound constitutional conflicts.²⁷¹ Furthermore, the judicially enforced Constitution is constrained by institutional limitations.²⁷²

A final point must be addressed. Praise of judicial supremacy is often entwined with deep skepticism about democracy and about the ability of legislatures or executives to engage in principled constitutional decisionmaking. Such concerns are only exacerbated when it comes to the public (even after putting the mob to one side).

With respect to the Executive, the skeptic’s views are hardly credible for the simple reason that “[t]he executive branch has several important institutions devoted to constitutional interpretation, most notably the Solicitor General’s office and the Office of Legal Counsel in the Department of Justice.”²⁷³ Of particular significance is the work of the Office of Legal Counsel, whose constitutional interpretations are not written for the Supreme Court.

An emerging literature shows Congress too is capable of constitutional deliberation.²⁷⁴ It is certainly clear that legislatures are not *per se* incapable

270. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 321 (1941) (as quoted in *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (Burger, C.J.)).

271. *See, e.g.*, West, *supra* note 13, at 76. West states:

Surely . . . not only lawmakers but citizens . . . should worry over whether our moral and social inclinations to outlaw contraception, regulate abortion, criminalize flag burning, allow prayer in schools . . . are or are not consistent with the commitments to liberty, equality, and a secular state that lawyers and courts find reflected in constitutional phrases.

Id.

272. *Cf. id.* at 65–66, 73–74 (discussing historical movements for basic welfare rights and the limits of achieving such rights when the Constitution is expounded only by judges and lawyers in ordinary courts of law); *accord* TUSHNET, *supra* note 2, at 169–72 (arguing that “[f]reed of concerns about judicial review, we might also be able to develop a more robust understanding of constitutional social welfare rights” because the primary barrier to accepting such rights are institutional limitations of judicial enforcement).

273. TUSHNET, *supra* note 2, at 61–62 (citing Frank H. Easterbrook, *Presidential Review*, 40 *CASE W. RES. L. REV.* 905, 916–17 (1990)).

274. *See, e.g.*, *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* PT. V (Richard W. Bauman & Tsvi Kahana eds., 2006) (in which several authors consider constitutional interpretation in the legislative branch).

of deliberating about rights in the ways that would be required.²⁷⁵

Two other facts are relevant in this regard. First, as previously mentioned, a great many important constitutional questions cannot be adjudicated, and are already regularly entrusted to these to co-equal branches of government. Second, the Court's own constitutional interpretations frequently come from outside the Court—from the briefs of the Solicitor General and other litigants, including public interest organizations such as the ACLU, Judicial Watch, and NRDC.²⁷⁶

How skeptical one is likely to be about the public's capacity to engage in constitutional interpretation largely depends on the image of the public onto which one latches. The public sphere in the United States is certainly an imperfect forum for serious constitutional argumentation and interpretation, but it is a gross overstatement to suggest that there are no spaces for constitutional argument, or that the public is entirely incapable of serious constitutional interpretation. Forums for reasoned argument exist throughout the public sphere even in our large pluralist democracy. We have, for example, foundations and think tanks as well as public interest groups and excellent new and old media.

It is also a grave mistake to idealize the deliberative nature of the Court. If there is reason to be concerned that non-Article III actors, most especially the public, will simply latch onto whatever argument gets them to the political outcome they want, this is no less a concern for the Justices.²⁷⁷

There is one concern about shared interpretive authority that no framework that weakens judicial supremacy can truly address. This is the fear that without judicial supremacy, the mob will rule.²⁷⁸ It drives the “deep ambivalence” among “serious liberal thinkers in America . . . toward popular constitutionalism.”²⁷⁹

275. See Waldron, *supra* note 48, at 1349–50 (offering as example British parliamentary debate on abortion as evidence that legislatures are able to discuss questions of rights, including competing rights, in a sophisticated way).

276. Alexander & Solum overstate the case when they suggest that the people could only engage in “[r]obust interpretive popular constitutionalism” if the United States were either “a small city-state” or a society with “overwhelming social consensus on constitutional issues.” Alexander & Solum, *supra* note 7, at 1623 n.72.

277. Cf. BOBBITT, *supra* note 10, at 22 (addressing the charge that judges act instrumentally, deploying whichever rhetorical device suits their political ideologies).

278. See, e.g., Alexander & Solum, *supra* note 7, at 1594 (confessing that any revival of a populist tradition of constitutional interpretation would “inspire dread and make the blood run cold”); accord Powe, Jr., *supra* note 7, at 866–84 (offering a parade of seven populist horrors, frequently marked by violence or the threat of violence).

279. See Forbath, *supra* note 20, at 971–72 (explaining that “the appeal of judicial supremacy” for liberals cannot be understood apart from the struggle for a racially inclusive democracy before and

The reason that this concern cannot be addressed is that, at bottom, this fear of the mob is a profound normative divide between advocates of judicial supremacy and advocates of shared interpretive authority. Which side of that line one finds oneself on depends a great deal on how much one trusts democracy and the public (voting and nonvoting).

Personally, I am cautiously optimistic. Given the world in which we live—a highly stable society with virtually no political violence, with far too many campaign ads and pollsters, and with too few citizens engaged in politics, constitutional or otherwise—it is hard to imagine that more democracy and more deliberation could hurt.

CONCLUSION

This Article has argued that what has been missing in the debate so far over judicial supremacy is an account of the practice of constitutional interpretation. This absence is particularly glaring insofar as the normative case for judicial supremacy importantly depends on the Court's relative interpretive expertise.

A closer look at the practice of constitutional interpretation reveals that the Supreme Court's claim to expertise has limits. Where constitutional meaning is largely determined on the basis of prudential or ethical arguments, other branches of government are at least as capable of interpretation. Put differently, certain lessons of *Chevron* apply to constitutional interpretation as well.²⁸⁰

The remainder of this Article sought to develop an account of how these insights about the Court's interpretive expertise could be developed into a framework for transferring certain issues out of the Court's exclusive domain. When might it be reasonable for the public to decide that the Court should not have the final say with respect to a particular interpretive question? When might it be reasonable for the co-equal branches of government to reassert their interpretive prerogatives under the Constitution? To illustrate how the analysis could work, the framework was applied to the Court's doctrine on affirmative action to consider whether its views with respect to the constitutionality of accounting for the continued salience of race in creating democratic institutions should be final.

after the Civil War); TUSHNET, *supra* note 2, at 177 (arguing that “[l]iberals today seem to have a deep-rooted fear of voting” that explains their enthusiasm for judicial review).

280. See *supra* notes 78–80 and accompanying text.

Many, particularly liberals and progressives, might wonder how this framework is likely to play out in other areas of the law—the death penalty, abortion, privacy, and so on. Would the Court ever get the final say?

Without having gone through a thorough analysis of these other areas, one cannot say for sure. I suspect, however, that a good number of politically charged, constitutional issues would not be up for grabs. For example, a close analysis of the Court's cases on state sovereign immunity is likely to reveal profound divisions over original intent (history) and structural imperatives. The Court's Commerce Clause doctrine is a closer call. There are also doctrinal lines replete with five to four decisions that are likely to remain in the Court's domain because they are best understood as instances where there is broad agreement as to the import of the Constitution, but the Justices struggle to reach consensus because they have set out an incoherent or unworkable doctrine and thus frequently come to divergent views on the facts. The public forum doctrine comes to mind.

All that said, my primary answer is that the relevant consequentialist concern should *not* turn on how much may or may not turn out to be eligible for the transfer. Instead, the relevant cost-benefit analysis should focus on the institutional and structural consequences for our democracy and its foundational aspiration for republican deliberative policymaking (including constitutional policymaking) of the status quo as compared to what has been proposed here. That is, we should be focused on the effects of different interpretive regimes on our system of checks and balances and our aspiration to principled constitutionalism.

Finally, there are those who will rightly point out that it is unlikely that such a mechanism will ever be developed. Sadly, this is right. Nevertheless, I believe there are benefits in staking out the position and arguing it as persuasively as possible (including showing how it could work within existing government structures).

Change is incremental. To the degree the arguments presented here have disrupted even momentarily or modestly a reader's faith in judicial supremacy, our discourse will have shifted slightly. If the argument makes it into the chambers of judges, perhaps through their law clerks, we may hope for more modesty from the courts when they engage in constitutional judgements that turn on modalities for which they have no unique claims of expertise. If they make it into the chambers of Congress or the White House, we can hope for more boldness.