Judicial Supremacy and Nonjudicial Interpretation of the Constitution

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> *Marbury* . . . declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and [this] principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system.[1]

> Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others . . . . 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.[2]

> Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them.[3]

1. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

2. President Andrew Jackson, Veto Message (July 10, 1832), *in* 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1144 (1897) (justifying his veto of a bill establishing a national bank).

3. Benjamin Hoadley, Bishop of Bangor, Sermon Before the King of England (March 31, 1717), *in* GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 130 (1981).

I. Who Interprets?

This Article grapples with a fundamental question: Who other than the judiciary has responsibility for constitutional interpretation?[4] This question has both a descriptive and a normative component; it asks who *does* interpret the Constitution, and who *should.* The answer to each part of the question is of great importance. Ascertaining who *does* interpret the Constitution is central to a full understanding of our political-legal culture. Developing an account of who *should* interpret the Constitution is essential to our vitality as a nation committed to constitutional governance.

Part I of this Article briefly explores the relevance and significance of the "who interprets?"[5] question, while clarifying what we seek to find out by asking it. Part II describes five models which, to varying degrees, plausibly present defensible answers to the query. Part III presents my own view. It explains the features of, and justifications for, what I deem the most compelling account of who *does*, and who *should*, interpret the Constitution. Part IV examines a number of current legal issues which illustrate the pertinence and utility of inquiries about who interprets the Constitution.

Ultimately, I articulate and defend a revised model of judicial supremacy. It offers a way of thinking about judicial supremacy which accounts for the subtleties of the interpretive process and better explains who interprets the Constitution under our existing interpretive scheme. This revised model also builds on the descriptive capabilities of judicial supremacy and urges a diffusion of interpretive responsibility. This diffusion fosters the interpretive capacities of nonjudicial actors and vests their interpretations with enhanced significance. Such a reorientation in interpretive responsibility would maintain the advantages associated with the judiciary's authoritativeness while amplifying the virtues of nonexclusive or extrajudicial constitutional interpretation.

4. A parallel inquiry can be made concerning interpretation of nonconstitutional sources of law. While some of the issues raised are similar, this Article is limited to an exploration of constitutional interpretation.

5. This question is a modified version of the query posed by Walter F. Murphy in *Who Shall Interpret?: The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986) [hereinafter Murphy, *Who Shall Interpret?*]. *See also* WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION (1986) [hereinafter MURPHY ET AL., CONSTITUTIONAL INTERPRETATION].

A. Today's Prevailing View

The prevailing view, generally embraced by the public,[6] by lawyers,[7] and entrenched in basic civics lessons, is that the Supreme Court—and the "lower" federal courts—interprets the Constitution and decides its meaning.[8] Embedded in this view is the idea that the Court is the final arbiter of what the Constitution means—it is a conception advancing "judicial supremacy" vis-a-vis the task of interpretation.

In spite of the widespread adherence to this generic characterization of judicial supremacy,[9] there is no similar consensus about some

6. In 1987 the Hearst Corporation conducted a survey about public knowledge of, and views on, the Constitution. Presenting the results of the survey, the *Washington Post* reported that six in ten people responded that the Supreme Court is the final authority on constitutional change. The author of the *Post's* article stated that the six in ten had responded "correctly." *See* Ruth Marcus, *Constitution Confuses Most Americans; Public Ill-Informed on U.S. Blueprint*, WASH. POST, Feb. 15, 1987, at A13.

7. That lawyers hold such a view should not be surprising if, as I presume is true, constitutional law classes pay little, if any, attention to the question "who interprets?" A glance at some of the leading casebooks in the field reveals that some fail to distinguish the query from the concept of judicial review. *See, e.g.*, WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW 33-39 (9th ed. 1993) (excerpting quotations which implicate the question who interprets, without discussing the matter, or separating it from the concept of judicial review); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW 10-11 (4th ed. 1993) (raising the issue of ultimate interpretive authority, but in the context of a discussion of judicial review). Others do differentiate the inquiries, but still dedicate minimal attention to who interprets. *See, e.g.*, GERALD GUNTHER, *Is Constitutional Interpretation a Special or Exclusive Judicial Function?*, *in* INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 20-28 (5th ed. 1992); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 50-54 (1991) (short note on judicial exclusivity). A major exception to this trend is a casebook written predominantly by political scientists engaged in the study of "public law." MURPHY ET AL., CONSTITUTIONAL INTERPRETATION, *supra* note 5; *see also* Gary Apfel, *Whose Constitution Is It Anyway?: The Authority of the Judiciary's Interpretation of the Constitution*, 46 RUTGERS L. REV. 771 (1994) (examining the treatment in constitutional law treatises of the interpretive authority of other branches of government); *cf.* Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385, 393 (1994) [hereinafter Paulsen, *Reply to Professors Levinson and Eisgruber*] (explaining that the inclusion of accounts repudiating judicial supremacy "is almost invariably *not* the way that Constitutional law is taught these days"); W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 19 YALE J. INT'L L. 1, 8 n.13 (1984) (positing that insofar as law schools fail to teach that constitutional adjudication involves a process in which nonjudicial actors participate, formally and informally, "there is no comprehensive course on constitutional law in any meaningful sense in American law schools").

8. My use of "Court" and "courts" refers to the Supreme Court and the federal courts respectively. For purposes of this Article, little hinges on differentiating between them, so I will use the two terms interchangeably.

9. *See* Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 371 (1994) (This is "an age when judicial supremacy is taken for granted."); Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to*

more subtle questions. Must nonjudicial actors abstain from interpretation, or merely accept judicial interpretations when they conflict with others? What is the scope of a judicial "interpretation"—how far, if at all, does it extend beyond a particular case's holding, or apply to other factual circumstances? There is no prevailing view as to how these questions should be answered. Nevertheless, the essential premise of judicial supremacy—that courts say what the Constitution means—dominates contemporary conceptions of the relationship between government and the Constitution, and enjoys adherence by many legal scholars.[10]

Accordingly, some would put to rest discussions about who interprets.[11] I urge that we resist any such temptation, and instead invite debate about this crucial dimension of our constitutional scheme. The discussion remains important in several ways, three of which warrant brief comment.

First, it is critical we have ongoing reflection and discourse about the nature, role, and meaning of the Constitution in our polity. "Who interprets?" is a foundational question about which any constitutional society must develop views in order to achieve mature self-understanding. Second, as a descriptive matter, numerous interpretive acts reveal a less-than-unwavering commitment to judicial supremacy. These apparent departures from the model of judicial supremacy demand explanation.

Finally, the dominance of judicial supremacy as an account of constitutional interpretation promotes what I call "cynical positivism."

Say What the Law Is, 83 GEO. L.J. 217, 298 (1994) [hereinafter Paulsen, *Executive Power*] ("Our generation is . . . accustomed to thinking in judicial supremacist terms."). Paulsen's article should not be confused with another article with a similar name. *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996) (discussing the separation of powers).

10. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (2d ed. 1986); RONALD DWORKIN, LAW'S EMPIRE 370 (1986); JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION 6 (1992) ("The Court's constitutional law is . . . effectively the supreme law of the land until the Court overrules itself or is overruled by amendment.") (footnote omitted); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 610-11 (1983) ("[The] system was designed to give the courts the final say."); *see also* SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES 7-12 (1992) (discussing the support of scholars on the political left and right for the notion that once the court has spoken its words are final); *cf.* JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 86 (explaining the longstanding appeal of the idea of a final interpreter of the Constitution within the central government itself).

11. Especially those who confuse it with judicial review, which has been the focus of such intense debate over recent decades that many in legal academia have grown weary deliberating about it. *See infra* Part II.A.1.

Cynical positivism is the fusion of the view that "the Constitution is what judges say it is"[12] with a judgment that such human-generated conceptions of constitutional meaning are derived from mere political or personal preferences and with a deepening sense of disappointment about this state of affairs.[13] Cynical positivism threatens the legitimacy of the judiciary and undermines the commitment to governance by constitutional principles.

For these and other reasons, many legal scholars wish to revive debate over who interprets. Notwithstanding my characterization of judicial supremacy as well entrenched in the public psyche, as well as in the minds of many academicians, views about the descriptive or normative appropriateness of judicial supremacy are by no means uniform.[14]

B. Who Interprets?: Refining the Question

What are we really asking when we inquire about who interprets the Constitution? Two basic distinctions will help guide the inquiry. First, as previously indicated, the "who interprets" problem has both a normative and a descriptive dimension. While at times discussions in this Article may not explicitly distinguish between the two, the reader ought to be mindful of the separateness of these components of the inquiry. Second, there is a basic distinction between "finality" and "exclusivity" in constitutional interpretation. The question of who, if anyone, offers final or authoritative interpretations is one matter, while whether interpretations can, or should, be propounded by more than one interpretive agent is quite another.

Erwin Chemerinsky, focusing on who should be the *authoritative* interpreter of the Constitution, suggests three possible answers.[15] One is that no branch has superior authority—all are equal in this regard. A second possibility is that interpretive responsibility is allocated to different departments or branches of the federal government,

12. *See also* AGRESTO, *supra* note 10, at 157 ("[T]he most serious of potential dangers [is] . . . the possibility that the judiciary will substitute its principles for the Constitution's, and then actively enforce its visions autonomously and unchecked."); *cf.* CHARLES EVANS HUGHES, ADDRESSES AND PAPERS 139 ("[T]he Constitution is what the judges say it is.").

13. *See, e.g.*, AGRESTO, *supra* note 10, at 106 (describing as "awkward" the "premise that the Constitution is what (or whatever) the justices care to say it is"); Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1120 (1995) (asserting there is a cynicism about the coherence and legitimacy of constitutional interpretation).

14. *See infra* Part II.A.2.

15. *See* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987) [hereinafter CHEMERINSKY, INTERPRETING THE CONSTITUTION].

depending on the topic or constitutional provision involved.[16] Finally, it is possible that ultimate interpretive authority is vested in a single branch.

It is important to note that the three possibilities enumerated by Chemerinsky address the issue of who is the *authoritative* interpreter of the Constitution.[17] Any account of interpretive roles must provide an answer about who is the final or authoritative interpreter. But interpretive *exclusivity* is a separate issue; even if one branch is identified as the authoritative interpreter, must other branches abstain altogether? If not, what roles do the other branches play, and what should their self-conceptions as interpreters be?

Keeping both the normative-descriptive and the finality-exclusivity dichotomy in mind should help illuminate the path ahead and provide a framework for assessing competing responses to the overriding inquiry into who interprets.[18]

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16. This, according to Chemerinsky, is the most apt description of contemporary affairs. *See id.* at 84.

17. By "authoritative" Chemerinsky means having the final say, substantively as well as sequentially, in the event of a conflict over constitutional meaning.

18. Before proceeding, I wish to note two limitations on the subject of this Article. First, interpretations of the Constitution which someone seeks in some manner to foster acceptance of, or to move from one's mind into the social arena, are my subject. In other words, this project concerns only thoughts which are intended for submission into the social interpretive process, rather than "private" thoughts. No one can deny, as a descriptive matter, that people interpret the Constitution in their own thoughts—at least from time to time. Moreover, I readily concede that "private" interpretation inevitably influences the ideas entering the "public" interpretative arena. But unless people attempt to convey their interpretations to others, our capacity to study them is limited. Because the realm of private interpretations holds little promise of a rewarding exploration, it is not addressed in this Article.

The second limitation concerns the relationship between the questions "who interprets?" and "how to interpret?" Admittedly, the divide between *who* interprets and *how* to interpret is permeable. Debates about "who" often rely on notions about how the roles various prospective interpreters occupy affect their relative interpretive dispositions and methodologies. Moreover, to the extent this Article encourages nonjudicial actors to assume more active roles as constitutional interpreters, *how* they should interpret is surely important. This Article discusses the development of interpretive self-images for nonjudges. But it does not address, or respond to the substantial literature about, methodologies of constitutional interpretation. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); ROBERT H. BORK, THE TEMPTING OF AMERICA (1990); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993); LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1991); MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869 (1994); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753 (1994); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) [hereinafter Tribe, *Reflections on Free-Form Method*].

II. Competing Accounts of Who Interprets

A decade ago Walter Murphy took up the question "who shall interpret?"[19] Murphy was primarily concerned with the normative dimension of this question. As a starting point, Murphy looked to the Constitution itself, and what the text says about interpretation. For instance, inherent in Congress's authority to make "all laws . . . necessary and proper for carrying into execution" other powers enumerated in Article I[20] is some responsibility and capacity for Congress to make judgments about the Constitution's meaning.[21] Senators, representatives, and other government officials are bound by an oath to "support" the Constitution.[22] Similarly, Article II requires Presidents to abide by an oath to "preserve, protect and defend" the Constitution.[23] Arguably, these oaths call for the exercise of interpretive functions.[24] Finally, Article III's extension of judicial power to "all Cases, in Law and Equity, arising under this Constitution" serves as the basic textual authorization for courts' participation in the interpretative process.[25]

These terse textual references themselves provide little guidance for thinking about who interprets as a general matter, and they surely fail to instruct about the resolution of disagreements among government entities about the meaning or requirements of the Constitution. The difficulty in such a case is ascertaining "the extent to which and the circumstances under which some governmental institutions should defer to other institutions . . . [and,] in cases of conflict, whose interpretation should prevail."[26]

The remainder of Part II will examine five accounts of who interprets. The accounts are normative in focus, but also address the descriptive capabilities of the models. The discussion in this section begins with judicial supremacy, and concludes with departmentalism,

19. Murphy, *Who Shall Interpret?*, *supra* note 5, at 402.

20. U.S. CONST. art. I, § 8. Such language is mirrored in the enforcement clauses of many of the Constitution's amendments, such as the Fourteenth, in Section 5.

21. *See* Murphy, *Who Shall Interpret?*, *supra* note 5, at 404.

22. U.S. CONST. art. VI, § 3.

23. *Id.* art. II, § 1.

24. Indeed, Murphy proffers that Lincoln's First Inaugural, asserting the indivisibility of the Union, was an act to "preserve" the Constitution. Murphy called Lincoln's remarks "the most important single act of American constitutional interpretation." Murphy, *Who Shall Interpret?*, *supra* note 5, at 405.

But what conduct do these oaths require? Adherence to court interpretations? Or may oath takers exercise independent judgment? For a discussion of the history and significance of the oath clauses, see Paulsen, *Executive Power*, *supra* note 9, at 257-62.

25. U.S. CONST. art. III, § 2.

26. Murphy, *Who Shall Interpret?*, *supra* note 5, at 402.

which poses the greatest challenge to the normative and descriptive power of judicial supremacy.

A. Judicial Supremacy

While conceptions of judicial supremacy vary, it has several general characteristics. First, judicial supremacy vests the judiciary with ultimate or final interpretive authority.[27] Second, under judicial supremacy, court-enunciated interpretations are to be understood broadly, as principles which apply beyond particular cases and their parties. Third, because judicial supremacy requires acknowledgment that courts determine constitutional meaning, any subterfuges undermining courts' authority are to be avoided.[28]

1. The Judicial Roots of Judicial Supremacy

The Supreme Court's landmark decision in *Marbury v. Madison*[29] is credited with providing the foundation for judicial review—the power of the Court to declare acts of Congress unconstitutional.[30] At issue was whether Congress acted properly[31] in conferring authority in the Court to issue original writs of mandamus in cases not "affecting Ambassadors, other public Ministers and Consuls [or] those in which a State [is] a party," the domains over which the Court had original jurisdiction under Article III. The Court held, in an opinion written by Chief Justice Marshall, that Congress acted unconstitutionally in granting this power to the Court.

Judicial review itself is by no means uncontroversial. Critics note that Marshall's justification for asserting the federal judicial power to interpret and apply the Constitution is not conclusive.[32] In his treatise on American constitutional law, Laurence Tribe explains, "It is not

27. Judicial supremacy therefore falls within the ambit of the third of Chemerinsky's categories.

28. These features of judicial supremacy suggest nothing about interpretive exclusivity. What is, or should be, the interpretive role of nonjudges under judicial supremacy? On this point, there is no obvious or dominant perspective, so attention must be paid to particular accounts of judicial supremacy to discern their views about whether the judiciary is the exclusive interpreter of constitutional meaning.

29. 5 U.S. (1 Cranch) 137 (1803).

30. However, some commentators argue the issue of judicial review was by no means a new one. *See, e.g.*, David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 655-56 (1982); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-2, at 23 n.3 (2d ed. 1988) [hereinafter TRIBE, AMERICAN CONSTITUTIONAL LAW].

31. By adopting a particular provision of the Judiciary Act of 1789.

32. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 30, § 3-2, at 25 & n.9; *see also* Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 389 (1982).

clear . . . what significance should be attached to the fact that neither Marshall nor anyone else has successfully established that independent judicial review, but no alternative, is consistent with constitutional text and structure."[33] Nor is judicial review of the sort justified in and flowing from *Marbury* inevitable in a constitutional scheme. In some countries, the legislatures' interpretations of constitutions are definitive, and courts defer to legislatures to reconcile tensions between statutes and constitutional provisions.[34]

Nevertheless, the essential elements of Marshall's justification of federal judicial review of acts of Congress are familiar: The Constitution is the supreme law of the land, and it is the province of the judiciary, particularly of the Supreme Court, to say what that law means. Yet Tribe urges that we not conflate the twin assumptions underlying *Marbury*:[35] First, the assumption that the Constitution is supreme law, and, second, the assumption that it is the "province and duty of the judicial department, to say what the law is."[36] Only the latter assumption, and the meaning it has taken on during the nearly two centuries since its utterance, remains contentious. This assumption rests at the core of the controversy over who interprets, which leads many academicians to trace the roots of judicial supremacy back to *Marbury*.[37]

However, the concept of judicial review is not synonymous with the concept of judicial supremacy.[38] In explaining his view of the difference, Murphy suggests that judicial supremacy involves more than the power of judicial review. While judicial review authorizes courts, when deciding cases and controversies, to refuse to give effect to an act or mandate of a coordinate branch of government, judicial supremacy creates "the obligation of coordinate officials not only to obey that ruling but to follow its reasoning in future deliberations."[39]

The argument that *Marbury* established judicial supremacy, quite apart from judicial review, was never more emphatically stated than

33. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 30, § 3-2, at 25.

34. *See id.* at 25 n.10.

35. *See id.* § 3-3, at 27.

36. *See Marbury*, 5 U.S. (1 Cranch) 137.

37. *See supra* note 7.

38. However, contemporary debates about judicial review and attendant claims about the nature and wisdom of "judicial restraint" in fact energize much of current discourse over who shall interpret. Chemerinsky argues that debate over the legitimacy of judicial review is futile and misguided. Instead, he encourages a debate which includes the matter of who is the authoritative interpreter of the Constitution. CHEMERINSKY, INTERPRETING THE CONSTITUTION, *supra* note 15, at 1, 24.

39. Murphy, *Who Shall Interpret?*, *supra* note 5, at 407.

by the Court itself in *Cooper v. Aaron*.[40] In *Cooper* the court asserted: "*Marbury* . . . declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and [this] principle has ever been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[41]

On its face, this statement appears to be a ringing endorsement of judicial supremacy. One reading of *Cooper* is that the "Court's interpretation is *itself* the 'supreme law of the land.'"[42] Many scholars identify *Cooper* as the moment when the Court truly declared itself the ultimate interpreter of the Constitution.[43] Whether or not *Cooper* established judicial supremacy,[44] the principle of judicial supremacy has been embraced by the Court several times since *Cooper*, and extended to cases involving Congress[45] and the executive branch.[46] As recently as 1992, the Court said that, in the minds of the people, it is "invested with the authority to decide . . . constitutional cases and speak before all others for [the people's] constitutional ideals."[47]

2. *Critics and Criticism of Judicial Supremacy*

Notwithstanding the fact that the Supreme Court appears to have embraced judicial supremacy, the concept has its critics. Laurence Tribe, for one, is wary of judicial supremacy in its strongest form, insofar as it "ignores the reality that, at least so long as the manner in which our nation's fundamental document is to be interpreted remains open to question, the 'meaning' of the Constitution is subject to legitimate dispute, and the Court is not alone in its responsibility to address that meaning."[48] Tribe proposes that "a variety of actors must make their own constitutional judgments, and possess the power to develop interpretations of the Constitution which do not necessarily conform to the judicially enforced interpretation articulated by the Supreme

40. 358 U.S. 1 (1958) (addressing Arkansas's noncompliance with federal desegregation orders).

41. *Id.* at 18.

42. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 30, § 3-4, at 34.

43. *See* AGRESTO, *supra* note 10, at 104; BURGESS, *supra* note 10, at 3; Paulsen, *Executive Power*, *supra* note 9, at 225.

44. *See* BURGESS, *supra* note 10, at 2 (explaining why *Marbury* is mistakenly understood as having done so); Eisgruber, *supra* note 9, at 348 ("[*Marbury*] does not establish judicial supremacy.").

45. *See* Powell v. McCormack, 395 U.S. 486 (1969).

46. *See* United States v. Nixon, 418 U.S. 683 (1974).

47. Planned Parenthood v. Casey, 505 U.S. 833, 868 (1992).

48. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 30, § 3-4, at 34-35 (citations omitted).

Court."[49] Among the potential alternative interpreters Tribe lists are the President, legislators, state courts, and the public.[50]

For Tribe, central to the notion that a variety of actors must make their own constitutional judgments is the distinction between the Constitution itself and the exercise of power under the Constitution, or the "concept of Constitutional law" versus "judicial enforcement of that law."[51] Tribe maintains that, read as a whole, *Cooper* does not require the adoption of judicial supremacy. Tribe concludes that it is "not difficult to reconcile indeterminate constitutional law—constitutional law which recognizes, within limits, the equal legitimacy of differing interpretations—with a determinate adjudicatory process."[52] Despite the proliferation of federal judicial power, the Constitution is open "at any given time to competing interpretations limited only by the values which inform the Constitution's provisions themselves, and by the complex political processes that the Constitution creates—processes which on various occasions give the Supreme Court, Congress, the President, or the states, the last word in constitutional debate."[53]

Tribe is by no means alone in questioning the desirability of a model of constitutional interpretation which anoints the judiciary the ultimate arbiter of its meaning. It is worth articulating briefly some of the other arguments against judicial supremacy, distinguishing those which challenge its descriptive accuracy from those which challenge the desirability of judicial supremacy. Some accounts, of course, do both, as appears to be the case with Tribe.

As a descriptive matter, American history is replete with rejections of judicial supremacy by government actors outside the judiciary. For instance, many Presidents have challenged the rationale of judicial supremacy. Thomas Jefferson often criticized the notion that the judiciary is the ultimate arbiter of all constitutional questions. As President, Jefferson pardoned those prosecuted under the Sedition Act of 1798, which he viewed as unconstitutional, notwithstanding that it was upheld by the federal judiciary.[54] Andrew Jackson was also a critic of

49. *Id.* at 35.

50. *See id.* at 35 nn.21-24.

51. *Id.* at 37.

52. *Id.* at 38.

53. *Id.* at 42.

54. *See* BURGESS, *supra* note 10, at 3; Paulsen, *Executive Power*, *supra* note 9, at 255-56.

judicial supremacy, as reflected in his challenge of the Court's judgment in *McCulloch v. Maryland* in his "Veto Message" of 1832.[55]

A favorite President among critics of judicial supremacy is Abraham Lincoln. One of his stands against judicial supremacy was his contention that *Dred Scott v. Sandford*[56] was an unconstitutional ruling which he was unwilling to allow to serve as a basis for nationalizing slavery.[57] On another well-known occasion, Lincoln refused to obey the Court's order after it issued a writ of habeas corpus.[58]

More recently, President Ronald Reagan's Attorney General, Edwin Meese, proclaimed in a speech: "[C]onstitutional interpretation is not the business of the Court only, but also properly the business of all branches of government."[59] Other modern Presidents have bristled at aspects of judicial supremacy, and argued for their own authority to interpret the Constitution.[60]

Many academicians who have closely examined constitutional law conclude that judicial supremacy poorly describes our legal regime. Chemerinsky, for example, posits that a model which assigns the role of final arbiter to different branches of government according to the constitutional provision in question[61] may best describe the current system. Among the evidence frequently cited in support of this view is the political question doctrine.[62]

Other interpretive acts cast doubt on judicial supremacy's descriptive capacities. For instance, there are areas of executive and legislative activity where government officials act on their own interpretations of the Constitution. These views may not even be articulated and are not reviewable by other branches of the govern-

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55. *See* BURGESS, *supra* note 10, at 4.

56. 60 U.S. (19 How.) 393 (1857).

57. *See* AGRESTO, *supra* note 10, at 86-95; BURGESS, *supra* note 10, at 5-6; ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (1992).

58. *See Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487); *see also* Paulsen, *Executive Power, supra* note 9, at 223 n.16, 276-83. The nature of habeas corpus has transformed since Lincoln's time. *See generally* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980).

59. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985 (1987).

60. *See generally* Christopher N. May, *Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1994). *See also infra* Part II.C.

61. *See* CHEMERINSKY, INTERPRETING THE CONSTITUTION, *supra* note 15, at 84, 97-98.

62. *See id.* at 98 ("[T]he political question doctrine allocates interpretation of some constitutional provisions to the electorally accountable branches of government."); Murphy, *Who Shall Interpret?*, *supra* note 5, at 414 (explaining that the doctrine makes sense in the context of such an allocative model); *infra* Part III.D.1.

ment.[63] If a court cannot get its hands on a case or controversy which allows it to undo a nonjudicial interpretation, it cannot serve as authoritative interpreter in that matter. Indeed,

> [o]n one level, the practical power of other governmental actors to employ differing constitutional interpretations is obvious: so long as they do not involve themselves in justiciable controversies coming within the subject-matter limits of article III, the Supreme Court's view of the Constitution cannot be brought to bear, and those other governmental actors will be free to interpret and apply the Constitution as they deem best.[64]

Under these and other circumstances, interpretations by nonjudicial actors may never arise in a case or controversy which would enable a court to displace those interpretations.

One could also argue judicial supremacy is not an accurate descriptive account because the nature of judicial adjudication itself makes judicial supremacy either unnecessary or impossible. The argument goes like this: Courts, if supreme at all, are only so by virtue of the authority vested in them under Article III to render, and demand obedience to, decisions arising from particular cases and controversies. Since no two cases are alike, courts only *decide cases* rather than propound the *authoritative meaning of the entire Constitution.*[65]

From a normative standpoint, there are several bases for criticizing judicial supremacy. Many interpreters look to the Framers' dispositions for guidance about how we ought to conduct our constitutional affairs today. Yet some claim that judicial supremacy is inconsistent with the Framers' intentions.[66]

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63. For example, legislators likely rely on nonjudicial interpretive judgments which do *not* lead to the adoption of legislation, and therefore afford no occasion for courts to assess their interpretive judgments. Likewise, the President may act upon such views in domains where justifications are neither required, nor reviewable. *See* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990) (discussing, what in Part II.C I have labeled, Presidential "zones of autonomy").

64. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 30, § 3-4, at 35-36.

65. *See* Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965) ("Under *Marbury* the Court decides a case; it does not pass a statute calling for obedience by all within the purview of the rule that is decided."); *see also* BICKEL, *supra* note 10, at 259-64; Daniel A. Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387, 388-89; Meese, *supra* note 59, at 983; Paulsen, *Executive Power*, *supra* note 9, at 273-74.

66. *See, e.g.*, Paulsen, *Executive Power*, *supra* note 9, at 236 (although Paulsen purports to reason from the "premises" advanced by the Framers and denies subscribing to "original intent"); AGRESTO, *supra* note 10, at 10.

Other familiar complaints are that judicial supremacy effectively gives the judiciary the power to govern[67] and that judicial supremacy conflates the Constitution and constitutional law.[68] Critics further argue interpretation is too important to be left to a single branch.[69] When interpretation is left to a single branch, there is a limited incentive for that branch to strive to persuade others of the appropriateness of its interpretations. Were other branches of the government vested with a substantial interpretive role, there would be an emphasis placed on "reason" in rendering interpretive judgments. The more it is necessary for one branch to convince other branches to accept its judgment, the more critical the quality of its analysis must be.

Furthermore, the oft-made charge that judicial review is antidemocratic likewise can be made against judicial supremacy. "Although the Constitution in a sense stands beyond ordinary politics[,] . . . democracy is surely less threatened by a system of constitutional interpretation in which many may share significant and respected roles than by a system with but one authoritative voice."[70] Insofar as judicial supremacy might be said to stifle such role-playing, concerns about the dynamic between democracy and control over interpretation are understandable.

Standing in the shadow of these critiques of judicial supremacy, I concede that our current legal regime at times operates other than we would expect if judicial supremacy were an accurate descriptive account. What this suggests to me, however, is that it is our account of judicial supremacy, rather than the idea itself, which requires reconsideration. As for the normative critiques, judicial supremacy's shortcomings are not inherent ones. The perceived failings of judicial supremacy apply only to some visions of it. A modified model of judicial supremacy can avoid many of judicial supremacy's imagined defects while capturing the substantial virtues associated with it. Part III of this Article sets out such an account of judicial supremacy.

B. Legislative Supremacy

In addition to judicial supremacy, Murphy describes four other models of authoritative constitutional interpretation. Among these is the argument for "legislative supremacy." In its pure form, one sup-

67. *See* AGRESTO, *supra* note 10, at 81; Meese, *supra* note 59, at 989; *see also* Hoadley, *supra* note 3.

68. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 30, § 3-3, at 27; Meese, *supra* note 59, at 981.

69. *See* Paulsen, *Executive Power*, *supra* note 9, at 222.

70. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 30, § 3-4, at 39.

poses, an account of legislative supremacy must maintain that in all circumstances congressional interpretation of the Constitution trumps that of any other branch, including the judiciary. Murphy finds few systematic assertions of legislative supremacy since the nation's founding.[71] Notwithstanding the apparent dearth of outright assertions of legislative supremacy, there are several arguments which can be made suggesting it is neither descriptively implausible nor normatively distasteful.[72]

Among the normative claims which can be advanced on behalf of legislative supremacy is its confluence with "democratic" ideals. Insofar as the Constitution should remain a living document of, and for, the people, arguably the branch of government thought most responsive to the people ought to serve as the ultimate interpreter of the ultimate guide for governing our polity. While this itself is not an argument for legislative supremacy, it lends credence to the view that ultimate constitutional interpretation is and ought to be more "democratic" than is supposed.

As a descriptive matter, there are several ways in which Congress might be understood as occupying the role of authoritative interpreter vis-a-vis a particular matter or set of issues. One stems from *Katzenbach v. Morgan*.[73] *Morgan* involved the constitutionality of section 4(e) of the 1965 Voting Rights Act, which provided that no person who successfully completed sixth grade in an accredited Spanish-language school in Puerto Rico could be denied the right to vote on account of an inability to read or write English. The Court upheld Congress's authority to adopt the provision, by virtue of Congress's power under Section 5 of the Fourteenth Amendment.[74] The Court explained that nothing in the Constitution prohibited Congress from acting under Section 5 on the basis of an interpretation of the Equal Protection Clause more expansive than that enforced by the Court itself.[75]

There is disagreement about the meaning, and continuing validity, of *Morgan*.[76] Nonetheless, one possible reading of *Morgan* is that

71. The most prominent examples, in his view, include efforts by radical Republicans after the Civil War, and claims by some Jeffersonians around the time of *Marbury*. *See* Murphy, *Who Shall Interpret?*, *supra* note 5, at 410-11.

72. *Cf. infra* Part IV.A (discussing Congress as a constitutional interpreter).

73. 384 U.S. 641 (1966).

74. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

75. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 30, § 3-4, at 36.

76. *See id.* §§ 5-12 to -15, at 330-53; Stephen L. Carter, *The* Morgan *'Power' and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986); Matt

it recognizes Congress's authority under the enforcement provision of the Fourteenth Amendment to interpret the Constitution.[77] Among the responses to *Morgan* was Henry Monaghan's exposition of a theory of "constitutional common law."[78] Monaghan presents a model in which there are two spheres of constitutional law. In the first, the sphere of "pure" constitutional law, only interpretation by the Court is permissible. The second sphere is that of "constitutional common law"—"a substructure of substantive, procedural, and remedial rules drawing their respective inspiration and authority from, but not required by, various constitutional provisions."[79] In this sphere, as Tribe recounts, "Congress would not merely participate as the Supreme Court's equal, but would hold the power to substitute its own views for those of the Court."[80] Whether or not one is persuaded by Monaghan's conception of constitutional common law, it reflects a desire to find a role for Congress in the interpretive process,[81] and may well draw on a more general intuition that Congress is engaging in some forms of "interpretation."

Another explanation that Congress may, under certain conditions, authoritatively interpret the Constitution comes from the work of Lawrence Sager. Sager has explained that the federal judiciary sometimes declines to uphold constitutional claims, not because of any particular interpretation of the Constitution, but because of institutional concerns, such as federalism and the limits of "judicial competence."[82] In such instances, the Court's rendering of a constitutional norm may not exhaust the full potential—or develop the full meaning—of the Constitution's provisions. These norms are said, in

Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us?: An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029 (1993). The *Morgan* "power" has been discussed in recent years as a possible source of congressional authority for the enactment of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994) [hereinafter RFRA]. *See, e.g.*, Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under the Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994); Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589 (1996). The constitutionality of RFRA is an issue before the Court this Term. *See* City of Boerne v. Flores, No. 95-2074 (argued Feb. 19, 1997).

77. This rationale might apply to other enforcement provisions in the Constitution. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112 (1970).

78. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1974).

79. *Id.* at 2-3.

80. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 30, § 3-4, at 37.

81. *See id.*

82. *See* Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

Sager's nomenclature, to be "underenforced." He has argued that the contours of judicial norms which are underenforced should be understood as demarcating only the boundaries of the federal courts' role in enforcement, and that "the unenforced margins of underenforced norms should have the full status of positive law which we generally accord to the norms of our Constitution."[83] Insofar as one accepts Sager's thesis, Congress retains for itself the capacity to determine the full meaning of underenforced constitutional provisions and principles. In a sense, this view operates similarly to *Morgan*, in that it delineates circumstances when Congress takes over where the courts have left off and assumes the role of authoritative interpreter.[84]

A third possible vehicle for Congress to act as the ultimate constitutional interpreter involves the much debated constitutional issue concerning the breadth of Congress's power to limit the jurisdiction of courts under Article III.[85] Article III may allow Congress to deny the federal courts jurisdiction over certain cases, thereby precluding court review of affected legislation. If, in that legislation, Congress explicitly or implicitly embraces a particular reading of the Constitution, then Article III consequently enables Congress to become the authoritative interpreter of the Constitution in these matters.[86]

Proposals to eliminate federal jurisdiction over certain topics have been floated for decades.[87] The limited success of such measures may be attributable to doubt about whether they are constitutional.[88] Indeed, whether Article III can be read to allow such limitations on

83. *Id.* at 1221; *see also* Laurence H. Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1084-91 (1977).

84. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 30, § 3-4, at 39.

85. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3, at 167-205 (2d ed. 1994); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984).

86. Presumably, however, state courts would retain jurisdiction over such matters, and might compete with Congress as an alternate interpreter. *See* CHEMERINSKY, *supra* note 85, FEDERAL JURISDICTION §§ 3.3, 10.2, at 186-202, 575-77; TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 30, § 3-4, at 40-41 (discussing *Oregon v. Hass*); Paul Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 586 (1981) (addressing the role of state courts in the development of federal constitutional norms).

87. Two prominent examples from the 1980s include S. 158, 97th Cong. (1981); H.R. 3225, 97th Cong. (1981) (bills which would limit federal jurisdiction in abortion cases); S. 481, 97th Cong. (1981); H.R. 4756, 97th Cong. (1981) (bills which would restrict federal jurisdiction over cases involving voluntary school prayer). *See also* Mikva, *supra* note 10, at 589 n.10.

88. *See* Mark V. Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809, 813 (explaining that a consensus among scholars that such measures are unconstitutional has operated to keep Congress from adopting them).

jurisdiction is a disputed matter. And, of course, someone must render an interpretation of the Constitution about Congress's power to limit Article III jurisdiction in this manner. Under a traditional conception of *Marbury*, the federal courts would themselves decide the meaning of Article III—whether they could be denied jurisdiction by such acts of Congress.[89] As indicated above, this tells us little about what to do if Congress disagrees, or how a legislator considering such a proposal ought to conceive of his or her responsibilities vis-a-vis the matter of interpreting that proposal's constitutionality. But jurisdictional limitations present at least a possible circumstance under which Congress would effectively have more authoritativeness than the courts as an interpreter.

Finally, accounts of the "formal" and "informal" mechanisms for constitutional amendment may suggest certain conditions under which Congress acts as a privileged interpreter. Looking first to the formal amendment process, Murphy posits "the primary option open to Congress and the President when fundamentally disagreeing with the Court is to amend the Constitution."[90] Surely, in the meta-interpretive sense, nothing is more fundamental to the power to interpret than the power to say what something means by formally clarifying or amending it. Congress is the only branch of the federal government which plays a formal role in the amendment process set out in Article V.[91] It, more so than either the executive or judiciary, is likely to play a major role in any alterations in the text of the Constitution.[92]

Scholarly work on "informal" constitutional amendments may also suggest a similar privileged role for Congress as an interpreter. In a provocative essay written in 1991, Sanford Levinson challenged the presumed answer to the question, "How many times has the United

89. *See* CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 85, § 3.1, at 171 (discussing the question of a court's jurisdiction to decide whether it has jurisdiction).

90. Murphy, *Who Shall Interpret?*, *supra* note 5, at 413. This is a tradition which Murphy identifies as extending back to the adoption of the Eleventh Amendment in response to the Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

91. Congress may, by a two-thirds vote of each house, propose amendments to the Constitution to the states. U.S. CONST. art. V. Article V also grants Congress some control over how the states may ratify an amendment, and case law has vested Congress with additional procedural authority over the amendment process. *See generally* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983); Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983) [hereinafter Tribe, *Amending*].

92. Congress has proposed every amendment thus far adopted as part of the Constitution. *See* Tribe, *Amending*, *supra* note 91, at 436.

States Constitution been amended?"[93] In that piece he explores the boundaries between interpretation and amendment, and maintains that discussions of "amendments" which focus exclusively on Article V are, "to put it bluntly, wrong."[94] Without articulating criteria for distinguishing amendment from interpretation, he insists the divide is less clear than legal formalism would suggest. Levinson's comments are relevant to examining claims of legislative supremacy insofar as his argument for less constrained conceptions of both amendments and interpretation sets forth the possibility that constitutional change can be propelled by any one of a number of actors, including Congress.[95]

Bruce Ackerman has also argued for a less constrained notion of constitutional "amendment."[96] Ackerman posits that America has experienced three constitutional regimes, or "constitutional moments"—roughly corresponding to the Founding, Reconstruction, and the New Deal. Like Levinson, he emphasizes that, in the grand sense, "amendment" takes place outside the Article V rubric. Ackerman views much of the Supreme Court's work as an attempt to synthesize these "moments."[97] Under his theory, the essential framework for interpretation is established outside the judiciary, by "the People."

93. The supposed and formal answer in 1991 was 26. Since 1991, in what is itself a bizarre constitutional tale, a twenty-seventh amendment has been added to the Constitution. The amendment provides: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect until an election of Representatives shall have intervened." Originally transmitted to the states for ratification in 1789, it received the required number of ratifications over two centuries later, and pursuant to authority granted under 1 U.S.C § 106b, was certified as the Twenty-Seventh Amendment by the Archivist of the United States on May 18, 1992. *See generally* Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501 (1994).

94. Sanford Levinson, *Accounting for Constitutional Change (Or, How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) All of the Above)*, 8 CONST. COMMENTARY 409, 431 (1991), *modified and reprinted in* RESPONDING TO IMPERFECTION (Sanford Levinson ed., 1995).

95. As for the substance of Levinson's argument, while I appreciate its originality and intellectual energy, it strikes me as ahistorical and limited in its appreciation of the benefits of the formal amendment process. Levinson seems to discount the possibility that having a formal conception of, and requirements for, an "amendment" contributes to dialogue and shapes constitutional politics and discourse in a particular (and useful) way. In addition, amendments themselves, as explicit textual treatments, are special. When Levinson asks if amendments are necessary he does not appear mindful that an "amendment" has no meaning until given life by actors—by interpreters. Thus, amendments may well be necessary if people think they are necessary.

96. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) [hereinafter ACKERMAN, WE THE PEOPLE]; *see also* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989); Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

97. *See* ACKERMAN, WE THE PEOPLE, *supra* note 96, at 131.

Even if one suspects Ackerman too easily resorts to labeling these moments "amendments,"[98] the point made clear by both he and Levinson is that nonformal, nonjudicially forged constitutional meaning takes shape from time to time. Congress may play the leading role among the branches in fashioning new constitutional meaning during these periods, and thus, in an important sense, occupy a privileged interpretive role.

In the end, however, these assessments of the limits of court-developed constitutional norms, of the prospect of constrained Article III jurisdiction, and of the amendment process are not arguments for comprehensive legislative supremacy. At best, they illustrate the possibility that, in certain domains, Congress may effectively serve as authoritative, or at least a pre-eminent constitutional interpreter—the bulk of the interpretive work and authority is still left with the judiciary. Thus, the strongest statement that can be made about legislative interpretive authority is that Congress and the courts are nonexclusive interpreters which share the distinction of being ultimate interpreters. This state of affairs, however, begins to resemble a model less like traditional accounts of "legislative supremacy" than an alternative model—departmentalism.[99]

C. Executive or Presidential Supremacy

Having discussed both judicial and legislative supremacy, in the next account the executive branch, or the President, occupies the position of interpretive supremacy. Murphy pays virtually no attention to this model in his article, and explains that no President "has seriously pushed Presidential supremacy."[100] Yet he is quick to point out that "one might argue that such a theory underlay much of Lincoln's actions during the Civil War."[101] Indeed, while no President has consistently advocated executive supremacy, numerous Presidents and members of the executive branch have intermittently espoused the

98. *See* Cass R. Sunstein, *New Deals*, NEW REPUBLIC, January 20, 1992, at 32 (book review) (making such a charge). In fact, several commentators have criticized Ackerman's account of "moments" and his conception of "amendment" outside of Article V. *See, e.g.*, Tribe, *Reflections on Free-Form Method*, *supra* note 18, at 1286 (arguing the "theory that constitutional change can be effected by a particular pattern of events bearing no relation to the procedures of Article V . . . is fundamentally flawed"); William Fisher III, *The Defects of Dualism*, 59 U. CHI. L. REV. 955 (1992); Michael Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992) (review essay).

99. *See infra* Part II.E (discussing departmentalism).

100. Murphy, *Who Shall Interpret?*, *supra* note 5, at 420 n.28.

101. *Id.*; *see also* Paulsen, *Executive Power*, *supra* note 9, at 75-76.

virtues of independent executive interpretive judgments.[102] While the notion of pure executive supremacy has yet to find an exponent among academicians, several have extolled the practice of executive review generally, as well as executive authority to interpret the Constitution, in particular.[103]

The strongest statement to date advocating executive review comes from Michael Stokes Paulsen, who has written about executive branch authority to interpret the Constitution.[104] His thesis is a direct and engaging one about the coordinacy of the departments of the federal government: "[T]he power to interpret law is not the sole province of the judiciary; rather it is a divided, *shared* power not delegated to any branch but ancillary to the functions of all of them within the spheres of their enumerated powers."[105]

Paulsen asserts the President has "will"—the power to make law, which is exercised by participating in the legislative process, and by threat and exercise of the veto, as well as through the substantial authority to prescribe rules under the auspices of the modern administrative state.[106] Ancillary to the power to make law is the power of "judgment"—to interpret the laws the President is charged with executing.

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102. *See generally* Easterbrook, *supra* note 63, at 914-15; May, *supra* note 60 (offering historical assessment of Presidential refusal to comply with laws on constitutional grounds); Meese, *supra* note 59. *See also* Michael J. Wieser, *Beyond* Bowsher*: A Separation of Powers Approach to the Delegation of Budgetary Authority*, 55 BROOK. L. REV. 1405 (1990).

By way of example, prior to *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), Presidents refused to give effect to "legislative veto" provisions. *See* E. Donald Elliot, *The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125. In 1984 President Reagan decided not to enforce part of the Competition in Contracting Act on the grounds that it violated the Constitution by vesting executive power in the Comptroller General. *See* Lear Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988), *withdrawn on other grounds*, 893 F.2d 205 (9th Cir. 1989). Moreover, no President has accepted the War Powers Act as binding on the executive. *See* BURGESS, *supra* note 10, at 65-108.

103. In addition to the works discussed below, see Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Geoffrey P. Miller, *The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law*, 56 LAW & CONTEMP. PROBS. 35 (1993); *cf.* Mark R. Killenbeck, *A Matter of Mere Approval?: The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 239 (1995) (arguing that the Constitution contemplates an essential executive voice in the interpretation of legislation, and advocating an augmented executive role in the construction of legislative histories of statutes).

104. *See* Paulsen, *Executive Power*, *supra* note 9.

105. *Id.* at 221.

106. *See id.* at 219-20.

As for the relationship of the executive to the other departments, Paulsen states that "[t]he President is not bound by Supreme Court interpretations of the Constitution . . . any more than the courts are bound by Congress's or the President's interpretations" relating to any matter falling "within the sphere of his governing powers."[107] Indeed, Paulsen presses on, proclaiming the President may "decline to execute acts of Congress on constitutional grounds, even if those . . . grounds have been rejected by the courts"—even in specific cases where judicial decrees order obedience.[108] He draws this conclusion from a theory which has as its underlying premise that the branches of the federal government are to be separate and coordinate, and power is to be distributed among them. The theory itself is that "the power to interpret law, including the Constitution, is like any other power too important to vest in a single set of hands."[109] And while he grounds his views in what he understands to be those of the Founders, he purports to have traced the Founders' premises to their logical conclusion. Paulsen concedes that the result is radical. No one, he explains, with the possible exception of Lincoln, has affirmed a power of executive review that would allow the President to refuse to enforce judicial decrees in cases within the Court's purview.[110]

Notwithstanding the force of his claim, Paulsen's structural argument does not itself champion executive "supremacy" per se.[111] But, as he proceeds to explain, the effective power of the executive to interpret the law is by far the greatest.[112] Contrary to the idea that the Court has "the last word," through its power to execute or decline to execute judgments rendered by courts, it is the executive which effectively has the final say in most controversies.[113]

Recognizing the additional powers his account vests in the executive, Paulsen nonetheless remains confident that Congress's powers of the purse and impeachment, as well as public and other forms of pres-

107. *Id.* at 221.

108. *Id.* at 221-22.

109. *Id.* at 222.

110. *See id.* at 226.

111. Paulsen strongly denies that the model he advances can be equated with "executive supremacy." Rather, he insists "*[c]o-equal* executive interpretive authority does not mean *supreme* executive interpretive authority because it does not compromise the judiciary's power of independent judgment within its sphere." *Id.* at 302.

112. *See id.* at 223.

113. *See id.* Paulsen calls this "the *Merryman* power," taken from *Ex parte Merryman*, 17 F. Cas. 144 (No. 9,487), in which President Lincoln refused to obey the Court's order in issuing a writ of habeas corpus. *See also* Michael S. Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993).

sure, will keep executive branch interpretation within "acceptable bounds."[114] Indeed after more than one hundred pages of unrelenting support for executive review, Paulsen tempers his proposal by advocating "executive restraint," featuring three voluntarily assumed guides: deference to the views of other branches in the formulation of the executive's interpretation; accommodation of the executive's position to the conflicting views of other departments; and a restrained interpretive methodology.[115]

Before Paulsen, Frank Easterbrook wrote about domains of Presidential action which may be based on constitutional views, and yet which pose no challenges to interpretations held by other branches. Four such categories are pardons, vetoes, additions,[116] and proposals for new legislation.[117] I call these "zones of autonomy"—areas where a President may rely on any bases for action, including a view of what the Constitution means.[118]

Yet for Easterbrook these domains do not delimit the extent of executive interpretive authority. Easterbrook contends there are occasions when the President may act on views at variance with statutory law when believing the law is at odds with the Constitution.[119] He explains the President must have the ability to evaluate courts' decisions for their principles and application beyond the parties to a particular case, and "declare laws unconstitutional in the course of applying the governing rules."[120] He makes this assertion while acknowledging that granting the President the power to generalize vests the President with power to make independent constitutional decisions. Then, pressing on, Easterbrook extends his embrace of Presidential review, claiming that the President can act even without relying on "similar decisions," for "it is still the Constitution that supplies the rules."[121]

While Paulsen and Easterbrook disagree about a variety of points regarding executive interpretive authority,[122] they share an over-

114. *See* Paulsen, *Executive Power*, *supra* note 9, at 224. It is by no means clear, however, how he measures "acceptability."

115. *See id.* at 332-42.

116. "Additions" refer to the President's authority to provide more procedural protections than statutory minima require. *See* Easterbrook, *supra* note 63, at 908.

117. *See id.* at 906-11.

118. "[H]ow odd it would be if a President, free to consider the welfare of donors in casting vetoes, could not consider the Constitution!" *Id.* at 909.

119. *See id.*

120. *Id.* at 914.

121. *Id.* at 924.

122. *See* Paulsen, *Executive Power*, *supra* note 9, at 271, 292 (discussing Easterbrook).

whelming commitment to the view that there has been, and ought to be, a substantial role played by the executive which cannot be accounted for by judicial supremacy. They further agree there are domains in which executive interpretations undoubtedly reign supreme. Insofar as their perspectives do not set out conceptions of comprehensive executive authority, however, they bear significant similarities to theories characterized as "departmentalist." Accordingly, their ideas are revisited in the discussion of departmentalism below.

D. Nullification or Confederational Departmentalism

A fourth model described by Murphy, albeit briefly, is "nullification" or "confederational departmentalism."[123] Under it, states are the final interpreters of the Constitution. "The basis of [the] theory is that the Constitution is a compact not among the American people as a whole, but among sovereign states. Thus, as an interpreter of the Constitution—the compact to which it is a party—an individual state is equal in authority not only to any other state but also to the national government."[124] Herbert Wechsler called the claim of state legislatures to a role in the interpretive process the "oldest . . . put forward in our history,"[125] and until the eve of the Civil War at least seven states repeated this type of argument.[126]

But the Civil War itself "effectively invalidated such claims."[127] Confederational departmentalism seems untenable in the postbellum period—even in view of today's emerging movement of congressionally led governmental decentralization. Yet, insofar as the argument sets out that states are equal in status with other states and the national government, rather than supreme, this account too begins to resemble departmentalism.

E. Departmentalism

Finally, we arrive at the fifth model described by Murphy—departmentalism. Most simply put, departmentalism refrains from

123. Murphy, *Who Shall Interpret?*, *supra* note 5, at 420 n.28; *see also* Paulsen, *Executive Power*, *supra* note 9, at 312-20 (exploring and expounding upon Justice Story's effort to discredit the position of state nullifiers in his *Commentaries on the Constitution of the United States*).

124. *See* MURPHY ET AL., CONSTITUTIONAL INTERPRETATION, *supra* note 5, at 257; *cf.* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1875 (1995) (Thomas, J., dissenting) ("The ultimate source of the Constitution's authority is the consent of the people of each individual state, not the consent of the undifferentiated people of the Nation as a whole.").

125. Wechsler, *supra* note 65, at 1007.

126. *See* MURPHY ET AL., CONSTITUTIONAL INTERPRETATION, *supra* note 5, at 257.

127. Murphy, *Who Shall Interpret?*, *supra* note 5, at 420 n.28.

anointing any one branch as "supreme" interpreter, and instead asserts equality, or "coordinacy," among two or more departments. It advances the claim that all of the branches, or "departments," of the federal government co-exist, equal in their capacity and authority to interpret the Constitution.[128]

While not a distinction Murphy offers, I wish to differentiate between two forms of departmentalism—fixed and fluid. The former accepts that there is such a thing as authoritative interpretation in a given matter, but rejects the notion of a single supreme interpreter regarding all matters. Instead, allocation of interpretive authority varies by topic or constitutional provision, and that allocation changes little, or not at all, over time.[129] The latter form of departmentalism is characterized either by the view that allocations are made but are not unalterable, or by the view that no allocation is to be made at all—that all departments have an equal claim as interpretive agents in all matters.

Departmentalism is not a wholly novel concept. Paulsen lines up a parade of Founders who have expressed skepticism about judicial supremacy and affinity for the principles of coordinacy, including Madison,[130] Hamilton,[131] Jefferson,[132] and James Wilson.[133] While their views reflect varying degrees of commitment to the notion that all branches of the government share authority as constitutional interpreters, it is clear the core principle of departmentalism took hold of them.

Modern efforts to articulate the nature of departmentalism are largely propelled by dissatisfaction with judicial supremacy. For instance, while Murphy notes a general pattern in the American system of accepting the courts' constitutional interpretations, he identifies three features of our system which militate against supporting—normatively and descriptively—the model of judicial supremacy: (1)

128. Of course, there are other conceptions of interpretive authority which reject the validity of a single authoritative interpreter but which decline to limit the list of acceptable interpreters to departments of the federal government. Levinson, for instance, champions constitutional "protestantism," which eschews hierarchical interpretive schemes. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); *see also infra* note 220.

129. Included among fixed departmentalists are those contending that constitutional design itself dictates the terms of allocation.

130. *See* Paulsen, *Executive Power*, *supra* note 9, at 229-38, 308-11; *see also* Murphy, *Who Shall Interpret?*, *supra* note 5, at 412.

131. *See* Paulsen, *Executive Power*, *supra* note 9, at 245-52.

132. *See id.* at 62-65; *see also* Murphy, *Who Shall Interpret?*, *supra* note 5, at 412; BURGESS, *supra* note 10, at 3.

133. *See* Paulsen, *Executive Power*, *supra* note 9, at 238-40, 252-55.

many problems, such as those involving immigration, foreign policy, and national defense, do not lend themselves to judicial resolution; (2) judges often defer to Congress; and (3) even in situations amenable to judicial resolution, the general pattern of acceptance of courts' interpretations has "been broken enough for tradition to supply a shaky basis for judicial supremacy."[134]

Murphy's strategy for responding to the normative dimension of the problem—deciding who *should* interpret—resembles a fixed departmentalist account. He would allocate interpretive authority to a particular branch of the federal government depending on the "range or reach of judicial authority, the nature of the substantive issue, and the nature of the constitutional provision, whether clause, practice, tradition, or principle of relevant political theory."[135] Murphy clearly hopes to transform the inquiry about who should interpret into one which asks about the kinds and degrees of deference institutions might owe and/or confer upon one another as constitutional interpreters under varying circumstances.

Although I have described Murphy's approach as a fixed departmentalist account, he calls it a "modified version of departmentalism."[136] He maintains that, if widely accepted, his view of departmentalism—which ascribes different areas of competence, whose parameters could change over time—would mitigate conflict between the judiciary and the other departments of the federal government.

Murphy is not alone among contemporary legal thinkers in his adherence to, or at least sympathy with, departmentalism.[137] Susan Burgess,[138] concerned about the detrimental effects of judicial supremacy,[139] has embraced a departmental alternative. Burgess's normative program is to augment "constitutional consciousness," and

134. Murphy, *Who Shall Interpret?*, *supra* note 5, at 413.

135. *Id.* at 414.

136. *Id.* at 417.

137. *See, e.g.*, AGRESTO, *supra* note 10; SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS (1984); BURT, *supra* note 57; STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE AND COMMUNITY IN LIBERAL CONSTITUTIONALISM (1990). *See generally* BURGESS, *supra* note 10, at 137-38 n.50; *cf.* LEVINSON, *supra* note 94 (endorsing "Protestant" constitutionalism, which rejects centralization of interpretive authority in the Court).

138. BURGESS, *supra* note 10.

139. Among the harms she perceives is an impairment of the tendencies and capacities of other branches of government, and of citizens, to interpret the Constitution. *See id.* at 139 n.65.

"authority."[140] She sets out a model which locates six levels of constitutional consciousness. With each successive level of constitutional consciousness the authority of branches of the government is increasingly distinguished from the authority of the Constitution.[141] Burgess hopes her model will supplant what she conceives of as facile cost-benefit analyses typically employed in evaluating the departmentalism-judicial supremacy debate.

Burgess identifies three principal benefits afforded by departmentalism: (1) debate about constitutional meaning would replace congressional attacks on the judiciary; (2) "the quality of the judiciary's constitutional interpretation would be improved"; and (3) "congressional [and] public sensitivity to constitutional issues would deepen."[142] She likewise identifies objectionable consequences which might be supposed to arise under a departmentalist scheme: (1) a deepening of legal and political confusion; (2) a diminished commitment to safeguarding individual rights; and (3) the prospect that either the legislature and/or the executive would eventually gain supremacy over the judiciary.[143]

Burgess's advocacy for departmentalism is rooted in two basic ideas. First, an underlying premise of her work is that there is a distinction between judicial and constitutional supremacy.[144] In her view, departmentalism appropriately reflects a commitment to the Constitution above all else.[145] Second, her notion of constitutional consciousness, and of having no single branch authoritatively interpret the Constitution, seeks to encourage awareness of, and widespread substantive discourse about, the meaning of the Constitution and its relevance to difficult and divisive issues.

Other modern departmentalists are more specific in articulating the contours of an alternative to judicial supremacy. As indicated earlier, Paulsen and Easterbrook advocate forms of departmentalism in

140. What she means by these is never fully evident. The closest she comes to defining "constitutional consciousness" is her explanation that the term is used to "capture the idea of the Constitution as a focus and shaper of the parameters of the community's political and legal discourse." *Id.* at 24.

141. *See id.* at 24-27. She further explains that a "discourse that successfully broadens constitutional authority will move through several levels of constitutional consciousness rather than simply attaining one level and remaining there." *Id.* at 26.

142. *Id.* at 13-19

143. *See id.* at 19.

144. *Cf.* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 30; text accompanying notes 51-53.

145. *See* BURGESS, *supra* note 10, at 12 ("[D]epartmentalists reject judicial finality as inconsistent with constitutional supremacy.") (footnote omitted).

the course of defending their respective conceptions of executive review.[146] They agree that the President can refuse to enforce statutes on constitutional grounds, and generally act upon independent judgments about what the Constitution means.[147] Yet, as Paulsen points out, Easterbrook fails to convey whether his vision of departmentalism allows the executive branch to refuse to give effect to a statute where the courts have previously ruled on the question, against the President's position.[148] While some of Easterbrook's comments suggest he is unwilling to go that far,[149] Paulsen does not hesitate in lurching ahead to the conclusion, "[i]f coordinacy means anything, it means everything."[150]

Christopher Eisgruber appears to be another departmentalist. In an article responding to Paulsen, Eisgruber rejects the extremes of both judicial supremacy and coordinacy (as described by Paulsen). Instead, Eisgruber recommends what he calls a "middle principle"—"comparative institutional competence." Under his account, "no institution deserves the blind deference of other branches, and no institution enjoys unqualified supremacy with respect to all controversies, but, nevertheless, each institution will sometimes owe a constitutional duty of deference to the decisions (including *erroneous* decisions) of another branch."[151] Insofar as Eisgruber imagines comparative institutional competence as "produc[ing] a doctrine of deference nuanced to specific domains,"[152] it bears the hallmarks of a fixed departmentalist account. Paulsen seems to agree. Having read Eisgruber's article, Paulsen asked rhetorically, "Are we really all 'departmentalists' now?"[153]

Despite not identifying himself as a departmentalist, Robert Burt presents one of the most thorough normative arguments for depart-

146. Their arguments, while focusing on executive authority, posit that Congress also possesses substantial interpretive power.

147. *Cf.* Walter E. Dellinger, *Legal Opinion from the Office of Legal Counsel to the Honorable Abner J. Mikva*, 48 ARK. L. REV. 313 (1995). Dellinger, in his capacity as Assistant Attorney General of the United States, presented the view in a November 2, 1994 memorandum to then-White House Counsel Abner Mikva that there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional. *Id.*

148. *See* Paulsen, *Executive Power*, *supra* note 9, at 271.

149. *See, e.g.*, Easterbrook, *supra* note 63, at 927 ("Presidential review is neither a power to nullify nor a power to disregard judgments.").

150. Paulsen, *Executive Power*, *supra* note 9, at 283.

151. Eisgruber, *supra* note 9, at 348.

152. *Id.* at 364.

153. Paulsen, *Reply to Professors Levinson and Eisgruber*, *supra* note 7, at 385.

mentalism.[154] He, like Paulsen and others, posits that Madison and Lincoln represent an interpretive tradition which rejects judicial supremacy and instead advocates judicial "egalitarianism." Judicial supremacy, Burt claims, is a form of coercion, and an enemy of democratic life,[155] which violates the norm of equality.[156] Rather than ending conflicts with purported authoritative constitutional interpretations, courts should, he suggests, "precipitate a process of collaboration and accommodation,"[157] for "constitutional interpretation does not belong to the Supreme Court alone but must take place over a prolonged time involving many different institutional participants."[158] Burt conceives of an ideal interpretive process as one where an important dispute is not finally settled until it has been widely affirmed after cautious and interactive deliberation.[159]

The descriptive capacities of departmentalism are also heralded by some. Returning to a classification described earlier, an important strand of departmentalist thought is "fixed" departmentalism—which accepts that in the aggregate there is no branch serving as the ultimate arbiter of what the Constitution means, but maintains that interpretation regarding certain matters or textual provisions are allocated to one of the three departments for authoritative constitutional judgment. Many find fixed departmentalism appealing for its supposed descriptive capacity. As mentioned earlier, the political question doctrine has been explained as conforming with this model.[160] Louis Fisher cites not only the political question doctrine, but constitutional factfinding and other activities of Congress, as demonstrations of the legislature's role as interpreter.[161] Easterbrook also makes clear there are domains in which the President exercises constitutional judgment without review. The carving out of such domains by each of these

154. *See* BURT, *supra* note 57. For a fine review of Burt's book, see Kathleen M. Sullivan, *The Nonsupreme Court*, 91 MICH. L. REV. 1121 (1993).

155. *See* BURT, *supra* note 57, at 375.

156. *See id.* at 101.

157. *Id.* at 131.

158. *Id.* at 99.

159. Burt views *Brown v. Board of Education*, 347 U.S. 483 (1957), as the paradigm of well-conceived court involvement. In contrast, he views *Roe v. Wade*, 410 U.S. 113 (1973), (wrongly in my view) as an exemplar of detrimental court involvement where the Court conferred total victory to one side.

160. *See also supra* Part III.D.

161. *See* Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985) [hereinafter Fisher, *Constitutional Interpretation*]; *see also* LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988) [hereinafter FISHER, CONSTITUTIONAL DIALOGUES].

branches may also appear to follow an allocative pattern suggested by fixed departmentalism.

Burgess also finds departmentalism's descriptive capabilities compelling. While the early part of Burgess's book, *Contest for Constitutional Authority*, is normative in orientation, the later chapters are dedicated to examining two case studies of what she deems real-life illustrations of departmentalism: the abortion and war powers debates. She is quite convinced these controversies evince departmentalism at work, and that judicial supremacy cannot possibly provide an accurate picture of the character of contemporary constitutional interpretation.[162]

Despite differences in focus and terminology employed by commentators discussed in this section, the body of work and perspectives represented constitute a set of ideas which conform with the essential tenets of departmentalism. It is departmentalism, particularly "fixed" departmentalism, which I conceive of as the real descriptive and normative competitor of judicial supremacy. Moreover, it is my view that most alternatives to judicial supremacy offered by academicians, and by those government actors who venture to provide principled support for their acts of resistance to judicial supremacy are, at their cores, departmentalist visions of constitutional interpretation.

III. Judicial Supremacy Revisited

In the course of advocating her "constitutional consciousness" alternative to judicial supremacy, Burgess expresses the hope that "serious study of [the views of departmentalists] may cause some scholars to abandon, or at least reconsider, their adherence to judicial supremacy."[163] The views of departmentalists do warrant attention and raise important issues. But an assessment of departmentalism should not induce us to discard judicial supremacy. Rather, departmentalism's challenge to judicial supremacy presents an occasion to reconsider, and then retain, judicial supremacy.

This Part sets out a revised form of judicial supremacy, which (for lack of a better term) is called "recast judicial supremacy." Recalling that the "who interprets" question has both a descriptive and a normative dimension, recast judicial supremacy also has two components. It offers a way of thinking about judicial supremacy which accounts

162. She believes that, historically as well as today, departmentalism has tended to emerge as an alternative to judicial supremacy during periods of legal and political strife. *See* BURGESS, *supra* note 10, at 23.

163. *Id.* at 12.

for the subtleties of the interpretive process, and ultimately provides an improved model for explaining who interprets under our existing interpretive scheme. As a normative program, recast judicial supremacy builds on its descriptive capabilities and urges a diffusion of interpretive responsibility, encouraging the participation of nonjudicial actors in the interpretive process. Such a reorientation in interpretive responsibility, when coupled with the advantages of traditional judicial supremacy (which fails to encourage nonjudicial interpretation), would yield a unique set of advantages. These advantages make recast judicial supremacy the interpretive model most appropriate as a guide for our political-legal order.

A. Recast Judicial Supremacy

As Murphy and others have noted, the capacity of traditional conceptions of judicial supremacy to explain many interpretive practices is strained. Numerous interpretive acts, or allocations of interpretive responsibility, appear inconsistent with what traditional judicial supremacy might be supposed to predict. These descriptive failings do not, however, condemn all accounts of judicial supremacy. Instead, they invite a view of judicial supremacy capable of addressing these apparent inconsistencies.

Recast judicial supremacy is capable of best explaining our existing interpretive scheme. At the core of recast judicial supremacy are three descriptive assertions. I will call these assertions recast judicial supremacy's "descriptive troika." They are: (1) the judiciary is the nonexclusive but "final" interpreter of what the Constitution means; (2) "final" does not mean insular; and (3) no interpretation is ever truly final.

This troika moves us closer to capturing how judicial supremacy really works, and in turn, how constitutional interpretation actually operates. In fact, with the aid of the descriptive troika, it becomes evident the principal doctrinal developments which might be supposed to demonstrate departmentalism are explainable as consistent with judicial supremacy.[164]

This explanatory model of judicial supremacy also provides the basis for the normative program of recast judicial supremacy. The troika—these three features of our interpretive scheme—invite a diffusion of interpretive responsibility. They allow nonjudicial actors to

164. I do, of course, accept that there are endless instances of divergence from, or rejection of, recast judicial supremacy. But sporadic, even though important, departures from recast judicial supremacy do not render it an incapacitated descriptive model.

contribute their interpretive judgments while retaining the judiciary as the "final" arbiter of constitutional meaning. Such a diffusion of interpretive responsibility, operating with the advantages of judicial supremacy, would yield a distinct set of advantages not available under an alternative model of interpretive authority.

1. Advantages of Judicial Supremacy

Judicial supremacy has numerous advantages. A familiar idea is that courts should deliver authoritative interpretations because they, unlike Congress or the executive, are apolitical, and because judges are granted life tenure. This argument has often been rephrased as one for a neutral umpire shielded from the passion of political life.[165] A related view is that, as an institution, the judiciary is relatively resistant to majoritarian pressures.[166] Any assignment of ultimate interpretive authority to the political branches is supposed to undermine the Constitution's own counter-majoritarian protections.

It is further argued that the judiciary's decision-making method affords a preferable means of interpretation and constitutional evolution.[167] Chemerinsky and others emphasize the special capacity of the adversarial process which accompanies judicial interpretations to foster wise deliberation and judgment about the meaning of the Constitution.[168]

A second advantage of judicial supremacy concerns the principle of separation of powers. To the extent we remain committed to the principle, our tripartite system of government—featuring both overlapping functions and distinct powers—is served best by judicial supremacy. Without ultimate interpretive authority, the judiciary possesses no powers countervailing those of Congress or the President.[169] Moreover, to allow branches of government to render authoritative judgments about interpretive issues affecting them is to engage in a kind of "double counting," by allowing them to wield interpretive powers as well as their already enumerated powers in pursuit of whatever interests they may have at a given time.[170]

165. *See* Murphy, *Who Shall Interpret?*, *supra* note 5, at 406-09.

166. *See* CHEMERINSKY, INTERPRETING THE CONSTITUTION, *supra* note 15, at 86.

167. *See id.*

168. *See, e.g.*, Michael Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137, 148 (1993).

169. *See id.*; CHEMERINSKY, INTERPRETING THE CONSTITUTION, *supra* note 15, at 99-101.

170. Similar sentiments underlie claims that a department should not be a "judge in its own case." *Cf.* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 14-16 (C.B. Macpher-

A third advantage begins as a conceptual point, but has far-reaching practical import. Under a scheme which denies a single branch the authority to vest the Constitution with meaning—like departmentalism, especially fluid departmentalism—the Constitution "would not have an articulated meaning."[171] At its core, the Constitution's meaning is social; it does not exist a priori. Without settled means for resolving interpretive conflicts, meaning becomes diffuse and arguments over meaning become unmanageable. The alternative is to settle conflicts through the rough-and-tumble of everyday politics. Yet not only does this stack the deck against judicial judgments, it encourages crises. Under such a scheme, political and constitutional strife would be too frequent. Paulsen dismisses this concern and assures his readers that the "likelihood of such scenarios seems grossly exaggerated."[172] His confidence stems from his faith in the operation of "strong, blunt checks [which] keep each branch within a proper constitutional orbit as determined by the other constitutional actors."[173] But this appears to be a dangerous method of dispute resolution.[174] Constitutional discourse can, and ought to be, conducted according to more gentle and stability-engendering methods.[175]

2. *Nonexclusivity and Recast Judicial Supremacy*

The foregoing justifications for judicial supremacy present the virtues of having the judiciary serve as the ultimate arbiter of what the Constitution means. These advantages are afforded, however, by both exclusive and nonexclusive judicial interpretation; they derive from the judiciary's status as authoritative interpreter rather than as sole interpreter.[176]

As suggested earlier, recast judicial supremacy not only allows for, but depends upon, an interpretive role for nonjudicial actors. Given the judiciary's ultimate interpretive authority, it may fairly be

son ed., 1980) (1690) (among the features which necessitate a transition to civil society from a "state of war" is the condition of "men" judging their own cases and the absence of a common source of appeal).

171. CHEMERINSKY, INTERPRETING THE CONSTITUTION, *supra* note 15, at 96.

172. Paulsen, *Executive Power*, *supra* note 9, at 324.

173. *Id.* (emphasis omitted).

174. That Paulsen's vision seems outmoded is only reinforced by his own analogy, relating his approach of checks-and-balances to MAD—the nuclear deterrence theory of "mutually assured destruction." *Id.*

175. Such methods might include "dialogue" and "equilibrium." *See infra* Part III.A.4.

176. *Cf.* Fisher, *Constitutional Interpretation*, *supra* note 161, at 715 ("Being 'ultimate interpreter' . . . is not the same thing as being exclusive interpreter.").

asked: What is the use of nonexclusivity? What is added by having nonjudicial actors engage in interpretation?

I contend the best interpretive practice will be one where there is a diffusion of interpretive responsibility—where nonjudicial actors regularly, and with seriousness, deliberate about constitutional matters relevant to the exercise of their duties, and inject their perspectives into the social interpretive process.

The benefits yielded by a diffusion of interpretive responsibility are many, but can be grouped into four main categories. To begin with, like analogous arguments made in the domains of speech and commerce, there is at least some basis for believing that the more interpretive voices, the better. Notwithstanding the meritorious criticisms leveled at exponents of unfettered markets or speech, the tradition inspired by thinkers like Milton[177] and J.S. Mill,[178] who shared a vision of the free flow of ideas as a vehicle to truth and human enrichment, suggests that inviting agents outside the judiciary to consider seriously and speak out on constitutional matters can only enrich interpretive judgments, regardless of who may be charged with rendering the authoritative last word.

A second important byproduct of a diffusion of interpretive responsibility is its educative function. To the extent the interpretive process operates solely within the judiciary, the exposure of citizens to deliberation about, and serious analysis of, constitutional matters is substantially limited.[179] Through the involvement of nonjudicial actors in the interpretive process, not only will occasions for exposure to constitutional deliberation be multiplied, but the character of citizen-engagement will be different and provide a basis for more comprehensive constitutional awareness among the public. For instance, having Congress serve as a consistent, self-reflective interpreter would present numerous circumstances where constituents could engage their representatives about their views on the meaning of the Constitution, and participate in collective exchanges about constitutional questions in a manner like they do about matters concerning government spending or environmental policies.

A third virtue of diffuse interpretive responsibility involves a process somewhat like the reverse of the educative function just de-

177. *See* JOHN MILTON, AREOPAGITICA (J.C. Suffolk ed., 1968) (1644).

178. *See* JOHN STUART MILL, ON LIBERTY (David Spitz ed., 1975) (1859).

179. *Cf.* Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992) (arguing the Court has educative responsibilities and examining the Court's competence as a teacher).

scribed. In addition to promoting education about the Constitution, diffusion also results in our being enriched *by* the Constitution. Insofar as the Constitution embodies a set of values and principles which are worthy of adherence on the basis of their content (and not merely because they are in the Constitution), the Constitution must be supposed to bring to bear a certain perspective about issues of the day. In conducting their business then, Congress and the executive, as well as state officials, would be enriched by consistently considering the relevance of the Constitution to matters before them.[180]

Finally, nonjudicial involvement in interpretation assists courts in rendering their authoritative judgments. Extra-judicial interpretations inform other branches, and especially the courts, of a particular branch's assessments and dispositions. These interpretations not only provide important and useful background information, which courts need in order to have a well-developed sense of what is at stake in the questions before them, but such interpretive perspectives also may be useful for courts insofar as they reveal something about the governmental actors' activities and views, which courts need in order to make their own decisions.[181]

These four types of benefits afforded by a diffusion of interpretive responsibility are in no way diminished by having the Court serve as the authoritative constitutional interpreter. At the same time, these advantages of diffusion cannot be realized simply by having other departments participate in the judicial interpretive process as parties or amici curiae appearing before judicial tribunals. These advantages are realizable only with a genuine interpretive role for nonjudges.

3. *Nonexclusivity at Work: Adopting an Interpretive Self-Image*

While I have touted the principle of diffusion, some discussion of how it might operate in practice is required. It would be fanciful to suppose that the political branches could ever completely abstain from engaging in constitutional interpretation. After all, even if Congress and the executive wished simply to abide by the will of the courts, this is all but impossible because the judiciary has not spoken on a great many questions. Thus, in order to conduct their affairs, other depart-

180. Discussions with Bruce Peabody significantly contributed to the formulation of the idea in this paragraph.

181. For instance, a legislature's perspective on constitutional meaning might provide clues for a court about its motivation for acting, which is relevant in some types of constitutional adjudication. *See, e.g.*, Mobile v. Bolden, 446 U.S. 55 (1980); Washington v. Davis, 426 U.S. 229 (1976).

ments will necessarily engage in some interpretation. As the Supreme Court itself has explained, "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."[182] The attainment of the virtues of diffuse interpretive responsibility requires a more expansive interpretive role than the bare minimum required for the performance of assigned constitutional duties. But even these alone make clear there is an interpretive role for nonjudicial actors—a role which can be reconciled with a commitment to ultimate judicial authoritativeness.[183]

How should nonjudicial actors conceive of their roles vis-a-vis interpretation? What interpretive self-images should they adopt? There is a range of possibilities, including: (1) attempt to predict what a court, at that moment, would do if the issue were before it; (2) apply principles enunciated by courts in the past; and (3) exercise completely independent judgment, which might or might not be informed by interpretive modes and practices employed by courts.

While this sketch of three possible interpretive dispositions is by no means exhaustive, it suggests there is a fundamental choice which needs to be made by a nonjudicial interpreter about the relevance of the courts to its own judgments. Recast judicial supremacy requires something close to the second of the possibilities just described.[184] Under recast judicial supremacy, while the judiciary is the nonexclusive but final interpreter of the Constitution, other branches are encouraged to engage in interpretation—particularly when interpretation is called for in the execution of their duties. But recast judicial supremacy also requires widespread acceptance of the idea that courts determine constitutional meaning, and of the idea that once a court has spoken on an issue its views warrant adherence. The more specific a court's view, and the more relevant its view is to a particular circumstance, the less uncertainty there should be in the minds of nonjudicial actors about what fidelity to that court's judgment mandates.

182. United States v. Nixon, 418 U.S. 683, 703 (1974).

183. Indeed, insofar as there will be interpretive "gaps" when courts have not addressed a particular question, developing a general pattern and practice of serious interpretive discourse will improve the work of nonjudicial actors when they are called upon to fill these "gaps," as they inevitably will be.

184. *Cf.* Rosenfeld, *supra* note 168, at 173 ("[W]ith respect to the duty to abide by valid Supreme Court precedents, the proper obligation of the President could be said to be . . . similar to those of a judge who sits on a federal court of appeals."); Dellinger, *supra* note 147, at 314-16 (promoting a mixture of approaches, which resemble both imitation and prediction).

Taking seriously and applying court-enunciated principles supports the vision of judicial supremacy. Mere prediction-driven interpretation reduces nonjudicial actors to second-rate judges. Alternatively, complete independence from consideration of the role and statements of courts effectively would negate the essence of the principles of judicial supremacy.

4. Noninsularity: Dialogue and Equilibrium

The preceding discussion presented an account of how nonexclusivity and judicial finality are to be joined, and offered a glimpse of the role nonjudicial actors would play in the interpretive process under recast judicial supremacy. At this juncture, I wish to reintroduce the second prong of judicial supremacy's descriptive troika—the idea that "'final' does not mean insular."

The centrality to judicial supremacy of the courts' role as ultimate interpretive arbiter should now be evident. The notion that "final does not mean insular" further refines the conception of judicial supremacy. It is a fact that although courts are assigned responsibility for having the final say about the Constitution's meaning, their views are not developed in isolation, or rendered without the profound influence of others, particularly other branches of the federal government.

Two processes especially facilitate the judiciary's noninsularity: dialogue and equilibrium. "Dialogue" is simply a general classification for a set of exchanges, formal and informal, by which courts and nonjudicial actors gain awareness of the views of one another on constitutional questions and attendant issues.[185] The courts speak primarily through their opinions and decisions, although less formal channels

185. Other commentators have employed the term "dialogue" to denote a similar process, although the specific dimensions of the processes others suggest differ from my account. *See, e.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580-81 (1993) ("Our Constitution is interpreted on a daily basis through an elaborate dialogue as to its meaning. All segments of society participate in this constitutional interpretive dialogue, but courts play their own unique role.") (footnotes omitted); FISHER, CONSTITUTIONAL DIALOGUES, *supra* note 161. Fisher skillfully presents evidence for the case that constitutional law is "a process in which all three branches converge and interact." *Id.* at 3. While ably detailing many of the dimensions of this interactive process—which guards against insularity in judicial interpretation—Fisher fails to relate his account to broader themes and principles about the interpretive process, and seems content to catalogue rather than connect his analysis to any normative program. Moreover, Fisher conflates what I am describing as dialogue with "equilibrium," a concept introduced later in this section. For a useful review of Fisher's book, see Neal Devins, *The Constitution Between Friends*, 67 TEX. L. REV. 213 (1988).

for sharing their perspectives are available.[186] The manners in which courts are *spoken to* are more varied, and comprehensive. The views of other branches are transmitted to the courts, most formally, by way of appearances as parties in cases, or as authors of government policies challenged in courts.[187] Through conduits like the media, and academic and professional literature, courts are bombarded by information—some of it is directly about constitutional interpretation, but most of it is not—which shapes the context in which judicial interpretive judgments are formulated.

Diffusion of interpretive responsibility affords a variety of benefits—for both the courts and other departments. To the extent that this responsibility is accepted and acted upon, the wealth of interpretive judgments produced will provide a rich source of information exchanged in the dialogic process described here. Under this scheme, the courts, while retaining ultimate authority, will have the benefit of the views of others in rendering their own judgments, thereby guarding against insularity.[188]

In addition to dialogic processes, there are institutional dynamics which facilitate judicial responsiveness to the interpretive judgments of other branches. William Eskridge and Philip Frickey have described law as in "equilibrium"—a state of balance among competing forces or institutions.[189] Under their account, "[e]ach branch seeks to promote its vision of the public interest, but only as that vision can be achieved within a complex, interactive setting in which each organ of government is both cooperating with and competing with the other organs."[190] While analyses of Congress's and the President's institutional interests and rationality are not unusual, Eskridge and Frickey's thesis is that the Court too engages in strategic behavior.[191] More un-

186. These include academic articles, professional conferences, and personal contacts.

187. *See* FISHER, CONSTITUTIONAL DIALOGUES, *supra* note 161, at 24-36.

188. Lisa Kloppenberg has written an interesting article on how "measured" constitutional decision-making—the idea that judges should decide constitutional issues as narrowly as possible—promotes dialogue. *See* Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 IND. L. REV. 297, 312 (1996) ("measured constitutional rulings by courts might promote deference to other constitutional decisionmakers, thus encouraging them to participate more fully in the development of constitutional law").

189. William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 28 (1994).

190. *Id.* at 28-29.

191. *Cf.* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 208 (revised by Sanford Levinson, 2d ed. 1994) (1960) ("[T]he facts of the [Supreme] Court's history impellingly suggest a flexible, nondogmatic institution fully alive to such realities as the drift in public opinion and the distribution of power in the American republic.").

usual still is their contention that constitutional interpretation itself is guided by this dynamic.[192]

Regardless of whether or not the forces which energize this process are, at any given moment, in equilibrium—a balance of competing institutional pressures—Eskridge and Frickey's argument is instructive for its emphasis on the extent to which the Court too operates under institutional constraints.[193] They persuasively explain how the Court is locked in deep interdependence with the other departments, and that as a consequence, "institutions will behave strategically, anticipating the responses of other institutions and signaling the nature and intensity of their preferences to the other institutions."[194] And Eskridge and Frickey are pleased by the state of affairs they perceive. As they explain, "law that is a balance among three interacting branches is superior to law as it might be produced by a single institution."[195]

Their argument about the dynamics of the interpretive process is convincing. What their exposition demonstrates is that under any interpretive model, including judicial supremacy, institutional dynamics make interaction and interdependence among the branches unavoidable. The exaggerated descriptive claims that judicial supremacy creates an isolated, nonresponsive interpretive fiefdom in the courts fail to appreciate the relationship Eskridge and Frickey have detailed.

Indeed, in countering the danger of judicial insularity, dialogue and equilibrium are two sides of a coin—one is intellectual, the other institutional. Together, they would help reconcile a diffusion of interpretive responsibility with retention of the ideal of judicial authoritativeness, and realize the normative ideal of the recast account of judicial supremacy advocated in this Article.[196]

192. *See* Eskridge & Frickey, *supra* note 189, at 29 ("The Court's constitutional interpretation is equally dynamic, transparently accommodating apparent national equilibria."); *cf.* Sager, *supra* note 82.

193. *Cf.* FISHER, CONSTITUTIONAL DIALOGUES, *supra* note 161, at 135-43, 215-21 (describing some of the mechanisms for the executive and Congress to exercise institutional influence over the judiciary).

194. Eskridge & Frickey, *supra* note 189, at 33 (emphasis omitted).

195. *Id.* at 35.

196. There are certainly additional constraints which mitigate the judiciary's insularity as an interpreter. "Personal" or "human" influences, including peer pressure from outside the judiciary and concern with popularity and legacies among the public, surely play a role. For a discussion of some informal restraints, see DAVID G. BARNUM, THE SUPREME COURT AND AMERICAN DEMOCRACY 197-201 (1993). For an examination of the impact of external political pressures on the Court's decision-making, see JOHN B. GATES, THE SUPREME COURT AND PARTISAN REALIGNMENT (1990); *see also* ROBERT F. NAGEL, JUDICIAL POWER AND AMERICAN CHARACTER 45-59 (1994); James G. Wilson, *The Role of*

5. Less-Than-Final Judicial Finality

The third prong of judicial supremacy's descriptive troika is "'final' is never truly final." This refers to two realities. First, due in part to the dynamics of dialogue and equilibrium, court interpretations are subject to change over time. Second, the courts themselves are not static. Courts do not render interpretations, judges do. To the extent the composition of the judiciary is in flux, so too are its "authoritative" interpretations.[197]

Alterations in the composition of courts come primarily with retirements or deaths, and subsequent new appointments. Nevertheless, the significance of the prospect of removal[198] is concealed by the infrequency of its practice. As "civil officers" of the United States, federal judges are subject to removal under Article II, Section 4 of the Constitution.[199] The possibility of impeachment and conviction by Congress serves as a symbolic and a (weak but genuine) substantive check on the interpretive autonomy of judges. This power ensures that Congress need not wait a generation or two to undo "final" decisions rendered by the courts.

Collectively, dialogue, equilibrium, and other factors facilitate give-and-take between the judiciary and other interpreters of the Constitution—a kind of "continuing colloquy" between courts, political institutions, and society-at-large, which Alexander Bickel embraced when he suggested that constitutional principles "evolve[ ] conversationally" rather than being "perfected unilaterally."[200] That constitutional meaning develops in such a manner makes clear the value of diffuse interpretive responsibility.

Public Opinion in Constitutional Interpretation, 1993 B.Y.U. L. REV. 1037 (1993); *cf.* MCCLOSKEY, *supra* note 191; Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policymaker*, 6 J. PUB. L. 279 (1957).

197. *See* BICKEL, *supra* note 10, at 244 ("[W]hat one means by the ultimate, final judgment of the Court is quite frequently a judgment ultimate and final for a generation or two."); *see also* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 31-40 (1985) [hereinafter TRIBE, HONORABLE COURT] (describing the difference a Justice or two can make on the Supreme Court).

198. Or, for that matter, of "Court packing," as was pursued and abandoned by President Franklin Roosevelt. *See* TRIBE, HONORABLE COURT, *supra* note 197, at 66-67.

199. "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4.

200. BICKEL, *supra* note 10, at 240, 244. *But see* RICHARD D. PARKER, HERE, THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO 132 n.96 (1994) (applauding Bickel's fundamental insight of give-and-take between the courts and others as it relates to judicial review, but calling ideas about "conversation" among the people and the Court "academic fantasy").

B. Perceptual Advantages of Recast Judicial Supremacy

As indicated, recast judicial supremacy grafts diffuse interpretive responsibility onto the interpretive framework already in place, encapsulated by judicial supremacy's descriptive troika. Recast judicial supremacy's appeal as a normative model derives from its capacity to retain the advantages of judicial authoritativeness while realizing those produced by encouraging the interpretive judgments of nonjudges. Many of these advantages have been outlined in the sections above. But two additional advantages flow from recast judicial supremacy. It is capable of alleviating cynical positivism of the sort described earlier.[201] At the same time, it promotes the legitimacy of the judiciary.

1. Combating Cynical Positivism

No doubt it is true that the strongest versions of judicial supremacy—which propose both judicial finality and exclusivity—tend to discourage serious deliberation outside the judiciary about the meaning of the Constitution. After all, if only courts get to say what the Constitution means, then it is judges who possess a monopoly over interpretation. And judges, to be sure, are only human and possess no pipeline to the "true" meaning of the document. They are subject to the same weaknesses as others: error, bias, malice. As described earlier, this circumstance, coupled with other factors, invites cynical positivism to take hold.

One might imagine abandoning judicial supremacy in favor of some form of departmentalism as a remedy to this malaise. As Edward Corwin put it some time ago, "If the Constitution is only 'the Supreme Court's last guess' then the other departments are entitled to their guess, too."[202]

Departmentalism, however, will only deepen the skepticism and cynicism associated with general understandings of how constitutional meaning is developed or discerned. At its core, departmentalism, especially fluid departmentalism, provides no method of arriving at settled meaning about the Constitution. Under departmentalism, constitutional debates would become transformed into blatantly political ones, with no regularized means of resolution rooted in a source other than institutional politics.

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201. *See supra* Part I.A.

202. EDWARD S. CORWIN, COURT OVER CONSTITUTION 78-79 (1938) (emphasis omitted).

In contrast, recast judicial supremacy combats cynical positivism. It encourages a diffusion of interpretive responsibility, engaging citizens and government actors alike. It would make discourse about the Constitution a collective project, but would stop short of the idea that the meaning of the Constitution is "up for grabs." Cynical positivists would therefore have greater appreciation of how, and why, judges interpret as they do, and consequently they would be less inclined to dismiss their judgments as blatantly personal or political. In this way, recast judicial supremacy would mitigate feelings of disenfranchisement and cynicism sometimes produced by traditional judicial supremacy.

2. Judicial Supremacy: Myth, Legitimation and Social Solidarity

In his seminal work on judicial review, Bickel described the so-called "mystic function" of the Court, whereby its decisions upholding something as constitutional serve to legitimate the practice or action in question.[203] But what of the *Court's* legitimacy—from what is it derived? While Bickel finds that legitimacy "comes to a regime that is felt to be good and to have proven itself as such to generations past as well as in the present,"[204] I am unconvinced that legitimacy is necessarily self-actualizing.

Instead, affirmative steps must be taken to promote judicial legitimacy. Judicial supremacy, even in its current form, engenders broad popular support and promotes judicial legitimacy. Adherence to judicial supremacy as a foundational understanding of how our government works creates a "myth" of sorts—a cousin of Bickel's "mystic function." This myth is comprised of the unqualified idea that the courts authoritatively (although not exclusively) interpret the Constitution,[205] and that the norms enunciated by courts as constitutional principles are to be given effect.

Why do we need such a myth? In America, constitutional law comprises a substantial part of our civic religion,[206] and we have left it largely to the Supreme Court to fashion and concretize our image of the Constitution.[207] A vision of political life without a clear sense of how to end conflicts about what the Constitution allows or proscribes would be unsettling to many citizens. The image of finality resting

203. *See* BICKEL, *supra* note 10, at 29-33.

204. *Id.* at 29.

205. In other words, the myth suggests judicial interpretation, and only judicial interpretation, establishes constitutional meaning.

206. *Cf.* LEVINSON, *supra* note 94.

207. *See* BICKEL, *supra* note 10, at 31.

with the "dispassionate" judiciary, detached from the rough-and-tumble of daily politics, is easy to understand and embrace. The absence of at least short-term temporal finality, and of first-order conceptual finality, threatens to strip the Constitution of meaning. Therefore, it is imperative that judicial supremacy remain the popular account of our interpretive process.

The myth is useful despite that, in reality, judicial interpretation is neither insular nor truly final. We know that the myth is not "true," in the sense that it is not a sophisticated and comprehensive account which explains how dialogue and equilibrium unravel claims about interpretive finality. But it is "true" as a baseline political commitment, and it is capable of promoting support among the governed and of fostering social solidarity.

I imagine the myth operating something like the relationship between perceptions of the trial process and jury decision-making. We treasure our right to jury trials,[208] and have "faith" in the "system." Yet we couple this with a set of rules designed to prevent knowledge of the way juries arrive at decisions.[209] We know that juries operate in a manner far from our ideal, but we do not inquire further, for fear of undermining the legitimacy of the system. So too with constitutional interpretation. With less-than-rigorous probing we can know that the judiciary's "authoritative" interpretations are neither insular nor truly final; but there are virtues to be extracted from the image that courts have the final say. Therefore, we should preserve the myth, knowing full well what rests behind it. Abandoning judicial supremacy would jeopardize the vitality of the myth and invite more frequent crises—political and constitutional—in resolving interpretive disputes.

At first blush it might seem there is tension between the myth and the objectives of diffuse interpretive responsibility. One might ask: if the myth suggests it is for courts to discern the meaning of the Constitution, why should nonjudicial actors, including citizens, bother to interpret and convey their views about constitutional meaning? They should because nonjudicial interpreters have varying degrees of awareness that judicial interpretation is neither insular nor truly final. Even partial recognition of the dynamism of the interpretive process enables some actors to accept active interpretive roles without impairing the utility of the myth (and its legitimating function) as applied to others. Admittedly, there is the potential the myth would dampen efforts to promote diffuse interpretive responsibility and achieve the full

208. *See* U.S. CONST. amends. VI, VII.

209. *See, e.g.*, FED. R. EVID. 606; Tanner v. United States, 483 U.S. 107 (1987).

richness of widespread constitutional debate. But the impact would not be substantial, and would be outweighed by benefits afforded by perpetuation of the myth itself.

Similarly, it might appear there is tension between the myth and efforts to combat cynical positivism. The myth is premised on the idea that judicial supremacy promotes the legitimacy of the judiciary. Cynical positivism stems from disenchantment with the idea that judges get to say what the law is, or what the Constitution means. How can recast judicial supremacy both promote legitimacy and defend against cynical positivism?

It can because cynical positivists are not the same people as those most likely to subscribe to the myth. Recast judicial supremacy speaks to both groups of people at once. Judicial supremacy's descriptive troika is not easy to comprehend. As suggested, there will be varying degrees of awareness that judicial interpretations are neither insular not truly final. For those who care little to, or are unable to, comprehend the subtleties of the interpretive process, recast judicial supremacy (including the descriptive troika at its core) looks just like traditional judicial supremacy, and continues to promote the judiciary's legitimacy.

Others will have a more comprehensive understanding of the "realities" of the interpretive process. These people will have either limited or no use for the myth. Cynical positivists tend to fall in this category. For them, recast judicial supremacy promises to minimize their unease with the interpretive process by inviting a diffusion of interpretive responsibility, and by generally enriching interpretive discourse.[210]

210. This conception of the myth might appear to have elitist overtones. In this Article I have emphasized that under judicial supremacy judicial interpretations are neither insular nor truly final. I have also suggested we should retain the myth because it promotes judicial legitimacy and social solidarity. One might infer that I believe it is beneficial that some people hold on to the traditional account of judicial supremacy while others (including those who read articles like this) know the "full truth" about the interpretive process.

Such an inference would be misguided. I do imagine some people will have greater understanding of the interpretive process than others. But there is nothing inherently valuable about some people having partial understandings. I welcome the day when every government actor's and citizen's view of the interpretive process tracks the descriptive account of recast judicial supremacy. Under such conditions, the myth would become unnecessary. Everyone would plainly understand the complexities and interactivity of the interpretive process. Whatever legitimacy that process would have would depend on something other than the sheer simplicity and stability of judicial authoritativeness. (Perhaps its legitimacy would be based on a normative account like recast judicial supremacy). The value of the myth is predicated on nothing other than the predictive supposition that not everyone will achieve heightened comprehension of the interpretive process. The

C. Departmentalism's Vices and Virtues

1. Taking Stock of Departmentalism

Having recast judicial supremacy, what can be said of departmentalism? As suggested at several points, many legal scholars subscribe partly or fully to an essential claim of departmentalism—that authoritative interpretive responsibility does not rest with the Court. But few explicitly identify themselves as "departmentalists."[211] It is not clear why this is so, although it may reflect a divide between those academicians schooled as lawyers and those who are trained as political scientists; the terminology of departmentalism is more closely associated with the latter group.[212] Nevertheless, resistance to judicial supremacy, on normative and descriptive grounds, is well represented in contemporary legal writings, and the alternatives offered by critics of judicial supremacy primarily take the form of accounts advancing coordinacy, or the equal standing of branches of the government as interpretive agents.

The insights of departmentalists, and the criticisms of judicial supremacy leveled by them, ought not be dismissed. They illuminate ways in which traditional notions of judicial supremacy are inadequate. Yet instead of counseling that judicial supremacy should be discarded altogether as a descriptive model or normative ideal, the contributions of departmentalists advance efforts to reconceptualize judicial supremacy.

Indeed, departmentalists' observations about nonjudicial interpretation are instructive. They demonstrate that constitutional interpretation is an interactive process. But the fact that interpretation takes place outside the judiciary does not require a repudiation of judicial supremacy. As I will argue in the next subpart, discussing the political question doctrine and modern Commerce Clause jurisprudence, even the most direct examples of judicial deference to the in-

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myth is of enduring use because it speaks to those people with less-than-full appreciation of judicial supremacy's descriptive troika and promotes legitimacy and solidarity in a manner nonjudicial supremacist accounts are incapable of doing.

211. Of course, agreeing that authoritative interpretive responsibility does not rest with courts is not enough to qualify one as a departmentalist. *See supra* note 220.

212. Murphy and Burgess, for example, are political scientists. Interestingly, one commentator accused Paulsen of overlooking political science literature in his treatment of prior scholarship on interpretive authority. *See* Eisgruber, *supra* note 9, at 353 n.24. In his article, Eisgruber acknowledges his debt to political scientist Jeffrey Tulis, whose work influenced Eisgruber's thinking on this topic. *See id. See generally* THE PRESIDENCY IN THE CONSTITUTIONAL ORDER (Joseph M. Bessette & Jeffrey K. Tulis eds., 1980); JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY (1987).

terpretive views of other branches do not amount to an undoing of judicial supremacy as a descriptive account.

As for the normative claims of departmentalists, or those sympathetic with their projects, here again their views are important and useful, but ultimately unpersuasive. While it is extremely difficult to bring the array of claims raised by departmentalists under general headings, it strikes me that departmentalism is designed as an antidote to five perceived flaws of judicial supremacy as a model governing the interpretive process. These problems are that: (1) interpretation is too important to be left to a single branch, and therefore judicial supremacy is procedurally deficient; (2) single branch interpretation produces inadequate substantive results—that there is a need for more voices to yield the best results; (3) other branches need to interpret in order to carry out their responsibilities; (4) judicial supremacy contravenes some substantive principles or commitments, like democracy or equality; and (5) judicial supremacy squashes broad-based awareness of, and commitment to, constitutional principles.

Redressing these concerns is a worthwhile objective. But these problems can be remedied without departmentalism. Departmentalists discount the virtues of judicial authoritativeness. Many critics of judicial supremacy also seem trapped in a binary analysis. They perceive complete abandonment of judicial supremacy as the only alternative to the rigid formalism it is supposed to represent.[213] And they appear unable to contemplate how textured and nuanced judicial supremacy can be, and unwilling to confront the full implications and potential risks presented by the views they espouse.

The failure to realize that the benefits of departmentalism can be harvested while avoiding the many dangers presented by departmentalist alternatives is one of their principal defects in the departmentalist accounts discussed here. Another is their indeterminacy. They refuse to acknowledge the havoc wrought by departmentalism, or explain sufficiently how such chaos is to be avoided.

Take Burt for instance. His project is geared toward fostering an augmented form of dialogue. Unlike many other departmentalists, he offers some particular prescriptions for how to proceed in a world without judicial supremacy. These, however, tend to focus on how the

213. Eisgruber's theory of comparative institutional competence appears to be an exception. *See* Eisgruber, *supra* note 9. Yet his account is plagued by the same kind of dangerous indeterminacy characterizing other forms of departmentalism. Because we do not know how interpretive authority is allocated, or when we are presented with the rare occasions when disobedience of a judicial mandate is permitted, we are left with layer upon layer of uncertainty and lose the benefits afforded by judicial supremacy.

Court should restrain its involvement, rather than explaining how other actors are to understand and execute their own roles in a refashioned interpretive process. In addition, many of the advantages of his interpretive vision are realizable without adopting the model he advocates, or accepting his contentions and notions of what constitutes equality and coercion.

Burgess's project appears aimed primarily at meeting two objectives: fostering interbranch communication and exchanges, and securing deepened sensitivity to, and awareness of, constitutional questions. These are meritorious aspirations. Nevertheless, her particular account of departmentalism is not instructive for government actors, for it does not tell us when departments should interpret, or what effect, if any, is to be given judicial decisions.[214] Nor does it explain what to do in the event a true clash develops between branches regarding interpretation.

Fisher, like Burgess, offers a rich descriptive account of nonjudicial interpretation. He has effectively detailed many of the ways in which the executive and Congress play important and sustained roles in the interpretive process. Ultimately, however, he seems to avoid many of the hard questions left unanswered by his survey.[215] Near the conclusion of *Constitutional Dialogues* he asks, in light of all he has said, what qualifications should be placed on the "last word" doctrine?[216] Notwithstanding his proclamation that "we cannot permit judicial power and constitutional interpretation to reside only in the courts[,]" his more specific responses evince little willingness to resist court judgments, and offer no guidance as to how, in particular, we ought to understand the relationship of the departments in the interpretive process.[217]

As for Paulsen, he is right in insisting the Constitution is too important to stifle debate over its meaning, and in suggesting the need for the political branches to engage in some interpretation in carrying out their constitutional duties. But his approach is exceedingly rooted in formalism[218] and ignores the prospect that judicial supremacy can

214. Does she, for instance, authorize nonacquiescence with court decisions?

215. Fisher says so little about the limits of his arguments against judicial interpretation that I find myself uncertain whether it is appropriate to classify him as a departmentalist.

216. FISHER, CONSTITUTIONAL DIALOGUES, *supra* note 161, at 278.

217. *Id.* at 278-79.

218. Paulsen is led astray, I think, by overreliance on "logic." He speaks of following the "logic" of the Founders' premises, of the "logic" of *Marbury*, and calls his method "Euclidean." He states "[t]he argument I have presented in this Article is in the nature of a logical proof—a syllogism." Paulsen, *Executive Power*, *supra* note 9, at 343. Law, however, is not, and never will be, math. *Cf.* Eisgruber, *supra* note 9 ("Paulsen is overly fond

retain the view that the judiciary is the ultimate interpreter and also recognize that, other than in the immediate short-term, the judiciary is not in any important respect alone in deciding what the Constitution means.

In fact, Paulsen's approach is precisely the reverse of my own: he argues for executive review—within a broader departmentalist framework—but explains why our system looks like judicial supremacy.[219] I, on the other hand, explain that our system is best described by a recast account of judicial supremacy but at times appears to conform with a departmentalist account.

2. *What Departmentalists Forgot: The People's Constitution*

Because departmentalism is a theory about the interpretive authority of the branches of the federal government, it does not obviously speak to the potential role of citizen interpreters. Departmentalist accounts rarely dedicate attention to the role citizen interpretation ought to play, if it is to have any role at all. Writing in response to Paulsen, Levinson presses this very point:

> Perhaps one would argue that the citizens' role is simply to accept . . . the decisions made by *some* institutional body, whether Congress, the Court, or the President. Although this might accurately capture the way most people would describe their (non-) role as constitutional interpreters, it is nonetheless highly problematic, especially if one takes the premises of constitutional supremacy seriously.[220]

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of quasi-mathematical forms of constitutional argument."); Rosenfeld, *supra* note 168, at 143 (suggesting the limitations of Paulsen's use of logic in an earlier article); Tribe, *Reflections on Free-Form Method*, *supra* note 18, at 1224 n.4.

219. The "executive restraint" Paulsen urges would operate so that our system continued to look much like a model of judicial supremacy. As he explains, "It may be . . . the primary value of my thesis is to offer an alternative *descriptive* model of the way the system of separation of powers, over time, produces results that resemble judicial supremacy, even though a model of judicial supremacy is formally contrary to the original constitutional vision." Paulsen, *Executive Power*, *supra* note 9, at 343.

220. Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 375-76 (1994). Levinson reads Paulsen's arguments about interpretive authority as "correctly anchored in a basic notion of constitutional supremacy—that the Constitution, however defined, sets boundaries to, and thus in some way takes priority over, acts of ordinary public officials that are incompatible with it." *Id.* at 373. Levinson is a "constitutional protestant"; he believes in the legitimacy of "individualized (or at least nonhierarchical, communal) interpretation." *Id.* at 373 n.1; *see also* LEVINSON, *supra* note 94. Although an examination of constitutional protestantism is beyond the scope of this paper, it warrants noting that while departmentalism and protestantism share important features, they are not identical accounts of interpretive authority. In responding to Paulsen, Levinson never refers to "departmentalism." In a reply to Levinson's response, Paulsen admits to being a protes-

Paulsen's response flows directly from the methodological approach of his article. His argument for the executive's independent interpretive power is rooted in the Constitution's structure and its oath clauses. "Logically, these same arguments, if valid, apply to all persons who exercise some degree of governmental power under our Constitution and (overlapping this category) all those who swear an oath to uphold the Constitution."[221] From this he concludes that "all citizens (each of whom possesses a tiny amount of governmental power under our Constitution) have independent interpretive power within their (tiny) spheres of governmental power."[222]

Other departmentalists who decry the supposed interpretive hegemony of judicial supremacy hint that one of judicial supremacy's failings is its exclusion of citizen interpretation. Burgess presents a typical view about the supposed effect of judicial supremacy: "It is unclear how the public's role in the process of interpretation will be maintained (or why the public should remain interested in interpretation) in the context of judicial supremacy."[223] Murphy also gestures toward the problem, reminding us that in its Preamble the Constitution lodges responsibility for itself in "the people."[224] Notwithstanding these musings, it is difficult to imagine nongovernmental actors would play an important interpretive function under any departmentalist scheme.

What is the role of citizens under recast judicial supremacy? To this point, I have focused on the interpretive roles to be played by the departments of the federal government. This should not suggest, however, that citizens would play an unimportant role under recast judicial supremacy.[225]

Under our current interpretive scheme, over time citizens affect constitutional meaning. But the role of citizens today is a pale version of what it ought to be. An important component in the diffusion of interpretive responsibility inherent in the account of recast judicial supremacy outlined here is a commitment to the ideal of the citizen-

tant to some degree or other, but maintains he is a departmentalist. Indeed, Paulsen appears to believe (or hope) that Levinson too is a departmentalist. *See* Paulsen, *Reply to Professors Levinson and Eisgruber*, *supra* note 7, at 393 (exclaiming that he, Levinson, and Eisgruber are "all . . . departmentalists now!").

221. Paulsen, *Reply to Professors Levinson and Eisgruber*, *supra* note 7, at 386.

222. *Id.*

223. BURGESS, *supra* note 10, at 9.

224. *See* Murphy, *Who Shall Interpret?*, *supra* note 5, at 402.

225. Nor should it suggest that there are not important questions to be asked about the relationship of state officials to the interpretations rendered by the federal courts. *See infra* Part IV.C.

interpreter.[226] As John Finn has explained in advocating improvements in "constitutional literacy," we must foster understanding of "the values and normative commitments that inform constitutional government," for the perpetuation of constitutional values requires a particular conception of citizenship which serves as a foundation for both political authority and political obligation.[227]

The vision of an engaged, and constitutionally "literate" populace can be realized without abandoning judicial supremacy.[228] Joseph Goldstein has remarked that the Constitution is for the People, and debate and judgments about its meaning must always be as accessible to the citizenry as is possible.[229] This is surely so, and is reflected in the mandate many judges impose upon themselves to make their opinions as readable, and nontechnical, as possible.[230] Recast judicial supremacy goes further, however, and insists that through the processes of dialogue and equilibrium citizens can actually develop, and act upon, their own constitutional judgments.[231] Citizen participation is needed not only on the rare occasions when constitutional amendments are pending, or even during the "moments" when fundamental constitutional change arises outside of the amendment process.[232] Rather, our union will be made "more perfect," our constitutional judgments will be infused with legitimacy, and our collective commitment to living by constitutional principles will be deep-

226. In addition to the writings discussed below, some recent explorations of the role of citizens in the processes of constitutional adjudication and interpretation include SUNSTEIN, *supra* note 18, Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990), and Frank Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

227. John E. Finn, Defining Constitutional Literacy, Address Before Wesleyan University Board of Trustees (Jan. 26, 1991), *in* WESLEYAN UNIV. CAMPUS REP., Feb. 21, 1991, at 8.

228. In fact, as argued earlier, a diffusion of interpretive responsibility promotes commitments to constitutional principles by encouraging citizens to engage the Constitution and become enriched by the values and ideas it embodies. *See supra* Part III.A.2.

229. *See* GOLDSTEIN, *supra* note 10, at 7 ("Our justices on the Court must never forget that the Constitution, which they expound, emanated from Us, was meant to remain comprehensible to Us, and was established for Our Posterity to endure and to be modified with Our informed consent.").

230. *Cf.* Edward R. Becker, *In Praise of Footnotes*, 74 WASH. U. L.Q. 1 (1996) (discussing the issue as it relates to the use of footnotes in judicial opinions).

231. Examples of how they might do so include voting so as to effectuate their views, involvement in the appointment process, see *infra* note 243, and constitutional conventions.

232. *See* ACKERMAN, WE THE PEOPLE, *supra* note 96 (discussing constitutional "moments" and higher lawmaking by "the People").

ened, with persistent involvement of citizens in infusing the Constitution with meaning.

Of course, not all citizen-interpretation of the Constitution is, or would be, thoughtful or useful. Some of it is downright silly.[233] The quality of citizen-interpretation will vary widely. But valuable contributions to our constitutional discourse can arise from sources other than public officials and constitutional law professors. It would be unwise for any normative account of who interprets to exclude citizens. Citizen interpretation already takes place,[234] and always will take place. But it is not encouraged, and has no routinized mechanism for expression. Were citizen interpretation more welcome it would become more disciplined and directed, and could only enhance our constitutional discourse.

Under recast judicial supremacy citizens are not inferior interpreters. Like other nonjudicial actors, in the short-term their views are not authoritative. But their interpretive contributions are always valuable as dialogic input, and over time they are central to shaping the Constitution's meaning.

Not surprisingly, some commentators express little or no enthusiasm for citizen interpretation. For instance, Jed Rubenfeld cautions us about the tension between democracy and constitutionalism,[235] and forcefully argues against the perspective that "the final arbiter of constitutional meaning should be the people itself."[236] He is chiefly concerned about the possibility authoritative citizen interpretation would undermine the notion the Constitution is an enduring document which

233. One need only peruse the Internet to find examples of what I consider quite bizarre readings of the Constitution. There are Constitution web-sites on the Internet, but most of the information I found in those had nothing to do with the Constitution. *See, e.g.*, <http://www. constitution.org>. Not surprisingly, most of the "constitutional dialogue" I came across while browsing the Internet one afternoon in July 1996 concerned the Second Amendment. Notwithstanding the disappointing results of my search, it strikes me the Internet is an ideal forum for citizen dialogue about the Constitution.

234. It is manifest in various forms. Recent confirmations battles over Supreme Court nominees reflect the influence of citizen interpretation. *See infra* note 243. Another less publicized example is the Libertarian Party's criticism of the Supreme Court's jurisprudence on forfeiture. At their 1996 political convention, much attention was directed toward the issue, including a decision reached during the 1995 Term, *Bennis v. Michigan*, 116 S. Ct. 994 (1996). *See, e.g.*, James Bovard, Address at the Libertarian Party U.S. Presidential Nominating Convention (July 4, 1996).

235. For other discussions of the relationship between democracy and constitutionalism, see Walter F. Murphy, *Civil Law, Common Law, and Constitutional Democracy*, 52 LA. L. REV. 91 (1991); AGRESTO, *supra* note 10, at 167; CONSTITUTIONALISM AND DEMOCRACY (Jon Elster and Rune Slagstad eds., 1988).

236. Rubenfeld, *supra* note 13, at 1167.

reflects commitments beyond the moment and is beyond the reach of the impulses of the masses at any given time. As he explains:

> [T]he great advantage of a constitutional commitment . . . is the ability to institutionalize the interpretive power: to delegate this power to a body of persons designed to be neither a proxy for the people as a whole, nor vested with the political power that is chiefly to be restrained, nor reliant on majority will.[237]

Rubenfeld argues against citizens as *final* interpreters. While citizens do not occupy this role under recast judicial supremacy, we should take seriously his concern about the relationship between citizen interpretation and the Constitution's safeguards against majoritarianism. But Rubenfeld appears to underestimate the dynamism of the interactive process which influences interpretation, even within the judiciary. Neither citizen engagement about constitutional meaning, nor treating citizens' interpretations as valuable, would expose the Constitution to the whims of the masses. Instead, citizens' interpretations would contribute to an enriched dialogue about constitutional meaning, without threatening to render the Constitution an instrument of sheer majority rule.

Unlike Rubenfeld, there are those who worry the role of citizens as interpretive agents is vastly too diminished today. Richard Parker has explicated a brief but powerful account of American democracy, which maintains that constitutional law should be understood, contrary to conventional wisdom, as designed to promote majority rule rather than limit it.[238] For Parker the notion that constitutional law is higher law, or "better" than law made by ordinary people, is "grandiose puffing."[239] Such "puffing," he worries, comes at the expense of "ordinary political energy"—the energy of ordinary people as political actors—and is characteristic of prevailing antipopulist sensibilities.

Parker calls for the development of populist sensibilities, whereby individuals would be "enabled" and "encouraged" to take part in political life,[240] while, as a corollary, government would become systematically responsive to ordinary people. Accompanying these changes would be a revised mission for modern constitutional law—one which "promote[s] majority rule."[241] Accordingly, Parker claims constitutional interpretation likewise ought to be guided by these principles.

237. *Id.*
238. *See* PARKER, *supra* note 200, at 4.
239. *Id.* at 66.
240. *Id.* at 95.
241. *Id.* at 96.

Notwithstanding the enhanced role for citizen-interpreters that recast judicial supremacy imagines, it is abundantly clear Parker would find such a model wanting. But Parker overreaches. Much of the "political energy" he longs for is attainable without radically reconceptualizing our constitutional culture. As he himself suggests, in anticipating the charge that his system would "politicize" law and courts, Presidential elections since at least 1968 have involved a dimension of politicized discourse about the course of constitutional law. Insofar as voters' choices may affect judicial appointments, which in turn will affect judicial dispositions, "politicization" has already occurred. Not only is this phenomenon "vital to whatever authority inheres in the judicial office,"[242] but it demonstrates that citizens can play an important role in shaping constitutional discourse and interpretation by this and other means.[243] We need not follow Parker to his radically democratic ideal polity,[244] or accept his supposition that it is "all right not only to criticize [and] . . . condemn constitutional argument enforced by judges, but also to disobey it,"[245] in order to engage citizens meaningfully in the interpretive dynamic.

D. The Political Question Doctrine and Commerce Clause Jurisprudence: Illustrations of Departmentalism?

As suggested earlier, the descriptive power of judicial supremacy has been questioned in part because there are occasions when its appears someone other than the judiciary speaks authoritatively about the Constitution's meaning. There clearly are plausible arguments to be made that departmentalism is operative (at least from time to time) in certain legal domains. Nevertheless, what might appear like departmentalism is most appropriately understood as recast judicial supremacy.

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242. *Id.* at 111-12.

243. Perhaps this was best illustrated by the Bork nomination hearings, which, whatever their shortcomings, were, I believe, a somewhat healthy manifestation of the citizen-interpreter ideal. *Cf.* NAGEL, *supra* note 196, at 5 ("Bork's confirmation hearings [were] . . . an imperfect but legitimate effort by the larger political culture to influence the direction of constitutional interpretation."); Wilson, *supra* note 196, at 1040 (examining the Bork and Ginsburg nomination hearings, and asserting that "[p]ublic opinion can either expand or contract important constitutional rights").

244. Given Parker's views, it is not surprising that he sees no tension between democracy and constitutionalism. At the conclusion of his book he asserts: "[T]here are constitutions . . . [b]ut there is no constitutionalism." PARKER, *supra* note 200, at 115; *cf.* sources cited *supra* note 235.

245. PARKER, *supra* note 200, at 111.

This section discusses two important doctrinal areas which, at first glance, seem to illustrate departmentalism at work: the political question doctrine and modern Commerce Clause jurisprudence. Yet examination reveals the interpretive activities in these domains conform with judicial supremacy rather than with a departmentalist paradigm.

1. The Political Question Doctrine

The political question doctrine describes the circumstances where the Court has stated that constitutional interpretation in particular areas should be left to the political branches of government—Congress and the executive.[246] This doctrine too can be traced back to *Marbury*,[247] but it has only been fully articulated in recent decades.[248] Today, the issues covered by the political question doctrine include the conduct of foreign affairs, the regulation of internal congressional processes, disputes seeking deliberation about the meaning of the "Guarantee Clause,"[249] and arguably, the constitutional amendment process. The effect of the doctrine, along with other justiciability doctrines,[250] is that "there are many parts of the Constitution . . . the Court refuses to interpret."[251]

Chemerinsky declares that the effect of the political question doctrine is, what I have called, "fixed departmentalism"—for each part of the Constitution there is a final arbiter, but the arbiter is not the same branch for all matters or constitutional provisions.[252] Is this assertion correct?

It strikes me this is not correct. Instead, the political question doctrine is best understood as a *voluntary allocation* of interpretive responsibility by the Court to the political branches. This contention appears supported, at the very least, by the fact that it is the Court itself which has developed the doctrine. In addition, the Court is con-

246. *See generally* CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 85, § 2.6.1, at 142-45.

247. 5 U.S (1 Cranch) at 165-70.

248. *See* Baker v. Carr, 369 U.S. 186 (1962) (stating the criteria used in determining whether or not the political questions test is satisfied); Powell v. McCormack, 395 U.S. 486 (1969).

249. "The United States shall guarantee to every State in this Union a republican form of government." U.S. CONST. art. IV, § 4.

250. Such as that governing "generalized grievances." *See* CHEMERINSKY, INTERPRETING THE CONSTITUTION, *supra* note 15, at 97-98.

251. *Id.* at 97.

252. *See id.* at 84; *see also* Eisgruber, *supra* note 9, at 355-57 (describing some "political questions" as "exceptions to judicial supremacy"); Murphy, *Who Shall Interpret?*, *supra* note 5, at 414 (suggesting the doctrine "makes sense in this context").

tinually asked to re-examine the same matters it already deemed political questions, and presumably the Court can assert jurisdiction over such matters at any moment.

Commentators who criticize the political question doctrine on normative grounds complain that it confuses deference with abdication.[253] They argue that issues generally covered by the doctrine ought not to be swept away with broad strokes as nonjusticiable. Instead, they propose that cases be parsed, and those areas raising constitutional questions come before the Court, while issues relating to the exercise of truly discretionary power should not.[254] These critics are right to focus on "deference," and may be correct when insisting the Court has ceded too much ground to the political branches than is good for the polity. Yet, that the political branches are engaging in *some* constitutional interpretation does not establish that the political question doctrine is an example of departmentalism at work, for recast judicial supremacy abhors judicial exclusivity in interpretation.

That courts should want to defer to the political branches, and under certain circumstances go so far as to allocate virtually all interpretive tasks to them, on a voluntary basis and for an indefinite period, should not surprise even those who would invoke the political question doctrine as evidence of departmentalism at work. As Chemerinsky himself recognizes, "courts must preserve their legitimacy by avoiding involvement in controversies that will risk the courts' political capital."[255] The kinds of issues now described as "political questions" are precisely those which would most embroil the courts in endeavors which can only corrode the legitimacy which the army-less, purse-less Court so desperately needs.

2. *Modern Commerce Clause Jurisprudence*

Modern Commerce Clause jurisprudence[256] also lends itself to a departmentalist account. Until April 1995, the Court left the bulk of constitutional interpretation related to the Commerce Clause to Congress. Under Article I, Section 8, Congress has the authority to "regulate Commerce . . . among the several states." The scope of Congress's power under the Commerce Clause was first explored by

253. *See, e.g.*, CHEMERINSKY, FEDERAL JURISDICTION, *supra* note 85, § 2.6.2, at 148; Louis Henkin, *Is There a 'Political Question' Doctrine?*, 85 YALE L.J. 597 (1976).

254. *See* CHEMERINSKY, INTERPRETING THE CONSTITUTION, *supra* note 15, at 101-02.

255. *Id.* at 104-05 (footnote omitted).

256. This discussion addresses only that aspect of the Commerce Clause which is a source of affirmative congressional regulatory power, not the "dormant Commerce Clause," which implicitly limits state legislative power.

the Court in *Gibbons v. Ogden*.[257] In *Ogden* the Court accepted the notion Congress should enjoy far-reaching power under the Commerce Clause—that Congress could legislate regarding all commerce which concerns more than one state, and that its power would be plenary, limited only by the Constitution's affirmative prohibitions on the exercise of federal power.[258] From the time of *Ogden* until the passage of the Interstate Commerce Act and the Sherman Act, in 1887 and 1890 respectively, the Court was rarely involved in review of congressional actions undertaken pursuant to the Commerce Clause.[259] Between 1887 and 1937, Commerce Clause cases were more frequently before the Court, which struck down a number of statutes as unauthorized by the Clause.[260] During this period, the Court imposed a classification scheme which delineated types of economic activity, limiting the meaning of "commerce," and consequently of Congress's power to regulate under the Commerce Clause.

The 1937 decision *NLRB v. Jones & Laughlin Steel Corp.*[261] marked a turning point in Commerce Clause jurisprudence. The Court abandoned the formal approach it had adopted in the previous period, and instead adopted a flexible, empirical approach, which inquired broadly about the effects on interstate commerce. From 1937 to 1995, the Court's Commerce Clause jurisprudence featured virtual acquiescence to the judgments of Congress about whether a particular exercise of power fell within the parameters of Article I, Section 8.[262] Undisputedly, after *Jones & Laughlin* the Court "exercised little independent judgment, choosing instead to defer to the express or implied findings of Congress to the effect that regulated activities have the requisite 'substantial economic effect.'"[263] So long as Congress's "findings" could be deemed supportable by some rational basis, Congress's view, and its statute, were upheld.[264] Even the one case be-

257. 22 U.S. (9 Wheat.) 1 (1824).

258. *See Ogden*, 22 U.S. (9 Wheat.) at 194, 196.

259. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 30, § 5-4, at 306-07.

260. *See id.* at 308; CHEMERINSKY, INTERPRETING THE CONSTITUTION, *supra* note 15, at 131-32.

261. 301 U.S. 1 (1937).

262. Notwithstanding the importance of *Jones & Laughlin* itself as demarcation of a new era in Commerce Clause jurisprudence, the transformation of the doctrine was a process, resulting in a dramatic change in the widely held view of the scope and meaning of the Commerce Clause. *Cf.* LEVINSON, *supra* note 94, at 428 (stating that the doctrine was "radically transformed without formal amendment ever being deemed necessary").

263. TRIBE, *supra* note 30, § 5-4, at 309.

264. *See, e.g.*, Hodel v. Virginia Surface Min. & Recl. Ass'n, 452 U.S. 264 (1981). Moreover, after 1937 the commerce power was extended under the "cumulative effect principle" and the "protective principle" to cover respectively acts which alone would not have sub-

tween 1937 and 1995 striking down congressional action as unauthorized under the Commerce Clause[265] has been explained by one commentator as primarily a "cue" from the Court to Congress that it has a burden to judge its "own actions to see if they conform to the limits and restraints placed on them by the Constitution."[266]

Arguably, Commerce Clause jurisprudence again changed course in 1995 with the Supreme Court's decision in *United States v. Lopez*.[267] Lopez presented the question whether the Commerce Clause empowered Congress to enact the portion of the "Gun Free School Zones Act," which made it a federal crime to possess a firearm in or within 1000 feet of a school. The United States Court of Appeals for the Fifth Circuit found the Act unconstitutional. While recognizing Congress's substantial powers under the Commerce Clause, including its authority to regulate purely intrastate activity, the Court concluded "there is nothing to indicate that Congress itself consciously fixed, as opposed to simply disregarded, the boundary line between the commerce power and the reserved power of the states."[268] In essence, the Fifth Circuit seemed disturbed that Congress had failed to engage in any kind of fact-finding or reflection about the relationship of the acts covered by the statute to interstate commerce.[269]

The Supreme Court affirmed by a five to four vote. Marking the most dramatic shift in the direction of Commerce Clause jurisprudence in nearly a half century, the Court determined that Congress had exceeded its powers under the Commerce Clause. Chief Justice Rehnquist, writing the opinion of the Court, explained the contested statute is one which "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[270] The Court reached this conclusion by measuring Congress's action against the principle that, aside from regulating the use of channels of interstate commerce and protecting the instrumentalities of interstate commerce, Congress's power to regulate under the Commerce Clause is limited to activities that "substantially affect"

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stantial economic effects and legislation which imposes conditions for the privilege of partaking in interstate commerce. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 30, §§ 5-5 to 5-6, at 310-13.

265. *See* National League of Cities v. Usery, 426 U.S. 833 (1976). *Usery* was effectively overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

266. PHILIP BOBBITT, CONSTITUTIONAL FATE 192 (1982).

267. 115 S. Ct. 1624 (1995).

268. United States v. Lopez, 2 F.3d 1342, 1363 (5th Cir. 1993).

269. *Cf.* Fisher, *Constitutional Interpretation*, *supra* note 161, at 722-25 (discussing the role of legislative "facts" in constitutional law).

270. *Lopez*, 115 S. Ct. at 1630-31.

interstate commerce.[271] Four dissenting Justices challenged the wisdom of the Court's approach, with Justice Souter calling it a "backward glance at . . . old pitfalls."[272]

Federal courts[273] and commentators[274] have begun to interpret *Lopez* and discern the new character of Congress's powers under the Commerce Clause.[275] But the first version of this Article was written while *Lopez* was pending before the Supreme Court. At that time I contended post-1937 Commerce Clause jurisprudence, like the political question doctrine, has been characterized by an effective voluntary allocation by the Court to Congress of the responsibility for interpreting the meaning and application of Article I, Section 8. While it is too soon to assess the full character of the change in Commerce Clause jurisprudence *Lopez* has effected, in my view *Lopez* does nothing to counter this description of modern Commerce Clause jurisprudence.

Indeed, judicial involvement in Commerce Clause adjudication does not threaten the Court's legitimacy in the way adjudicating political question cases might. Not surprisingly then, in Commerce Clause cases the Court's deference, or voluntary allocation, has been less categorical, and more subject to change over time, than in political question cases. *Lopez* can be read as a reflection of the dissatisfaction of a majority of the Court with Congress's handling of its interpretive responsibility vis-a-vis the commerce power. This dissatisfaction led the Court to retract some of the deference it had extended to Congress during the preceding forty-eight years. The Court, it seems, determined that Congress has partly defaulted in executing its task to assess

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271. *Id.* at 1630.

272. *Id.* at 1653.

273. Since *Lopez*, numerous claims have been brought challenging the constitutionality of federal legislation. These cases are working their way through the federal courts. This Term, the Supreme Court heard arguments in a case which asks whether Congress exceeded its Commerce Clause powers in passing part of the Brady Act, 18 U.S.C.A. § 922 (Supp. 1997). *See* Printz v. United States, 66 F.3d 1025 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 2521 (1996) (No. 95-1478) (argued Dec. 3, 1996); *see also* United States v. Michael R., 90 F.3d 340 (9th Cir. 1996) (upholding law barring juvenile possession of handguns).

274. *See, e.g.*, Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695 (1996); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167 (1996); Louis H. Pollak, *Foreword: Reflections on* Lopez, 94 MICH. L. REV. 533 (1995); *see also* Mark Tushnet, *Living in a Constitutional Moment:* Lopez *and Constitutional Theory*, 46 CASE W. RES. L. REV. 845 (1996) (exploring the idea that *Lopez* marks a "constitutional moment" of the sort described in Part II.B).

275. A detailed assessment of *Lopez* is beyond the scope of this Article.

responsibly its own authority under the Commerce Clause. Moreover, Congress's failure to include in the legislation any findings about the relationship between the statute and interstate commerce appeared a kind of flaunting of its free reign under the commerce power,[276] which invited the Court to reprimand the legislature and remind it of its responsibilities.[277]

Prior to *Lopez*, it appeared the only limitation on Congress's commerce power was that imposed by other provisions of the Constitution,[278] and by the internal political restraints of the legislative process itself.[279] The Court's permissiveness can be explained by recast judicial supremacy, which embraces widespread diffusion of interpretive responsibility and allows the judiciary to allocate interpretive tasks when deemed useful or necessary.[280] *Lopez* reinforces rather than refutes this notion. Indeed, with *Lopez* the Court has sent the message that if federal courts are to continue to allocate interpretive responsibility to Congress, then that body must act more reflectively and conscientiously as an independent constitutional interpreter.

IV. The Relevance and Utility of the "Who Interprets" Inquiry

This Part of the Article examines a number of issues which have received political and media attention during recent years, and which implicate nonjudicial interpretation of the Constitution. The first subpart discusses Congress's role as a constitutional interpreter, in general, as well as in connection with two legislative initiatives—the Line Item Veto Act and the Defense of Marriage Act. The second subpart addresses "judicial independence," and considers how we might think about the boundaries between legitimate criticism of judges and unde-

276. Some commentators, however, doubt that *Lopez* will limit Congress's apparent unrestrained authority under the Commerce Clause. *See, e.g.*, Henry Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 177 (1996) ("Despite [*Lopez*] . . . it remains clear that virtually all desired political, social, and economic change can be achieved through ordinary legislation at the national level.").

277. It is interesting to note that a bill has been introduced in the House of Representatives to require Congress to specify the source of its authority under the Constitution for each law it seeks to enact. *See* H.R. 2270, 104th Cong. (1995) (introduced by Congressman Shadegg).

278. This includes, arguably, principles of federalism. *See* Nagel, *Federalism as a Fundamental Value:* National League of Cities *in Perspective*, 1981 SUP. CT. REV. 81.

279. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 30, § 5-7, at 313-16.

280. *Cf.* Fisher, *Constitutional Interpretation*, *supra* note 161, at 715-16 ("Congressional interpretations are given substantial weight in some circumstances, even to the point of becoming the controlling factor.") (footnote omitted).

sirable impingement on the operation of the judiciary. The third subpart looks to Proposition 187, a 1994 California ballot initiative. Without delving into the substance of that issue, the discussion of Proposition 187 sets out a number of important questions related to any inquiry about who interprets. In addition, Proposition 187 provides an occasion to revisit the interpretive role of citizens and consider the place of state officials in an interpretive scheme.

Discussion of these topics should illustrate the far-reaching relevance of the "who interprets" question, and demonstrate that thoughtful consideration of the question facilitates productive deliberation about the substance of the disputed "political" issues to which they are related.

A. Congress as a Constitutional Interpreter

Congress must have authority under some constitutional provision to pass a law.[281] Therefore, every legislative act Congress undertakes raises (or should raise) at least one, and perhaps several, constitutional questions. At times, Congress makes no mention in its reports, or in actual legislation, of the constitutional authority under which it proposes laws. And it often pays little attention to constitutional questions related to the passage of ordinary legislation, usually adopted pursuant to Article I, Section 8.[282] According to Paul Brest's research, in "the late eighteenth century and throughout much of the nineteenth century, the entire Congress often debated constitutional issues."[283] This practice waned over time, however, and during the nineteenth and into the twentieth century, such debates were relegated to the judiciary committees, and then left principally to the courts.[284]

On many occasions today when robust constitutional debate on the floors of Congress is warranted few or no such exchanges occur. A great many legislators demonstrate little knowledge of, or interest in, constitutional questions or the relevance of the Constitution to their work. This trend is worsened by the fact that members of Con-

281. *See* U.S. CONST. art. I.

282. *See* Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 59 (1986) ("Congress has not regularly dealt with these ordinary constitutional issues in a responsible manner.").

283. *Id.* at 83.

284. *See id.* at 85. For a discussion of the extent to which constitutional issues were debated in relation to some major pieces of legislation between 1954 and 1985, see *id.* at 85-93.

gress fail to engage their constituents about the meaning and significance of the Constitution.

Why has serious evaluation of the Constitution's relevance to proposed legislation diminished as a congressional practice? Brest suggests that, at least in the early stages of this development, the growth and complexity of constitutional doctrine, as well as increasing demands on individual legislators, probably contributed.[285] Abner Mikva, who served as both a congressman and a federal judge,[286] identifies a number of factors—institutional and political—which contribute to the paucity of constitutional dialogue in Congress.[287] Also figuring in "Congress' mixed performance is . . . the fact that its proper role in making constitutional judgments has never been firmly defined."[288] That it has never been properly defined appears partly the result of an unreflecting embrace of traditional judicial supremacy.

Whatever its causes, Mikva is concerned about the dangers associated with congressional abstinence.[289] He wants Congress to make more of an effort to screen legislation for possible constitutional defects, and to clarify its motives to the courts. Such practices might "provide a different viewpoint on the Constitution and become an innovative force."[290] At its core, Mikva's Congress would engage in interpretation of the Constitution in order to assist courts by being clearer about its intentions and ideas, and by providing another voice in a conversation about the meaning of the Constitution. The virtues advanced by this undertaking would be honesty, clarity, and furtherance of dialogue. Mikva does not, however, wish to depart from a plan where courts ultimately have the unfettered capacity to review the constitutionality of all congressional legislation. Whatever value might be derived from enhanced congressional deliberation, "it is not a substitute for the judgment of the courts."[291]

Brest also has higher aspirations for Congress. In an early article he expressed hope for the development of "conscientious legislators," who will learn how to understand and interpret both the Constitution

285. *See id.* at 85.

286. Upon leaving the judiciary, Mikva served as White House Counsel.

287. *See* Mikva, *supra* note 10, at 609-10.

288. *Id.* at 587.

289. He identifies two specific dangers. First, by passing questions onto the courts, Congress diverts political pressure from itself, and invites courts either to respond to public opinion and political pressure, or face political attack. Second, to the extent the courts assume some level of congressional deliberation has taken place, courts may reduce the level of scrutiny they apply to a question requiring interpretive judgment. *See id.* at 588-89.

290. *Id.* at 608.

291. *Id.* at 610.

and court decisions about it.[292] At that time Brest had little to say about the particular tensions or dangers associated with Congress as an interpreter. Rather, he simply propounded that the legislative view of what the Constitution means is relevant and important, and wanted legislators to learn how courts view problems.

His later articles reveal a more comprehensive view about the role of Congress. Brest's view about the authority of Congress to counter court decisions is, by his own admission, unusual. For him, Congress only possesses such authority if it has the capacity to deliberate "well"[293] about the Constitution's meaning. Yet, in his judgment, Congress woefully lacks this capacity. Its "traditions and practices of considering constitutional questions" are, he claims, "weak and untrustworthy."[294] Nevertheless, Brest is not without hope. He wishes for a time when Congress will put in place mechanisms and procedures for thoughtful review of constitutional questions, so that it can assume a role which, in his eyes, the Constitution itself mandates: interpreting the Constitution.

Indeed, notwithstanding the complexity of constitutional law, the incredible demands on the time of legislators, and the apparent absence of political awards, I share Brest's and Mikva's desire to have Congress engage in more systematic and thoughtful debate about the bearing of the Constitution on their work as legislators. As a descriptive matter, "at best, Congress does an uneven job of considering the constitutionality of the statutes it adopts."[295] From a normative standpoint, the quality of constitutional discourse would be enriched were Congress to adopt an interpretive consciousness of the sort recast judicial supremacy embraces.[296] Notwithstanding the fact that Congress

292. Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

293. Throughout this Article, I have assiduously avoided addressing the question "what counts as interpretation?" While clearly relevant to the issues discussed in this Article, the query deserves a treatment of its own. However, I must say I am skeptical about efforts to develop a scheme to segregate genuine or worthwhile interpretations from half-hearted or stupid ones. My sense is that the interpretive process, as described by recast judicial supremacy, is itself capable of sorting through all types of "interpretations" and making use of the ones which are deemed worthwhile by the interpretive process itself. It strikes me as unnecessary to develop a separate account of what qualifies as an interpretation, which would cabin weak or disingenuous interpretations and identify them as unfit for consideration when examining constitutional meaning.

294. Brest, *supra* note 282, at 103.

295. Mikva, *supra* note 10, at 587.

296. Fisher, a specialist with the Congressional Research Service at the Library of Congress, would agree with Brest, Mikva, and me that "the interests of constituional [sic] law and the political process are best served when members of Congress form independent

has at times performed poorly as an interpreter, a movement toward more thorough and consistent consideration of constitutional issues would produce more valuable contributions to the dialogic interpretive process already at work.[297]

1. The Line Item Veto Act

Congress's treatment of two pieces of legislation with significant constitutional implications provides useful illustrations of Congress's experience as an interpreter, and suggests how Congress may improve as an interpreter. On April 9, 1996, the President signed into law the Line Item Veto Act.[298] Proposals for a "line item veto" have been introduced with regularity in Congress during the past decade. As a general matter, a "line item veto" provides a method for the President to strike out particular parts of legislation approved by the Congress; it is typically proposed as a method to eliminate specific budget authorizations. Line item veto proposals have taken the form of either a proposed amendment to the Constitution,[299] or statutory authorization for exercise of the "veto."[300]

Constitutional questions have been raised in connection with the panoply of line item proposals which have been advanced, including concerns that a particular veto provision might contravene the "Presentment Clause,"[301] and separation of powers principles. Clearly, a

judgments on constitutional issues." Fisher, *Constitutional Interpretation*, *supra* note 161, at 743. Fisher nevertheless goes awry in asserting that "the Supreme Court is the 'ultimate interpreter' only when its decisions have been accepted as reasonable and persuasive by the people and other governmental units." *Id.* at 716.

297. It would be reasonable to ask: Why should Congress choose to take on this interpretive role? Members of Congress have no obvious "political" incentive to do so. Yet it seems to me members of Congress have an obligation to assume this role because they have taken an oath to "support" the Constitution. U.S. CONST. art. VI, § 3. While the requirements imposed by the Article VI oath are hardly self-evident, at a minimum I take the oath to mean that Senators and Representatives have a duty to consider independently the meaning of the Constitution and its connection to their work. Moreover, citizens ought to provide an incentive for members of Congress to assume a more active interpretive role, by expecting serious deliberation about the Constitution from their representatives.

298. Pub. L. No. 104-130, 110 Stat. 1200 (1996) (codified as 2 U.S.C.A. §§ 621 (note), 681 (note), 691, 691 (note), 691(a)-(f), 692 (Supp. 1997)).

299. For a discussion of some proposed amendments and evaluation of the effects of such amendments on the federal balance of power, see Anthony R. Petrilla, *The Role of the Line-Item Veto in the Federal Balance of Power*, 31 HARV. J. ON LEGIS. 469 (1994).

300. For a useful discussion of some of the major proposals (both statutory and by way of amendment), see Walter Dellinger, Assistant Attorney General, Testimony Before the Senate Judiciary Committee's Subcommittee on the Constitution, Federalism, and Property Rights (January 24, 1995).

301. U.S. CONST. art. I, § 7.

statutory approach raises constitutional worries which are not directly implicated by a proposed amendment to the Constitution.[302]

The Line Item Veto Act became effective on January 1, 1997. The Act does not confer upon the President a "true" line item veto. Instead, it gives the President "enhanced rescission authority." Under the enhanced rescission scheme, the President can selectively eliminate individual spending items in appropriation bills or their reports.[303] Congress could attempt to nullify the President's item veto by passing a disapproving bill. But the President could veto that bill, too.[304]

Since Congress adopted a line item veto by statute rather than by pursuing a constitutional amendment, examination of how members treated the attendant constitutional questions should provide a useful illustration of how Congress conceives of its own role as an interpreter of the Constitution. A few observations about the debate on the House and Senate floors warrant mention.[305] First, considerable attention was dedicated, especially by opponents of the bill, but also by supporters, to the effect of the proposed legislation on the constitutional principle of separation of powers. Scores of references to the

302. This is not to suggest, however, that debate about the meaning of the "existing" Constitution is not relevant when considering the virtues of a proposed constitutional amendment. Indeed, the theoretical possibility of an "unconstitutional" constitutional amendment is not implausible to me. *See* Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV 457, 504 (1994) ("[P]erhaps not everything is properly amendable."); Levinson, *supra* note 94, at 414-17; Jeffrey Rosen, *Was the Flag Burning Amendment Unconstitutional*, 100 YALE L.J. 1073 (1991); *cf.* Tribe, *Amending*, *supra* note 91, at 439, 443 (asserting that the merit of a suggested amendment to the Constitution is committed to judicially unreviewable resolution, while commenting that the Constitution can be understood as unified by certain underlying political ideals and fundamental norms which cannot be ignored).

Interestingly, at a question-and-answer period during a visit to Harvard Law School during the Fall of 1994, Justice Ruth Bader Ginsburg was asked a question which posited the possibility that an amendment might violate some existing provision of the Constitution. She declined to answer the question because of the prospect she might have to decide such a matter. If the notion of an unconstitutional amendment were beyond the pale of plausibility, I wonder if she would have responded in a manner like she did.

303. *See* Robert D. Reischauer, *Line-Item Veto Won't Offer Big Bite*, WASH. POST, Apr. 17, 1996, at A45 (discussing the Act's provisions).

304. There are further limitations on the President's exercise of the item veto under the Act. *See id.*; Bruce Fein, *Line Item Frugality . . . or Fantasy?*, WASH. TIMES, Apr. 5, 1996, at A16.

305. Floor debates surely are not the only measure of the extent to which Congress has reflected on the constitutionality of proposed legislation. Yet floor debates are important, and particularly so in this case because the precise features of the bills ultimately approved were unsettled until a fairly late date, and members could not consider the actual legislation before them until the floor debates occurred. The principal debates over the Line Item Veto Act occurred on March 27 and March 28, 1996.

visions and intentions of the Founders, and how these might support or counsel rejection of the measures before the houses of Congress, were also made. Fewer direct citations were made to Supreme Court decisions which would likely be used by a court were it asked to evaluate the constitutionality of the legislation.[306] Personal views were seldom developed in much detail, and oftentimes were displaced by references to lists of scholars lined up on one side or the other.[307]

Conspicuously sparse in the debates were discussions of Congress's role in addressing the constitutional questions raised. Little attention was paid to the question, "What self-conception should legislators adopt regarding their responsibility for interpretation of the Constitution?" One exception, however, was a statement by Senator Robert Byrd, who expressed the greatest self-consciousness about the role of the Senate in evaluating the proposed Act. Byrd stated, "We have, as Senators, a responsibility to make some judgment ourselves as to the constitutionality of a measure before we pass on it." Acknowledging that "[i]n the final analysis, it will be the courts that will decide," he nevertheless insisted to his colleagues, "[b]ut we cannot pass that cup to others. We have to make that judgment here."[308]

What interpretive stance should legislators adopt? Is their task merely one of prediction, like Holmes's "bad man"[309] who worries foremost about whether his actions will be permitted or punished? Should members of Congress try to imitate courts by acting as if they are judges? Or should legislators exercise judgment independent of considerations about what courts have done, or might do in the future? Senator Byrd's view seems a mixture of sentiments. He recog-

306. For instance, a search of the Congressional Record reveals that during 1996 the debates and statements of members concerning the line item veto included only the following references: six to *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) (finding one house "legislative veto" unconstitutional), none to *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding Congress's delegation to U.S. Sentencing Commission), and one to *Bowsher v. Synar*, 478 U.S. 714 (1986) (invalidating Congress's delegation of budgetary responsibility to the Controller General under the Gramm-Rudman Act). These cases are three of the more important modern "separation of powers" cases. *Cf.* Mikva, *supra* note 10, at 609 ("In fact, most Supreme Court opinions never come to the attention of Congress.").

307. *See* Mikva, *supra* note 10, at 609 ("Unlike judges, the Representatives and Senators are almost totally dependent on the recommendations of others in making constitutional judgments."). *But cf.* Fisher, *Constitutional Interpretation*, *supra* note 161, at 728-31 (defending Congress's institutional capacity as an independent interpreter, especially in light of improvement made during the past three decades).

308. 141 CONG. REC. S4450 (daily ed. Mar. 23, 1995).

309. Oliver Wendell Holmes, *The Path of the Law* (1897), *reprinted in* AMERICAN LEGAL REALISM 17 (William W. Fisher III et al. eds., 1993).

nizes courts will have the "final" say, but asserts Senators must exercise some judgment of their own; they cannot simply abdicate interpretive responsibility, leaving the courts not just the final say, but the only say.

The Line Item Veto Act notably provides for special judicial review, which allows any member of Congress challenging the legislation's constitutionality to seek a declaratory judgment and injunctive relief before the appropriate district court, and for direct and expedited appeal to the Supreme Court.[310] What does the adoption of such a procedure suggest about Congress's self-image as an interpreter?[311] Perhaps it evinces Congress's lack of confidence in its own views, and a desire to have more "learned" persons address constitutional questions. Is Congress conceding its immateriality as an interpreter? It seems likely that if Congress had a more entrenched practice of rigorous debate about the constitutionality of legislative acts, Congress would have been less inclined to include such a measure in the Act. Provisions like this merely highlight Congress's uncertainty about its own role as an interpreter and discomfort with its own capacity to render judgments about the Constitution's meaning.[312]

This cursory review of Congress's performance with the Line Item Veto Act reveals that although constitutional issues were plainly implicated, legislators seemed uncertain about their roles as interpreters, and less than thorough in exploring the substantive constitutional matters at hand. While Senator Byrd's statement is far from a fully articulated guide for a "conscientious legislator," his posture is compelling, and suggests precisely the kind of role I envision for members

310. Pub. L. No. 104-130, § 3(a)-(c), 110 Stat. 1211-12 (1996). Senator Simon stated upon introducing the judicial review amendment in the Senate, "What we do not want is to live in limbo." 141 CONG. REC. S4244 (daily ed. Mar. 21, 1995).

Six members of Congress filed suit on January 2, 1997 in federal court in Washington, D.C., challenging the constitutionality of the Line Item Veto Act. That Court declared the Line Item Veto Act unconstitutional. *See* Byrd v. Raines, No. 97-0001 (D.D.C. Apr. 10, 1997).

311. *Cf.* Fisher, *Constitutional Interpretation*, *supra* note 161, at 719-22 (recounting debate among Senators during 1984 on another line-item veto proposal and the role of the Senate as an independent constitutional interpreter).

312. The inclusion of such provisions in legislation appears to be increasingly frequent. *See, e.g.*, The Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (regulating the Internet); The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (*see infra* Part IV.A.2); *see also* 28 U.S.C. § 1253 (1994) (providing for direct appeal to the Supreme Court from decisions by three-judge district court panels); WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4040 (1988 & Supp. 1996) (discussing three-judge district courts).

of Congress under recast judicial supremacy. Yet just as Mikva and Brest each express serious doubts about the capacity of Congress to fulfill the aspirations they set out,[313] I am skeptical about its ability to fulfill, with skill and vigor, the role which recast judicial supremacy encourages members of Congress to occupy. As Mikva observes, "The very knowledge that the courts are there, as the ultimate naysayers, increases the tendency to pass the issue on, particularly if it is politically controversial."[314] It is a movement of legislators away from an unhealthy reliance on courts which recast judicial supremacy seeks to effect. Yet the existing dynamic may be too difficult for legislators to resist. Indeed, Senator Byrd may well share this pessimism, as indicated when he quipped to his colleagues: "I know it is old fashioned to read the Constitution anymore around here."[315]

2. *The Defense of Marriage Act*

Congress's experience with another piece of contentious and politically charged legislation provides an additional occasion to assess its role as an interpreter. During the Fall of 1996, Congress passed the Defense of Marriage Act. It provides:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[316]

The statute also states that for purposes of federal law the word "marriage" means only the legal union between a man and a woman, and "spouse" means a husband or wife of the opposite sex.[317]

Introduction of the legislation was prompted in part by litigation in the Hawaii courts,[318] which presents the possibility that the State will soon recognize as legal a marriage between persons of the same gender. Before the Act had been passed in either the House or the

313. *But cf.* Fisher, *Constitutional Interpretation*, *supra* note 161 (expressing confidence in Congress's ability to function as a constitutional interpreter).

314. Mikva, *supra* note 10, at 610.

315. 141 CONG. REC. S4225 (daily ed. Mar. 21, 1995).

316. Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996). .

317. *Id.* at § 3.

318. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that statute restricting marital relations to unions between males and females establishes sex-based classification which is subject to "strict scrutiny" test in equal protection challenge brought under the Hawaii Constitution), *appeal after remand sub nom.* Baehr v. Miike, 910 P.2d 112 (Haw. 1996).

Senate, President Clinton pledged to sign it. But the Defense of Marriage Act presents profound constitutional questions. To begin with, there is the now-familiar issue of Congress's authority to enact the Act. The source of Congress's authority to pass the Defense of Marriage Act is not self-evident. Some supporters of the Act contend the Constitution's Full Faith and Credit Clause[319] provides the requisite authorization.[320] But the Full Faith and Credit Clause can be understood as either having no bearing on,[321] or inconsistent with, the proposed Act. In addition, there is the question whether the Act violates one or more of the Constitution's "negative prohibitions," such as the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments.

The principal debate in the House about the Defense of Marriage Act occurred on July 11 and 12, 1996. As with the Line Item Veto Act, viewed through the lens of floor debate, Congress's performance as a constitutional interpreter was mixed. But numerous statements made on the House floor provide hope for the ideal of congressional interpretation. Three in particular warrant attention. The first is a statement by Congressman Skaggs, analyzing the text of the Full Faith and Credit Clause. Skaggs discussed the meaning of the Clause, including its "Enabling Clause," and the implications of adopting one reading of the text over another.[322] Without regard for the substance of Skaggs's viewpoint, Skaggs's approach seems quite right. He personally considered a relevant constitutional issue presented by legislation before the House—without deferring completely to the courts, or relying exclusively on the views of law professors—thereby accepting

319. U.S. CONST. art. IV, § 1. The Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.*

320. The argument turns on the Clause's "enabling clause," which provides that "Congress may by general Laws prescribe the Manner in which . . . Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.* Defenders assert the Defense of Marriage Act is such a "general law" prescribing the "effects" of acts, records and proceedings involving marriage. *But see* Letter from Laurence H. Tribe to Senator Kennedy, 142 CONG. REC. S5931 (daily ed. June 6, 1996) (calling that view "a play on words, not a legal argument").

321. Some contend the Defense of Marriage Act is unnecessary because whatever power states have to refuse to accept other states' recognitions of marriages would not be expanded or contracted by the Act. *See* 142 CONG. REC. H7489, H7491 (daily ed. July 12, 1996) (Congressman Moran and Skaggs expressing this view); *see also* Laurence H. Tribe, *Toward a Less Perfect Union*, N.Y. TIMES, May 25, 1996, at 11 (explaining "states need no Congressional license to deny effect to whatever marriages (or other matters) may fall within" the so-called public policy exception to the Full Faith and Credit Clause).

322. *See* 142 CONG. REC. H7491-92 (daily ed. July 12, 1996).

his responsibilities as a constitutional officer and advancing the normative ideal of a diffusion of interpretive responsibility.

Congressman Abercrombie also approached the Defense of Marriage Act in a manner one might expect from a responsible congressional interpreter. He carefully reflected on the constitutional implications of the Act. In doing so he invoked the opinions of legal scholars[323] and considered the possible relevance of a recent Supreme Court decision.[324] But he also developed and offered his own interpretive judgments.[325] This balanced approach is a useful example of how members of Congress ought to undertake their interpretive tasks.

Understandably, supporters of the legislation discussed the Constitution less often than critics. As Brest has noted, "Opponents of particular bills sometimes seem to voice constitutional doubts as rhetorical stratagems, while proponents avoid paying attention to potentially damaging constitutional questions, preferring to leave them to a later judicial test."[326] But during debate on the Defense of Marriage Act, Congressman Hyde, a proponent of the Act, rose to address its constitutionality and the relevance of a recent Supreme Court opinion.[327] He and Congressman Frank, a detractor of the Act, exchanged views about *Romer v. Evans*, in which the Supreme Court declared unconstitutional an amendment to the Colorado Constitution which precluded all government action designed to protect homosexuals.[328] While invocation of Supreme Court decisions is preferable to ignoring them, reliance on them as a mere predictor of what the courts will do

323. Abercrombie cited the views of Professors Eskridge and Tribe. *See* 142 CONG. REC. H7449 (daily ed. July 11, 1996).

324. Abercrombie discussed *Romer v. Evans*, 116 S. Ct. 1620 (1996), which found unconstitutional an amendment to the Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexuals from discrimination. He stated that "[t]his case suggests that the Supreme Court will rule legislation motivated by animus against gays and lesbians unconstitutional . . . unless the legislative classification bears a rational relationship to a legitimate State purpose. In other words, since [the Defense of Marriage Act] targets a group of people due to . . . [their lifestyle] . . . it is likely to be struck down by the courts." *See* 142 CONG. REC. H7449 (daily ed. July 11, 1996).

325. Abercrombie questioned Congress's authority under the Constitution to enact the Act. He then noted his disbelief that many supporters of the Defense of Marriage Act are also supporters of H.R. 2270, which would require Congress to specify its power under the Constitution for the enactment of any law. *See supra* note 277. Abercrombie asked his colleagues: "Where in [A]rticle I or anywhere else in the Constitution is the Congress given authority to write a national marriage law? Maybe the sponsors of both bills don't see the contradiction. Maybe they just don't care." *See* 142 CONG. REC. H7449 (daily ed. July 11, 1996).

326. Brest, *supra* note 282, at 93.

327. *See* 142 CONG. REC. H7500-01 (daily ed. July 12, 1996).

328. *See Romer*, 116 S. Ct. 1620.

is an imperfect exercise of interpretive judgment. Hyde's and Frank's remarks were promising, however, because they suggested that their consideration of *Romer* transcended prediction. Congressmen Frank and Hyde appear to understand the importance of heeding court judgments and principles, but they nonetheless exercised their own deliberative capacities and developed their own views about the constitutionality of the Defense of Marriage Act.

Before the House passed the Defense of Marriage Act, Senator Kennedy asked Tribe to review the legislation and consider its constitutionality. In his response, entered into the *Congressional Record*, Tribe wrote: "Congress . . . has a solemn duty to take seriously the constitutional boundaries of its affirmative authority" to enact legislation.[329] Tribe argued that enactment of the Act would evidence a failure to abide by this duty.[330] While I do not believe a vote for or against the measure necessarily indicates a shirking of interpretive responsibilities, as I have argued throughout this section, I fully concur that Congress has such a duty. The approaches of the four House members just described, and that of Senator Byrd in relation to the Line Item Veto Act, illustrate how other members of Congress may transform themselves into more consistent, self-conscious interpreters. It is not enough for members of Congress to demonstrate sporadic interest in constitutional questions—limited to occasions when law and mass politics intersect (e.g., abortion) or when members' own interests are implicated (e.g., campaign finance reform and the First Amendment).[331] Instead, they should address constitutional questions whenever they arise, and contribute to our society's dialogue about the meaning of the Constitution.

B. Judicial Independence and Judicial Critics

The recent commotion over criticism of judges also demonstrates the relevance and importance of the "who interprets" question. During the past several years, numerous public officials have rebuked sitting federal judges. While not all of these rebukes have focused on interpretations of the Constitution, many have. It would be naive to

329. Letter from Laurence Tribe to Senator Kennedy, *supra* note 320, at S5931; *see also* TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 30, § 3-4, at 39 ("Congress must . . . be recognized as having the power and the duty to interpret the document in a way that may command the respect of others.").

330. *See* Letter from Laurence Tribe to Senator Kennedy, *supra* note 320, at S5931.

331. Many questions before Congress which implicate constitutional meaning never come before the courts. *See supra* Part II.B. Therefore, it is imperative that Congress be generally proficient and rehearsed as a constitutional interpreter.

suggest these recent comments are not politically motivated, and it would be generous to characterize them as the product of careful scrutiny of, or reflection about, judicial opinions. Nevertheless, the expression of public criticism of judges by members of the legislative and executive branches invites consideration about the appropriate boundary between legitimate expression of contrary views and unwelcome impingement on the operation of the judiciary.

The most notable incident of 1996 was prompted by a decision of United States District Judge Harold Baer, Jr. The uproar concerned an evidentiary ruling by Baer in a criminal trial. Baer, appointed by President Clinton to the Southern District of New York, had excluded from evidence drugs found in the trunk of a car, which the police recovered after four men placed duffel bags in the defendant's car and then fled when the police arrived.[332]

In his opinion explaining the exclusion of the evidence, Baer noted the federal prosecution of a police officer in an anticrime unit operating in the same neighborhood where the drug seizure occurred. Baer then wrote, "After the attendant publicity surrounding the[se] . . . events, had the men not run when the cops began to stare at them, it would have been unusual."[333] Because their flight did not provide reasonable suspicion "that criminal activity was afoot," Baer found the police did not have requisite cause to suspect criminal activity when they stopped the defendant, and declared the investigatory stop illegal.[334]

The judge's ruling, based in part upon his understanding of the Fourth Amendment, came to the attention of political leaders, who denounced it. Among the critics was Bob Dole, then the presumptive Republican nominee for President. Another was President Clinton, who, speaking through a spokesperson, suggested he might solicit Baer's resignation.[335]

Before criticism of Baer had run its course, he changed his mind. Citing supplemental testimony proffered after his initial decision, he modified his ruling and admitted the evidence.[336] But the Baer incident ignited a vigorous, albeit indirect, exchange between politicians and members of the federal judiciary. Four judges from the United

332. *See* United States v. Bayless, 913 F. Supp. 232 (S.D.N.Y. 1996).

333. *Bayless*, 913 F. Supp. at 242.

334. *Id.*

335. *See Judges Accuse White House of Intimidating Jurist*, BOSTON GLOBE, Mar. 29, 1996, at 19 (recounting that White House spokesman called Baer's ruling "wrongheaded" and said President Clinton might ask Baer to resign).

336. *See Bayless*, 921 F. Supp. 211.

States Court of Appeals for the Second Circuit[337] issued a statement defending Baer and objecting to the criticisms as an inappropriate encroachment on the independence of the judiciary.[338] Other prominent federal judges also publicly expressed their concern over the reproaches of Baer.[339] Even Chief Justice Rehnquist—without directly referring to Baer—delivered a speech emphasizing the importance of judicial independence.[340]

Many of those uneasy with politicians' denunciations of Baer's opinion voiced concerns that such statements would undermine the separation of powers among the branches of the federal government. This view was expressed strongly by Judge Louis Pollak, who commented that "[i]t is not the province and duty of the President, or of the Majority Leader, or of the Chairman of the Senate Judiciary Committee [to say what the law is]."[341] Following the Baer incident, Rehnquist called "an independent judiciary with the authority to *finally* interpret a written constitution" one of the "crown jewels of our system of government."[342]

Politicians, however, refused to acquiesce completely to the notion that judges should be free from critiques of nonjudges. President Clinton asserted that judges are not entitled to "a gag rule on everybody else."[343] Bob Dole exclaimed in a speech that "there is nothing in the Constitution . . . [saying that judges] should not be held up to scrutiny for their actions."[344] Even a *Wall Street Journal* editorial posited that the First Amendment itself protects criticism of judges, including those made by politicians.[345]

337. The Second Circuit hears appeals from the Southern District of New York.

338. *See Second Circuit Chief Judges Criticize Attacks on Judge Baer*, N.Y. L.J., March 29, 1996, at 4 [hereinafter *Second Circuit Judges Criticize*] ("These attacks do a grave disservice to the principle of an independent judiciary, and, more significantly, mislead the public as to the role of judges in a constitutional democracy.").

339. *See, e.g.*, Gilbert Merritt, *Judge-Bashing Only Undermines Public Confidence in Judiciary*, NASHVILLE BANNER, July 3, 1996, at A11 (Chief Judge of the United States Court of Appeals for the Sixth Circuit); Louis H. Pollak, *Criticizing Judges*, Address Delivered at *University of Pennsylvania Law Review* Banquet (April 12, 1996) (United States District Judge, Eastern District of Pennsylvania).

340. William Rehnquist, Remarks at Washington College of Law Centennial Celebration Plenary Academic Panel: The Future of the Federal Courts (April 9, 1996).

341. Pollak, *supra* note 339, at 11-12.

342. Rehnquist, *supra* note 340, at 17 (emphasis added).

343. Paul Richter, *Clinton Defends His Criticism of Judge*, L.A. TIMES, Apr. 3, 1996, at 13.

344. Senator Bob Dole, Address at American Society of Newspaper Editors (April 19, 1996) (transcript available from Federal News Service).

345. *See Jurist, Heal Thyself*, WALL ST. J., Apr. 3, 1996, at A14.

In defending judicial independence some judges recognized the validity—even the virtue—of criticism of judges. Chief Judge Merritt of the United States Court of Appeals for the Sixth Circuit, explained that "[u]p to a point, strong public criticism of judges is healthy."[346] Rehnquist proffered that the principle that judges' rulings would not be the basis for their removal from the bench—a lesson emanating from the Senate's decision during 1805 impeachment proceedings not to convict Associate Justice Samuel Chase—"obviously does not mean that federal judges should not be criticized for the decisions which they make."[347]

My advocacy of diffuse interpretive responsibility, which recast account judicial supremacy requires, would suggest I disagree with the most extreme view that judges should not be criticized by nonjudicial officers of the federal government. I do. Yet I also readily agree that judge-bashing, described by Merritt as "public criticism that is often unthinking and intemperate, sometimes apoplectic,"[348] is unwelcome and unhelpful but not atypical. No account of diffuse interpretive responsibility, be it departmentalism or a view of judicial supremacy like my own, should ever be used to justify underinformed, politically expedient criticism of judges.

The unsatisfactory nature of recent exchanges about judicial independence was clearly evidenced by events related to Judge H. Lee Sarokin of the United States Court of Appeals for the Third Circuit. After a lengthy tenure on the United States District Court for the District of New Jersey, President Clinton appointed Sarokin to the Third Circuit in 1994. Sarokin became a favorite target of Republicans, who took issue with a number of his rulings, including his declaration that a municipal library's policy barring a homeless person violated the First Amendment,[349] and his release from prison of former boxer Ruben "Hurricane" Carter upon determining Carter's constitutional rights had been violated during his murder trial.[350]

346. Merritt, *supra* note 339; *see also Second Circuit Judges Criticize, supra* note 338, at 4 (Second Circuit judges noting that "[w]e have no quarrel with criticism of any decision of any judge. Informed comment and disagreement from lawyers, academicians, and public officials have been hallmarks of the American legal tradition. But there is an important line between legitimate criticism of a decision and illegitimate attack on a judge.").

347. Rehnquist, *supra* note 340, at 15.

348. Merritt, *supra* note 339.

349. *See* Kreimer v. Bureau of Police, 765 F. Supp. 181 (D.N.J. 1991), *rev'd*, 958 F.2d 1242 (3d Cir. 1992).

350. *See* Carter v. Rafferty, 621 F. Supp. 533 (D.N.J. 1985), *aff'd in part, dismissed in part*, 826 F.2d 1299 (3d Cir. 1987).

Like Baer, Sarokin became the object of Bob Dole's scrutiny. In numerous speeches Dole criticized Sarokin by name, suggested he was unfit to sit on the federal bench, and placed him in his "judicial hall of shame."[351] Among Dole's charges was the assertion that Sarokin "twists the Constitution to impose his liberal views of social policy."[352]

The attacks on Sarokin by Dole and others apparently took their toll. In a June 4, 1996 letter, Sarokin notified President Clinton he would leave the bench effective July 31, 1996.[353] Alluding to advertisements run in 1988 against Presidential Candidate Michael Dukakis, Sarokin complained that some sought to "'Willie Hortonize' the federal judiciary," making him a "prime target[ ]."[354] In a letter marked with both anger and disbelief, he wrote: "It is ironic that I do not stand charged with misconduct, but rather with protecting the constitutional rights of persons accused of crimes—a somewhat astonishing accusation to be leveled against a federal judge."[355] Moreover, Sarokin observed that "[t]he current tactics will affect the independence of the judiciary and the public's confidence in it, without which it cannot survive."[356]

Sarokin also wrote in his letter to the President:

> So long as I was the focus of criticism for my own opinions, I was designed to take the abuse no matter how unfair or untrue, but the first moment I considered whether or how an opinion I was preparing would be used was the moment I decided that I could no longer serve as a federal judge.[357]

Because Sarokin concluded criticisms of him had affected his work, he decided to retire.

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351. Dole, *supra* note 344.

352. *Id.*

353. As a technical matter, Sarokin "retired" rather than resigned from the bench. Sarokin's decision to retire followed soon after the Third Circuit denied his request to move his chambers to California when he became a senior judge, which was to take place during the Fall of 1996. Some speculated his resignation was prompted more by the refusal of his request than his stated concerns about the politicization of his work on the bench. *See, e.g*, Lisa Brennan, *California Dreamin'*, N.J. L.J., June 10, 1996, at 6; Thomas L. Jipping, *The End of a Dream—Or the Beginning of a Cushy Pension?*, WASH. TIMES, June 6, 1996, at A17 (Op-Ed). Sarokin strongly denied this in a letter to his colleagues on the Third Circuit. *See* Letter from H. Lee Sarokin to Third Circuit Judicial Colleagues (June 10, 1996), *in* N.J. LAWYER, June 1996, at 19. I was a law clerk on the Third Circuit at the time of Sarokin's resignation and, based on my knowledge and experiences, I have no reason to believe Sarokin's reasons were other than those expressed in his letters.

354. Letter from H. Lee Sarokin to President Clinton (June 4, 1996), *in* N.J. L.J., June 10, 1996, at 27.

355. *Id.*

356. *Id.*

357. *Id.*

Like others, I question the efficacy of Sarokin's resignation as an effort to depoliticize judging.[358] But I have little doubt that increased hostility toward federal judges of the sort directed toward Baer and Sarokin disserves efforts to promote a diffusion of interpretive responsibility.[359] One might observe optimistically that judges and their critics have stumbled onto some common ground by admitting that judges should not be immune from criticism but recognizing that judges should not be intimidated to the point their independent judgment is impaired. Yet this commonground is muddled. For instance, up to what point is public criticism healthy? When, or under what conditions, is the criticism legitimate? The recent furor did nothing to answer these truly hard questions.

Directing attention to the issues raised in this Article would foster the development of answers to these questions. Careful consideration of the normative and descriptive dimensions of the "who interprets" problem would have imposed structure upon, and improved the quality of, recent debates over judicial independence and criticism of judges. It would also—perhaps most usefully—allow citizens to differentiate more easily between principled criticisms and politically expedient ones.[360]

Indeed, consideration about who interprets would facilitate constructive deliberation about scores of substantive issues. Discussion of how the who interprets query relates to the Line Item Veto, the Defense of Marriage Act, and the politics of "judge-bashing" should have made evident that the descriptive and normative dimensions of nonjudicial interpretation of the Constitution are central to the conduct of responsible and productive public discourse.

358. *See Judge Sarokin's Retreat,* N.Y. TIMES, June 7, 1996, at A30 (contending that, in leaving, Sarokin "has given politicians fresh incentive to target judges in the hope they can bully them into resigning or fashioning decisions to avoid political censure").

359. A further danger posed by such rampant and unprincipled criticism is that it undermines the legitimacy of the judiciary. *Cf. supra* Part II.B.2; Merritt, *supra* note 339 ("The independence of the judiciary is fragile and rests in large measure upon the continued confidence of the public.").

360. Confirmation battles over nominees to the federal judiciary have received considerable attention in recent years. Several books and articles have discussed the appropriate role of the political branches in the confirmation process, and the bearing of the process on judicial independence. *See, e.g.*, STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENT PROCESS (1994); Michael J. Gerhardt, *The Confirmation Mystery*, 83 GEO. L.J. 395 (1994) (review of Carter's book); Michael Stokes Paulsen, *Straightening Out* The Confirmation Mess, 105 YALE L.J. 549 (1995) (same).

C. Proposition 187 and Some Tough Questions for Nonjudicial Interpreters

Part III of this Article advanced a recast account of judicial supremacy, and described the normative appeal of diffuse interpretive responsibility. The first subpart of Part IV suggested the value of a more active interpretive role for Congress. Yet these discussions leave significant dimensions of the practice of diffuse interpretive responsibility unsettled.

Some of the critical questions related to the ideal of interpretive diffusion were raised in the case of California's Proposition 187,[361] the ballot initiative of November 1994 concerning immigration and public benefits for noncitizens in a variety of contexts. Leaving aside both general arguments about the virtues of ballot initiatives[362] and court decisions evaluating the legality of Proposition 187,[363] the circumstances surrounding this much debated policy provide occasion for identifying problems related to determining the specific interpretive roles for state officials and citizens actors. These problems are also important for, and relevant to, efforts by the executive and Congress to ascertain how they should contribute to the interpretive process.

I mention—without addressing in detail—three interrelated themes which arose in the context of Proposition 187: (1) discerning the scope or reach of a judicial opinion; (2) determining whether, and when, forms of nonacquiescence with judicial opinions are permissible; and (3) evaluating when court judgments are "ripe" for consideration.

Since Proposition 187 was a popular referendum, the voters of California were placed in the position of citizen-legislators.[364] What regard, if any, should they have given to previous Court judgments in deciding how to act themselves? Many opponents of Proposition 187, and even some of its supporters, contended there are elements of it

361. *See* Tony Miller, Acting Secretary of State, Proposition 187, *in* CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION, November 8, 1994, at 50-55, 91-92 (1994).

362. *See* David B. Magleby, *Governing by Initiative: Let the Voters Decide?*, 66 U. COLO. L. REV. 13 (1995) (a general assessment of this method of deliberation and lawmaking).

363. *See* United States v. de Cruz, 82 F.3d 856 (9th Cir. 1996); Gregorio T. By and Through Jose T. v. Wilson, 59 F.3d 1002 (9th Cir. 1995); League of United Latin American Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995); Wilson v. City of San Jose, 1995 WL 241452 (N.D. Cal. Apr. 14, 1995).

364. Citizens, of course, do not take an oath to uphold or affirm the Constitution. Should this make any difference in assessing the character of their actions when placed in the role of legislators?

which conflict with the Supreme Court's decision in *Plyler v. Doe*.[365] This raises questions about the scope of a judicial decision's authority. *Plyler* and Proposition 187 may provide a relatively clear case of the applicability of a prior Court holding to a subsequent fact pattern. But as a general matter, the scope of judicial decisions is hardly self-evident. And the problem of line-drawing is made more difficult when one considers claims that court judgments apply only to the parties to a case and no one else.[366] If this were so, *Plyler* would have no bearing on a nonjudicial judgment about whether or not to adopt Proposition 187.

A second issue concerns the right of nonparties to refuse to adhere to interpretations of law reflected in judicial opinions.[367] If it were clear, and accepted, that a particular court holding applied in a given circumstance, could that decision nonetheless be disregarded? Can those who admit *Plyler*'s applicability elect to disobey its precepts?

Finally, there is the problem of ascertaining when a judicial decision is ripe for reconsideration. Are judgments "fair game" as soon as they are rendered? For those who reject judicial supremacy, and maintain that a court's decision applies only to the parties to a case, surely a holding—let alone a "principle"—is ripe for immediate reconsideration.[368] Furthermore, a legislator (or a citizen empowered to legislate) might decide to ignore any court judgments on the ground that any law supposedly in tension with a court decision is merely an invitation to courts to reconsider that previous decision.[369] Is either of these views compelling?

Recast judicial supremacy supplies some resolute answers, and some less definite answers, to these three problems which are central to any nonjudicial interpretive deliberation. Judicial supremacy un-

365. 457 U.S. 202 (1982) (finding unconstitutional Texas's allowance of denial of public education to illegal alien children).

366. *Cf. supra* note 65.

367. *See* Paul L. Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041 (1987); FISHER, CONSTITUTIONAL DIALOGUES, *supra* note 161, at 221-30 (discussing executive and legislative noncompliance with judicial judgments).

368. *See* Tribe, AMERICAN CONSTITUTIONAL LAW, *supra* note 30, § 3-3, at 26-32 (on the normative breadth of a judgment of unconstitutionality).

369. *See, e.g., Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary, reprinted in* Brest, *supra* note 282, at 77 (testimony of John Noonan, explaining: "A decision of the Supreme Court interpreting the Constitution is neither infallible nor eternal nor unchangeable . . . . The proposed Act [overruling *Roe v. Wade*] is an invitation for the Court to correct itself."). Easterbrook offers a similar conception, stating legislators "may vote for a bill that the Court has held unconstitutional, in order to prompt change." Easterbrook, *supra* note 63, at 911.

questionably presupposes that judicial opinions and interpretations extend beyond the parties to the case of decision. How broadly is unclear; yet it simply cannot be correct that judicial opinions are only for other judges to use in deciding future cases, rather than for citizens and government officials to use in deciding how to act.[370]

As for nonacquiescence, recast judicial supremacy involves encouraging other branches to engage in interpretation. But it requires widespread acceptance of the idea that courts decide meaning and when a court has spoken on an issue its views warrant adherence. The more specific a court's view, and the more relevant a view is to a particular circumstance, the less uncertainty there should be about what fidelity to that court's judgment mandates. Outright noncompliance, however, is always inconsistent with judicial supremacy of any form.

With regard to ripeness, it might appear that the use of defiance of prior court decisions to invite their reconsideration actually affirms judicial supremacy by conceding the judiciary's authority to settle a matter finally. In actuality, what such an approach does is strip opinions of any lasting meaning, and in so doing renders judicial supremacy itself meaningless—converting it to a weak form of judicial review.

Less clear is how nonjudicial interpreters should ascertain what judicial judgments prescribe and proscribe, and how broadly judicial opinions are to be applied. Also far from definite is how to distinguish noncompliance from appropriate efforts to seek reconsideration. What conceptions and principles should, and will, guide the development of answers to these dilemmas?

My sense is that the only principles which should inform the perspectives of nonjudicial actors about these matters are those which constitute the fabric of the recast judicial supremacy. This form of judicial supremacy derives its strength from the tension arising from, and the interactivity engendered by, simultaneously embracing judicial authoritativeness while recognizing that authoritativeness is tempered and constrained by intellectual and institutional interdependence among the branches of the government, and with "the people." Aside from the clear requirements just outlined above, evaluations about scope, nonacquiescence and ripeness should be in-

370. *Cf.* Louis H. Pollak, *The Republic for Which It Stands*, 24 LAND & WATER L. REV. 565 (1989) (discussing deference owed by state governor to a decision of the U.S. Supreme Court in deciding whether to veto legislation). *But cf.* Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993) (suggesting judicial opinions ought to be regarded as explanations for judgments, and that they do not impose direct obligation of obedience).

formed by perceptions and commitments which recast judicial supremacy begets. Assessment by nonjudicial actors about these problems will be shaped and restrained by the same forces which operate on the judiciary and render its "final" judgments neither insular nor truly final.

V. Concluding Thoughts

This Article has advanced an account of judicial supremacy which both aptly describes our existing interpretive regime and fosters an enriched interpretive scheme. There are dynamics already in place which prevent judicial interpretation from being insular and which render "final" interpretations less than truly final. We should utilize these dynamics to encourage nonjudicial interpretation, while retaining the precept that courts have the final say about constitutional meaning. For the reasons set forth here, this recast account of judicial supremacy is uniquely well suited to serve a range of needs of our political and legal cultures.

I am under no illusion that the claims advanced here will persuade everyone. I do hope, however, that I have convinced readers of the importance of the question regarding who interprets the Constitution. Not only are the query and attendant issues of great practical significance and theoretical interest, but they are central to developing a rich understanding of ourselves, "the people."

With this project I have attempted to confront the challenges presented by critics of judicial supremacy, and build on their insights, without foregoing the virtues afforded by a reconceived understanding of the interpretive process. I have also argued for the necessity of a diffusion of interpretive responsibility, while conceding that hard questions remain and will challenge efforts to effectuate a truly meaningful diffuse interpretive process. Without serious and sustained input from sources outside the judiciary, judicial supremacy remains susceptible to the potent attacks of its critics. More importantly, however, without such a diffusion, our constitutional discourse is weakened and the legitimacy of the courts threatened.

Moreover, I have not only embraced recast judicial supremacy as a normatively compelling conception of constitutional interpretation, but also maintained it provides an apt, albeit imperfect, description of our existing legal order. Many of the dimensions of judicial abstinence from interpretation result from voluntary allocations of interpretive responsibility. The extent to which nonjudicial actors presently take seriously their potential roles as interpretive agents,

however, is minimal. In this regard, current interpretive dynamics are deficient. Indeed, the model of judicial supremacy I have detailed is nascent—it appropriately describes elements of contemporary interpretive processes, yet its normative objectives have not yet been realized fully.

Before concluding, one more point warrants attention. It involves a limitation of any comprehensive account of constitutional interpretation. In my view, the dynamism and interdependence which characterize the interpretive process reflect the fact that law is, at its core, a form of "politics." By this I do not refer to politics in the pejorative sense, as many commentators use the term in exploring the relationship of law and politics.[371] Rather, in the broadest sense, the subject of politics is the fundamental choices a polity makes about how to order social life.[372]

Constitutional law will always be subordinate to, although it surely influences, the underlying dynamics which shape our commitments and sensibilities. Insofar as constitutional debate implicates underlying values and concerns, interpretive processes will be informed, and perhaps propelled, by them. While Tocqueville's observation that "[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one"[373] may be of enduring poignancy, it surely is not the case that the Constitution is the exhaustive embodiment of our ideals. Both constitutional and extra-constitutional values together serve as an engine for interbranch exchange under judicial supremacy, and guard against static interpretation or judicial hegemony.

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371. *See, e.g.*, BORK, *supra* note 18, at 348-49; *cf.* DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 110-47 (1989) (discussing three versions of the law/politics distinction); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS 202-04 (1994) (arguing constitutional adjudication is both law and politics); TUSHNET, *supra* note 18; Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233 (1989).

372. For an instructive treatment and short history of the view that law is a form of politics, see Martin Shapiro, *Morality and the Politics of Judging*, 63 TUL. L. REV. 1555, 1555-59 (1989). Shapiro appropriately scolds his colleagues for their facile use of the term, and harks back to more comprehensive notions of what "politics" is about. "Politics . . . is the pursuit of virtue, the attempt to achieve the good person in the good state. Law being an instrument and a product of this pursuit, is indeed a subspecies of politics." *Id.* at 1558. One need not embrace Shapiro's allusions to an Aristotelian vision of the "good" to recognize that his comments about law also include the Constitution. Constitutional struggles do not exhaust the scope of pursuits of our most fundamental aspirations, or circumscribe the clashes which accompany them.

373. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (J.P. Mayer ed., George Lawrence trans., 13th ed. 1969) (1850).

Speaking of the limits of constitutional adjudication and forms of argument, Philip Bobbitt professes that "[w]e are incapable of making something that will obviate (rather than suppress) the requirement for moral decision."[374] While reserving judgment about his conception of the relationship between law and moral choices, I am persuaded Bobbitt has aptly captured the notion that law, or the Constitution, is not the end of the line among the layers of conflict and challenges which characterize social life.[375]

Law's unsettled character may likewise suggest that constitutional interpretation is a form of politics in the grandest sense. Precise answers to some questions are largely unattainable. We cannot hope to develop perfectly full and clear answers about how to proceed. Notwithstanding this inevitable indeterminacy and the difficulty in ascertaining clear boundaries and easily applied principles, under recast judicial supremacy actors' roles are clarified, self-reflection is enhanced, and consciousness about constitutional meaning is raised. Fully realized, recast judicial supremacy promotes virtues and instills values which render it the most appropriate interpretive scheme for our polity and our constitutional order.

374. BOBBITT, *supra* note 18.

375. Some have advanced the idea that the norms and practices developed or endorsed for living well under our constitutional order may be displaced in times of crisis. An argument can be made that constitutional rules and principles are circumscribed by other considerations in extraordinary times. *See, e.g.*, Rosenfeld, *supra* note 168, at 147 (positing that the ordinary constitutional scheme might call for "judicial supremacy with respect to the judgments of courts" while such a convention might be inappropriate "under those highly unusual circumstances where acquiescence in court judgments would create or exacerbate a potentially destructive constitutional crisis"). Commentators often point to Lincoln's refusal to abide by the Court's judgment in *Ex parte Merryman* as a leading example of justified nonacquiescence. Leaving aside the problem of how to identify these times, or of resolving disagreement about whether a given occasion amounts to such a crisis, contemplating such a possibility further suggests that in a fundamental sense the Constitution is embedded in an overarching set of political and social challenges.