

Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age

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We live in a time of anxiety about the rule of law. In railing against individual judges and their decisions, angry protesters—including elected officials and the President—presume a knowledge of what the Constitution requires, judicial pronouncements to the contrary notwithstanding. Recent bluster raises a question about what would occur if the President ordered government officials to defy a judicial ruling. The idea that the Supreme Court has ultimate authority in matters of constitutional interpretation—which often rides under the heading of “judicial supremacy”—has acquired strong currency. In the history of American political ideas, it has substantially eclipsed “departmentalist” theories, which hold that each branch of government should interpret the Constitution for itself, and an allied notion of “popular constitutionalism.” In the view of many, the rule of law requires judicial supremacy.

This Article probes the concepts of judicial supremacy, departmentalism, popular constitutionalism, and the rule of law, all of which possess relatively timeless importance. In doing so, it sheds light on issues of immediate practical urgency. The truth, terrifyingly enough under current circumstances, is that our system is not, never has been, and probably never could be one of pure judicial supremacy. In principle, moreover, a regime in which judicial review operates within “politically constructed bounds”—and judicial rulings on constitutional issues are at risk of occasional defiance—is entirely compatible with rule-of-law ideals.

In our current political context, there is abundant ground for anxiety about the future of rule-of-law constitutionalism. But judicial supremacy is not the answer to any significant legal, constitutional, or political problem. An adequate response will require repair of the ethical commitments—among elected officials and the public, as well as the Judicial Branch—that the rule of law requires.

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We live in a time of anxiety about the future of the rule of law, not only in the world, but in the United States.¹ Legal commentators and political theorists often define the rule of law in distinction from “the rule of men” and women.² Today, however, angry men and women protest loudly against the institutions—themselves populated by men and women—that we have long trusted as embodiments of the rule of law in the United States. To cite just one salient example, the President has attacked individual judges and expressed more general distrust of the Judicial Branch.³ So far, the assaults have remained verbal. But when the President and others rail against judges, they presume a knowledge of what the Constitution and laws of the United States require, judicial pronouncements to the contrary notwithstanding. Recent bluster raises a question about what would occur if the President, claiming more insight into the Constitution than the courts, ordered government officials to defy a judicial ruling. In the case of such a confrontation between the Executive and Judicial Branches, could, would, and should the courts speak the last, authoritative word?

The idea that the Supreme Court has ultimate authority in matters of constitutional interpretation—which often rides under the heading of “judicial supremacy”—has acquired strong currency.⁴ A related view holds that the much celebrated ideal of the rule of law requires judicial supremacy. Perhaps not surprisingly, the Court has promoted judicial supremacy and

1. See, e.g., David Leonhardt, *The Lawless Presidency*, N.Y. TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/opinion/the-lawless-presidency.html?mcubz=0> [<https://perma.cc/Y54A-6XQ9>].

2. See, e.g., Philip Selznick, *Legal Cultures and the Rule of Law*, in *THE RULE OF LAW AFTER COMMUNISM: PROBLEMS AND PROSPECTS IN EAST-CENTRAL EUROPE* 21, 21–22 (Martin Krygier & Adam Czarnota eds., 1999); Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, 2012 SINGAPORE J. LEGAL STUD. 232, 243–46.

3. Kristine Phillips, *All the Times Trump Personally Attacked Judges—and Why His Tirades Are ‘Worse Than Wrong’*, WASH. POST (Apr. 26, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/04/26/all-the-times-trump-personally-attacked-judges-and-why-his-tirades-are-worse-than-wrong/?utm_term=.056b662c211c [<https://perma.cc/NFU3-MZLB>].

4. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 125 (2004) (equating judicial supremacy with the position “that judges have the last word when it comes to constitutional interpretation and that their decisions determine the meaning of the Constitution for everyone”); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 3–4 (2007) (characterizing doctrine that the Legislative and Executive Branches must accept judicial interpretations of the Constitution as “judicial supremacy”). For a prominent defense of the idea that officials are bound by judicial interpretations of the Constitution even when they disagree with those interpretations, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) [hereinafter Alexander & Schauer, *Extrajudicial Interpretation*]; see also Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000) [hereinafter Alexander & Schauer, *Defending Judicial Supremacy*] (responding to criticism of the idea that other officials must adhere to the Supreme Court’s constitutional rulings).

associated it with the rule of law. For example, *Cooper v. Aaron*⁵ declared it to be a “basic principle” of our constitutional order “that the federal judiciary is supreme in the exposition of the law of the Constitution.”⁶ It follows, the Court said in *Cooper*, that its interpretations of the Constitution are “the supreme law of the land,” binding on other officials who have taken oaths to uphold the Constitution.⁷ The Court has also associated judicial supremacy with the requirements of the rule of law in a number of other decisions, including *United States v. Nixon*,⁸ which held that a court could compel the President to surrender tapes of Oval Office conversations,⁹ and *Planned Parenthood v. Casey*,¹⁰ which involved abortion rights.¹¹

Historically, however, claims of judicial supremacy have provoked contestation. During the early years of U.S. history, it was widely believed that each branch or department of government should interpret the Constitution for itself, without any branch’s interpretation necessarily binding the others.¹² Thomas Jefferson held this position, called departmentalism, for all of his life.¹³ So did James Madison.¹⁴ In a book published in 2004, Larry Kramer described departmentalism as operating in service of a broader theory of popular constitutionalism, which holds that the ultimate authority in constitutional interpretation resides in “the people themselves.”¹⁵ That idea merits careful reconsideration in what increasingly appears to be a populist age, characterized by widespread beliefs that

5. 358 U.S. 1 (1958).

6. *Id.* at 18.

7. *Id.*

8. 418 U.S. 683 (1974).

9. *Id.* at 703–14.

10. 505 U.S. 833 (1992).

11. *Id.* at 868.

12. See KRAMER, *supra* note 4, at 105–10, 135–36 (quoting early prominent advocates of departmentalism and explaining the political and cultural assumptions that made departmentalism attractive to them).

13. See *id.* at 106 (quoting Jefferson’s observation that “[e]ach of the three departments has equally the right to decide for itself what is its duty under the constitution, without regard to what the others may have decided for themselves under a similar question”); *id.* at 171 (“Jefferson [related] for the umpteenth time[] his well-known views on the independence and equality of the three branches when it came to constitutional interpretation.”).

14. See *id.* at 106 (“But, I beg to know, upon what principle it can be contended that any one department draws from the constitution greater powers than another, in marking out the limits of the powers of the several departments.”); *id.* at 145–47, 186–87 (describing Madison’s departmentalist views in two letters he wrote).

15. See *id.* at 201 (describing a view of departmentalism as “grounded in” popular constitutionalism); see also Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 222 (1994) (defending an independent presidential power of constitutional interpretation as a “consequence of a broader theory . . . that liberty is best preserved where governmental power is diffused”).

ordinary people should mobilize politically and reject the dominance of privileged elites.¹⁶

Popular constitutionalism is an elusive concept—a trait that it shares with “judicial supremacy” and also with “departmentalism.” In perhaps the most precise definition in his book, Kramer characterizes popular constitutionalism as a framework within which the people of a polity assume “active and ongoing control over the interpretation and enforcement of constitutional law.”¹⁷ In order for the people to achieve such control, eighteenth- and nineteenth-century popular constitutionalists welcomed disagreement among the branches of government about constitutional matters—and thus embraced departmentalism—based on the assumption that disputes would provoke public debate and that public debate would lead to the ultimate resolution of constitutional issues through constitutional politics.¹⁸ Presidents whose positions the public rejected might be voted out of office or even impeached. Judges and Justices whom the public believed to have erred would deservedly risk having their rulings skirted or ignored by presidents and Congress. Additional levers for reproaching a wayward judiciary included jurisdiction-stripping, Court-packing, and impeachment.¹⁹

The concepts of judicial supremacy, departmentalism, and popular constitutionalism possess an enduring relevance in efforts to understand the distribution of power under the Constitution of the United States. The contemporary political climate makes such efforts urgently timely. My principal focus in this Article involves relatively timeless issues. My aim is to provide a perspective on actual and very imaginably looming crises.

At the present moment, departmentalism not only strikes many of us as terrifying, but also contravenes intuitions about the requirements of the rule of law. Riveted by precedents such as the *Nixon Tapes Case*²⁰—in which Richard Nixon’s lawyer initially equivocated about whether the President would accept a Supreme Court order to turn over Oval Office recordings of direct relevance to criminal investigations²¹—we may rush to the conclusion

16. The American Heritage Dictionary defines *populism* as “[a] political philosophy supporting the rights and power of the people in their struggle against the privileged elite” and *populist* as meaning “[a] supporter of the rights and power of the people.” *Populism*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016); *Populist*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016).

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

18. Cf. Paulsen, *supra* note 15, at 222 (“The result of this interpretive tug-of-war is a decentralized and dynamic model of constitutional interpretation.”).

19. See KRAMER, *supra* note 4, at 249.

20. 418 U.S. 683 (1974).

21. See Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 4, at 1364–65.

that, in the Court's phrase, "our historic commitment to the rule of law"²² requires some form of judicial supremacy.²³ At the very least, we may think, the rule of law requires presidential acquiescence to the principle of judicial finality, which holds that a judicial decision conclusively resolves the dispute between the parties to a case, even if one is the President.²⁴

The truth, I reluctantly conclude, is much more complicated.²⁵ Our system is not, never has been, and probably never could be one of pure judicial supremacy.²⁶ Presidents have defied or credibly threatened to defy judicial rulings in the past. Presidents may do likewise in the future. Moreover, it would be a mistake to say categorically that such presidential conduct is inherently unconstitutional or necessarily incompatible with the ideal of the rule of law. There are many roughly equivalent ways in which we could describe the distribution of authority for constitutional interpretation within the United States. Among them, we might say that we have a mixture of judicial supremacist, departmentalist, and popular constitutionalist elements.²⁷ Judicial rulings normally are recognized as possessing binding force, certainly as between the parties and typically beyond, but subject to departmentalist and popular constitutionalist

22. *Nixon Tapes Case*, 418 U.S. at 708.

23. See, e.g., Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1029 (2004) ("[S]ome forms of judicial finality are essential to the rule of law."); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1313–14 (1996) ("With the notable exception of Professor Michael Stokes Paulsen, every modern departmentalist scholar has maintained that the President has an obligation to enforce specific judgments rendered by federal courts, even when the President believes that the judgments rest on erroneous constitutional reasoning.").

24. See, e.g., Rebecca L. Brown, *Judicial Supremacy and Taking Conflicting Rights Seriously*, 58 WM. & MARY L. REV. 1433, 1435 (2017) (defining judicial supremacy as entailing that "[i]f the other branch is a party to a case, then the court's interpretation of the Constitution will necessarily prevail over that of any other branch of government"); Lawson & Moore, *supra* note 23, at 1313–14; Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46 (1993) ("[T]here is widespread agreement that the executive has a legal duty to enforce valid final judgments rendered by courts, regardless of whether the executive agrees with the legal analysis that forms the basis for the judgment.").

25. The views that I express in this Article diverge from the more nearly judicial supremacist position I took in 2007. See Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1 (2007).

26. To save the term's descriptive accuracy would require an amendment of assertions of supremacy to ones of what Professor Lain calls "soft supremacy." See Corinna Barrett Lain, *Soft Supremacy*, 58 WM. & MARY L. REV. 1609, 1611 (2017); see also Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2599 (2003) ("[O]ur system is one of popular constitutionalism, in that judicial interpretations of the Constitution reflect popular will over time.").

27. See Lain, *supra* note 26, at 1612–13 (hinting that departmentalism and popular constitutionalism are perhaps inherent in the federal system of soft supremacy); Post & Siegel, *supra* note 23, at 1029 ("[W]e do not understand judicial supremacy and popular constitutionalism to be mutually exclusive systems of constitutional ordering They are in fact dialectically interconnected and have long coexisted.").

limitations and influences. But if we can get beyond an either-or choice between judicial supremacy and departmentalism, it would be most accurate to say (as some political scientists have said) that judicial review in the United States operates within “politically constructed bounds.”²⁸ When the courts speak, they normally speak authoritatively. But that is because courts normally speak only about matters, and in ways, that it is politically acceptable for them to speak about at particular times.²⁹

This insight helps bring into focus what many of us find so troubling in a political climate that has witnessed the election of Donald Trump as president of the United States. In a constitutional crisis involving a President who denied the entitlement of the Judicial Branch to say authoritatively what the Constitution means or requires in a particular case, we could not expect courts and a judge-based conception of the rule of law to save us. Congress and members of the President’s Administration would need to decide how to respond. Public reaction would likely prove crucial. And if we ask how the ideal of the rule of law would bear on developments, matters are once again more complicated than we might reflexively think or wish. In principle, a regime in which judicial review operates within politically constructed bounds is entirely compatible with rule-of-law ideals. So, in principle, are departmentalism and popular constitutionalism. Those who recoil in horror from the prospect of a populist President’s invoking departmentalist principles should not lose sight of the larger picture.

In our current political context—in which debates about issues of constitutional significance are routinely polarized, alienated, partisan, angry, and hypocritical—there is abundant ground for anxiety about the future of rule-of-law constitutionalism in the United States. But the problem is not with departmentalism or with our institutions—which make it inevitable that judicial review will function within politically constructed bounds and that constitutional law and constitutional politics will be indissolubly interconnected. The problem, rather, is with “ourselves.”

I put that tritely formulated diagnosis³⁰ in scare quotes because if we have any hope of making progress from our present predicament, the path needs to begin with an exercise in disaggregation: who, exactly, are the “we” who have a problem and who are the “ourselves” who are the source of it? The rule of law requires a network of ethical commitments that transcend the

28. See *infra* notes 97–115 and accompanying text.

29. See LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 244 (1988) (“Judicial decisions rest undisturbed only to the extent that Congress, the President, and the general public find the decisions convincing, reasonable, and acceptable. Otherwise, the debate on constitutional principles will continue.”).

30. See WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2 (“The fault, dear Brutus, is not in our stars, But in ourselves . . .”).

boundary between constitutional politics and constitutional law. The most urgent challenge to those who care about American constitutionalism and the rule of law today is to find ways to rehabilitate the ethical commitments that our political and judicial institutions need in order to operate successfully. We should disabuse ourselves of the notion that judicial supremacy is the answer to any important legal, empirical, or practical question.

The Article's argument comes in four main parts. Part I closely examines the concepts of judicial supremacy, departmentalism, and popular constitutionalism. It concludes that our present regime mixes weak or diluted judicial-supremacist, departmentalist, and popular-constitutionalist elements. It also elaborates the thesis that judicial review under the U.S. Constitution inevitably operates within politically constructed bounds. Finally, Part I highlights the possibilities for congressional and especially presidential resistance to claims of ultimate judicial authority in constitutional matters.

Part II explores the ideal of the rule of law and its potential application to American constitutional law—pursuant to the assumption, which Part III later drops, that predominant numbers of nonjudicial officials and the voting public seek to adhere to constitutional norms as they conscientiously understand those norms. Part II argues that the rule of law demands that judges, as much as Congress and the President, should inhabit networks of accountability for fidelity to law. In principle, Part II concludes, departmentalism and popular constitutionalism are not antithetical to the rule of law. To the contrary, they are potential mechanisms for holding courts accountable for their fidelity to law.

Part III considers the relative normative attractiveness of a robust version of departmentalism, of enhanced judicial supremacy, and of our current system's mixture of judicial-supremacist and popular-constitutionalist elements under circumstances in which predominant numbers of nonjudicial officials and the voting public are not "ruled by law" in the way that rule-of-law ideals would require. Part III rejects arguments for strengthening either our system's current popular-constitutionalist or its judicial-supremacist aspects. But Part III also refutes suggestions that current institutional arrangements can be relied on to function as relatively well in the future as they have in the past. Rather, Part III argues, the approximation of rule-of-law ideals requires an ethos of overlapping constitutional, political, and cultural norms. Where such an ethos fails to exist, no institutional structure can ensure governmental, judicial, or public adherence to rule-of-law ideals.

Part IV frames the resulting challenges for those who care about the future of American constitutionalism. It calls for a partial reconceptualization of the relationship between constitutional law and constitutional politics. Part IV also offers suggestions for ways in which various constitutional

actors, including individual citizens, might work to nurture a rule-of-law ethos.

I. The Politically Constructed Bounds of Judicial Power

My overarching aim in this Part is to establish that judicial power to interpret the Constitution authoritatively exists within politically constructed bounds. In other words, the Supreme Court is the decisive arbiter if and insofar, but only if and only insofar, as its decisions are ones that Congress, the President, and ultimately the bulk of the American people will accept as lying within the lawful bounds of judicial authority to render. We can give concreteness to this theoretical claim by imagining two cases:

Case One. The Supreme Court orders the President to desist from enforcing a policy of excluding all Muslims from entering or returning to the United States unless they have undergone a screening process to which non-Muslims are not subjected.

Case Two. The Supreme Court orders the President to invade Iran, purportedly because the President has taken an oath to protect the Constitution and the security of the constitutional regime requires this preemptive action against a national enemy.

In both cases, let us assume, the President defies the Supreme Court's order. In doing so, the President offers the departmentalist argument that each branch must interpret the Constitution for itself. He explains his conclusion that the Court's ruling was beyond the Court's lawful power to issue. Accordingly, he argues, the Court's order was invalid and not binding on him or the Executive Branch more generally.

In *Case One*, I would hope that Congress and the American people would accept the Supreme Court's order as valid and binding. If the President refused to comply, I would hope that the House of Representatives and the Senate—each interpreting the Constitution for itself—would respectively vote for articles of impeachment and remove the President from office. In *Case Two*, I would hope that Congress and the American people would accept the constitutional judgment of the President that the judicial order was *ultra vires* and had no lawful binding authority.

It would be possible to reach and describe these conclusions without reliance on the terms “judicial supremacy” and “departmentalism.” But because so much of the longstanding discussion of judicial power over constitutional interpretation is framed in terms of judicial supremacy, my strategy in this Part is to enter into, and seek to clarify, the existing debate before attempting partly to move beyond it.

A. *Departmentalism and Popular Constitutionalism*

The basic idea of departmentalism is easily stated: each branch interprets the Constitution for itself. As depicted by Larry Kramer in his important book *The People Themselves*, whose historical account I credit despite normative disagreements,³¹ the roots of departmentalism and popular constitutionalism antedated the drafting of written constitutions on the North American continent. The British and the American colonists both spoke about a constitution, and argued about how to interpret it, well before written constitutions emerged.³² Within an intellectual framework that prevailed throughout the British rule of North America, the constitution was a quasi-political network of ideas, conventions, and shared but sometimes disputed norms that stood on a different foundation from other law.³³ Whereas other law mostly addressed citizens or subjects, the British tradition from which American constitutionalism developed regarded the constitution as addressed to and limiting the powers of political officials, including judges.³⁴ It required official accountability, but the form of accountability did not characteristically lie in judicial processes. In the British regime, the judicial review as we know it did not exist.

Against this background, the introduction of written constitutions spawned new questions, including about the powers and prerogatives of the various branches in interpreting and enforcing the Constitution. In the view of many, including Madison and Jefferson, the immanent theory of written constitutionalism required a departmentalist approach:³⁵ All branches were equally empowered and constrained by the Constitution. None enjoyed superiority of status or authority. Each had to interpret the Constitution for itself, as necessary to the discharge of its duties.

A stylized example would involve the Alien and Sedition Acts, which criminalized “false, scandalous, and malicious” criticisms of the President

31. Even those who have taken sharp issue with Kramer’s normative views have generally not challenged his book’s rendition of relevant history. *See, e.g.*, Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1594 (2005) (book review); James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1377, 1389 (2005); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1552 (2005).

32. *See* KRAMER, *supra* note 4, at 9 (describing early Americans and their British counterparts as familiar with the idea of a constitution and as having “well-developed ideas about [its] nature”).

33. *See id.* at 9–15.

34. *See id.* at 29–30.

35. *Cf.* Paulsen, *supra* note 15, at 227 (arguing that an independent power of the President to interpret the Constitution, not bound by judicial pronouncements, “follow[s] logically from . . . the structure the Constitution embodies”); *id.* at 240 (recounting James Wilson’s view that checks on each branch’s constitutional interpretations from the other branches were essential to the mutual dependence necessary for effective federal governing).

and Congress.³⁶ If behaving responsibly, Congress needed to assess the Acts' constitutionality in the course of adopting them, and the President in signing them. The courts then had to appraise the Acts' validity in challenges to criminal prosecutions. Although no challenge ever reached the Supreme Court, the lower courts upheld prosecutions against constitutional objections.³⁷ But even if the Supreme Court had concurred, its ruling would not have bound the President. When a new President adjudged the Alien and Sedition Acts unconstitutional, he could act on his beliefs by terminating pending prosecutions and pardoning all who had been convicted.³⁸ And if we then suppose that a court tried to order the President to continue prosecuting those who violated the Alien and Sedition Acts—for example, on the theory that the President's duty to take care that the laws are faithfully executed required him to do so—the President, under a departmentalist theory, would have no obligation to recede from his prior constitutional judgment about the Constitution's requirements. The Judicial Branch might think him obliged to prosecute offenders, but he could, and should, decide for himself.

As presented by Larry Kramer, the concept of constitutional departmentalism was linked tightly to, and developed in service of, a broader concept and ideal of popular constitutionalism. Popular constitutionalist theory regarded the Constitution as a document written for and capable of interpretation by ordinary people.³⁹ To put the point in terms of a contrast, popular constitutionalists denied that the Constitution was essentially a lawyers' document, to be interpreted through ordinary legal techniques that judges possessed a distinctive capacity to apply.⁴⁰ In interpreting the Constitution, all three branches served as agents of the people. In cases of disagreement among the branches, it was assumed that the people, typically through elections, would resolve constitutional disputes.⁴¹ The resolution would not come directly: the Constitution makes no provision for referenda.

36. On the Acts' enactment and enforcement, see JAMES F. SIMON, *WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES* 50–57 (2002).

37. If the Supreme Court had ruled that the Alien and Sedition Acts violated the First Amendment, all seemed to agree that the Executive Branch could not lawfully impose criminal punishment in the absence of a criminal conviction. See Paulsen, *supra* note 15, at 282–83.

38. Thomas Jefferson so explained: “The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because the power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power has been confided to them by the Constitution.” Thomas Jefferson, *Letter from Thomas Jefferson to Mrs. John Adams* (Sept. 11, 1804), in 11 *THE WRITINGS OF THOMAS JEFFERSON* 49, 50–51 (Albert Ellery Bergh ed., 1907).

39. See KRAMER, *supra* note 4, at 91 (asserting that “the Founders expected constitutional limits to be enforced through politics and by the people”).

40. *Id.*

41. *Id.* at 83–84 (describing popular resistance to abuses of power via “elections, juries, popular outcries, or, in the unlikely event that all these failed, by more violent forms of opposition”).

Neither would it be immediate. Nevertheless, in cases of colliding judgments among the branches, issues involving the correctness and binding character of judicial rulings would make their way into the political arena and receive indirect, even if not direct and immediate, political determination.⁴²

Kramer's historical account of departmentalism and popular constitutionalism incorporates a multitude of surrounding ideas and expectations, including expectations concerning mechanisms besides elections through which "the people" might express their constitutional judgments. These included jury nullification and mob violence⁴³—a terrifying prospect to which I shall return below. But for now, in developing my affirmative thesis, I want to shear departmentalism of as much baggage as possible. Unless the context indicates otherwise, I shall use the term to refer to the theory that each branch of government should interpret the Constitution for itself and that judicial interpretations, once rendered, are subject to reexamination, challenge, and rejection by the President and Congress.

Popular constitutionalism, which I have begun to explicate already, is a harder concept to define than departmentalism. So acknowledging, I shall not aspire to more specification than the term permits. Unless the context indicates otherwise, I shall understand popular constitutionalism as encompassing departmentalism, but also as embracing a view of the Constitution that makes its interpretation by Congress, the President, and even ordinary citizens as appropriate as interpretation by the Judiciary. In a democratic republic, popular-constitutionalist theories postulate, citizens are entitled to demand, and to exercise levers of political and other power to seek to ensure, that the government, including the courts, will construe the Constitution as the citizenry conscientiously believes that it ought to be construed. There are admitted difficulties here about who the people are and about what mechanisms of control, beyond voting in elections, ought to be available to them.⁴⁴ Today, members of the public take to social media, answer pollsters' questions, communicate with members of Congress, and much else. Without delving into specifics, I want to be firm about just one point: In speaking about "the people" in references to popular constitutionalism, I make no collectivist metaphysical assumptions. By "the people," I mean ordinary people who vote in elections and otherwise work to exert political influence in ordinary ways.

42. See, e.g., Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 847 (2002) ("Extrajudicial constitutional interpretation happens all the time.").

43. See *infra* note 230 and accompanying text.

44. See Alexander & Solum, *supra* note 31, at 1606–07.

B. *Judicial Supremacy*

As I have signaled, I believe that our constitutional order includes significant departmentalist elements that refute even moderately robust pretensions of judicial supremacy. But the point is difficult to prove because it is hard to nail down exactly what “judicial supremacy” means. In the face of this obstacle, I proceed by considering three possible definitions, arrayed along a spectrum from strongest, to still relatively strong, to minimalist.

1. *Judicial Supremacy as the Authoritative Fixing of Constitutional Meaning.*—In imagining what a maximally robust form of judicial supremacy would look like, we can begin with a premise advanced by Professors Alexander and Schauer, who maintain that, for reasons involving the benefits of achieving authoritative “settlement” of constitutional issues, “the Supreme Court’s interpretations of the Constitution should be taken by all other officials . . . as having an authoritative status equivalent to the Constitution itself.”⁴⁵ Pressed to logical limits, this definition would imply that presidents and members of the Senate should not try to use their powers of judicial nomination and confirmation to change prevailing Supreme Court interpretations of the Constitution any more than they could permissibly seek to appoint Justices pledged to ignoring or revising the First Amendment.⁴⁶

Obviously, however, no one thinks that we have judicial supremacy of this kind, and almost no one thinks we ought to have it. When it comes to questions of who should be nominated and confirmed to sit on the federal bench, everyone now agrees, or ought to agree, that judicial philosophy—as cashed out in terms of likely positions on controverted issues—matters. Accordingly, the President cannot make nominations nor the Senate confirmation decisions without engaging in independent constitutional interpretation.⁴⁷ In recent years, moreover, Republican presidents and

45. Alexander & Schauer, *Defending Judicial Supremacy*, *supra* note 4, at 455; *see also* Alexander & Solum, *supra* note 31, at 1608 (“[J]udicial supremacy requires that the judicial branch be given final and binding authority to interpret the constitution.”).

46. Alexander and Schauer regard it as a difficult question whether the Supreme Court should be able to overrule its prior decisions at all. *See* Alexander & Schauer, *Defending Judicial Supremacy*, *supra* note 4, at 477 n.62. They ultimately endorse a view under which the Court may overturn only those precedents that are “both erroneous as constitutional interpretations *and*, in the Court’s opinion, unjust or mischievous,” but characterize their conclusion as “less than wholehearted and quite tentative.” *Id.*; *see also* WHITTINGTON, *supra* note 4, at 7 (“Judicial supremacy requires deference by other government officials to the constitutional dictates of the Court, even when other government officials think that the Court is substantively wrong . . . and in circumstances that are not subject to judicial review. Judicial supremacy asserts that the Constitution is what the judges say it is.”).

47. *See, e.g.*, Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1191–92 (2012) (“[E]ven the most dedicated judicial supremacist would not doubt that the president may nominate judges whose views depart from those prevailing on the Supreme Court.”); Post &

senators have made clear that they believe *Roe v. Wade*⁴⁸ to have been wrongly decided, while Democrats have just as unhesitatingly condemned *Citizens United v. Federal Election Commission*.⁴⁹ In reaching these judgments, presidents and senators not only interpret the Constitution for themselves, but seek to alter the course of future judicial decision-making, without accepting that they are bound to treat the Supreme Court's past decisions as being as authoritative as the Constitution's text. In earlier times, Abraham Lincoln sought the overruling of the *Dred Scott*⁵⁰ decision.⁵¹ Franklin Roosevelt and other progressives inveighed against *Lochner v. New York*⁵² and "horse-and-buggy" era interpretations of the Commerce Clause that threatened the New Deal economic agenda.⁵³ In doing so, Roosevelt brought debate about proper constitutional interpretation into the public arena, and he won. Over the course of more than three presidential terms, Roosevelt's appointees—who reflected his extrajudicial constitutional vision—transformed the Supreme Court, overruled many of the precedents to which Roosevelt had objected, and established assumptions that guided constitutional adjudication for the next half-century.⁵⁴ A sequence of nominations by Republican Presidents from Nixon to Trump has also proven highly consequential.⁵⁵

My point in insisting on the obvious here is simply to clarify that almost no one—and maybe no one at all—thinks that nonjudicial officials should not make constitutional judgments, and act on them, even in some contexts in which their judgments diverge from those that courts have made or would make. In other relatively noncontroversial examples, presidential pardons and vetoes based on judgments of unconstitutionality contrary to judicial

Siegel, *supra* note 23, at 1030 ("No plausible version of judicial supremacy would prevent citizens from voting for a President because they believe he will appoint Supreme Court Justices who will express the citizens' own view of the Constitution, even if that view differs from the decided opinions of the Court.").

48. 410 U.S. 113 (1973).

49. 588 U.S. 310 (2010).

50. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

51. See KRAMER, *supra* note 4, at 211–12 (detailing Lincoln's response to *Dred Scott*, including his Administration's refusal to extend enforcement of the decision beyond the parties in the case).

52. 198 U.S. 45 (1905).

53. See KRAMER, *supra* note 4, at 215–17.

54. On Roosevelt's transformative influence, see, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 234–36 (2009); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995); WHITTINGTON, *supra* note 4, at 56–58, 266–71.

55. See, e.g., WHITTINGTON, *supra* note 4, at 274–82 (discussing effects of Reagan nominees, especially in cases revitalizing federalism-based doctrines).

conclusions excite little or no objection.⁵⁶ In addition, presidents since Jefferson (in the case of the Alien and Sedition Acts) have refused to enforce laws that they thought unconstitutional, despite judicial decisions holding or suggesting that those laws were valid.⁵⁷ The assertion of a departmentalist prerogative is especially striking in these cases. Under Article II, the President is duty-bound to “take care that the laws are faithfully executed.”⁵⁸ In deeming a statute unconstitutional and refusing to enforce it on that basis, the President claims an executive authority to make independent, extra-judicial determinations of statutes’ validity. The question of when presidents ought to decline to enforce law that they think unconstitutional is extremely complex.⁵⁹ But no one should deny that presidents have a prerogative and perhaps a responsibility not to enforce laws that they think unconstitutional under at least some circumstances.⁶⁰

2. *Judicial Supremacy as Authoritative Declaration of Rights-Creating and Power-Limiting Constitutional Principles.*—If proclamations of judicial supremacy do not imagine judicial supremacy in the robust sense that my maximalist ideal type models, we need to imagine weaker positions. Along a spectrum of judicial supremacist views, limitless possibilities exist. Among them would be one suggested by the actual stakes of *Cooper v. Aaron*, involving whether officials who are not parties to a case are bound by the Supreme Court’s rationale of decision in other contexts in which that rationale would imply either that constitutional rights exist or that constitutional limitations on governmental powers apply.

Issues involving state officials and their obligations to accept the authoritative status of federal judicial rulings present special complexities, largely beyond the scope of traditional departmentalist theories, to which I

56. See Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397, 412–14, 420–22 (2015) (describing vetoes by Presidents Madison and Monroe on constitutional grounds); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 907 (1989) (recounting Jefferson’s Sedition Act pardons, Washington’s Apportionment Act veto, Madison’s veto “on constitutional grounds [of] a bill chartering a church in the District of Columbia,” and Jackson’s veto of a bill re-chartering a Bank of the United States after the Supreme Court deemed the bank constitutional); Paulsen, *supra* note 15, at 264–65 (collecting authorities).

57. See Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 948, 956, 960 (1994) (listing cases of presidential noncompliance on the basis of constitutional objection from Buchanan to Carter, including Wilson’s noncompliance with a congressional attempt to terminate a treaty and Eisenhower ignoring statutory restriction on executive agreements).

58. U.S. CONST. art. II, § 3.

59. For a wise and incisive discussion, see Meltzer, *supra* note 47.

60. See *id.* at 1193–94 (instancing, *inter alia*, statutes that are clearly unconstitutional under the rationale of recent Supreme Court decisions).

shall return in subpart II.D.⁶¹ But if we focus for now just on federal officials' felt obligations to treat judicial rationales of decision as categorically binding on them, it quickly becomes plain that judicial supremacy of the form seemingly contemplated by *Cooper* frequently does not exist as a matter of fact. The President and other federal officials often have not attempted to enforce the rationale of Supreme Court decisions—including those involving school desegregation,⁶² busing,⁶³ and school prayer—against state officials who were not directly subject to judicial orders. Indeed, federal officials have sometimes defended a policy of not even acquiescing to lower-federal-court rulings in suits involving the federal government outside or sometimes even inside the circuits in which those rulings occurred.⁶⁴ Even insofar as Supreme Court decisions are concerned, federal officials have sometimes adopted tendentiously narrow interpretations, framed test cases seeking to provoke reconsideration of determinations that they disliked, and either ignored or defied plainly applicable Court rationales. For example, in issuing passports and in a variety of other matters, the Lincoln Administration either defied or ignored the holding of the *Dred Scott* case that African Americans could not be citizens of the United States.⁶⁵ More recently, Congress has continued to enact and the President has continued to honor legislative-veto mechanisms⁶⁶ of the kind that the Supreme Court held unconstitutional in *INS v. Chadha*.⁶⁷

61. A challenging body of social-scientific and historical literature purports to show that state officials have frequently failed to comply with the rationale of Supreme Court rulings to which they were not direct parties. See, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

62. See, e.g., Lain, *supra* note 26, at 1653–54.

63. See *id.* at 1655 (citing “efforts of Congress to underenforce Supreme Court rulings in the bussing context, abortion context, and criminal procedure context by simply denying the federal funding needed to enforce them”).

64. See Paulsen, *supra* note 15, at 272–74. For an able but limited defense of nonacquiescence in lower-court rulings that assumes the categorically binding effect of Supreme Court decisions, see Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 *YALE L.J.* 679 (1989). For forceful criticism of executive refusals to follow a circuit court's precedents when judicial review can or will come solely within that circuit, see Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 *MINN. L. REV.* 1339 (1991).

65. Whittington, *supra* note 42, at 785 (“[T]he Lincoln administration felt free to ignore the Court's opinion in order to recognize black citizenship in the context of the regulation of coastal ships, passports and patents, as well as to pass laws abolishing slavery in the territories and the District of Columbia.”).

66. See Louis Fisher, *The Unitary Executive and Inherent Executive Power*, 12 *U. PA. J. CONST. L.* 569, 581 (2010) (“Hundreds of committee vetoes appeared in statutes after *Chadha* [and] Presidents used their signing statements to object that these provisions are unconstitutional, [but] agencies [regularly] comply with [the] provisions.”).

67. 462 U.S. 919 (1983).

3. *Judicial Supremacy as Judicial Finality.*—If we continue to move along the spectrum of possible conceptions of judicial supremacy, we come to a position that equates judicial supremacy with judicial finality, defined to mean that other branches must treat final judicial rulings as having authoritatively determined the rights of the parties in adjudicated cases.⁶⁸ Here, it might be thought, we hit an absolute minimum.

To see the attraction of viewing judicial finality as the minimally necessary content of meaningful judicial supremacy, we can begin with a phenomenon that drew the attention of, and partly flummoxed, both Jefferson and Madison in their commitments to interpretive departmentalism.⁶⁹ Given the structure of judicial review, courts normally pronounce on constitutional questions only after other branches have rendered their opinions—Congress when enacting legislation and the President in signing it into law. When judicial pronouncements come at the end of a chain, and purport to pronounce authoritatively on the rights of particular individuals, the implicit logic of the Constitution's design might seem to dictate that the President must always acquiesce with respect to the parties before the Court—as, for example, in the *Nixon Tapes Case*. Otherwise, judicial review might seem to serve no point. In addition, routine refusal by the Executive to acquiesce to judicial rulings in particular cases could lead to practical anarchy.

In pondering these considerations, we should distinguish between what it is normally desirable and requisite for presidents to do and what presidents always should have to do. With that distinction in mind, we can best begin with some hypothetical cases, and then examine some historical examples, before finally reflecting both more theoretically and more commonsensically on the context in which presidents normally accede to judicial decisions and on the role of departmentalist principles in defining that context. To start, imagine, once more, that the Supreme Court ordered the President to launch a military strike on Iran or, without pretense of statutory authority, that the Court directed the Federal Reserve Board either to raise or to lower interest rates. I am quite confident that notions of judicial supremacy or even judicial finality would not operate in cases of judicial action widely recognized to be *ultra vires*—a formulation on which I shall elaborate below. Rather, I assume that Congress, the President, and the Federal Reserve Board would refuse to comply. I further assume that they would explain their refusals by asserting that the Court had misinterpreted the Constitution so dramatically that they had no obligation of obedience.

68. See *supra* note 24 and accompanying text.

69. See KRAMER, *supra* note 4, at 105 (quoting Madison's observations that "as the Courts are generally the last in making their decisions,[] it results to them by refusing or not refusing to execute a law, to stamp it with its final character," and "[t]his makes the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper").

Having introduced a reference to *ultra vires* judicial action, I anticipate that many instinctive defenders of judicial supremacy would say this: the obligation of the President and other executive officials to obey final judicial orders binds categorically unless the orders in question are *ultra vires*.⁷⁰ This position would of course be compatible with departmentalism: a departmentalist might say that when issues of judicial finality (rather than a broader conception of judicial supremacy) are at stake, the independent inquiry of the Executive Branch should be limited to whether a judicial ruling was *ultra vires*. If imported into a theory of judicial supremacy, however, the concept of *ultra vires* judicial action is instructively elusive. Here, although keeping my extravagant hypothetical cases of plainly *ultra vires* judicial action in mind, we can profitably turn to history. Historically, there are a few actual cases of presidents, in particular, who have either not obeyed judicial rulings or who have signaled in advance that they would not obey if the courts ruled against them. The examples are old. I do not mean to claim that prevailing understandings of constitutional norms have not changed in any way. Nonetheless, the examples help to affirm the common-sense proposition that a President who thought the courts wrong enough, in a case in which the stakes were high enough, and who further believed that Congress and the public would largely stand with her, would not feel bound to obey a judicial ruling. More to the current point, the historical examples also test the boundaries that divide judicial rulings that are *ultra vires* from those that are or would be merely arguably mistaken.

The first example involves *Marbury v. Madison*⁷¹ and the companion case of *Stuart v. Laird*.⁷² Both arose from actions taken by a lame-duck Federalist administration and Federalist Congress after the 1800 elections routed their party from office.⁷³ In *Marbury*, President Jefferson instructed his Secretary of State James Madison to refuse to acknowledge the jurisdiction of the Supreme Court, and Madison, accordingly, entered no appearance.⁷⁴ Although the Court proceeded with the case anyway, it was widely reported that an order directing Madison to install the Federalist

70. See William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1862 (2008) (arguing that the judicial power to bind the President applies only when a court acts within its jurisdiction).

71. 5 U.S. 137 (1803).

72. 5 U.S. 299 (1803).

73. On the political maneuvering surrounding and reflected in *Marbury* and *Stuart v. Laird*, see BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005); see also Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 16–20, 27–33 (2003) (describing *Marbury* as a prudent response to the nation's political context and discussing the subsequent tradition of prudential judicial decision-making).

74. See Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 365 (recounting Madison's refusal to acknowledge the proceedings and the Administration's consideration of them as a nullity).

William Marbury as a minor officeholder would provoke immediate defiance and subsequent retaliation, possibly including the impeachment of Federalist judges and Justices.⁷⁵ Equally important, the public likely would have sided with newly elected President Jefferson, Secretary Madison, and the Democratic-Republicans in any showdown between the Executive and Judicial Branches. Roughly the same calculus applied to *Stuart v. Laird*, which included a challenge to the validity of a statute that repealed the 1801 Judiciary Act, and thereby effectively divested sixteen newly appointed federal judges of their offices, in the teeth of Article III's provision that federal judges would retain their offices "during good behavior."⁷⁶ Faced with a threat of defiance if it ruled for the Federalist plaintiffs, the Supreme Court decided in favor of the Jefferson Administration and its congressional allies in both cases.⁷⁷ In a subsequent episode, President Jefferson refused to comply with some aspects of a subpoena to hand over documentary evidence in a criminal case against Aaron Burr.⁷⁸ Although Jefferson agreed to supply most of the requested material, he did so subject to restrictions, and insisted that he acted based on his independent constitutional interpretation.⁷⁹

Additional examples of threatened and actual Executive Branch defiance of judicial rulings—involving Lincoln and Franklin Roosevelt—have mostly involved wartime or emergency. In *Ex parte Merryman*,⁸⁰ Lincoln supported Union military officers in defying a writ of habeas corpus, issued by Chief Justice Roger Taney, in the early days of the Civil War.⁸¹ In Lincoln's view, detaining suspected Confederate sympathizers in the border state of Maryland was a military necessity at a precarious moment in his

75. See Mark A. Graber, *Establishing Judicial Review: Marbury and the Judicial Act of 1789*, 38 TULSA L. REV. 609, 639 (2003).

76. U.S. CONST. art. III, § 1.

77. For a vivid account of the relevant history, see ACKERMAN, *supra* note 73. As an influential commentator has observed, the Court acted in *Stuart v. Laird* "out of a fully justified fear of the political consequences of doing otherwise." Alfange, *supra* note 74, at 363–64.

78. Paul A. Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 29 (1974). See generally *id.* at 24–30.

79. See *id.* at 26 ("[Jefferson] repeated his insistence that . . . the President 'must be the sole judge of which of them the public interest will permit publication.'" (quoting Thomas Jefferson, *Letter from Thomas Jefferson to George Hay* (June 17, 1807), in 11 THE WRITINGS OF THOMAS JEFFERSON 230, 232 (Albert Ellery Bergh ed., 1907))). Jefferson explained his position in departmentalist terms: "But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, and to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south to east to west, and withdraw him entirely from his constitutional duties?" Thomas Jefferson, *Letter from Thomas Jefferson to George Hay* (June 20, 1807), in 11 THE WRITINGS OF THOMAS JEFFERSON 239, 241 (Albert Ellery Bergh ed., 1907).

80. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487). For an account of the surrounding events and an analysis of the decision, see DANIEL A. FARBER, *LINCOLN'S CONSTITUTION* 17, 157–63, 188–95 (2003).

81. *Merryman*, 17 F. Cas. at 152–53.

struggle to save the Union. In defending his action in a subsequent message to Congress, Lincoln gave reasons for thinking that Taney's ruling was mistaken.⁸² He left it to Attorney General Edwin Bates specifically to defend his refusal to enforce a direct judicial order, largely on the ground that Taney had no jurisdiction to issue the writ under the circumstances.⁸³

During the early part of World War II, President Roosevelt let it be known that he would defy the Supreme Court if the Justices sought to interfere with the military trial and subsequent swift execution of would-be German saboteurs.⁸⁴ Even though one of the accused was a U.S. citizen with a more-than-colorable claim of entitlement to be tried in an Article III court, the Justices capitulated.⁸⁵ In a breach of ordinary protocol, the Court ruled for the government only a day after hearing arguments in the case, with a brief notation that an opinion would follow.⁸⁶ When the opinion came down more than eleven weeks later, it dealt only cryptically and cursorily with the relevance of U.S. citizenship to rights to trial by jury for an alleged criminal offense committed within the United States, in an area in which the civilian courts remained open, by someone who was not a member of the U.S. armed forces.⁸⁷

The judicial decisions that Lincoln's military defied in *Ex parte Merryman* and that the Jefferson and Roosevelt Administrations credibly threatened not to obey were not or would not have been *ultra vires* in any transparent sense. The Supreme Court's jurisdiction was not seriously in question in *Stuart v. Laird* or *Ex parte Quirin*. The Lincoln Administration denied the court's jurisdiction in *Ex parte Merryman*, but its position was debatable at best, tendentious at worst. A federal court had clear authority to issue the writ of habeas corpus unless entitlement to the privilege of the writ

82. ABRAHAM LINCOLN, *Message to Congress in Special Session* (July 4, 1861), in SPEECHES AND WRITINGS 1859–1865: SPEECHES, LETTERS, AND MISCELLANEOUS WRITINGS, PRESIDENTIAL MESSAGES AND PROCLAMATIONS 246 (Don E. Fehrenbacher ed., 1989).

83. See Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74 (1861); Baude, *supra* note 70, at 1857–61 (arguing that the judicial power to bind the President applies only when a court is acting within its jurisdiction).

84. See PIERCE O'DONNELL, IN TIME OF WAR: HITLER'S TERRORIST ATTACK ON AMERICA 213 (2005) (detailing private communications between the Roosevelt Administration and Justices leading up to the decision); David J. Danielski, *The Saboteur's Case*, 1996 J. SUP. CT. HIST. 61, 69 (discussing fears among Justices during preliminary discussion that Roosevelt would execute petitioners despite Court action).

85. See *Ex parte Quirin*, 317 U.S. 1 (1942).

86. See *id.* at 20 (“[A]fter hearing argument of counsel and after full consideration of all questions raised, this Court affirmed the orders of the District Court . . . [and] announced . . . that the full opinion in the causes would be prepared and filed with the Clerk.”).

87. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2079 (2007).

was validly suspended.⁸⁸ Lincoln claimed that military officials acting under his authority had suspended the writ, but the Constitution provides for suspension in Article I, which addresses the powers of Congress, not Article II, which deals with presidential authority. Chief Justice Taney had therefore adjudged the purported suspension invalid.⁸⁹ Many commentators believe he was correct.⁹⁰

If the actual or threatened rulings in any of the central cases were *ultra vires*, it was only under a vague and deeply contestable standard that marks judicial judgments as *ultra vires* when they are too dangerous or unreasonable to count as within a court's authority to render. In reaching a conclusion of that kind, a president necessarily engages in independent reasoning in which substantive constitutional questions are inseparable from jurisdictional ones or issues involving whether a judicial order was *intra* or *ultra vires*.

We could imagine a similarly testing case today if—admittedly very improbably—the Supreme Court were to hold paper money or Social Security unconstitutional. At one time there was a very serious constitutional question whether the Constitution permits Congress to establish paper money.⁹¹ Article I grants a power to “coin” money, possibly in distinction from a power to print it. There was also once a serious question whether Article I authorizes Congress to establish a scheme of old-age pensions and unemployment insurance that the Founding generation could never have imagined.⁹² Today, however, a decision holding paper money or Social Security unconstitutional would unleash havoc—if it were implemented. But in the most improbable event that the Supreme Court were to issue such a decision, I doubt very much that Congress and the President would allow it to take effect, at least immediately. I would anticipate either emergency legislation or an executive order effectively staying if not countermanning the Court's decision, at least until other provisions could be made to avert economic chaos and the obliteration of settled financial expectations. Whom then would relevant officials and the citizenry accept as having spoken

88. See U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

89. See *Ex parte Merryman*, 17 F. Cas. 144, 152–53 (C.C.D. Md. 1861).

90. See, e.g., Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227, 1290 (2008); Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391, 430 (2007).

91. The Supreme Court held that it could not in *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603, 625 (1870), before overruling itself in *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 553 (1871), apparently partly as a result of a change in personnel. For discussion, see generally Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367.

92. See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 733 (1988) (noting that Social Security would likely not be consistent with the Constitution's originally understood meaning).

authoritatively, the Judiciary or Congress and the President? I would anticipate the latter.

If I am right in these speculations, and if we want to relate the allocation of constitutional authority that they reflect to the notion of judicial supremacy that minimally entails judicial finality, the most we could say would be that we have a regime of presumptive, rather than absolute, judicial finality. There is a strong presumption—embraced by nearly all officials and also by the public, as exhibited in the *Nixon Tapes Case*—that presidents must obey or enforce judicial orders. But the presumption is a defeasible one. And if so, it is open to presidents and others to consider independently, in every case, whether a particular judicial judgment should be accepted.⁹³

Here, of course, a defender of judicial supremacy might retreat even further along the spectrum of possible judicial supremacist positions and maintain that as long as a defeasible presumption of finality applies, judicial supremacy prevails, notwithstanding all of the other limitations that I have discussed: it suffices that judicial rulings must be obeyed as long as they are *intra* rather than *ultra vires* and are not unreasonable as judged from the perspective of the President and a majority of the American people. If someone defines judicial supremacy in these terms, I have no stake in resisting. I would recall only that Jefferson and Madison—who counted themselves departmentalists—also thought that officials of nonjudicial departments should treat judicial rulings as presumptively authoritative. If the only difference between judicial supremacists and departmentalists involves the relative strength of a defeasible presumption of judicial finality, we have moved into the part of the spectrum of possible judicial supremacist positions in which the difference between what many have thought to be polar rivals is—by definition—one of degree, not kind.

C. *A Sometimes Fragile Balance*

Although we do not have a strong form of judicial supremacy, neither do we have robust departmentalism. Even if presidents have not always stood ready to accede to all judicial judgments, presidents, as I have meant to recognize, have almost always capitulated, typically without protest. Indeed, presidents almost invariably enforce the underlying rationales of judicial decisions. And they likely do so out of a felt sense of legal obligation, which I shall discuss below,⁹⁴ that is reinforced by their awareness that the public would nearly always think it their legal duty to comply. I have insisted that we should not generalize too much from decisions such as the *Nixon Tapes*

93. Cf. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 196–206 (1991) (defending “presumptive positivism”).

94. See *infra* notes 176–80 and accompanying text.

Case, in which the Supreme Court claimed preeminence in matters of constitutional interpretation,⁹⁵ but surely we should not forget *Nixon* and other examples that could be arrayed beside it, either. At some point in the historical, sociological, and political development of our society, both the President and the public appear to have accepted that presidents must obey judicial judgments, at least outside of extraordinary circumstances.

In view of the historical sequence, we might be tempted, once more, by the conclusion that even if we defined judicial supremacy as entailing both judicial finality and some further something more (recognizing that it might be difficult to specify exactly what that something more is), we have judicial supremacy for all practical purposes. But before drawing that inference, we should take account of one further factor. Although presidents have rarely defied or threatened to defy judicial orders, and although the public has almost always assumed that the President has a constitutional obligation to comply, the longstanding pattern of presidential acquiescence has occurred in a context in which the Supreme Court, in particular, has rendered very few decisions that presidents could plausibly have regarded as *ultra vires* or as imminently dangerous under the circumstances.⁹⁶ And if we ask why courts rarely render rulings that could plausibly be regarded as *ultra vires*, it may be in part because courts have long known, and continue to know, that if they did so, they could be defied, and the public could support the President who defied them. Accordingly, claims that we have a robust form of judicial supremacy—defined in stronger terms than departmentalists such as Jefferson and Madison could largely accept—still come up short.

At the same time, assertions that our system is strongly departmentalist would fare no better. Only on one point do departmentalist theory and its popular-constitutionalist corollary seem indubitably correct: in the case of a refusal by the President to acquiesce to a judicial order, resolution of the resulting constitutional crisis would need to come through action by Congress, possibly in the form of impeachment or a refusal to impeach and convict the President, and through the mechanisms of electoral politics. In the absence of more facts, constitutional law and logic furnish no guarantee concerning the outcome of a showdown.

D. Judicial Review Within Politically Constructed Bounds

In this subpart, I turn to the insights of political science to explain the fallacies of robust assertions that our system is one of judicial supremacy and to demonstrate the inevitability of at least limited forms of departmentalism

95. *United States v. Nixon*, 483 U.S. 683, 704 (1974).

96. *See* Alexander & Solum, *supra* note 31, at 1638 (“The Supreme Court has rarely gone beyond the outer bounds of interpretive authority.”).

and popular constitutionalism in American constitutional practice. From the perspective of political scientists, a central question involves why political leaders might want to establish, promote, and preserve judicial review and why they would not seek systematically to subvert it to the extent that circumstances permit.⁹⁷ How does a system of even moderately robust judicial review take root and then sustain itself?

The core answer—as furnished by political scientists—is that judicial review provides political leaders with a valuable insurance policy.⁹⁸ As part of the price, officials give up some powers that they otherwise might have enjoyed during their tenures in office. In return, they gain protections against severely adverse treatment of their legislative accomplishments and possibly themselves while they are out. For the insurance policy to be a good one, however, it cannot be too costly: it cannot pose too much of an impediment to political officials’ governing successfully in the domains over which they and their supporters most want control. Elected officials may also find it politically advantageous to leave the resolution of some contentious issues to the courts, but surely not all contentious issues.

In explaining the resulting equilibrium, political scientists offer the thesis that for judicial review to survive and flourish, the courts, to echo a phrase that I used earlier, must operate within politically constructed bounds.⁹⁹ The Judicial Branch must be empowered, and indeed charged, to constrain political officials with respect to some matters and to some extent, but not with respect to all matters, nor too much.¹⁰⁰ Over time, a roughly

97. See, e.g., Matthew C. Stephenson, “When the Devil Turns . . .”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 60–61 (2003) (providing a formal model and empirical test for the hypothesis that risk-averse political actors accept judicial review to enforce mutual restraint in ongoing political competition). See generally RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 10–12 (2004) (describing conditions under which vulnerable political elites in other nations have chosen to establish robust schemes of judicial review to protect then-prevailing elites’ values).

98. See, e.g., WHITTINGTON, *supra* note 4, at 4, 9 (explaining the thesis that “judicial supremacy” is “politically constructed”); Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425, 425–28 (2005) (reviewing the emerging body of political science literature that frames judicial review as an institution constructed by the political branches).

99. See *supra* text accompanying note 28; see also Lain, *supra* note 26, at 1679 (“Within the world of political science, the point is well established—judicial supremacy is a political construct built over time by the representative branches to further ends that they would find difficult, if not impossible, to accomplish on their own.”); cf. Neal Devins, *Why Congress Does Not Challenge Judicial Supremacy*, 58 WM. & MARY L. REV. 1495, 1498–99 (2017) (arguing that members of Congress have little political incentive to challenge judicial supremacy and are largely content to operate within judicially constructed bounds).

100. See Graber, *supra* note 75, at 624 (“The political foundations of judicial review admit of degree. Crucial political actors tend to support a range of possible judicial decisions rather than judicial power per se.”); see also Mark A. Graber, *Judicial Supremacy Revisited: Independent Constitutional Authority in American Constitutional Law and Practice*, 58 WM. & MARY L. REV. 1549, 1607 (2017) (“Americans may play at judicial supremacy only because constitutional doctrine

defined balance of power between courts and political actors has emerged, partly explainable within the framework of game theory: a president considering violating a judicial order will calculate the costs of doing so, which would ordinarily include adverse public reaction and potential impeachment; and Supreme Court Justices who consider testing the outer perimeter of their already-recognized authority will weigh the risks of public outrage, official defiance, Court-packing, and the like.¹⁰¹ No equilibrium is necessarily stable. War and emergency are especially likely to deliver shocks that unsettle previously enduring balances. For the most part, however, judges and Justices apprehend the outer limits of the powers that they can exercise efficaciously and without retaliation, which are set by politics, and stay within those boundaries.¹⁰²

In an illuminating article written in 2006, Frederick Schauer contrasted the Supreme Court's agenda, as reflected in its docket, with the political agenda of the American people, as gauged by surveys of the issues that the public thought most important over roughly a ten-year span.¹⁰³ He found dramatic divergences. The Supreme Court exercised great power, but power that was limited in scope. The Court's rulings ordinarily possess finality (at least in the short-term) with respect to such high-profile matters as abortion, affirmative action, and gun control—though even with respect to those issues, political influence exerts itself through the departmentalist processes of judicial nomination and confirmation. Recent years have also seen the Court extend its oversight to such highly salient matters as national health care¹⁰⁴ and immigration policy.¹⁰⁵ Nevertheless, many of the most vital issues of war and peace, diplomatic affairs, economic policy, and taxation are off

throughout American history provides them with numerous opportunities to game the system when they know or suspect that particular Supreme Court rules are not to their liking.”).

101. See Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1120–21 (2008) (discussing efforts by game theorists to explain how “[t]he patterns of behavior of judges and others might similarly be thought to reflect equilibria that have become settled because each player anticipates that the costs of any alternative course—such as, for example, asserting broader powers or entitlements than others have previously tolerated—would be too great”). For examples of this approach, see, e.g., Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 662 (2011); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1646, 1666–68, 1675–83 (1995); Peter C. Ordeshook, *Some Rules of Constitutional Design*, 10 SOC. PHIL. & POL’Y 198, 206 (1993); Stephenson, *supra* note 97.

102. This is a central general theme of FRIEDMAN, *supra* note 54.

103. See Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court’s Agenda—and the Nation’s*, 120 HARV. L. REV. 4, 5–8, 14–21 (2006) (outlining the history and structure of the debate over “government by judiciary”).

104. See, e.g., *Nat’l Fed’n Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

105. See, e.g., *Arizona v. United States*, 567 U.S. 387 (2012); *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017).

the judicial agenda entirely. To put the point more sharply, the scope of judicial intervention into governmental decision-making was and remains relatively small.¹⁰⁶

In response to Schauer's findings, someone might proffer the explanation that the constitutional text, rather than a behavioral equilibrium or subconstitutional interpretive norms, defines the domain of judicial authority. If courts have little to do with war and peace and with economic policy, for example, it is because the Constitution assigns them no substantial role. But perceived textual constraints on judicial power tend to possess a constraining effect only because reigning cultural and political forces dictate that they should have it.¹⁰⁷ To cite just a few examples, the Supreme Court has no difficulty in concluding that the First Amendment protects free speech against suppression by the President and the courts¹⁰⁸—even though the relevant text begins with a seemingly clear announcement that it extends only to Congress.¹⁰⁹ Although the Equal Protection Clause applies in terms only to the states and not to the federal government, the Supreme Court has similarly held that the Due Process Clause of the Fifth Amendment—which says nothing about the equal protection of the laws—imposes equal protection norms on Congress and the federal government more generally.¹¹⁰ At the same time that the Supreme Court construes some textually restricted constitutional guarantees in ways that expand judicial authority, it construes other provisions that would seemingly invite judicial intervention in sharply limited terms. For example, the Court seldom invokes equal protection principles as a basis for intervention into matters of economic regulation and wealth distribution—even though issues of equality are centrally at stake. The Court could also find a variety of plausible textual hooks to intervene in matters of war and peace if it so chose. But the Justices have generally not done so.

The thesis that judicial review operates within politically constructed bounds offers a convincing explanation of all of the phenomena that I have

106. See Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 410–11 (1993).

107. For persuasive arguments that the ascription of meaning to legal texts is sociologically conditioned in ways that sometimes pull legal meaning apart from what might appear, at first blush, to be ordinary linguistic meaning, see Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213 (2015); David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015).

108. See Bradley & Siegel, *supra* note 107, at 1243–47.

109. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech.”).

110. See, e.g., *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 & n.1 (2017).

described in this Part.¹¹¹ At the risk of oversimplification, we can distinguish harder from softer forms of political influence and control.

Actual and credibly threatened presidential defiance of judicial orders falls into the harder category. As canvassed in section B(2), a small set of judicial decisions have overstepped or would have overstepped the bounds of politically tolerable and publicly accepted judicial decision-making. As I further argued in section B(2), we can generalize from those cases. It is the fact, and judges and Justices know it to be the fact, that political officials, with the support of the public, would refuse to tolerate a variety of decisions that courts otherwise could claim textual warrant to make. Testing cases seldom arise because judges and Justices have largely internalized the hard constraints that the political-construction thesis highlights.¹¹² The hard-edged aspect of the political-construction thesis thus explains why we can be very sure that the Supreme Court will not order the President to invade Iran, direct the Federal Reserve Board to raise interest rates, or invalidate Social Security—even if the Justices might otherwise be tempted to do so.

The softer mechanisms of political influence and control include those discussed in section B(1), which maintained that the Supreme Court is constrained in its capacity to impose lasting resolutions of constitutional issues even in cases that do not trigger immediate, publicly supported executive or presidential defiance. If the Supreme Court deviates too far from aroused public opinion on politically salient issues, politics will force an eventual correction of its constitutional rulings, typically through the ongoing, politically charged process of judicial nominations and

111. See Lain, *supra* note 26, at 1688 (“The practice of judicial supremacy . . . is weak, malleable, and decidedly democratic in its operation, channeling the will of the people and contributing to the democratic enterprise in numerous ways.”). Perhaps for similar reasons, many forms of judicial oversight of and intervention into congressional and executive decision-making are themselves soft, restricting the means by which policy goals can be achieved, but not absolutely barring the goals’ achievement. See Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1719 (2001) (arguing that courts engage in a constitutional dialogue with the other branches rather than wielding hard-and-fast, judicially supreme authority).

112. See generally Martin Krygier, *Institutional Optimism, Cultural Pessimism and the Rule of Law* (“Where thickly institutionalized constraints *do* exist—indeed typically where they do their best work—they are often not noticed, for they are internalized Limits are not tested because people cannot *imagine* that they should be.”), in *THE RULE OF LAW AFTER COMMUNISM: PROBLEMS AND PROSPECTS IN EAST-CENTRAL EUROPE* 77, 90 (Martin Krygier & Adam Czarnota eds., 1999).

confirmations.¹¹³ History testifies to the potency of this mechanism of political boundary-setting.¹¹⁴

The politically constructed bounds within which the Supreme Court issues its rulings can change over time. Sometimes changing attitudes empower the Court to recognize new constitutional rights that would have been culturally and politically unthinkable in earlier times. Changed social attitudes made it possible for the Supreme Court to uphold rights to racial nondiscrimination, women's equality,¹¹⁵ and same-sex marriage that would have provoked an irresistible political backlash only decades earlier. Liberals frequently celebrate popular constitutionalism in these contexts. In doing so, they almost inevitably embrace a theory of the Constitution as a publicly accessible, debatable, and interpretable document that fits well with a popular-constitutionalist conception as framed by Larry Kramer. We should also recognize, however, that changed attitudes can narrow as well as expand the bounds of permissible judicial decision-making.

II. Departmentalism and the Ideal of the Rule of Law

If a descriptively accurate account of our constitutional practice needs to disavow total or even what I would take to be strong judicial supremacy, and to accommodate insights associated with departmentalism and popular constitutionalism, the question arises: can a system with such significant departmentalist and popular-constitutionalist elements accord with rule-of-law ideals? This Part offers a qualifiedly affirmative answer. It argues that departmentalism and popular constitutionalism are consistent with, and indeed would advance, rule-of-law ideals in a reasonably but not perfectly well-ordered constitutional democracy, as defined by three conditions:

First, the central circumstances that give pertinence to the ideal of the rule of law prevail. On the one hand, human beings have a proclivity sometimes to engage in unreasonably self-interested behavior if not restrained by political authorities. On the other hand, human beings have

113. See, e.g., FISHER, *supra* note 29, at 244 (arguing that judicial finality exists only insofar as “Congress, the President, and the general public find the decisions convincing, reasonable, and acceptable,” and detailing Chief Justice Taney’s and Justice Frankfurter’s views that the opinions of the Court regarding the Constitution are open to debate); see also Graber, *supra* note 75, at 649 (“Justices are nominated and appointed by partisan leaders who have partisan purposes for choosing particular Justices and for structuring the federal judicial system in particular ways.”).

114. See *supra* notes 54–55 and accompanying text; see also Lain, *supra* note 26, at 1664 (“The Supreme Court’s pronouncements are final in only the thinnest of ways and supreme only to the extent that the people and their representatives are willing to accept them.”); Post & Siegel, *supra* note 23, at 1042 (“Through the appointment and confirmation process, as well as through a variety of other mechanisms, the people in the end will have the form of constitutional law that they deem fit.”).

115. See Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 322–23 (2001).

capacities for reasonableness in social cooperation as well as for pursuit of rational self-interest.¹¹⁶

Second, at least in regard to constitutional matters, predominant segments of the population—including judges, nonjudicial officials, and in some respects the broader public—are normally ruled by law and not merely through law. This is an important distinction, which I shall explain at length in subpart C below. As a first approximation, the assumption that predominant numbers of relevant constituencies are ruled by law implies that they seek to comply with the law because it is the law and because they wish to do their part in upholding a rule-of-law regime, not merely because they fear adverse consequences if they disobey.

Third, commitments by some (not necessarily all) to comply with the Constitution as law result in agreement concerning many fundamental questions. Nonetheless, the notion of a reasonably well-ordered political democracy does not rule out the possibility of reasonable disagreement about other constitutional matters, including some of high political salience.

In my view, many liberal democracies satisfy these three conditions much of the time.¹¹⁷ But this Part makes no claim that our current practices of law and politics are reasonably well-ordered in the relevant sense. I postpone questions about departmentalism, popular constitutionalism, judicial supremacy, and the rule of law in the United States today for consideration in Part III.

My argument in this Part unfolds in a structured sequence. Subpart A advances and preliminarily defends a conception of the rule of law that requires judges, as much as other officials, to be accountable for their fidelity to law. Robust forms of judicial supremacy would be incompatible with the vision of the rule of law that subpart A sketches. Subparts B and C fill in the details necessary to vindicate subpart A's promises. Subpart B lays out a practice-based jurisprudential theory within which nonjudicial officials and the public can have roles in establishing what the Constitution means and

116. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 48–49 n.1 (1993) (“[K]nowing that people are rational we do not know the ends they will pursue, only that they will pursue them intelligently. Knowing that people are reasonable where others are concerned, we know that they are willing to govern their conduct by a principle from which they and others can reason in common; and reasonable people take into account the consequences of their actions on others’ well-being.” (citing W.M. Sibley, *The Rational Versus the Reasonable*, 62 *PHIL. REV.* 554, 554–60 (1953))); T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 191–92 (1998) (suggesting that rationality entails a simple capacity for means-ends analysis while reasonableness involves “tak[ing] others’ interests into account”).

117. *But see* FREDERICK SCHAUER, *THE FORCE OF LAW* 91 (2015) (terming it a “plausible conclusion” that “the processes of politics and public opinion formation rarely tak[e] the law itself as an important determinant of political rewards and political punishment” and that “just as with citizens, official obedience to the law, absent the threat of formal legal sanctions, may well be less than is commonly assumed”).

requires. That theory reveals both the possibility and the attraction of locating constitutional adjudication by the courts within a network of accountability-holding in which courts do not and should not necessarily possess the last, authoritative word on constitutional issues. Subpart C develops accounts of what it means first for judges, and then for other officials and the public, to be ruled by law—as the ideal of the rule of law demands that they should be—in reaching constitutional judgments. Subpart D sketches some limitations of my argument in its application to state officials and subordinate officials in the Executive Branch.

A. *The Ideal of the Rule of Law and Judicial Accountability*

In nearly all theories of the nature and requirements of the rule of law, four constitutive demands stand out. First, there should be law rather than anarchy.¹¹⁸ Second, the law should ensure physical safety, should enforce forms of control over property adequate to facilitate productive enterprise and other meaningful projects, and should permit reasonable planning.¹¹⁹ Third, there should be regular procedures for applying the law fairly.¹²⁰ Fourth, officials must be subject to the law in ways that restrain the exercise of arbitrary power.¹²¹

Despite this core of agreement, the rule of law is a deeply contested ideal.¹²² In this subpart, I shall not take on the vast project of developing a fully worked-out conception of the rule of law. I shall, however, defend the view that the best conception would require official accountability to law and would insist that the courts—as much as other official decision-makers—must inhabit a network of accountability relationships in which their judgments are examinable, and in some cases resistible, by other officials.

118. See, e.g., Tamanaha, *supra* note 2, at 233 (arguing that the minimum necessary requirement for the rule of law is for “government officials and citizens [to be] bound by and abide by the law”).

119. See, e.g., *id.* at 240 (“[F]ormal legality provides predictability through law.”).

120. See, e.g., A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 110 (8th ed. 1915); F.A. HAYEK, THE POLITICAL IDEAL OF THE RULE OF LAW 45 (1955) (positing that coercive action by the state should always be reviewable for fair application without regard to the current government); JOHN RAWLS, A THEORY OF JUSTICE 238–39 (1971) (arguing that a legal system must be fair, rational, impartial, and in accord with due process norms).

121. DICEY, *supra* note 120, at 114–15; HAYEK, *supra* note 120, at 41; Selznick, *supra* note 2, at 22. As Jeremy Waldron points out, the substantive and process-based requirements may have different intellectual lineages, even though they are often merged today. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6–9 (2008).

122. See, e.g., RAWLS, *supra* note 120, at 235–43 (1971); Waldron, *Rule of Law*, *supra* note 121, at 6–9. For an examination of some of the contests as played out in American constitutional discourse, see Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1 (1997).

1. *Judicial Supremacist Conceptions.*—In demanding checks against arbitrary power, judicial supremacists valorize the courts as the ultimate guardians of the rule of law. Though judicial supremacists are diverse, nearly all believe that courts have distinctive abilities to determine and enforce the Constitution’s meaning.¹²³ They are also virtually unanimous in thinking that to allow other branches to countermand judicial interpretations would substitute politically motivated, self-interested decision-makers for the best, most impartial, most reliable arbiters of constitutional meaning—namely, the courts—that either the Constitution’s framers or anyone else has been able to identify.¹²⁴

As Part I explained, courts within our regime are not as insulated from political processes and pressures as the judicial-supremacist ideal of the rule of law would suggest that they ought to be. But the question here is normative: as applied to societies in which the three assumptions that I outlined at the outset of this Part are satisfied, does the best conception of the rule of law call for one of the robust versions of judicial supremacy that Part I surveyed?

In my view, we should resist the conclusion that it does. Even in societies that are reasonably well-ordered in the sense defined above, the potential for occasional, aberrant abuse of judicial power—as much as for abuse of legislative and executive power—would remain. Moreover, abuses of judicial power could cause grave harms, especially in a regime in which courts exercise the power of judicial review. Some check ought to exist. Despite risks of judicial arbitrariness, a defender of judicial supremacy still might argue that judicial supremacy dominates its competitors:¹²⁵ Whatever risks undiluted judicial supremacy might pose, any alternative would be worse. We will need to confront that argument in due course. For now, I mean to stake only a provisional claim. If we view the ideal of the rule of law as an answer to the ancient question of who will guard the guardians,¹²⁶ the ancient answer was “the law.”¹²⁷ Before settling for a judicial-supremacist

123. See, e.g., RONALD DWORKIN, A MATTER OF PRINCIPLE 33–34 (1985) (characterizing the Supreme Court as unique among institutions in its commitment to principle over political expediency); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 46–47, 147 (1997) (accepting that the judiciary has “ultimate responsibility” for determining the law’s content, a responsibility that requires “impartiality, judgment, and lawyerly acumen”).

124. See Frederick Schauer, *The Annoying Constitution: Implications for the Allocation of Interpretive Authority*, 58 WM. & MARY L. REV. 1689, 1711–12 (2017).

125. See *id.*

126. The question troubled Jefferson in its application to judges. See KRAMER, *supra* note 4, at 108.

127. Gerald J. Postema, *Law’s Rule: Reflexivity, Mutual Accountability, and the Rule of Law*, in BENTHAM’S THEORY OF LAW AND PUBLIC OPINION 7, 7 (Xiaobo Zhai & Michael Quinn eds., 2014).

conception that would leave the courts ultimately unguarded, we ought to consider whether we can make sense of “the law,” as distinguished from “the courts,” as an answer to the question of who will guard the guardians.

2. *Republican Conceptions of the Rule of Law.*—In a thoughtful essay, Professor Gerald Postema argues that the rule of law requires networks of accountability¹²⁸ in which all public officials are answerable to other individuals or institutions for their fidelity to law—with fidelity understood as involving an attitude of faithfulness going beyond mere conformity, especially in circumstances of reasonable disagreement about what the law requires.¹²⁹ Other accounts of the rule of law are possible, including that offered by Hobbes, who imagined the reign of an unaccountable sovereign.¹³⁰ Postema’s conception is republican¹³¹ in its opposition to ceding “control over the law to any one individual or body.”¹³² His argument begins with the premise that the rule of law requires that those who exercise authority in the name of the law should themselves be not only subject to, but also ruled by, the law: “The rule of law obtains in a polity just when *law rules* those who purport to rule with law. *Reflexivity*—law ruling those who rule with law and in its name—is the rule of law’s *sine qua non*.”¹³³

Postema’s argument could easily be stretched, and actually may go, untenably far. Imagine an initial lawmaker who breaks from preexisting positive law in order to establish a new legal order. Either a Hobbesian sovereign or the American Founding Fathers would suffice as an example. It would take a very broad conception of what “law” is, encompassing the demands of “reason” or natural right, to characterize initial lawmaking as itself law-governed.

But if we focus on an established legal regime, and ask whether the rule of law obtains within it, Postema’s insistence that those who act with the authority of law should also be ruled by law—insofar as law applies—holds attraction as a guard against official, including judicial, arbitrariness,

128. *Id.* at 13–14.

129. *See id.* at 23 (“Law can rule only when those who are subject to it . . . are bound together in a thick network of mutual accountability with respect to that law.”).

130. *See* THOMAS HOBBS, *LEVIATHAN* 224 (Richard Tuck ed., 1991) (rejecting the proposition that “he that hath the Sovereign Power, is subject to the Civill Lawes”).

131. For elaboration of a modern republican theory, see PHILIP PETTIT, *ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY* (2012). Pettit associates republican thought with commitments to “the equal freedom of citizens,” the premise that “if [a] republic is to secure the freedom of its citizens then it must satisfy a range of constitutional constraints,” and the “idea . . . that if the citizens are to keep the republic to its proper business then they had better have the collective and individual virtue to track and contest public policies.” *Id.* at 5.

132. *Id.*

133. Postema, *supra* note 127, at 22.

partisanship, and poor judgment in applying the law, including to disputable cases. The question then becomes what mechanisms the rule of law requires to insure official, including judicial, fidelity to law. In Hobbes's view, whatever person or institution gets to pronounce authoritatively on the content of the law is itself a de facto sovereign and thus necessarily unaccountable to law.¹³⁴ But even judicial supremacists do not typically want to embrace the courts as de facto sovereigns. Courts purport to obey and enforce the law. In doing so, they presuppose a standard for measuring fidelity to law. And, as Postema points out, for an institution or official, including a court or its judges, to claim immunity from answerability for fidelity to law leaves no logical space between a claim of lawful judicial authority and an assertion of raw, potentially arbitrary, political power.¹³⁵

To fill the logical space that he identifies, Postema argues, persuasively in my view, that the best conception of the rule of law would depend on a complex, nonhierarchical network of accountability-holding.¹³⁶ Insofar as the argument depends on a quasi-logical claim about the necessity of accountability for judicial fidelity to law, it does not directly establish what an appropriate accountability network would look like or what mechanisms of accountability-holding it would include. For example, judges might be accountable only to each other or to members of the legal profession. In theory, the only mechanism of accountability might be professional criticism in law reviews.

In response to these possibilities, however, my own deep intuitions, like Postema's, incline in a distinctively "republican" direction. Given both reasonable disagreement about what constitutional norms require and the potential for judicial arbitrariness in applying them, we should reject robust conceptions of judicial supremacy—such as those that would elevate judicial interpretations to the same plane as the Constitution itself or even accord absolute finality to judicial judgments, no matter how recklessly improvident. More attractive is a conception of the rule of law under which relevant accountability networks encompass judges as well as other officials and include meaningful mechanisms of accountability-holding. For the most part, such networks are already in place and are widely applauded. Officials, and especially judges, hold the citizenry accountable to law.¹³⁷ Judges exercising

134. See HOBBS, *supra* note 130, at 224.

135. Postema, *supra* note 127, at 26 (“[T]o judge that one’s act is warranted [by law] is, necessarily, to claim *self-transcending* warrant To deny the office of others to assess one’s assessments, to judge one’s judgments, is simultaneously to claim and deny *self-transcending* warrant.”).

136. See *id.* at 14, 28 (rejecting Hobbes’s Hierarchy Thesis for one that involves reciprocal accountability among “officials of all ranks and citizens alike”).

137. *Id.* at 30.

judicial review hold executive and legislative officials accountable to law.¹³⁸ As a final element, judges should be reciprocally accountable for adherence to the constitutional norms on which their claims to possess lawful authority for their decisions depend.¹³⁹ In demanding judicial accountability for fidelity to law, Postema's argument partly overlaps with that of historical departmentalists and popular constitutionalists, as depicted by Kramer.¹⁴⁰

Insofar as the courts are concerned, accountability for fidelity to law need not imply answerability to a higher court. If it did, we would have a problem of infinite regress: the chain of courts needed to hold other courts accountable would have no end.¹⁴¹ Nor need, or should, judicial accountability take the form of comparable, decision-by-decision review of judicial rulings by officials of other departments. Nor, finally, are judicial elections a necessary or probably even a desirable mechanism.¹⁴² Nevertheless, some element of judicial accountability remains crucial. I conclude, accordingly, that whatever other content the best conception of the rule of law would contain, it would include elements of judicial accountability for fidelity to law.

3. Judicial Accountability, Departmentalism, and Popular Constitutionalism.—I do not imagine, and certainly shall not undertake to prove, that the best conception of the rule of law would require any particular form of judicial accountability. But neither can I stop without exploring whether a regime in which judicial finality exists only within politically constructed bounds—roughly in the way that subpart I(C) described—could satisfy rule-of-law ideals under the assumptions sketched at the beginning of this Part.

The answer should be “yes.” In considering why, we can begin with the kinds of concessions that most self-described judicial supremacists are quite prepared to make. Implicitly, if not explicitly, even they recognize that the stakes are too high not to permit, and indeed require, some forms of departmental and electoral influence over the direction of constitutional law.

138. *Id.*

139. *Id.* at 35 (“[A]lthough the judiciary plays a crucial role in realizing the rule of law, it is a mistake to believe that the rule of law is ultimately the rule of judges. For that is just to confer on the judiciary the incoherent status of an unaccountable accountability-holder.”).

140. See KRAMER, *supra* note 4, at 114 (noting Madison’s belief that a good republican citizenry should keep watch over exercises of governmental authority).

141. Hobbes recognized this problem and thought it fatal to the position that a sovereign can be bound by law. See HOBBS, *supra* note 130, at 224.

142. On some of the pathologies associated with judicial elections, see David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047 (2010). On the historical origins of judicial elections, see JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012).

As we have seen, the least controversial mechanism involves political processes of nomination and confirmation to federal judicial office. Now, however, I want to go a step further by insisting that it is consistent with the rule of law, and indeed might actually promote rule-of-law ideals, for even individual judicial judgments to be subject to examination before their categorical claim to obedience is acknowledged. Even if judicial decisions ought to be authoritative in resolving particular cases except in extraordinary circumstances, exceptions should exist. Familiar analogies and common sense both support the conclusion that even if courts have authority to rule definitively on what the Constitution means in most cases, their authority does not and should not extend to decisions that are *ultra vires*—however fuzzy that term may be. In a partly analogous situation, military officers can conclusively determine the duties of those subject to their commands, but with a proviso excepting commands that violate the laws of war.¹⁴³ The rule of law requires this outcome. As Postema puts it, “[t]o be *solely self-accountable* is to be accountable *to no one*.”¹⁴⁴

4. *Remaining Questions.*—From a judicial-supremacist perspective, it may appear paradoxical to appeal to departmentalism as an instrument for upholding rule-of-law norms.¹⁴⁵ Departmental processes might appear to risk too much political influence on the resolution of issues of constitutional principle, even in a reasonably (but not perfectly) well-ordered society. There is a core of truth here: judges should be accountable to law, not to the immediate, undiluted preferences of the mass public, as reflected in opinion polls or as refracted through any other institution. Accordingly, departmentalism, in the schematic terms in which I have presented it thus far, provides at most the seeds of an answer to demands that judicial power should be accountable to law and to institutions adequate to enforce a proper accountability relationship. Among other things, for departmentalist mechanisms to play the role that I have imagined, we would need a general account of the nature of law, which was capable of specific application to American constitutional law, in light of which we could say what it means

143. For general discussion of the nature and limits of the duty to obey, and of liability for complying with unlawful orders, see Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CALIF. L. REV. 939 (1998).

144. Postema, *supra* note 127, at 26.

145. See, e.g., Alexander & Solum, *supra* note 31, at 1609–15, 1629 (arguing that departmentalism is inadequate to uphold the rule of law).

for nonjudicial officials to be ruled by law when challenging judicial interpretations of the Constitution.¹⁴⁶

B. A Practice-Based Theory of Law

To probe more deeply into whether the limited forms of departmentalism and popular constitutionalism that I described in Part I could be consistent with rule-of-law ideals, we need a jurisprudential account of the constitutional law that judges, other officials, and the public must interpret and apply. I shall assume—without purporting to establish—that analysis should occur within a practice-based theory.¹⁴⁷ According to practice-based theories, the foundations of law do not lie in sovereign commands to obey—whether by the Framers or any other institution or group—but in the practices of relevant constituencies in identifying legally authoritative rules and standards.¹⁴⁸ To frame the basic claim as applied to the American legal system, the Constitution is law not because the Founders so ordained, or because it achieved that status through legally valid ratification in the eighteenth century, but because relevant constituencies today accept the Constitution as authoritative.¹⁴⁹

In the best-known practice-based legal theory, Professor H.L.A. Hart identified the crucial constituencies whose practices of acceptance fix a legal system's most fundamental norms as public officials and, especially, judges.¹⁵⁰ According to Hart, modern legal systems embody the conjunction

146. On the relationship between the concept of law and the ideal of the rule of law, see Waldron, *supra* note 121, at 10–13.

147. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 256 (2d ed. 1994) (“[T]he rule of recognition . . . is in effect a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts.”); see also *id.* at 116 (“[The] rules of recognition specifying the criteria of legal validity and [the legal system’s] rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.”). Hart’s jurisprudential critic and rival, Ronald Dworkin, is even more explicit than Hart in characterizing law as a “practice,” see RONALD DWORKIN, *LAW’S EMPIRE* 45–53 (1986), although he denies that the practice can be accurately described as constituted by “rules.” More generally, although Dworkin agreed with Hart that social practices have a role in determining what the law is, he disagreed about how and why social practices did so. See Nicos Stavropoulos, *The Debate that Never Was*, 130 *HARV. L. REV.* 2082, 2088–89 (2017).

148. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. CHI. L. REV.* 877, 887 (1996) (“[N]o version of a command theory, however refined, can account for our constitutional practices.”).

149. See Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 *HARV. J.L. & PUB. POL’Y* 45, 51–53 (1994) (arguing that the “ultimate validity” of the Constitution is “not itself a constitutional question, but a political and sociological one”).

150. HART, *supra* note 147, at 256 (asserting that “the rule of recognition” that validates other legal rules exists “only if it is accepted and practised in the law-identifying and law-applying operations of the courts”); see also *id.* at 116 (“[R]ules of recognition specifying the criteria of legal validity and [the legal system’s] rules of change and adjudication must be effectively accepted as

of primary and secondary rules.¹⁵¹ Primary rules directly regulate what is lawful and unlawful. Secondary rules confer powers and authorize change. Apart from a legal system's primary and secondary rules, and linking them as constituent aspects of a single legal system, is what Hart called a rule of recognition that provides criteria of legal validity.¹⁵² According to Hart, the rule of recognition exists as a matter of fact. Its content is fixed by the practices of officials in differentiating law from non-law and in interpreting recognized legal authorities.

Unfortunately, to speak of a single rule as defining the criteria of legal validity in the United States invites confusion. As one sympathetic critic puts it, "[t]here is no reason to suppose that the ultimate source of law need be anything that looks at all like a rule, whether simple or complex, or even a collection of rules, and it may be less distracting to think of the ultimate source of recognition . . . as a *practice*."¹⁵³ Another scholar in the Hartian tradition has characterized the rule of recognition in some societies, including the United States, as a conventional "framework for bargaining" in reasonably disputable cases, though not in all cases.¹⁵⁴ In the most general terms, the crucial point may be that core participants in legal practice, certainly including the Justices of the Supreme Court, understand themselves as engaged in a norm-governed, cooperative endeavor in which each strives to do his or her part in identifying, elaborating, and enforcing the law in ways that others—if they applied shared norms correctly—ought to agree with or at least respect.

Although Professor Hart spotlighted the centrality of judicial practice in fixing the content of the rule of recognition, he acknowledged that courts, including highest courts, can violate the rule of recognition in particular cases.¹⁵⁵ Furthermore, Hart suggested at some points that the practices of nonjudicial officials might play a constitutive role in determining a society's fundamental rule or rules of recognition.¹⁵⁶ This suggestion deserves close attention. As the political construction thesis implies, judges' recognition practices are nested within other officials' practices of recognition in

common public standards of official behaviour by its officials."). By contrast, Hart said, "[t]he ordinary citizen manifests his acceptance largely by acquiescence." *Id.* at 61.

151. *See id.* at 81, 94–99.

152. *See id.* at 94–95, 100–10.

153. Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 145, 150 (Sanford Levinson ed., 1995).

154. JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 100 (2001).

155. HART, *supra* note 147, at 145–46 (insisting that rules supply "standards of correct judicial decision" that courts "are not free to disregard").

156. *Id.* at 116.

identifying what the Constitution means and requires. And just as other officials' recognition practices take account of judicial rulings, judicial recognition practices could treat the practices of other officials, including their likely willingness to accede to possible judicial dictates, as relevant to their own powers in adjudicating disputed cases. To put the claim more starkly, from a conceptual point of view, the content of the constitutional law of the United States could depend partly on what nonjudicial officials, centrally including the President, conscientiously understand themselves as legally bound to accept.¹⁵⁷

In my view, the conceptual possibility that I have just described is an empirical reality: the recognition practices of both elected officials and judges are not only situated in proximity to, but are also interrelated with, the recognition practices of the American public.¹⁵⁸ In identifying what the law is, the Justices assume that the Constitution of the United States seldom if ever mandates results that nonjudicial officials and the public would predominantly refuse to comply with based on their own, partly independent recognition practices.¹⁵⁹ And nonjudicial officials and the public, reciprocally, have accepted judicial decisions as final and binding—though not necessarily as more generally authoritative—as long as they are not *ultra vires* or unreasonable as measured within recognition practices that are partly independent of those of the Justices.¹⁶⁰ To provide a hypothetical but

157. See Kenneth Einar Himma, *Making Sense of Constitutional Disagreement: Legal Positivism, the Bill of Rights, and the Conventional Rule of Recognition in the United States*, 4 J.L. SOC'Y 149, 154 (2003) ("Since the legal authority of the courts is constrained by the acceptance of other officials, the existence and content of the rule of recognition depend on the joint practices of both judges and other officials.").

158. Cf. Mathew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 721 ("On the Hartian account, citizen understandings and practices cannot have a bedrock role in constituting the legal system.").

159. Paulsen, *supra* note 15, at 235–37, ascribes this view to James Madison. Although my claim involves an interpretive judgment about how to understand the guiding norms of American constitutional practice, historical evidence strongly supports my conclusion. The Supreme Court has seldom been seriously out of touch with aroused political majorities for a sustained period. See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 190 (1989) ("[T]he views of a majority of the justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country."); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 224 (1960) ("[I]t is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand."); see also Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 279 (2010) ("What is surprising is that even after taking into account ideology, *Public Mood* continues to be a statistically significant and seemingly non-trivial predictor of outcomes."); David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 730 (2009) ("[E]mpirical studies suggest that the Court's actions are at least as consistent with public opinion as those of the *elected* branches.").

160. Adler characterizes law as "group-relative" and identifies courts, the Executive Branch, and the public as constituting different "recognition communities." Adler, *supra* note 158, at 745–47. In partial agreement but also partial contrast, I would emphasize that the practices of the most

nevertheless concrete illustration: if political officials and substantial segments of the public would not recognize a Supreme Court decree invalidating Social Security or ordering a military attack on a foreign nation as legally authoritative, that anticipated response is relevant to whether the law, correctly interpreted, requires or authorizes such a ruling.¹⁶¹

A practice-based theory of law could also assign jurisprudential significance to various other phenomena that Part I described as deviations from any robust conception of judicial supremacy. Prominent among these are the seemingly mundane practices of political criticism of judicial decisions and uses of the appointments and confirmation powers to attempt to alter the outcomes of Supreme Court cases, sometimes retrospectively through overrulings and sometimes prospectively. For example, appointments to the Court can constitute efforts to change the rules or practices of recognition by which our most authoritative judicial tribunal distinguishes law from non-law.¹⁶²

Acknowledgment that the recognition practices of nonjudicial officials have a role in establishing the constitutional law to which courts must show fidelity—for example, in holding paper money and Social Security constitutional, and in declining to render judgments too threatening to national security—complements the suggestion that the ideal of the rule of law requires judicial accountability. It does so by buttressing the plausibility of the claim, asserted from a position of commitment to the rule-of-law ideal, that other branches or departments of government could play a useful role in holding the courts accountable for their fidelity to law. If nonjudicial officials' recognition practices bear on what the Constitution means, then nonjudicial officials may have relevant expertise in assessing the correctness of judicial decisions or such decisions' legal entitlement to obedience.

C. *Being Ruled by Law*

A further rule-of-law argument for a robust version of judicial supremacy, and against any form of departmentalism or popular constitutionalism, focuses on the requirement that those who interpret and apply the law should themselves be ruled by law. This argument claims that

relevant “recognition communities” are, or at least traditionally have been, interactive and cooperative and that their disagreements can generally be described at a sufficiently and appropriately abstract level as ones about how best to interpret and apply shared norms.

161. Cf. Paulsen, *supra* note 15, at 222 (“[T]he Constitution requires cooperation and compromise—or else deadlock—with respect to the meta-power of interpretation of constitutional powers and of federal laws.”).

162. See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067 (2001) (“When enough members of a particular party are appointed to the federal judiciary, they start to change the understandings of the Constitution that appear in positive law.”).

once we grasp what it means to be ruled by law, nonjudicial officials and the public are almost inherently incapable of being ruled by law, either because they would be partisan judges of their own powers¹⁶³ or because the task requires skills and learning that only judges and lawyers possess.¹⁶⁴ In response, this subpart offers an account of what it means to be ruled by law pursuant to which nonjudicial officials and the public could normally satisfy the requirements under plausibly imaginable circumstances. A crucial first step is to recognize that it may mean one thing for the courts to be ruled by law, another for nonjudicial institutions and the public to be ruled by law. Nonjudicial officials are normally obliged to treat judicial judgments as legally binding, at least with regard to the cases in which they issue, even if the obligation to obey is not absolutely categorical. The rule-of-law obligations of Supreme Court Justices, in particular, are not similarly mediated.

1. Courts and Judges.—Being ruled by law in the sense in which Professor Postema and other theorists in the republican tradition use the term requires an attitude toward, not just conformity with, legal rules. That attitude centrally includes giving thoughtful attention to legal norms and making a conscientious effort to do as they direct. Officials cannot be ruled by law by accident or only insofar as they anticipate that their deviations will not escape detection.¹⁶⁵

To gauge fidelity to law, we also need a standard of constitutional legality. Here an obstacle may seem to arise from the famously “argumentative” character of American constitutional practice.¹⁶⁶ Any standard of constitutional legality would need to accommodate and explain reasonable disagreement. Nevertheless, we ought not be stymied—any more than the Justices of the Supreme Court, the lawyers who argue before them, and the millions of other Americans who engage in constitutional debate are stymied. From their practice, we can discern and accept high-level guiding principles, including these: that the written Constitution of the United States and the written amendments that have historically been embraced as validly ratified are law; that nothing incompatible with the written Constitution is law; that the written Constitution requires interpretation; that settled practice and judicial precedent can alter what otherwise would be the best

163. See Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1464, 1468–70 (2017).

164. See Alexander & Solum, *supra* note 31, at 1633–34.

165. Cf. *Extrajudicial Interpretation*, *supra* note 4, at 1369 (“Obedience becomes relevant only when we contemplate following directives we think mistaken, or directives that would either have us do what we would otherwise not do or refrain from doing what we would otherwise do.”).

166. See DWORKIN, *supra* note 147, at 13 (“Legal practice, unlike many other social phenomena, is *argumentative*.”).

interpretation of the written Constitution;¹⁶⁷ and that, all else equal, courts and judges should prefer proffered interpretations that are more functionally or morally attractive over those that are less attractive. Although the final proviso might appear contentious, American courts have recognized the need to exercise moral and practical judgment in resolving disputable issues from the beginning of constitutional history. Chief Justice Marshall's opinion in *McCulloch v. Maryland*¹⁶⁸ furnishes an exemplar. In *McCulloch*, Marshall asserted it as axiomatic that courts should prefer interpretations that render the Constitution adequate to its fundamental purposes over interpretations that would impede those purposes.¹⁶⁹

Recognizing the need for judgment and the possibility of disagreement in identifying what the law requires, we should think of judges and especially Justices as ruled by law insofar as they adhere to fundamental, practice-based rules or norms of recognition as construed and applied in the best or most reasonable light.¹⁷⁰ This formulation recognizes that constitutional interpretation sometimes requires normatively inflected judgment. It also presupposes that interpretation has both backward- and forward-looking aspects.¹⁷¹ The Supreme Court derives its interpretive and dispute-resolving capacities (however broad or cabined they may be) from the written Constitution (as interpreted by relevant constituencies). The Court's claim to legitimate authority—to possession of a lawful power to declare or alter normative obligations¹⁷²—therefore depends on its looking backward to ascertain and respect the norms that the Constitution has established. But insofar as it is reasonably disputable how the Constitution and other past authorities bear on a current dispute, judges and Justices, speaking in the name of the law, must also look forward in seeking to establish their own decisions as legitimate authorities, deserving of obedience by political

167. Judicial recognition of precedent as establishing the legally valid and binding law of the United States has been a central, widely accepted feature of our constitutional practice almost from the beginning. See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 662–81 (1999). “Indeed, all of the current [and recent] Justices, including the self-proclaimed originalist Justices Scalia and Thomas, have [specifically and] self-consciously accepted the authority of [past judicial] precedents that could not themselves have been justified under [strict] originalist principles.” Fallon, *supra* note 101, at 1130.

168. 17 U.S. (4 Wheat.) 316 (1819).

169. *Id.* at 407–08, 411.

170. See Himma, *supra* note 157, at 189–97 (asserting that the Justices are practicing a recognition norm that requires the Court to ground its validity decisions in the best interpretation of the Constitution); McNollgast, *supra* note 101, at 1641–47.

171. See Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 177 (Larry Alexander ed., 1998).

172. See, e.g., H.L.A. HART, *Commands and Authoritative Legal Reasons* (characterizing a legitimate authority as one capable of altering obligations), in ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY 243, 257–58 (1982); Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1939 (2008).

officials and the public. In order to justify claims to obedience in their resolution of reasonably disputable cases, judges and Justices must implicitly represent that acquiescence in their decisions will produce better outcomes than would result otherwise, either generally or in a particular case.¹⁷³

Given the phenomenon of reasonable disagreement, I would emphasize just one more point relevant to the debate between the departmentalist and the judicial-supremacist positions. According to my account, courts could be ruled by law even if there were reasonable disagreement about exactly how courts should resolve some interpretive disputes.¹⁷⁴ The regulative ideal is that of the legally best interpretation of relevant authorities, whatever it is.¹⁷⁵ But neither has anything that I have said so far established that the judgment reached by courts will always be more legally correct or morally legitimate than alternative conclusions that political officials and the public might think that courts ought to have reached. The soundness of judicial decisions is not self-certifying.

2. *Nonjudicial Departments and “the People Themselves.”*—In considering what it would mean for nonjudicial officials and the public to be ruled by law in reaching constitutional judgments, we should recognize that the ideas of being ruled by law and of holding courts accountable to law are not incompatible with deference to judicial judgments.¹⁷⁶ To the contrary, any imaginable legal regime will allocate authority among institutions, often on the basis of comparative competence. What is more, any sensible allocation will endow some institutions with authority to make legally binding judgments, even when those judgments are mistaken. As articulated by Professors Henry Hart and Albert Sacks, the principle of institutional

173. Cf. Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1035 (2006) (“It seems implausible to think that one can be a legitimate authority however bad one is at acting as an authority.”).

174. See Waldron, *supra* note 121, at 51–54. Stated as abstractly as I have framed it, the regulative ideal leaves open what would count as legally best and does not foreclose any of myriad originalist as well as nonoriginalist conceptions.

175. As Dworkin emphasized, judges with different views about what is the best legal interpretation could regard themselves as constrained or required by law to reach different conclusions in the same case. See DWORKIN, *supra* note 147, at 254–75, 410–13; see also Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 662 (1987) (“Judges conceive of themselves as constrained by the law even when no widely accepted social rule includes such a constraint.”).

176. Even Professor Paulsen, who is the strongest proponent in the literature of an independent executive power of judicial interpretation, so recognizes. See Paulsen, *supra* note 15, at 337–38.

settlement¹⁷⁷ calls for both official and public adherence to judgments made by those with lawful jurisdiction to make decisions of the relevant kind.¹⁷⁸

Within our system, moreover, there are both normative and empirical reasons for recognizing that judicial decisions should receive strong deference. Among other things, judges will often (which is not to say always) have greater relevant training, more time and opportunity for study of and reflection on legal authorities bearing on particular issues, and a better perspective for discerning the spillover implications of deciding issues in particular ways.¹⁷⁹ The nature of judicial decision-making also renders it peculiarly well suited to achieve clarity, settlement, and stability in constitutional law if other officials and the public will accept judicial pronouncements as legally authoritative. Well-reasoned judicial opinions articulate controlling principles, rather than just acting on them. They thus create precedents that achieve settlement, at least temporarily, and promote stability.

Under these circumstances, practice-based norms of law-abidingness and accountability-holding—which we might think of as the rules of recognition practiced by nonjudicial officials—normally require nonjudicial officials and the public to accord finality to judicial rulings except for those that could plausibly be thought *ultra vires* or otherwise wholly unreasonable under the circumstances.¹⁸⁰ To put the point differently, we might say that nonjudicial officials have a practice-based constitutional duty to obey and enforce judicial judgments in particular cases unless a narrow exception applies. Much more is involved than a light thumb on the scales in a balancing exercise.

Nevertheless, the notion of nonjudicial officials and the public being ruled by law does not entail an absolutely categorical obligation even to obey and enforce judicial judgments in particular cases. The principle of institutional settlement does not preclude nonjudicial officials or the public from judging for themselves whether the Judicial Branch has discharged its functions correctly. It poses no impediment to political officials making judicial-nomination decisions and votes on confirmations based on independent judgments concerning how the Constitution is best interpreted.

177. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 4 (William N. Eskridge & Philip P. Frickey eds., 1994).

178. *Id.*

179. See Paulsen, *supra* note 15, at 335 (asserting a “competence” argument for executive deference to judicial judgments); Lawrence G. Sager, *Courting Disaster*, 73 *FORDHAM L. REV.* 1361, 1369–70 (2005) (noting courts’ epistemic advantages in resolving questions of constitutional justice).

180. See Gerald J. Postema, *Fidelity in Law’s Commonwealth* (linking the rule-of-law-based concern to restrict “arbitrary” assertions of official power with *ultra vires* action), in *PRIVATE LAW AND THE RULE OF LAW* 17, 18 (Lisa M. Austin & Dennis Klimchuk eds., 2014).

Nor does the principle of institutional settlement preclude extrajudicial judgment by the President and Congress concerning when judicial decisions might be deemed *ultra vires* or so unreasonable as to fall outside of, or within an exception to, the principle itself.¹⁸¹

A strong spirit of interpretive pragmatism has long characterized American legal practice. If we ask how it has come about that American legal practice leaves as much room for interpretive dispute as it does, part of the answer involves our having a very old Constitution, written over 200 years ago, that is nearly impossible to amend under Article V.¹⁸² To remain workable in the twenty-first century, the Constitution has required interpretive adaptation, which the practice-based norms that govern interpretive legitimacy have evolved to permit.¹⁸³ Over time, moreover, the courts, the political branches, and the voting public have all played roles in adapting the rules of recognition that undergird our legal system today.

As proponents of strong judicial supremacy emphasize, there is undoubtedly a risk that officials of nonjudicial departments might prioritize immediate practical and political interests over fundamental constitutional norms when purporting to interpret the Constitution, even in a reasonably well-ordered regime.¹⁸⁴ But once we accept that the Constitution requires interpretation in light of felt exigencies as well as enduring fundamental values, the notion that the Judicial Branch possesses a singular claim to interpretive expertise, and that all forms of judicial accountability to the political branches are therefore lamentable or even suspect, seems out of touch with reality. So does the idea that nonjudicial officials and the public should necessarily be deemed to be ruled by politics, not law, unless they ignore practical consequences when assessing constitutional issues or determining whether the judiciary has overreached its legitimate authority under practice-based norms. Taking account of practical consequences is part of the warp and woof of judicial decision-making in many constitutional cases.

In determining the best interpretation of a disputed provision, political leaders and the public are also capable of taking issues of constitutional

181. Cf. Lawson & Moore, *supra* note 23, at 1825–26 (“[T]he best understanding of the role of judgments in the constitutional scheme is that the President and Congress can refuse to enforce a judgment only in extreme circumstances: only for constitutional error, and only when that error is ‘so clear that it is not open to rational question.’”).

182. See Richard H. Fallon, Jr., *Constitution Day Lecture: American Constitutionalism, Almost (But Not Quite) Version 2.0*, 65 ME. L. REV. 78 (2012).

183. See *id.*; Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1239 (2010) (“Is this process of constitutional change a good thing? . . . [I]t is awfully hard, in light of the difficulty of the Article V amendment process, to see how it could be any different.”).

184. See, e.g., Schauer, *supra* note 124, at 1707–08, 1710.

principle seriously, even if they do not always do so. Political and constitutional liberals who have endorsed that proposition in celebrating the influence of social movements in promoting recognition of the constitutional rights of racial minorities, women, and gay people¹⁸⁵ should not develop selective amnesia when popular-constitutionalist movements such as the Tea Party embrace values that liberals dislike.¹⁸⁶

In appraising what it would mean for nonjudicial officials and the public to be ruled by law, including in resisting or even defying judicial decisions, we should recognize a great variety of historical examples. I recoil in horror at the thought of resistance to a judicial order by the Trump Administration, as I did at veiled threats of presidential defiance of the Supreme Court in the *Nixon Tapes Case*. But it does not follow that all defiance of judicial orders would deserve similar condemnation. Here the example of Abraham Lincoln may prove instructive. Confronted with a judicial ruling in *Ex parte Merryman* that he thought posed an existential threat to the Union at the outset of the Civil War, Lincoln refused to accept that he must enforce the judicial decree if doing so might result in the collapse of constitutional authority altogether. The facts of *Merryman* presented numerous complexities that I cannot pause to probe here.¹⁸⁷ But the most salient point may be that Lincoln, himself a lawyer, appears to have pondered a range of considerations bearing on the Constitution's proper interpretation with an extraordinary thoughtfulness—just as he had in his earlier rejection of the Supreme Court's reasoning in the *Dred Scott* case. Besides keeping his gaze fixed on the Constitution, he struggled with the institutional implications of rejecting asserted claims of judicial authority that in his judgment went too far under the circumstances. Overall, it is entirely plausible to conceptualize Lincoln as having been ruled by law and as having held the Justices in the *Dred Scott* and *Merryman* cases accountable for their fidelity or infidelity to law, or at least as attempting to do so.

D. *Some Limits of the Argument*

I said above that the ideal of the rule of law was unlikely to determine the precise form that an appropriate network of judicial accountability would take under the Constitution of the United States. In asserting a constitutional prerogative and responsibility of independent constitutional interpretation for

185. See, e.g., Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 33 (2003); Siegel, *supra* note 115, at 322–23.

186. See, e.g., Schauer, *supra* note 124, at 1708 n.90 (“[S]ome of the enthusiasm for popular constitutionalism may have waned with the realization that public nonexpert rhetoric explicitly connecting political arguments with the language of the Constitution was important for the Tea Party Movement.”).

187. For discussion, see FARBER, *supra* note 80, at 17, 157–63, 188–95.

Congress, the President, and for the people in their capacity as citizens of the United States, leading departmentalists have frequently put state officials in a different category.¹⁸⁸ More specifically, departmentalists have often characterized state officials as bound at least to respect the finality of federal judicial judgments and possibly to accept the Supreme Court's rationales of constitutional decision as binding on them in their official capacities.¹⁸⁹ These limitations seem prudent to me in light of our nation's history, interests in the supremacy and uniformity of federal constitutional law, and the imperatives of practical government. But I shall not attempt to work out exactly how the powers and prerogatives of state officials to engage in independent constitutional interpretation should be understood.¹⁹⁰ I claim only that a theory of *federal* departmentalism and a correspondingly limited theory of popular constitutionalism are consistent in principle with the idea of the rule of law and that they would provide an adequate, if not ideal, accountability network for federal judges and Justices.

I have also not tried to develop the implications of a republican theory of the rule of law with regard to the prerogatives and responsibilities of executive officials subordinate to the President. Within our structure of government, I believe that such subordinate officials should surely be subject to a norm of judicial finality, and should further accept the authority of Supreme Court rationales of decision, unless directed to do otherwise by politically accountable officials acting with the authority of the President. Once again, the requirements of the rule of law should be understood to accord with the imperatives of coherent constitutional government. In response to a directive from the President to deny the finality of a judicial order or to reject or ignore a judicial rationale of decision—as in *Ex parte Merryman*, for example—subordinate executive officials would need to decide for themselves how the Constitution required them to behave. That is, they would need to decide for themselves whether a judicial decision that the

188. See KRAMER, *supra* note 4, at 186–87 (noting that Madison held this view); Paulsen, *supra* note 15, at 236 (ascribing this limitation on departmentalist theory to Madison and “nearly all federalists”).

189. See Paulsen, *supra* note 15, at 236–37. The supporting argument depends, *inter alia*, on the Supremacy Clause, U.S. CONST. art. VI, § 2, which refers specifically to the obligations of state-court judges to respect the supremacy of federal law; on U.S. CONST. art. III, § 2, cl. 2, which confers Supreme Court appellate jurisdiction over state-court judgments; and on *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), which affirmed the constitutional validity of a statutory grant of appellate jurisdiction authorizing Supreme Court review of state-court judgments.

190. Beyond an obligation to respect the finality of federal judgments would lie complex issues involving the roots of federal judicial authority in the need to decide cases, not issue opinions, see Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999), and the possible benefits of challenges to monolithic federal authority under some conditions, see Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

President instructed them to disobey was *ultra vires*. If the judicial ruling was not *ultra vires*, deciding whether to resign or be fired might sometimes be an unpleasant obligation of responsible public service. But sometimes, as I believe to have been the case in *Merryman*, it might not: executive officials might conclude in some cases that their obligations of constitutional fidelity dictated that they should follow the President's directives, rather than those of a court.

III. Departmentalism, Judicial Supremacy, and the Rule-of-Law Ideal in a Less-than-Reasonably Well-Ordered Society

The argument of Part II concerning the consistency of departmentalism and popular constitutionalism with rule-of-law ideals depended on the assumption that most judges, nonjudicial officials, and voters are ruled by law in making constitutional judgments. Determining whether there are implications for the world in which we live requires further inquiries.

A. *Is Our Constitutional Practice Reasonably Well-Ordered?*

I would not know how to gauge either whether or to what extent the constitutional and political culture now prevailing in the United States is well-ordered in the sense defined in Part II. Unfortunately, however, there is cause for concern, and in some cases for alarm, regarding all of the institutions that figure prominently in debates about judicial supremacy, departmentalism, and popular constitutionalism.

1. Nonjudicial Departments.—The extent to which the Executive Branch is ruled by law depends heavily, though not totally, on the attitude of the President. The President can dismiss, or direct others to dismiss, nearly all top officials who might fail to follow a prescribed line. Within both cabinet departments and the White House, I assume that there are career lawyers with a strong sense of professionalism and a commitment to rule-of-law norms.¹⁹¹ To some extent, the political appointees who direct the relevant legal offices may also view themselves as custodians of the rule of law and

191. See Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1723 (2011) (reviewing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010)) (arguing that “‘cultural norms’ of ‘detachment and professional integrity[.]’ . . . are deeply ingrained” among government lawyers in the Office of Legal Counsel (quoting JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 6 (2012))); Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1414 (2012) (noting that government lawyers outside the White House are “likely to be more risk averse with respect to legal questions than the President”). *But see* BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 98–116 (2010) (deriding the quality of legal advice produced by Executive Branch lawyers).

of inherited traditions of professionalism.¹⁹² But norms can be fragile. Moreover, presidents have absorbed the lesson that they can shop for legal advice by relying on the counsel of those administration lawyers who give them the constitutional answers that they want.¹⁹³

By nearly all accounts, recent presidents have pushed claims of executive authority under the Constitution to highly controversial and even tendentious extents. In the War on Terror, the George W. Bush Administration embraced a policy of “working the dark side” that tested constitutional limits and aroused constitutional alarm in many quarters.¹⁹⁴ The Obama Administration excited claims of executive overreach for its pursuit of congressionally unauthorized military operations in Libya¹⁹⁵ and for its aggressive use of executive orders to establish and reverse regulatory policy.¹⁹⁶ Among other troubling episodes, President Trump has fired an FBI director for pursuing a criminal investigation into the activities of associates of Trump’s own presidential campaign.¹⁹⁷ Whatever the legality of this action, the rule of law requires accountability networks that reach the highest levels of government.

Within Congress, Republicans and Democrats routinely accuse one another of cynical gamesmanship in their deployment of constitutional arguments. Scholars easily identify “flip-flops” on purported issues of constitutional principle once Republicans take control of Congress or the Presidency from Democrats or Democrats from Republicans.¹⁹⁸ Even more disturbingly, students of congressional behavior report that members typically take scant interest in constitutional issues presented by the legislation that they debate and enact.¹⁹⁹ Apart from promoting ideological

192. See Pildes, *supra* note 191, at 1396–97 (recounting that “a phalanx of top government lawyers . . . threatened to resign” if the George W. Bush Administration did not abandon or revise a counterterrorism surveillance program that they believed to be illegal).

193. See Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 839–43 (2017).

194. For critical discussion of the Bush Administration’s positions regarding executive power, see generally JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008); CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* (2007). For a generally balanced and incisive discussion, see GOLDSMITH, *supra* note 191.

195. I was among the critics. See Richard H. Fallon, Jr., *Interpreting Presidential Powers*, 63 DUKE L.J. 347, 363–67 (2013).

196. Janet Hook, *Republicans Criticize Obama’s Push to Use Executive Power*, WALL STREET J. (Jan. 28, 2014), <https://www.wsj.com/articles/republicans-criticize-obama8217s-push-to-use-executive-power-1390949791> [<https://perma.cc/AW3Q-Q44U>].

197. Michael D. Shear & Matt Apuzzo, *F.B.I. Director James Comey Is Fired by Trump*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html> [<https://perma.cc/H8XQ-V9HH>].

198. See Devins, *supra* note 99, at 1513; Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEXAS L. REV. 485 (2016).

199. See Devins, *supra* note 99, at 1515–24; Schauer, *supra* note 124, at 1707.

interests, members focus predominantly on warding off challengers and securing reelection.²⁰⁰ Nor do congressmen and senators have long-term institutional allegiances that would lead them to defend congressional prerogatives against erosion by the Executive Branch.²⁰¹ Short-term political interests, mostly defined along partisan lines, tend to dominate. Close and nonpartisan observers deem Congress a broken institution.²⁰²

Insofar as the use of departmentalist levers to influence the Judicial Branch is concerned, the process of filling judicial vacancies has grown notoriously partisan, with the aim of influencing future Supreme Court rulings, sometimes with respect to specific issues. Contention about the constitutional prerogatives of the President and responsibilities of the Senate came to a climax of sorts following the sudden death of Justice Antonin Scalia in February 2016. If President Barack Obama could have appointed Justice Scalia's successor, the Court's balance might have tipped from conservative to liberal for the first time since the 1970s. Republican senators so recognized and refused even to consider confirming an Obama nominee, even though their stance left the Court shorthanded for more than a year.

Overall, political self-interest and partisanship raise serious questions about how far either the Executive Branch or members of Congress are, or could be relied on to be, ruled by law in making judgments about politically salient constitutional issues.

2. *The People Themselves.*—In electoral politics, an angry populism has taken root. Those at partisan poles exert disproportionate influence due to their capacity to control the outcome of primary elections.²⁰³ But deep divisions of distrust have spread more broadly.²⁰⁴ As one measure, both

200. See DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 16–17, 43–44 (2d ed. 2004).

201. See Devins, *supra* note 99, at 1502, 1504.

202. See THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2012) [hereinafter WORSE THAN IT LOOKS]; THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK (2006).

203. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 298 (2011).

204. See Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 822 (2014) (doubting that greater primary-election participation would result in more centrist outcomes in light of recent evidence that “polarization in government is not so obviously a distortion or corruption of the larger public’s less polarized views”).

Republicans and Democrats report that they would be alarmed to see their sons or daughters marry a member of the opposing party.²⁰⁵

When constitutional issues become topics of political debate, the divisions remain large. In the 2016 presidential election, both the winning Republican and the losing Democratic candidate emphasized the importance of Supreme Court nominations in shaping the country's future.²⁰⁶ Voters freely opine about constitutional issues,²⁰⁷ with the ardor of the Tea Party and pro-life movements on the Right matched by that of champions of women's and LGBT rights on the Left. But voters, generally, are little informed about the issues on which they vote, inconsistent in the positions that they take, and often impervious to evidence.²⁰⁸ Psychologists have coined the term "motivated reasoning" to explain how ideology shapes perception.²⁰⁹ And when those of like ideological disposition receive information and exchange opinions mostly with each other, extremes tend to become more extreme—not only in their opinions, but also in their commitment to alternative versions of purported facts.²¹⁰

As division and polarization make evident, it is a political as well as a conceptual and metaphysical mistake to think that there is a unitary people with a discernible will about constitutional or other matters. Public opinion is a shifting composite, typically fragmented and badly informed. If there is any matter on which general agreement exists, it is probably on a commitment to uphold the Constitution. But that agreement exists at a highly abstract level. It tends to break down most with respect to that set of constitutional issues that might be thought the most likely candidates for resolution by "the people themselves," acting through the mechanisms of ordinary politics, in response to interbranch face-offs.

205. Shanto Iyengar et al., *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OPINION Q. 405, 415–18 (2012).

206. See Lain, *supra* note 26, at 1618–19.

207. See, e.g., *id.* at 1637–38.

208. See BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER 2–3 (2008) ("What voters don't know would fill a university library."); ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE 17–20 (2016) (citing data from polls over several decades showing that the majority of voters are ignorant of basic facts of issues they have positions on, that they support measures inconsistent with their misunderstandings of reality, and that they remain this way despite increasingly available and affordable information).

209. See, e.g., Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7–8 (2011); Mason Richey, *Motivated Reasoning in Political Information Processing: The Death Knell of Deliberative Democracy?*, 42 PHIL. SOC. SCI. 511, 516–17 (2012).

210. See CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 69–79 (2017).

3. *The Judicial Branch.*—Insofar as the Judiciary is concerned, I am not a cynic. The legal system churns up an endless flow of “easy” questions,²¹¹ nearly all of which I assume courts decide fairly, correctly, and without hint of corruption. There are also difficult cases, including and especially in the Supreme Court. With respect to these, purported realists claim that the Justices routinely follow political agendas without regard for law.²¹² Based on the available evidence, I would reject strong versions of this claim.²¹³ Among other indicators, the Justices reach unanimous judgments in many cases—in 62% during the 2013 Term,²¹⁴ for example. To cite just one more bit of evidence, an examination of the coalitions of Justices that invalidated fifty-three federal laws between 1980 and 2004 revealed that more than 70% had a bipartisan composition and that “more than [60%] . . . [were] inconsistent with a model of policy-motivated judging, either because they were joined by both liberal and conservative justices or because they reached results that are difficult to place in ideological space.”²¹⁵ Nonetheless, I would not paint an entirely sanguine picture.

The modern constitutional era is characterized by both high methodological self-consciousness and widespread hermeneutic suspicion.²¹⁶ Critics recurrently point to cases in which both liberal and conservative Justices deviate from previously embraced methodological principles—such as those requiring fidelity to the original public meaning of constitutional language, or alternatively to judicial precedent—in high stakes, ideologically salient cases. For example, conservative Justices have voted to invalidate affirmative action programs, despite the absence of evidence that relevant constitutional provisions were originally understood or intended to preclude preferences for racial minorities.²¹⁷ On the other side, liberals who castigate

211. See generally Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

212. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 323 (2002) (maintaining that “[t]he correlation between the ideological values of the justices and their votes is 0.76.”); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 34 (2005) (arguing that the Supreme Court is a “political body” when deciding constitutional cases).

213. See Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 1002–24 (2007).

214. Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 784 (2015).

215. Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 AM. POL. SCI. REV. 321, 324, 336 (2007).

216. See Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 L. & CRITIQUE 91, 116 (2014).

217. See, e.g., CASS R. SUNSTEIN, *RADICAL IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 137–42 (2005) (arguing the history of the Fourteenth Amendment provides no foundation deeming affirmative action unconstitutional); Jed Rubenfeld, *Essay, Affirmative Action*, 107 YALE L.J. 427, 431–32 (1997) (citing the Freedmen’s Bureau Acts as examples of nineteenth century “statutes expressly refer[ring] to color in the allotment of federal

their conservative colleagues for overturning broad swaths of precedent in some cases²¹⁸ have readily jettisoned precedents in order to find protected rights to sexual intimacy outside of marriage²¹⁹ and to same-sex marriage.²²⁰

Appointments processes aimed at pushing the Court in an ideologically defined direction raise the prospect of increasing polarization within the Court itself. And even assuming good faith on the part of the Justices, no one should doubt that the phenomenon of motivated reasoning²²¹ affects the Justices as much as the rest of us. Motivated reasoning may help to explain the well-documented ideological correlations between the Justices' political values and their judicial judgments. Some point with alarm to legal divisions that strongly correlate with political association or ideological proclivity. As examples, liberals would cite *Bush v. Gore*²²² and the vote of five Justices—all appointed by Republican presidents—to deny congressional power under the Commerce Clause to enact the Affordable Care Act.²²³ On the other side, Chief Justice John Roberts wrote with conviction that the Constitution “had nothing to do with” the Court’s decision to uphold a right to gay marriage.²²⁴ Conservatives similarly protested that the Court’s 5–4 ruling extending habeas corpus and due process rights to suspected noncitizen terrorists who were apprehended abroad and held at Guantanamo Bay constituted a dangerous and unprecedented interference with presidential, congressional, and military prerogatives.²²⁵ Overall, if we imagine that there is a spectrum along which particular institutions could be ranked either as more or less well-ordered in the sense defined in Part II, I would venture the opinion that the Supreme Court, today, should qualify as predominantly ruled by law. But I would also insist that the Court’s practice is far from perfect.²²⁶ In addition, I find the trend line worrying.

benefits”); Stephen A. Siegel, *The Federal Government’s Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 513–25, 549–65 (1998) (detailing color-conscious lawmaking, benign and invidious, in both the Founding and Reconstruction eras).

218. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 395–96 (2010) (Stevens, J., concurring in part and dissenting in part) (criticizing the majority for “reject[ing] a century of history” and “blaz[ing] through our precedents, overruling or disavowing a body of case law”).

219. See *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (criticizing the majority for hypocrisy in its “17-year crusade to overrule *Bowers v. Hardwick*” after castigating those trying to overrule *Roe v. Wade* in *Planned Parenthood v. Casey*).

220. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

221. See *supra* note 209 and accompanying text.

222. 531 U.S. 98 (2000).

223. See *Nat’l Fed’n Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

224. *Obergefell*, 135 S. Ct. at 2626.

225. See *Boumediene v. Bush*, 553 U.S. 723, 827 (2008) (Scalia, J., dissenting) (“[T]he Court’s intervention in this military matter is entirely *ultra vires*.”).

226. See RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (forthcoming 2018).

B. Appraising Available Options

Against the background of this informal appraisal of relative institutional reliability in our current practice, we can now ask, normatively, how we should assess proposals for greater departmentalism and popular constitutionalism, or alternatively for a comparably enhanced commitment to judicial supremacy, under current conditions. We can also recognize the difficulty of the apparent, but possibly chimerical, option of continuing with the diluted mixture of departmentalist, popular-constitutionalist, and judicial-supremacist elements that past practice has exhibited.

1. Departmentalism and Popular Constitutionalism.—In the less than reasonably well-ordered conditions outlined above, I see no convincing normative arguments for embracing robust and undiluted versions of departmentalism and popular constitutionalism. With regard to departmentalism, it is easy to imagine a president displaying a greater disposition to ignore or defy judicial rulings than have prior chief executives over the past half-century. But insofar as the attractiveness of the Executive's doing so depends on the President being ruled by law in the sense that subpart II(C) outlined, empirical conditions would make reduced executive deference to judicial rulings more frightening than alluring for the immediate and possibly the longer term future. The situation in Congress looks no better if we imagine possible efforts to bend the courts to legislative preferences in constitutional matters—for example, through increased reliance on Court-packing or jurisdiction-stripping as a mechanism for achieving congressionally preferred constitutional interpretations.²²⁷

Apart from exertions by the elected President and members of Congress, it is difficult to know what strong forms of departmentalism and popular

227. "Court-packing" exists as a potential lever for congressional influence on constitutional adjudication because the Constitution does not specify the size of the Supreme Court. In the past, Congress, by statute, has provided for as few as six and as many as ten Justices. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 27 & n.44 (7th ed. 2015) [hereinafter *HART & WECHSLER*]. Several of the changes in numbers reflected congressional efforts to shape the outcomes of contested cases, notably during the Civil War and Reconstruction periods. *See, e.g.*, FRIEDMAN, *supra* note 54, at 134. During the New Deal era, President Franklin Roosevelt proposed a Court-packing plan aimed at saving crucial New Deal legislation, including the Social Security Act. *See* LEUCHTENBURG, *supra* note 54, at 84–85, 96–97, 112–21, 142–43, 216–20; Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan*, 12 *INT'L REV. L. & ECON.* 45, 56 (1992). Although his proposal failed, the crucial vote in the Senate came only after the Court had already shifted course in several key cases. LEUCHTENBURG, *supra* note 54, at 142–44. Like Court-packing, jurisdiction-stripping is a highly controversial instrument of departmentalist influence on constitutional interpretation, but for a different reason. Although Congress has some unquestionable core of authority to define and limit the jurisdiction of both federal and state courts, the limits of the power are much contested. *See* HART & WECHSLER, *supra*, at 295–410. In the past, however, Congress has unquestionably

constitutionalism would look like in the current day.²²⁸ In *The People Themselves*, Larry Kramer invokes the idea of an antielitist, populist sensibility in which ordinary people feel competent to interpret the Constitution for themselves and to rebuke the Judicial Branch for rulings with which they disagree.²²⁹ To a considerable extent, ordinary people already feel competent to register their constitutional views in private conversation, via social media, through political donations, and at the ballot box. In proposing the reclamation of a more aggressively assertive version of popular constitutionalism that he believes prevailed in earlier eras, Kramer typically instances electioneering, voting, and jury nullification, but he does not shy from references to mobs and mobbing.²³⁰

That example has chilled many readers of his book,²³¹ me among them. Even if one empathizes with the outrage that would animate violent displays of resistance to some judicial decisions, one ought to recoil from the presumptuousness of mobbers in purporting to act not merely on their own behalf, but as representatives of “the people” defending the Constitution as correctly interpreted. Violence and intimidation by self-appointed representatives of the people are manifestly ill-suited instruments for upholding the rule of law in a politically polarized age.

used the power with the aim of affecting the resolution of disputed constitutional issues. A clear example comes from *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869), which upheld a statute that a Reconstruction Congress had enacted to withdraw Supreme Court appellate jurisdiction over a case challenging the constitutional validity of Military Reconstruction. *Id.* at 515. Further examples stem from the *Lochner* era and the New Deal, when Congress curbed the jurisdiction of a hostile federal judiciary to hear constitutional challenges to certain kinds of regulatory legislation. See HART & WECHSLER, *supra*, at 30–32. The most recent congressional attempt at jurisdiction-stripping came before the Court in *Boumediene*, which invalidated an effort to limit federal habeas corpus review of the decisions of military tribunals in cases involving alleged illegal combatants in the War on Terror. *Boumediene*, 553 U.S. at 798.

228. See Pozen, *supra* note 142, at 2062 (imagining popular-constitutionalist activism in today’s society as most effective through “mediating institutions such as civic organizations, political parties, and the elected branches of government” since “America [today] is much too big and diverse, and political power much too entrenched, for direct action”); *id.* at 2064 (“[R]obust departmentalism would effectively make Congress and the President the supreme institutional interpreters of the Constitution.”).

229. See KRAMER, *supra* note 4, at 129 (contrasting a popular constitutionalist sensibility with the view of Federalists that “[b]etween elections, the people needed only to listen and to obey. Unity, ‘respectability,’ order, and, above all, reverence for ‘constituted authorities’ were the hallmarks Federalists looked for in a well-functioning political system”); *id.* at 241–46 (detailing and arguing against the elitist viewpoints of judicial supremacists).

230. See KRAMER, *supra* note 4, at 27–29; see also *id.* at 83–84 (discussing Federalists’ anticipation that any congressional misuse of power would be countered by “formidable popular resistance—via elections, juries, popular outcries, or, in the unlikely event that all these failed, by more violent forms of opposition”).

231. See, e.g., Alexander & Solum, *supra* note 31, at 1594 (describing *The People Themselves* as having “the capacity to inspire dread and make the blood run cold”).

I put the point so starkly to bring out the depth of the disagreement underlying the clash of sensibilities that Kramer depicts. My sensibility, he might counter, is that of an academic-seminar room in which disagreement must always be polite and respectful—and the professor remains firmly in charge.²³² In the real world, he might argue, we should accept that politics inevitably includes rough and tumble aspects, and we should welcome broad public participation in constitutional politics on realistically achievable terms.

Kramer may be right that sensibility is bedrock: whatever our sensibility is, whether elitist or populist, we cannot ever get wholly beyond it.²³³ But perhaps some room for progress emerges if we can agree on a rule-of-law ideal that requires those who exercise power in the name of the law to be both (a) accountable for their fidelity to law and (b) ruled by law.

2. *Fallacies of Strong Versions of Judicial Finality and Supremacy in a Less-than-Ideal World.*—As intimated above, I view the courts, centrally including the Supreme Court, as the governmental institutions most likely to be predominantly ruled by law in our current circumstances. If so, proposals for an enhanced or more robust regime of judicial supremacy deserve to be taken seriously.²³⁴ Nonetheless, analysis should proceed cautiously.

In a less-than-ideal world, the most familiar argument for a robust form of judicial supremacy postulates that courts, because of their culture of reasoned deliberation and their relative insulation from intemperate public opinion, are more likely than other institutions to decide constitutional issues correctly—or, at the very least, temperately rather than intemperately.²³⁵ A closely allied argument relies on the special sensitivity of minority rights, of which it depicts an untrammelled judiciary as the only reliable guarantor.²³⁶

232. Cf. KRAMER, *supra* note 17, at 1004 (“[S]kepticism about people and about democracy is a pervasive feature of contemporary intellectual culture.”).

233. In arguing that judgments about the proper public role in constitutional interpretation may be “a matter of sensibility,” KRAMER, *supra* note 4, at 241, Kramer quotes RICHARD D. PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO 4 (1994).

234. See Schauer, *supra* note 124, at 1711–12 (arguing that courts “are likely less flawed than any of the other candidates for the job” of interpreting the Constitution).

235. See Alexander & Schauer, *Defending Judicial Supremacy*, *supra* note 4, at 476:

One reason for believing that the Supreme Court rather than Congress or the Executive is the best institution to wield the settlement authority, however, is the Court’s relative insulation from political winds, a clear virtue unless one holds the view that constitutional interpretation is and should be no more than the expression of contemporary values and policies.

236. See Brown, *supra* note 24, at 1438 (“The best rationale for judicial supremacy is that it protects rights.”); Chemerinsky, *supra* note 163, at 1463 (maintaining that “those without political power have nowhere to turn except the judiciary for the protection of their constitutional rights”).

In appraising this argument, we should notice that its proponents often differ starkly in their assumptions about the proper criteria for gauging constitutional correctness. Proposed measures range from originalism at one end of the spectrum²³⁷ to “living constitutional” theories that valorize judges’ superior capacity for moral judgment at the other.²³⁸ Without agreement on criteria of constitutional correctness, the strategy of vesting the judiciary with greater authority as a mechanism for achieving better constitutional results seems underspecified if not incoherent.

The judicial-supremacist strategy also risks incoherence along another dimension. As I have emphasized, elements of departmentalist influence and control are hardwired into our Constitution, perhaps most notably in its provision for presidential appointment and senatorial confirmation of federal judges and Supreme Court Justices. Moreover, even if change were possible, history would counsel hesitation in protecting the Judiciary from departmentalist influences operating through the power of appointment. Maximally strong forms of judicial supremacy would have embarrassed if not defeated efforts to reject *Dred Scott* and *Lochner v. New York*.

Weaker but still significant proposals for enhanced judicial supremacy would leave judicial appointments alone yet demand absolute finality for judicial judgments and exceptionless official fidelity to the rationales of judicial decisions until they have been overturned. Perhaps surprisingly, however, the assumption that our current political and constitutional practices are not reasonably well-ordered does little to increase the attractiveness of this alternative. Even and perhaps especially in a political and constitutional regime that is not reasonably well-ordered, we should account for the possibility of arrogant and ideologically driven decision-making by the courts, including the Supreme Court, even if we assume that the Court is currently the relatively best ordered of our institutions. If the Court has almost invariably behaved reasonably and responsibly in the past, part of the explanation may lie in the Justices’ awareness of politically defined limitations on their power.

In addition, there are domains of constitutional decision-making in which it would be untenable to regard courts as possessing the only relevant expertise. These encompass many matters involving national security and foreign affairs, taxation and budgetary policy, and allocations of resources among competing priorities—even though, as Part II argued, courts could

237. See, e.g., Antonin Scalia, Assoc. Justice, U.S. Supreme Court, Address at the University of Cincinnati William Howard Taft Constitutional Law Lecture (Sept. 16, 1988) (transcribed at Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989)) (arguing that judicial review is legitimate only because the Constitution is “the sort of ‘law’ that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law”).

238. See, e.g., DWORKIN, *supra* note 123, at 33–34.

find textual bases for involvement in these areas if they sought a larger role. A regime of strong judicial supremacy could easily erode current, salutary limits on judicial power.

The relevant question is whether it is desirable for judicial review to operate, and for courts to understand that it operates, within departmentally enforced limits of the kind that Part I described. It is barely possible to imagine a society that otherwise was not reasonably well-ordered but that observed a norm of according absolute fidelity to judicial judgments, regardless of their content. But in a society with sufficiently strong rule-of-law commitments to follow judicial mandates, one would expect enough residues of a disposition to be ruled by law to make categorical acquiescence to all possible judicial mandates and judicial rationales an unwisely extravagant prescription.

3. *The Chimerical Attractions of Synthesis in the Absence of a Rule-of-Law Ethos.*—Given the paired excesses of robust versions of both judicial supremacy and popular constitutionalism, we might imagine that a juxtaposition of the popular-constitutionalist thesis with its judicial-supremacist antithesis points directly to a happy synthesis, even for a less-than-well-ordered political and constitutional environment: we should retain the mix of weak or diluted judicial supremacist and weak or diluted departmentalist elements that our traditional practices reflect.²³⁹ To elaborate, we might think that the conjunction of a strong presumption that nonjudicial officials must obey judicial-judgments with a recognition that judicial review operates within politically constructed bounds has created an historic equilibrium that conduces to the maintenance of the rule of law and that we should therefore opt to retain.

Unfortunately, however, the chain of reasoning that would lead to this conclusion ignores an important dimension of the challenge that led us from a discussion of rule-of-law ideals in a reasonably well-ordered regime to worries about a not-well-ordered environment in the first place. We need to recognize the crucial role that constitutional culture plays in determining how close a legal regime comes to meeting rule-of-law norms. In addition, we have to appreciate that those considerations are variables, not constants. Confrontational actions by judges and especially nonjudicial officials that would have seemed unimaginable a few decades ago are utterly imaginable today. And questions of the form “What would happen if . . . ?” seem increasingly difficult to answer.

239. See, e.g., Lain, *supra* note 26, at 1678 (“[S]oft supremacy . . . showcases the Supreme Court serving as guardian of the people’s Constitution against the acts of ordinary government, just as it was intended to do.”).

Professor Postema equates the rule of law with an “ethos”²⁴⁰ that encompasses widespread agreement on and adherence to legal, constitutional, and political norms, notwithstanding areas of significant, reasonable disagreement.²⁴¹ My discussion of what it means for relevant actors to be ruled by law signals basic agreement. As historical and international experience testifies, the best-written laws and constitutions cannot ensure the achievement or even the approximation of the rule of law—or the protection of minority rights—in the absence of broadly shared and practiced ethical commitments among both government officials and ordinary citizens.²⁴²

As reflected in arguments that I have advanced already, the requisite ethos must include resolve to adhere, and to hold judges and other officials accountable for their fidelity, to law. Even where this disposition exists, moreover, it cannot suffice, all by itself, to ensure a polity ruled by law. The rule of law requires a willingness of those who hold political power not only to hold others accountable, but also to embrace accountability themselves. This disposition, in turn, depends on a recognition of personal fallibility coupled with an acknowledgment of the standing of others within an accountability network to act as judges of fidelity.²⁴³

Sadly, we have reason to fear that the rule-of-law ethos that once prevailed in the United States may be eroding at all levels. Without that ethos, reliance on the mechanisms, norms, practices, and attitudes of forbearance that have existed in the past may prove unavailing in the future. In short, simply to go on as we have previously may not be an available item on the menu of options currently before us.

IV. The Future of the Rule of Law in a Populist Age

In this Part, I drop any assumption that current circumstances in the United States put us clearly on either one side or the other of the contestable divide between constitutional regimes that are reasonably well-ordered and those that are not. Either way, we inhabit a distressing environment. If we ask what those who care about American constitutionalism and the rule of law ought to do to put our practices on a healthier footing, no simple answer

240. Postema, *supra* note 127, at 19; *see also* Gerald J. Postema, *Law's Ethos: Reflections on a Public Practice of Illegality*, 90 B.U. L. REV. 1847, 1857–59 (2010).

241. *See also* Selznick, *supra* note 2, at 37 (“[T]he rule of law requires a culture of lawfulness, that is, of routine respect, self-restraint, and deference.”); Tamanaha, *supra* note 2, at 246 (maintaining that the rule of law requires “a shared cultural belief”).

242. *See, e.g.*, Krygier, *supra* note 112, at 80 (“[S]ome countries do well with unsightly constitutions, while others seem to get nowhere with works of high constitutional art.”).

243. *See* ERIC BEERBOHM, IN OUR NAME: THE ETHICS OF DEMOCRACY 148–58 (2012) (explicating and defending the cognitive virtues of epistemic integrity, independence, and humility on which successful democratic self-government depends).

emerges. Implicitly if not explicitly, most constitutional scholarship adopts a judge-centered perspective and assumes that, absent the need for structural reform, any defects in our constitutional law and practice lie within the competence of courts to remedy. “Constitutional theory” as developed, studied, and criticized in law schools tends to consist mostly of claims about how judges do or should interpret the Constitution,²⁴⁴ sometimes in response to public opinion, but with little attention to the responsibilities of nonjudges as wielders of constitutional authority. The most fundamental message of this Article rejects an exclusively or even a predominantly judge-focused approach to constitutional theorizing.

The spheres of constitutional and political judgment are overlapping. Nonjudicial officials and the public engage commonly in constitutional interpretation and function—for better or for worse—as enforcers of the Constitution, holding the Judiciary accountable for its fidelity to law. Nonjudicial officials and the public also have vitally important roles to play in backing up the courts when other officials, including the President, violate constitutional norms, including those that demand compliance with judicial orders under all circumstances not reflecting an abuse of judicial power. Among the grave worries today is that Congress and the public would not rise to their rule-of-law obligations if a president of the same party, or whom large constituencies held in high esteem for reasons unrelated to rule-of-law ideals, defied a judicial ruling that was not *ultra vires* or utterly unreasonable. I shall return to this concern below. For the moment, the key point is that within the accountability network that the Constitution presupposes, responsibility exists at every node. None is exempt from the challenge of constitutional rehabilitation, repair, and reform.

This Part begins by laying out a general framework for thinking about the daunting challenges that those who care about American constitutionalism confront. Although I cannot offer a comprehensive agenda for the kinds of reforms that are both possible and necessary, the second subpart of this Part offers a few specific suggestions that could serve as starting points.

A. *Framework for Thinking About Rule-of-Law Constitutionalism*

Acknowledgment of the elements of departmentalism and popular constitutionalism that are intrinsic to our constitutional regime should provoke reflection on the necessary cultural foundations of successful rule-of-law governance. The Constitution constrains official power, including that of judges and Supreme Court Justices, by constituting constraining

244. See Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 1–2 (1998).

mechanisms.²⁴⁵ We understand the courts as enforcing the law against presidents and Congress through constitutional adjudication. In the *Nixon Tapes Case*, for instance, we describe the Supreme Court as exerting a constitutional constraint on presidential power. But the President, Congress, and the electorate—fully as much as the Judicial Branch—are constitutionally empowered institutions, vested with responsibility to hold each other, as well as judges, accountable for their fidelity to law.²⁴⁶ Accordingly, if we want to maintain or restore healthy, rule-of-law constitutionalism, we need to look to nonjudicial institutions as well as to the courts.

Focused excessively on judicial review as the sole mechanism of constitutional enforcement, sophisticated commentators increasingly proclaim that the President is unbounded by law and that law has withered as a constraining force on modern government.²⁴⁷ Those who take this view base their conclusion on a perception that the Judiciary exercises little oversight of executive decision-making. In the realm of foreign affairs, they emphasize, there may sometimes be no judicial review at all. But this position reflects too narrow a view of what law, or at least constitutional law, is, and of how law of the relevant kind—which is often vague and contestable—could be enforced.²⁴⁸

An example, tellingly, comes from the realm of foreign and military affairs. The scope of the President's unilateral power to commit troops to hostilities is constitutionally contestable.²⁴⁹ Few doubt that the President has authority to repel sudden attacks on the United States or its citizens, or to respond to some other imminent threats to vital American interests, without summoning Congress into session and awaiting its approval. Most of us, however, would perceive “a practical and constitutional difference between relatively minor military interventions of short duration and major wars that

245. See Fallon, *supra* note 213, at 1002–24.

246. See *id.* at 1023–24.

247. See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 15 (2010) (“[L]aw does little to constrain the modern executive.”).

248. See Pildes, *supra* note 191, at 1408–16. Professors Posner and Vermeule, who maintain that “the major constraints on the executive” come from “politics and public opinion,” acknowledge that “[l]aw and politics are hard to separate and lie on a continuum,” but they insist that “the poles are clear enough for our purposes, and the main constraints on the executive arise from the political end of the continuum.” POSNER & VERMEULE, *supra* note 247, at 4–5.

249. Compare JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* 148 (2005) (arguing that the President can initiate hostilities) with JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH I* (1993) (maintaining that Congress has the exclusive power to commit the nation to war, whether declared or undeclared).

would require large, long-term commitments of forces and commensurate risks of losses of life.”²⁵⁰

Events surrounding the 1991 Persian Gulf War and the 2003 war in Iraq illustrate the vitality of nonjudicial means of constitutional interpretation, enforcement, and accountability-holding when and insofar as Congress and the American people meet their rule-of-law commitments. In both cases, the President’s representatives initially maintained that he could conduct large-scale military operations without congressional authorization.²⁵¹ Had the President insisted on this position, it is doubtful that a court would have tried to stop him. The “political question” doctrine arguably applies.²⁵² Troops in the field should not have to await judicial pronouncement on the lawfulness of military orders. But even when the Judicial Branch sits on the sidelines, other mechanisms of accountability-holding and constitutional enforcement remain available. The Constitution continued to matter to Congress and the President, not least because it mattered to the American people. In the case of both the Gulf War and the Iraq War, the President, looking to the people, ultimately found it politically indefensible to begin a war without first obtaining congressional authorization.²⁵³ And if we ask why the President’s initial stance was politically untenable, it is because too many members of the public viewed it as constitutionally insupportable.

Just as judicial rulings are not always necessary to enforce presidential compliance with law, judicial rulings are not always themselves sufficient, as brought out by actual or threatened presidential defiance of judicial orders in *Marbury v. Madison*, *Stuart v. Laird*, *Ex parte Merryman*, and *Ex parte Quirin*. The *Nixon Tapes Case* illustrates how American constitutional law works only when it is seen in a broad historical and institutional context. In one sense, the *Nixon Tapes Case* illustrates the potency of the Supreme Court: Richard Nixon needed to comply or face impeachment. As the juxtaposition of the *Nixon Tapes Case* with prior cases of actual or threatened presidential resistance to the courts reveals, however, the Supreme Court could have the “last,” authoritative word in the *Nixon Tapes Case* only

250. See RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE* 322 (2d ed. 2013).

251. See Mark R. Shulman & Lawrence J. Lee, *The Debate Over War Powers*, AM. BAR ASSOC.: HUM. RTS. MAG., Winter 2003, https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol30_2003/winter2003.html [<https://perma.cc/Z82X-6FXL>] (“[T]he [George W. Bush Administration] claimed for nearly a year that it did not need congressional authorization for [the war in Iraq].”); Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1642–43 (explaining that the George H.W. Bush Administration threatened initiation of hostilities against Iraq in the Persian Gulf War without congressional authorization, although it ultimately gained authorization before going to war).

252. See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 24–25 (D.C. Cir. 2000) (Silberman, J., concurring).

253. See FALLON, *supra* note 250, at 322–23.

because Congress and the American public accepted its word as constitutionally authoritative. In doing so, moreover, Congress and the American public made their own constitutional judgment, even if they began with a presumption that the President ought to obey a clear judicial order.

To sum up, judicial rulings are neither sufficient nor necessary to ensure official accountability for their fidelity to law. Successful rule-of-law constitutionalism requires a more pervasive rule-of-law ethos. And, almost self-evidently, there are significant limits to the Supreme Court's capacity to create and sustain the rule-of-law ethos on which its authority partly depends.

Accordingly, if we ask what "we" ought to do in response to the frayed and worsening condition of our rule-of-law ethos, we should begin by disaggregating the "we" into the diverse actors in our constitutional practice.²⁵⁴ We should ask what each ought to do, given her role, in order to nurture the ethos on which rule-of-law constitutionalism depends.

B. Possible Applications: Different Reforms by Different Institutional Actors

If I have established that the most pressing challenge confronting American constitutionalism involves its ethical culture, this Article will have accomplished a good deal. I could not hope to lay out agendas for all of the multifarious parties who play consequential roles in American constitutional practice. By way of example, however, it may be useful for me to offer four brisk proposals, each directed at a different set of actors, for desirable, potentially norm-shaping changes in individual behavior. In doing so, I shall not hesitate to acknowledge the riskiness of being a first mover in a political environment in which there is no guarantee that others will reciprocate gestures of accommodation and good will.

My examples are diverse, but they have a common theme. A republican theory of the rule of law, as offered in Part II, needs to confront the perennial challenge to theories that either require or presuppose a wide base of civic virtue, involving what to do when virtue runs short.²⁵⁵ For citizens and officials who view once-shared ethical commitments as having shattered, the first, urgent problem is to reestablish common ground as a step toward further renewal of moral bonds. Those who face such a task should not abandon their own strong political commitments. They need not posit a false equivalence

254. Postema, *supra* note 127, at 39 ("Fidelity to law . . . depends on each taking responsibility for his or her conduct and for the law's proper functioning (to the extent that it is within their power to do so).").

255. For a classic modern exploration of this challenge, see J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

in allocating blame for the developments that have led to crisis.²⁵⁶ But if they—if we—are to achieve success, our aim must be to win over, rather than merely to defeat, as many as possible of those whose current views strike us as hostile and misguided.

If this is the goal, an instrumentally and ethically mandated first tactic is to try to achieve a partly empathetic understanding of at least some positions that we find wrongheaded. Only in this way could we reasonably hope to identify bases for renewed conversation and attempted persuasion.

As animated by a need to reestablish reasoned debate on the basis of shared premises, my first example is generic rather than specific and involves nearly all the levers of departmentalist constitutionalism that Part I discussed. Through much, though not all, of our history, individual and institutional norms of accommodation and restraint have played invaluable roles in averting both governmental paralysis and constitutional crises.²⁵⁷ Seldom has one branch pressed its claims of prerogative to the point of provoking showdowns with another. For instance, presidents have not only obeyed judicial orders in nearly all cases, but also avoided flat defiance of congressional enactments regulating the exercise of war powers.²⁵⁸ Even in this fraught area, interpretive olive branches are the historic norm, even when the President's front-line position is that he possesses unilateral authority.²⁵⁹

Norms of accommodation and restraint are precious assets of our constitutional culture. They are the barriers against all-out political warfare and scorched-earth tactics under circumstances of interbranch collision, especially in eras of politically divided government. Significantly, moreover, traditional norms of restraint have extended from the domain of action to that of rhetoric. Demonization of political adversaries is more likely to exacerbate than narrow ethical divisions. Reflexive castigation of judges tears at the fabric of respect and forbearance that the rule of law and the principle of institutional settlement require.

Today, voices of what I would call moderation and tempered judgment risk outrage and retaliation from elements of their own partisan constituencies. There is often no purely political incentive to be reasonable or to cooperate across the aisle. But those with the temperament, ability, and courage to do so are national assets. Those of us who are not ourselves in a

256. Cf. WORSE THAN IT LOOKS, *supra* note 202 (holding the political Right more blameworthy than the Left for the breakdown of responsible congressional behavior).

257. See, e.g., Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255 (2017) (describing norms and conventions that have typically thwarted proposals for Court-packing and jurisdiction-stripping).

258. See, e.g., DAVID J. BARRON, *WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS 1776 TO ISIS* xii (2016).

259. See *id.* at 425–26.

position to lead should applaud bridge building and reward political courage when we see it.²⁶⁰

Here is a possible avenue by which we might do so, though I understand why others might disagree. Even though I am a registered Democrat, I have supported, and in one instance made campaign donations to, Republican as well as Democratic congressional candidates. From my perspective, supporting any Republican involves a cost or trade-off: I would prefer to see Democrats, rather than Republicans, control both Houses of Congress. But if we are to restore across-the-aisle trust and respect to our national politics, we will need office-holders with open minds and bipartisan temperaments from both political parties. Accordingly, I believe that politically courageous shows of bipartisan cooperativeness in the national interest ought to be rewarded.

My second example involves judicial nominations and confirmations—the one area in which nearly everyone agrees that departmentalist and popular constitutional mechanisms should limit judicial supremacy. As the Supreme Court has assumed an increasingly prominent and ideologically charged role in our constitutional scheme, presidents in making nominations and senators in casting confirmation votes have viewed appointments of Justices as occasions to push the Court as far as politically possible in a preferred ideological direction. Upon reflection, no thoughtful person should welcome the result. By design, the Court should exercise sober second thought concerning legislative and executive decisions. But no sound reason of political morality calls for placing the power to thwart the policies of politically accountable officials in a tribunal composed of ideological extremists, individually nominated and confirmed to advance sometimes dueling political agendas.

Recognizing that current practice has no principled justification, presidents should develop a practice—in hopeful expectation that their successors in office would adhere to it—of appointing only relatively moderate Justices.²⁶¹ Reciprocally, Senators should feel no obligation to confirm politically immoderate nominees. In the short-term, one might question why any president would forgo the opportunity to achieve a politically definable advantage in pushing the Supreme Court as far as possible to the left or to the right. But if one takes a longer view, a norm of moderation should work to nearly everyone's advantage. Over the long term,

260. For insightful discussion of the ethics of political compromise, see AMY GUTMANN & DENNIS THOMPSON, *THE SPIRIT OF COMPROMISE: WHY GOVERNING DEMANDS IT AND CAMPAIGNING UNDERMINES IT* (2012); ROBERT MNOOKIN, *BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO FIGHT* (2010).

261. President Obama's nomination of Merrick Garland, which the Republican Senate majority refused to bring to a vote, furnished a model in this respect.

there is no reason to believe that either the President or the Supreme Court will more often be conservative than liberal, or vice versa. If not, and if political scientists are correct that risk-averse political leaders favor judicial review as a hedge against partisan overreaching by their political opponents,²⁶² it would be in everyone's long-term interest to establish conventions that protect against the Court's being moved too far in any partisan direction.

That said, a president who sought to put practices of judicial nomination on a healthier footing would make a short-term sacrifice with no guarantee of long-term reward. A restrained approach by one president could not guarantee reciprocity from his or her successors. There would be no bargaining partner to agree to a deal and no reliable enforcement mechanism even if a deal could be struck. In response, I can offer only that presidents who deserve our respect and admiration will adjudge some risks to be worth taking.

My third example involves the Justices of the Supreme Court. In recent decades, a number of the Justices have exhibited a conspicuous lack of restraint in their stance toward Congress.²⁶³ Less noticed is how little restraint and respect the Justices appear to display in their attitudes toward the views of one another in reaching their decisions. The Justices decide many of their cases by unanimous votes.²⁶⁴ In their most politically salient decisions, however, the Justices have often divided along politically identifiable, conservative-versus-liberal lines. Even among a majority coalition of five, agreeing on a majority opinion may require negotiation and bargaining. But when the Justice assigned to write a majority opinion can count on four allies, there is no practical necessity of further accommodation that would require more narrowly written opinions—rulings that would have the same party winning in the case before the Court, but leave more issues open for specific consideration in the future.

In many contexts, more bargaining in search for greater unanimity would mark an improvement. Above I quoted a description of the rule of

262. See *supra* notes 97–114 and accompanying text.

263. See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 199–201* (2004).

264. According to data regularly published in the annual November Supreme Court issue of the *Harvard Law Review*, the Court's unanimity rates for the past six years have been: 2010: 46.3%; 2011: 42.7%; 2012: 48.7%; 2013: 63.9%; 2014: 40.5%; and 2015: 48%. *The Supreme Court, 2010 Term—The Statistics*, 125 HARV. L. REV. 362, 367 (dividing the sum of the number of unanimous and unanimous-with-concurrence full opinions by the total number of full opinions); *The Supreme Court, 2011 Term—The Statistics*, 126 HARV. L. REV. 388, 393 (same); *The Supreme Court, 2012 Term—The Statistics*, 127 HARV. L. REV. 408, 413 (same); *The Supreme Court, 2013 Term—The Statistics*, 128 HARV. L. REV. 401, 406 (same); *The Supreme Court, 2014 Term—The Statistics*, 129 HARV. L. REV. 381, 386 (same); *The Supreme Court, 2015 Term—The Statistics*, 130 HARV. L. REV. 507, 512 (same).

recognition that prevails among the Justices in doubtful cases as a “framework for bargaining.”²⁶⁵ Building on this formulation, we should think of the recognition practices that exist in the Supreme Court as a framework for ongoing negotiation extended through time in a context in which other officials and the public need to be brought on board if judicial decisions are to endure. For those negotiations to succeed in their ultimate aspiration, cautious elaboration and extension of emerging principles is typically preferable to bold lurches.

As an additional benefit, more cautious, incremental decision-making—with more Justices joining in cooperative problem solving across familiar ideological lines—might help to weaken an unhealthy feedback loop between Supreme Court decision-making and radically polarized electoral politics. Norms of accommodation and restraint among the Justices would provide a buttress against perceptions that constitutional adjudication in the Supreme Court is merely an extension of partisan politics. Electoral politics can swing sharply with each successive election cycle. Supreme Court decision-making is inevitably shaped by constitutional politics, but rule-of-law values call for more stability.

My final example involves the electorate. As members of accountability networks that are vital to the rule of law, we should regard citizenship as an office that carries cooperative as well as critical and oversight responsibilities.²⁶⁶ If mob rule is the antithesis of the rule of law, voting animated by the fanaticism of a mob, fueled by intemperate railing in an echo chamber, is also dangerous.

The underlying pathologies of populist politics are resentment and demonization, fed by “motivated reasoning”²⁶⁷ and group polarization.²⁶⁸ All of us—literally all of us—are prone to motivated reasoning, whether to greater or lesser degrees. Just as it is each of our responsibilities to hold others accountable for fidelity to law, we should acknowledge our own accountability by embracing a personal ethics of belief formation about political matters.²⁶⁹

In the months running up to the November 2016 presidential election, I—a faithful reader of the *New York Times*, a regular listener to National Public Radio, and an occasional viewer of CNN—took on the project of

265. See *supra* note 154 and accompanying text.

266. On the ethical obligations of democratic citizenship, see BEERBOHM, *supra* note 243, at 142–92.

267. See *supra* note 209 and accompanying text.

268. See SUNSTEIN, *supra* note 210, at 59–97.

269. See BEERBOHM, *supra* note 243, at 184 (defending a “Peer Principle,” under which “[a]s the moral significance of a [political] decision increases, a citizen’s obligation to seek out and engage with epistemic peers increases”).

watching at least twenty minutes of Fox News per day. On a number of occasions, the juxtaposition of CNN and Fox News—with their dramatically different perceptions of the day’s most newsworthy events—left me with a vertiginous sense of moving between alternative realities. I wish I could report that I emerged from the experience much modified in my political views. Perhaps to my discredit, I did not. I did, however, come away with a somewhat altered sense of what it is reasonable to ask from the Supreme Court if those of us who inhabit alternative realities are to live together successfully under a Constitution that was substantially written in the eighteenth century. All things considered, I think most, if not all, of us would be well advised to ask for less from the Supreme Court—when a majority agrees with us—if we, in return, would need to fear less when a majority disagrees.

Once again, there are no guarantees that moderation and self-restraint by some—you and me, for example—would elicit reciprocity from others. Unilateral restraint is a risky policy in many contexts. But policies that accelerate downward spirals bring risks of their own. Such is the endemic predicament of those who inhabit political democracies and who aspire to achieve ideals associated with the rule of law under culturally fraught conditions.

Conclusion: The Rule of Law in the Age of Trump

And what if President Trump defied a judicial order? It should be plain, in principle, how relevant actors ought to respond. With the President and the Judicial Branch having acted based on incompatible constitutional judgments, the responsibility would devolve to Congress and the American public, divided though we may be, to resolve the crisis of competing claims of constitutional authority. My arguments about departmentalism, popular constitutionalism, and the politically constructed bounds of judicial power would offer neither a justification nor an excuse for presidential defiance of a judicial order except in the unlikely case of dramatic judicial overreaching. Both Congress and the public should presume that the Constitution and the rule of law require enforcement of the judicial judgment. But the possibility that the Judicial Branch might have overstepped its bounds would need to be considered.

Available mechanisms for resolving the crisis would include the impeachment process and votes in elections that would signal support either for the President’s view or for that of the Supreme Court. Successful resolution would require a substantial modicum of public agreement emerging from a network of shared ethical commitments and understandings. There would be no guarantee of a happy outcome. All of us would need to be ready to do our part to save our constitutional republic and the rule of law through constitutional politics. The idea of a meaningful “we” who might rise

to the occasion is admittedly elusive, though I hope not muddleheaded. If we can agree on anything, it should be that no single person and no single institution could do what would need to be done without the help of a lot of others.