Constitutional Conflict and Judicial Supremacy: Rethinking the Authority of the Court

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Chapter One

The United States Constitution has been preserved and protected for over two hundred years. Since its creation, the text has endured a civil war, economic depression, political corruption, and foreign attack. The ability of the text to remain applicable over the course of American history, through both ordinary and extraordinary circumstances, makes the Constitution a remarkable document within a remarkable area of study.

As the most powerful legal text of the American government, the Constitution acts as the fundamental rulebook for all government actors. The "supreme Law of the Land" provides that all "Senators and Representatives," "Members of the several State Legislatures," and "executive and judicial Officers" are bound to the text upon taking their oath.[1] To fulfill their promise, all three Federal departments are expected to abide by the Constitution when carrying out their responsibilities. When unfamiliar situations arise, however, the guidelines put forth in the Constitution frequently become unclear and give rise to conflicting interpretations. Although the document provides space for dialogue and debate over constitutional meaning, it does not, in its text, allow for multiple arbitrations. In the event of a constitutional dispute, therefore, it has become common in the American system to determine a final arbiter.

Today, it is widely accepted that the Supreme Court acts as the authoritative interpreter of the Constitution. When questions of constitutionality divide the American people, the modern narrative of resolution dictates that the disputing parties bring the issue before the Court to determine a constitutionally appropriate settlement. The narrative further maintains that once the Court renders a decision, the ruling becomes law and is enforced by all other departments of

[1] U.S. Constitution. Art. 6, Sect. 2,3.

government. In light of today's major Supreme Court decisions, it is clear that judicial opinion dominates contemporary constitutional settlements.

In recent past, the Supreme Court has controlled the outcome of the nation's most controversial debates. The Court has been responsible for determining a presidential victor, striking down campaign finance reform, authorizing universal health care, and legalizing same-sex marriage at the federal level. Despite opposition to these contentious rulings, all government officials have continued to enforce the judgments made by the Court. This contemporary dynamic of American government is defined as the theory of *judicial supremacy* and acts as first of the three modes of constitutional interpretation discussed in my work. As the name indicates, this theory of interpretation asserts that the Supreme Court is the dominant voice of constitutional meaning over all other interpretations. Frederick Schauer expands on this premise in his study "Judicial Supremacy and the Modest Constitution," "Supreme Court interpretations of the Constitution are understood by other branches of government and by the people as authoritative, not necessarily because of their wisdom but solely because of their source."[2] Not only do the American people respect the opinion of the judiciary because of its position institutionally, but also because of the esteemed nature of the branch itself. The Court is largely understood to be 'above the fray' in terms of political disputes, focused only on preserving the Constitution in light of the Founders' original convictions. Thus, as the legitimacy of the Court has developed, judicial supremacy has come to entail that all actors, political and nonpolitical, accept Supreme Court decisions as law regardless of their own interpretations.

Despite the modern dominance of the Supreme Court in constitutional debates, recent scholarship has emerged to challenge the notion of judicial supremacy as the controlling

[2] Frederick Schauer, "Judicial Supremacy and the Modest Constitution." *California Law Review* 92 (2004): 1047.

narrative.[3] In their work, academics such as Larry Kramer, Michael Stokes Paulsen and Mark Tushnet bring alternative methods of constitutional interpretation into focus through historical analyses of challenges to judicial supremacy.[4] In light of such existing scholarship, two alternative methods of constitutional interpretation have become prevalent in the discussion of challenges to judicial supremacy. The first theory, *popular constitutionalism,* is based on the notion that the American people assume "active and ongoing control over the interpretation and enforcement of constitutional law" as the sovereign creators of the founding text.[5] The second theory, *departmentalism,* offers the argument that all three branches of federal government have equal authority to interpret the Constitution.[6] Unlike judicial supremacy, which defines justices as the sole interpreters of the text, departmentalism argues that legislators and presidents, upon taking their oaths, must also interpret the meaning of the Constitution in an equally authoritative manner. Both of these theories challenge the widespread understanding that there must be one interpretation of the text.

In light of these previous works and the emerging dialogue on alternative modes of interpretation, my study will research the role of popular constitutionalism and departmentalism in times of heightened judicial supremacy. To analyze the potential for these alternative theories to exist in modern constitutional dialogue, I will introduce two case studies that examine constitutional discrepancy in the wake of enhanced judicial dominance. By highlighting two

[3] Frank Easterbrook, "Presidential Review." *Case Western Reserve University Law Review* 40 (1990); Louis Fisher, *Constitutional Dialogues: Interpretations as Political Process* (Princeton: Princeton University Press, 1988); Larry D. Kramer, "Popular Constitutionalism, circa 2004." *California Law Review* 92 (2004); Thomas W. Merrill, "Judicial Opinions as Binding Law and as Explanations for Judgments." *Cardozo Law Review* 15 (1993); Bruce Peabody, "Nonjudicial Constitutional Interpretation, Authoritative Settlement, and A New Agenda for Research." *Constitutional Commentary* 16 (1999); Robert C. Post and Reva B. Siegal, "Popular Constitutionalism, Departmentalism, and Judicial Supremacy." *Yale Law School Faculty Scholarship Series* 178 (2004).
[4] Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); Michael Stokes Paulsen, "Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation." *Cardozo Law Review* 81 (1993); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999).
[5] Kramer, "Popular Constitutionalism, circa 2004," 959.
[6] Post and Siegal, "Popular Constitutionalism, Departmentalism, and Judicial Supremacy," 1031.

pivotal moments in American history in which the Supreme Court exerted aggressively visible judicial supremacy over public policy, I will assess the capabilities and limitations of alternative interpretations in challenging the opinion of the Court. By examining the methods used by political actors in their confrontation to the supremacy of the Court, my study will attempt to answer the following questions: Is it possible for alternative modes of constitutional interpretation to exist in a system of enhanced judicial supremacy? Or, does the dominating nature of judicial supremacy prevent additional interpretations from becoming relevant to constitutional dialogue?

To more comprehensively introduce these three theories of interpretation utilized in my study, the remainder of the first chapter will elaborate on the origins and development of each method to place them appropriately in American constitutional history. Following this discussion, my second chapter will focus on the challenges posed by President Abraham Lincoln to the Supreme Court following the decisions *Dred Scott v. Sanford* and *Ex parte Merryman.* In light of these confrontations, my third chapter will investigate the challenges brought by President Franklin D. Roosevelt in response to the Court's determination of economic policy following *Lochner v. New York.* To conclude my study, the final chapter of my work will reflect on the questions I have posed and attempt to reconcile my findings in contemporary constitutional dialogue.

The Impracticalities of Popular Constitutionalism

Although judicial supremacy functions as the dominant mode of constitutional interpretation today, the debates of the founding era were focused primarily on popular

constitutionalism. Unlike ordinary law that is created by the government to "regulate and restrain the people," the Constitution was established as the nation's fundamental law, created through popular sovereignty or "by the people to regulate and restrain the government."[7] Thus, as "regulators" of the government, the American people were determined, at least in theory, to have the final say on constitutional questions.

To empower the people, the Founders integrated two main doctrines into the Constitution including the doctrine of *fundamental law* and the doctrine of *popular sovereignty*.[8] By creating the Constitution as fundamental law, the Framers provided that all legislation enacted from that point on must conform to the standard set out in the founding document. This notion of "higher law" was derived from the American colonial experience. Prior to winning independence, the American colonies were bound by English Charters and thus, expected to create laws consistent with the legal standard established by the British. During this period, if legislation were passed that encroached on the defined limitations within the charter, the British Privy Council would review and invalidate the law.[9] Thus, along the same lines, the Constitution was intended to serve as the dominant legal authority. To ensure its dominance, the Founders included the Supremacy Clause,

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be

[7] Larry D. Kramer, "Judicial Supremacy and the End of Judicial Restraint." *California Law Review* 100 (2012) 622.
[8] Robert G. McCloskey, *The American Supreme Court: Fifth Edition*, ed. Sanford Levinson (Chicago: University of Chicago Press, 2010), 7.
[9] James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law." *Harvard Law Review* 7 (1893): 131.

> bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.[10]

By including the clause within the Constitution, the Founders necessitated that all government legislation and action comply with the text and principles ingrained in the text.

After empowering the Constitution through the doctrine of fundamental law, the Founders limited the potential for government abuse of that power through the doctrine of popular sovereignty. By including "We the People" as the authorizing body in the preamble of the Constitution and providing the method of convention in the amendment process, the Founders established the American people as the *source* of constitutional authority. As McCloskey recounts, "The American pamphleteers had insisted on the principle of home rule; the Declaration of Independence had founded just government on the "consent of the governed"; the next and natural step was to regard the people as not only a consenting but a willing entity and to declare as Jefferson later said, that "the will of the majority is in all cases to prevail.""[11]In the event that the government interpreted the Constitution in conflict with the will of the people, the doctrine of popular sovereignty necessitated that the government alter its behavior. Thus, popular sovereignty mandated that the power to authoritatively interpret the fundamental law belonged to the people, ingraining popular constitutionalism directly into the Constitution.

Although the Founders agreed, in theory, to the supremacy of the people over constitutional meaning, the mode in which the public was to articulate their will was more controversial. Some of the Founders believed that the people must be directly involved in constitutional alterations. Thomas Jefferson, a principal advocate for popular constitutionalism, proposed a plan that would allow the American people to correct "breaches" of the Constitution

[10] U.S. Constitution. Art. 6, Sect. 2.
[11] McCloskey, *The American Supreme Court*, 7.

directly. In his draft for the state constitution of Virginia, he offered the proposal, "Any two of the three branches of government concurring in opinion, each by the voices of two thirds of their whole existing number, that a convention is necessary for altering this constitution, or correcting breaches of it, they shall be authorized to issue writs to every county for the election of so many delegates as they are authorized to send to the General Assembly…"[12] Jefferson believed that the people could be involved in solving constitutional issues directly by electing delegates to attend conventions on the conflicts. In creating a forum for the public to participate in constitutional debates, Jefferson sought to "formalize the people's role in supervising constitutional law."[13] This method, however, proved to be problematic for other members of the Founding era.

James Madison, the so-called "Father of the Constitution" supported popular constitutionalism, in theory, but expressed concerns over the challenges of its practice. In *Federalist* No. 49, James Madison explained his appreciation for Jefferson's proposal,

> The plan, like every thing from the same pen, marks a turn of thinking, original, comprehensive, and accurate; and is the more worthy of attention as it equally displays a fervent attachment to republican government and an enlightened view of the dangerous propensities against which it ought to be guarded….
>
> As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived; it seems strictly consonant to the republican theory, to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new model the powers of government; but also whenever any one of the departments may commit encroachments on the chartered authorities of the others. The several departments

[12] Thomas Jefferson, "Draught of a Fundamental Constitution for the Commonwealth of Virginia," in *Notes on the States of Virginia*, ed. William Peden (Chapel Hill: The University of North Carolina Press, 1954), 221.
[13] Kramer, *The People Themselves*, 45.

> being co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers: and how are the encroachments of the stronger to be prevented, or the wrongs of the weaker to be redressed, without an appeal to the people themselves, who, as the grantors of the commission, can alone declare its true meaning, and enforce its observance?[14]

Madison understood the reasoning behind Jefferson's proposal, so much so that he believed it to be "enlightened." Because the people authorized the government, it would only make sense to appeal to popular will when settling constitutional questions. The feasibility of the plan, however, seemed problematic for Madison.

In the remainder of *Federalist* No. 49, Madison outlines the dangerous consequences that he foresees resulting from appeals to the majority. His first concern is over the damage that frequent appeals would have to the legitimacy of the government. Madison writes, "…it may be considered as an objection inherent in the principle, that, as every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in a great measure, deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability."[15] For Madison, if the government were to be consistently reviewed by the people, it would lose the legitimacy it needed to keep order. Madison's second concern involved the difficulty of reconciling multiple interpretations, on which he reasons,

> The danger of disturbing the public tranquility by interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional

[14] James Madison, "Federalist No. 49," in *The Federalist: The Gideon Edition,* ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), 260-261.
[15] Madison, "Federalist No. 49," 262.

> questions to the decision of the whole society. Notwithstanding the success which has attended the revisions of our established forms of government, and which does so much honor to the virtue and intelligence of the people of America, it must be confessed that the experiments are of too ticklish a nature to be unnecessarily multiplied.[16]

Although the participants of the Constitutional Convention had been successful in making concessions to ratify the Constitution, Madison expresses his doubts as to the ability of the American people to reach the same types of agreements.

Madison's final concern over Jefferson's plan involves the tendency for people to make decisions based on their political affiliations. In his explanation, he argues that it is human nature for people to side with members of their own political party. Thus, when determining constitutional questions, Madison concludes, "The *passions*, therefore, not the *reason*, of the public would sit in judgment. But it is the reason, of the public alone, that ought to control and regulate the government. The passions ought to be controled and regulated by the government."[17] According to Madison, the American people were influenced too easily by their political ties to make a sensible decision. Therefore, although he saw the importance of maintaining popular will, Madison found popular constitutionalism, by way of conventions, to be problematic

Popular Constitutionalism vs. Judicial Supremacy-"A dialectical tug of war"

As James Madison had asserted in his response to Thomas Jefferson's proposal, the functionality of popular constitutionalism was troublesome. Appealing directly to the people in times of constitutional dispute, Madison argued, would result in reduced reverence for the

[16] Madison, "Federalist No. 49," 262.
[17] Madison, Federalist No. 49," 264.

government, further interpretational disputes, and increased popular passions. In light of these anticipated difficulties, the Founders searched for an alternative source of interpretational authority.

For some of the Founders, the judicial branch appeared to be the most fitting replacement for popular involvement. Vesting the Supreme Court with the "judicial power of the United States," Article III gives the Court the authority to adjudicate on "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."[18] Given that the Court was granted the power to uphold the Constitution in all cases under its jurisdiction, some of the Founders believed that the judicial branch was constitutionally specified to make the final interpretation of the text. This line of reasoning serves as the foundation for the theory of judicial supremacy.

The idea of judicial dominance was built over time, through the establishment of two major doctrines during the Founding era: the doctrine of judicial independence and the doctrine of judicial review. Robert G. McCloskey describes this development in his narrative on the evolution of the Supreme Court. In his work, McCloskey argues that the Court had to settle "three major role problems" before it could secure its place as the final interpreter of the Constitution including judicial independence, judicial review, and judicial supremacy.[19] Thus, over time, the concept of judicial supremacy would develop organically from the successful development of these two doctrines.

Since the drafting of the Constitution, the tensions between popular constitutionalism and judicial supremacy have been escalating. Popular constitutionalism champions the American people as the final arbiters of the Constitution, while judicial supremacy is contingent upon the

[18] U.S. Constitution. Art. 3, Sect. 1,2.
[19] McCloskey, *The American Supreme Court,* 18.

finality of judicial decisions. It is therefore not surprising that Kramer argues in his work, "Popular Constitutionalism, circa 2004," that the two theories have remained in a consistent battle for dominancy since the start of the American government.[20] The inception of this struggle is evident in early discourse over the role of the Court.

The most prominent advocate for judicial authority over constitutional interpretation was Alexander Hamilton who built a formidable defense for both judicial independence and judicial review in *Federalist* No. 78. In his essay, Hamilton argues that it is the constitutionally determined duty of the Court to uphold the Constitution against all encroachments.

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.[21]

As the "bulwarks of a limited constitution against legislative encroachments," Hamilton argues that the Supreme Court is granted the authority to determine if legislation is contradictory to the Constitution.[22] This judicial practice of reviewing and invalidating legislation passed by other departments of government is known as *judicial review.* Hamilton defends this procedure as an inevitable implication of the Court's role to protect "the intention of the people"; because the

[20] Kramer, "Popular Constitutionalism," 959.
[21] Alexander Hamilton, "Federalist No. 78," in *The Federalist: The Gideon Edition,* ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), 404.
[22] Hamilton, "Federalist No. 78," 405.

Court is obligated to uphold the Constitution, it cannot give legitimacy to any law in violation of it.

In addition to protecting the Constitution from contradictory laws, Hamilton argues that the Supreme Court is also in a unique position to protect individual liberties. Free from elections and granted life tenure during "good behavior," [23] justices are, in theory, free from political accountability. Hamilton argues that this *judicial independence* of the Court allows justices to practice "inflexible and uniform adherence to the rights of the constitution, and of individuals."[24] In *Federalist* No. 78, he contends that the Judiciary protects individuals from "the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves…to occasion dangerous innovations in the government, and serious oppression of the minor party in the community."[25] Because the Supreme Court is not empowered by popular will, Hamilton argues, it is the only government body capable of protecting the oppressions of minorities.

Alexander Hamilton was not alone in his support of judicial review and judicial independence. James Iredell, one of the first justices of the Supreme Court, reiterated many of Hamilton's defenses. In a letter to Governor Richard Spaight, Iredell argues that judicial review is an unavoidable task of the Judiciary, necessary to protect individual liberties,

> In a republican government (as I conceive) *individual liberty* is a matter of the utmost moment, as, if there be no check upon the public passions, it is in the greatest danger. The majority having the rule in their own hands, may take care of themselves; but in what condition are the minority, if the power of the other is without limit?...The Constitution, therefore, being a fundamental law, and a law *in writing* of solemn nature I have

[23] U.S. Constitution. Art. 3, Sect.1.
[24] Hamilton, "Federalist No. 78," 407.
[25] Hamilton, "Federalist No. 78," 405.

> mentioned (which is the light in which it strikes me), the judicial power, in the exercise of their authority, must take notice of it as the groundwork of that as well as of all other authority; and as no article of the Constitution can be repealed by a Legislature, which derives its whole power from it, it follows either that the *fundamental unrepealable* law must be obeyed, by the rejection of an act unwarranted by and inconsistent with it, or you must obey an act founded on an authority not given by the people, and to which, therefore, the people owe no obedience. It is not that judges are appointed arbiters, and to determine as it were upon any application, whether the Assembly have or have not violated the Constitution; but when an act is necessarily brought in judgment before them, they must, unavoidably determine one way or another."[26]

In his letter, Iredell makes it clear that Supreme Court justices are not "appointed arbiters," demonstrating the nonexistence of the judicial supremacy theory at this time. Due to their assigned duties mandated by the founding text, however, justices must make judgments on legislation. Without the ability to invalidate unconstitutional acts, Iredell reasons, the Supreme Court would be unable to preserve fundamental law or protect individual liberties.

Despite Hamilton and Iredell's assertions of the Judiciary as a protective body, many people were concerned by the heightened power that judicial independence and judicial review granted the Court. Robert Yates (under the pseudonym "Brutus"), author of the Anti-Federalists papers, found the political freedom of justices to be deeply problematic. In his paper Brutus No. 11, Yates argues that giving justices independence from political accountability allowed them to "determine, according to what appears to them, the reason and spirit of the constitution." Without "power provided in the constitution, that can correct their errors or control their

[26] James Iredell, "Letter to Richard Spaight, August 26th, 1787," in *Life and Correspondence of James Iredell: One of the Associate Justices of the Supreme Court of the United States,* ed. Griffith John McRee (New York: D. Appleton and Company, 1857), 173.

adjudications," judges would "mold the government, into almost any shape they please."[27] Without accountability for their decisions, Yates argued, the justices would shape public policy to their own interests.

In response to concerns over the increasing power of the Court, Hamilton argues that the Judiciary is the "least dangerous branch" to the political rights of the Constitution. In his essay *Federalist* No. 78, Hamilton writes,

> The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[28]

Without control over the federal budget like the legislative branch or control over the armed forces like the executive branch, Hamilton concludes that the Judiciary is the least able "to annoy or injure" political rights. Unable to fund or enforce its decisions, Hamilton argues, the Supreme Court only has the power to determine a verdict. As a seemingly weak and politically autonomous body, the Supreme Court was determined by Hamilton to be the most fit to uphold the Constitution.

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[27] Robert Yates, "Brutus No. 11," in *The Complete Anti-Federalist,* ed. Herbert J. Strong (Chicago: The University of Chicago Press, 1981), 420-422.
[28] Hamilton, "Federalist No. 78," 405.

The doctrine of judicial review incited similar disagreements during the founding era, becoming "one of the greatest and most controversial contributions of the Constitution to the law and politics of government."[29] To define the doctrine more clearly, Keith Whittington describes the procedure as "the authority of a court, in the context of deciding a particular case, to refuse to give force to any act of another governmental institution on the grounds that such an act is contrary to the requirement of the Constitution."[30] Judicial review allowed the Court to evaluate the behavior of its so-called "coordinate" branches of government.

In addition to its controversial nature, judicial review also incited contention because of the lack of explicit authorization in the Constitution. Article III, as "the sole constitutional source of the federal judiciary's power to act,"[31] never mentions anything about the judicial power to invalidate federal legislation. The first section of Article III, known as the Vesting clause, provides that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[32] The following provisions of Article III identify the limitations on the Courts' powers by limiting the areas of dispute in which the Judiciary can act. Not once does the text authorize the Judiciary to review or invalidate an act of another federal branch of government.

Despite the disagreement over the validity of judicial review, however, the practice became legal precedent in *Marbury v. Madison.* In the majority opinion, Chief Justice John Marshall used textual support to conclude that the Court must invalidate congressional action. In his ruling, Marshall refuses to enforce legislation on the assertion that it violated the text of the

[29] David M. O'Brien, *Constitutional Law and Politics: Eighth Edition* (New York: W.W. Norton & Company), 23.
[30] Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton: Princeton University Press, 2007), 8.
[31] Gary Lawson and Christopher Moore, "The Executive Power of Constitutional Interpretation," *Iowa Law Review* 81 (1996): 1996.
[32] U.S. Constitution. Art.3, Sect. 1.

Constitution. As put by Samuel Konefsky, "His exposition of fundamental political precepts makes it plain that for Marshall, as for Hamilton, judicial review of legislation flowed logically-indeed inevitably-from the very nature of the institutions created by the Constitution."[33] Marshall reasoned, as did Hamilton in *Federalist* No. 78, that the supremacy of the Constitution necessitates judicial review,

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very *essence* of *judicial duty* [emphasis added]… It is also not entirely unworthy of observation that, in declaring what shall be the supreme law of the land, the Constitution itself is mentioned first, and not the laws of the United States generally, but only those which shall be made in pursuance of the Constitution, have that rank.[34]

Marshall reasons that because the Constitution is fundamental law and the Judiciary has been bound to uphold the Constitution, the Supreme Court must refuse to support any law that acts contrary to it. Thus, Marshall legalizes what Hamilton had worked so hard to defend: the authority of the Court to review and invalidate acts made by other branches of government.

With the establishment of both the doctrine of judicial independence and the doctrine of judicial review, the theory of judicial supremacy became an active mode of constitutional interpretation. Just as Kramer had claimed in his work, the expansion of judicial authority

[33] Samuel Joseph Konefsky, *John Marshall and Alexander Hamilton: Architects of the American Constitution* (New York: Macmillan, 1964), 83.
[34] Marbury v. Madison, 5 U.S. 137 (1803).

resulted in the weakening of popular constitutionalism, marking the beginning of the "dialectical tug of war" between the two.

An Evolution of Popular Constitutionalism- Departmentalism

In light of the difficulties of practical popular constitutionalism, the theory of departmentalism emerged during the infancy of the American government as another mode to challenge judicial supremacy. The theory of departmentalism or "coordinate construction," functions on the premise that "the President and members of Congress have both the authority and competence to engage in constitutional interpretation, not only before the courts decide but after as well. All three branches perform a valuable, broad, and ongoing function in helping to shape the meaning of the Constitution."[35] During the first constitutional conflicts between the judicial and executive branches, Presidents Thomas Jefferson and Andrew Jackson utilized the departmentalist argument to challenge the expanding authority of the Court.

As the first presidential opponent of the Court, Thomas Jefferson was strongly opposed to the notion that the decisions made by the Supreme Court and other federal courts were binding on the other departments.[36] In defense of his defiance to the Judiciary in pardoning those convicted under the Sedition Act of 1798, Jefferson employs the theory of departmentalism. In a letter to Abigail Adams, Jefferson proclaims,

> [N]othing in the Constitution has given [the judiciary] a right to decide for the Executive, more than to the executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them. The judges, believing the [law] constitutional,

[35] Louis Fisher, *Constitutional Dialogues: Interpretations as Political Process* (Princeton: Princeton University Press, 1988), 232.
[36] O'Brien, *Constitutional Law and Politics*, 30.

> had a right to pass a sentence of fine and imprisonment, because that power was placed in their hands by the Constitution. But the executive, believing the law unconstitutional, was bound to remit the execution of it; because that power had been confided to him by the Constitution. That instrument meant that its coordinate branches should be checks on each other. But the opinion which give to the judges the right to decide what laws are constitutional, and what are not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch.[37]

By interpreting the constitutionality of the Sedition Act as independent body, Jefferson asserts that all three federal branches have a duty to determine the constitutionality of the law in their sphere of authority. In the event that the Judiciary had the ability to interpret the Constitution for both Congress and the President, Jefferson reasons, the judicial branch would be tyrannical. Thus, Jefferson concludes, "each of the three departments has equally the right to decide for itself what is its duty under the Constitution, without any regard to what the others may have decided for themselves under a similar question."[38] Through Jefferson's conflict with the Court, the theory of departmentalism is born.

In a second attack against judicial supremacy, President Andrew Jackson rebukes the constitutionality of the second National Bank and strengthens Jefferson's departmentalist claims. In his explanation for vetoing the bill to reinstate the bank, Jackson argues:

> The Congress, The Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the

[37] Thomas Jefferson, "Letter to Abigail Adams, Sept. 11 1804," in *The Writings of Thomas Jefferson,* ed. Paul Leicester Ford (New York: G.P. Putnam's Sons, 1892-1899), 310-311.
[38] Thomas Jefferson, *The Works of Thomas Jefferson,* Vol. 12, ed. Paul Leicester Ford (New York: G.P. Putnam's Sons, 1904-1905), 137-138.

> Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.[39]

As a public officer, Jackson argues, it is his duty to decide the constitutionality of laws presented to him for enactment. In the footsteps of Jefferson, Jackson concludes that the interpretations of all branches of federal government have equal authority and that the Court cannot bind the other branches to their judgment.

As implied by both Jefferson and Jackson in their defenses, the theory of departmentalism formed as an evolution of popular constitutionalism. In each of their explanations, both presidents argue that they are bound to fulfill the oath they took to "preserve, protect and defend the Constitution of the United States."[40] In defending their interpretation of the Constitution, each president reasons that they are performing their duty to protect the American people. Without the ability to directly participate in constitutional dialogue, the public empowers the legislative and executive branches to convey their interpretation of the Constitution. Kramer provides another account of this implication,

[39] Andrew Jackson, "President's Veto Message (July 10, 1832)," in *A Compilation of the Messages and Papers of the Presidents,* Vol. 2, ed. J. Richardson (New York: Bureau of National Literature, 1917), 582.
[40] U.S. Constitution, Art. 2, Sect. 1.

> Each branch could express its views as issues came before it in the ordinary course of business: the legislature by enacting laws, the executive by vetoing them, the judiciary by reviewing them. But none of the branches' views were final or authoritative. They were the actions of regulated entities striving to follow the law that governed them, subject to ongoing supervision by their common superior, the people themselves.[41]

According to Kramer's departmentalist theory, elected officials act as agents of the people in interpreting the Constitution, subject to popular will through political mechanisms such as elections.

For others, such as Lawson and Moore, departmentalism is an implication of the structure of government. According to the scholars, the separation of powers creates room for multiple interpretations of the Constitution,

> Dividing power across jurisdictions and among institutions is a recipe for uncertainty and conflict. One cannot be sure that a bill that passes one house will pass another, that a bill that passes Congress will be signed by the President, that legislation once enacted will be enforced in a particular or predictable way, or that enacted and enforced legislation will be interpreted and applied by the courts in a particular or predictable way. Moreover, the division of powers is consciously designed to place the government in an ongoing state of tension, with each institution in a constant struggle with the others for power and prestige; such is the clear message of Madison's brilliant essay on governmental structure in The Federalist. All of this chaos and conflict was deliberately left to us by the founders because they deemed it necessary to preserve liberty. Departmentalism is simply one aspect of the separation of powers.[42]

[41] Kramer, *The People Themselves*, 201.
[42] Lawson and Moore, "The Executive Power of Constitutional Interpretation," 29-30.

By pinning government institutions against one another, Lawson and Moore argue, the Founders created a system that encourages government actors to question each other's authority. In a government in which all government officials take an oath to uphold the Constitution, it is necessary that all of those actors would interpret the text in their own way, independent of other branches.

Whether departmentalism has emerged as an implication of popular constitutionalism or of the separation of powers, it is clear that all three federal branches must, to some extent, interpret the Constitution. According to Walter Murphy's "Who Shall Interpret," each federal branch must individually interpret the Constitution to effectively perform its respective duties.[43] In his work, Murphy argues that the Legislative branch is granted interpretive power through the "Necessary and Proper" Clause, defining what is "necessary" and "proper" in accordance with existing constitutional principles.[44] Similarly, Murphy contends that the President must also interpret the founding document when carrying out his duty to "preserve, protect, and defend the Constitution."[45] Thus, just as Article III binds the Supreme Court to the Constitution, Congress and the President must also uphold the text when carrying out their constitutional obligations.

In looking more specifically at the role of the president in interpreting the meaning of the Constitution, scholars have debated what behavior is appropriate and within the confines of the Constitution. According to Thomas Merrill, the Take Care Clause of the Constitution grants the President the authority to determine that "the judicial understanding of law is wrong." [46] In light of Article II, Section 3 which provides that "He shall take Care that the Laws be faithfully executed," it is the duty of the president to execute laws that conform to the Constitution. Thus,

[43] Walter F. Murphy, "Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter," *The Review of Politics* 48 (1986): 404-405.
[44] Murphy, "*Who Shall Interpret,"* 404.
[45] Murphy "*Who Shall Interpret,"* 405.
[46] Merrill, "Judicial Opinions as Binding Law and as Explanations for Judgments," 6.

Merrill concludes, in the event that the president disagrees with the constitutionality of a judicial opinion, he can refuse to follow it.[47]

Other scholars such Louis Fisher and Keith Whittington argue that the authority of the judiciary relies upon the presidential acceptance of their decisions. In his work "Constitutional Dialogues: Interpretations as Political Process," Louis Fisher argues that the Court is neither "final nor infallible." Instead, Congress, the President, and the American people must accept the opinions of justices if they are to remain authoritative interpretations of the text. Without such approval, "the debate on constitutional principles will continue."[48] Keith Whittington offers a similar argument, contesting that the Court competes with other political actors for authority to define the terms of the Constitution. In focusing on the role of the President, Whittington argues that the executive must "see some political value in deferring to the Court and helping to construct a space for judicial autonomy."[49]

Recent scholarship has developed to outline the interpretational benefits of departmentalism. According to Bruce Peabody in his work "Nonjudicial Constitutional Interpretation, Authoritative Settlement, and A New Agenda for Research," various interpretations across branches produces "greater diffusion of interpretive responsibility (which) might allow for what is ultimately a deeper consensus about constitutional meaning as a variety of political actors engage in and legitimate the interpretive process."[50] In light of the valuable dialogue initiated by multiple interpretations, Peabody argues, alternative methods of constitutionalism may lead to the preservation of constitutional values. In turn, he concludes, "It is not clear that the conceded goods of settlement, stability and coordination should be given

[47] Merrill, "Judicial Opinions as Binding Law and as Explanations for Judgments,"6.
[48] Fisher, "Constitutional Dialogues," 231.
[49] Whittington, *Political Foundations of Judicial Supremacy*, 26.
[50] Peabody, Nonjudicial Constitutional Interpretation, 6.

priority over all other legal and constitutional values, or that they can only be protected by authoritatively binding interpretations to the Supreme Court."[51]

Although departmentalism has received considerable support from scholars, there are also academics that express concerns over the weakening of judicial supremacy. In his essay "Judicial Opinion as Binding Law and as Explanations for Judgments," Thomas Merrill argues that the president is responsible for enforcing judicial decision. Merrill claims, "…there 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."[52] Michael Stokes Paulsen expands on the problems of departmentalism, arguing "the premises of executive interpretive autonomy and of judicial supremacy are, in principle, irreconcilable. Either the executive branch possesses the prerogative of autonomous legal interpretation within the sphere of its powers or it is subordinate to the judiciary; the two propositions cannot peacefully coexist."[53] Similar to the Kramer's imagery of the "dialectical tug of war" between popular constitutionalism and judicial supremacy, Paulsen contends that departmentalism is also incompatible with judicial supremacy.

The following two case studies that constitute the second and third chapter will explore these claims of incompatibility, looking closely at the conflicts between the Supreme Court and their presidential opponents.

[51] Peabody, Nonjudicial Constitutional Interpretation , 53.
[52] Merrill, Judicial Opinions as Binding Law and as Explanations for Judgments, 46-47.
[53] Paulsen, Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation, 83.

Abraham Lincoln v The Taney Court

Chapter Two

The first case study of my work focuses on Abraham Lincoln's confrontation with the Supreme Court during the early years of the American Civil War, including the tensions leading up to the war resulting from *Dred Scott v. Sanford* and the dispute taking place during the war with the opinion of *Ex parte Merryman.* Prior to Lincoln's presidency, the Court had exercised heightened judicial authority in ruling on the constitutionality of slavery. Encompassing the theory of judicial supremacy, the Court had attempted to dictate national policy and settle the most complicated of social debates. Thus, when Lincoln enters into his presidency he is confronted by a system of judicial dominance to which he combats with by championing notions of popular constitutionalism and departmentalism.

Historical Foundations of Constitutional Controversy

The decade leading up to the Civil War set an appropriate stage for the constitutional conflict between Abraham Lincoln and the Supreme Court. During this period, the entire country was divided, primarily along sectional lines, due to their differing perceptions of the Constitution.[54] Thus, as put by Daniel Farber in his work "*Lincoln's Constitution*," "when Americans debated sovereignty before the Civil War, they were debating the ultimate locus of political authority."[55] The ambiguity of the Founders on the nature of the federal government in respect to the states created room for debate, which quickly resulted in a national division

[54] Daniel Farber, *Lincoln's Constitution* (Chicago: The University of Chicago Press, 2003) 26.
[55] Farber, *Lincoln's Constitution*, 27.

between those who supported sweeping national powers and those who advocated for state rights.[56]

In light of the unsteady relationship between the federal government and the states, the presidents preceding Lincoln encouraged citizens to avoid controversial issues, particularly the institution of slavery. These cautious presidents sought to maintain the status quo by discouraging controversial discourse between states. In his Farewell Address, Andrew Jackson proclaimed that the American republic had proved itself to be a superior form of government in that "our country has improved and is flourishing beyond any former example in the history of nation."[57] To maintain this progress, Jackson urged the American people to "avoid everything calculated to wound the sensibility or offend the just pride of the people of other States, and they should frown upon any proceedings within their own borders likely to disturb the tranquility of their political brethren in other portions of the Union."[58] Jackson argued that anti-slavery advocates were working under the façade of "philanthropic" motives but were actually trying to endanger the sovereignty of the states.[59] In a similar articulation, Martin Van Buren urged the American people to follow the example of the Founders in treating interstate controversy with "delicacy" and "forbearance."[60]

As Lincoln approached his presidency, however, the political controversy could no longer be avoided through political rhetoric. The instability of the nation-state relationship had become undeniable through the controversy of the slavery question. As the nation expanded physically with the adoption of additional states, Congress was faced with the unavoidable

[56] Farber, *Lincoln's Constitution*, 44.
[57] Robert V. Remini, *Andrew Jackson and the Course of American Democracy, 1833-1845*, vol. III (New York: Harper & Row Publishers, 1817), 416.
[58] Remini, *Andrew Jackson and the Course of American Democracy*, 415.
[59] Remini, *Andrew Jackson and the Course of American Democracy*, 416.
[60] John Niven. *Martin Van Buren: The Romantic Age of American Politics* (New York: Oxford University Press, 1983), 409-410.

dilemma of deciding whether or not to extend slavery into those territories.[61] In an attempt to maintain peace between the states that prohibited slavery, "free states," and states that permitted slavery, "slave states," Congress passed the Missouri Compromise in 1820. Under this compromise, all states within the Louisiana Territory, except for Missouri, were to be considered "free," "limiting future expansion of slavery north of a line drawn at thirty-six degrees, thirty minutes."[62]

Despite the enactment of the Missouri Compromise, debate over the expansion of slavery continued after the Mexican-American war when America won the territories now known as California, Utah, Nevada, Arizona and New Mexico.[63] In debates over whether to permit slavery in these states, Southerners responded by threatening to secede from the Union in the event that the territories were not considered "slave states." In turn, the congressional solution, known as the Compromise of 1850, sought to satisfy both Northerners and Southerners by admitting California as a free state, abolishing slavery in Washington D.C., and allowing slavery in New Mexico and Utah.[64]

Despite efforts to construct concessions over the question of slavery, the regional division spurred further disagreements upon which the federal government was forced to take sides. In 1854, Senator Stephen A. Douglas passed the Kansas-Nebraska Act, disregarding the pact made in the Missouri Compromise and allowing the new states of Kansas and Nebraska to decide on their own whether they were to be considered "free" or "slave" states.[65] Opponents of the act joined together to form the Republican Party, soon headed by Abraham Lincoln.[66] With the

[61] Earl M. Maltz, *Slavery and the Supreme Court, 1825-1861* (Lawrence: University Press of Kansas, 2009), 17.
[62] Farber, *Lincoln's Constitution,* 9.
[63] Farber, *Lincoln's Constitution,* 9.
[64] Farber, *Lincoln's Constitution,* 9.
[65] Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978), 108.
[66] Farber, *Lincoln's Constitution,* 9.

defiance of the Missouri Compromise and regional tensions rising, the federal government was forced to take a position in the debate. As judicial supremacy would entail, the Supreme Court was consulted to determine a constitutionally appropriate settlement. As a result of conflicting interpretations of the Constitution, Abraham Lincoln challenged the judicial supremacy of the Court.

Dred Scott v. Popular Constitutionalism

Up until the 1850's, the Supreme Court had managed to stay relatively removed from the issue of slavery.[67] In 1851, the Court set forth their first stance on the slavery question, giving the power to determine the status of personhood to each state respectfully in *Strader v. Graham.*[68] As argued by McCloskey, *Strader* caused very little backlash because Kentucky, the state involved, was a slave state and the extension of slavery was unaffected by the decision. In turn, the Supreme Court's decision did not endanger its "carefully nurtured prestige."[69]

In 1856, however, the Supreme Court encountered the case that would ultimately reveal the Court's position on the question of slavery. In the late eighteenth century, an African American man named Dred Scott was born enslaved to Peter Blow of Virginia. In 1818, the Blow family moved with Scott to Saint Louis, Missouri where he was sold to Dr. John Emerson. Under the ownership of Emerson, Dred Scott was moved further to Illinois and then the Wisconsin Territory, both of which were considered areas where slavery was prohibited.[70] During his stay in these territories, however, Scott never took action as a free man. Instead, Scott filed suit

[67] McCloskey, *The American Supreme Court*, 60.
[68] McCloskey, *The American Supreme Court*, 60.
[69] McCloskey, *The American Supreme Court*, 61.
[70] Maltz, *Slavery and the Supreme Court,* 19.

against his owners after being moved back to Missouri, claiming that he had achieved the status of a free man upon entering Wisconsin.[71]

In response to Dred Scott's suit, Chief Justice Roger Taney delivered arguably the most controversial decision ever rendered by the Supreme Court. In his opinion, Taney established the judicial rule that Dred Scott, as an African American, had no right to bring a suit in federal court because he was not a United States citizen. The Framers, he argued, never intended to include African Americans within the constitutional clause "people of the United States" nor in the Declaration of Independence's "all men are created equal".[72] In fact, Taney claimed, African Americans were "so far inferior that they had no rights which the white man was bound to respect."[73] Concluding his opinion, Taney ruled that Congress violated the Due Process Clause of the 5th amendment in passing the Missouri Compromise because the legislation infringed upon slaveholders' right to property.[74]

Chief Justice Taney based his ruling in *Dred Scott* on the theory of judicial supremacy. In deciding that both African Americans were not United States citizens and that the Missouri Compromise was unconstitutional, Taney created judicial rules that he expected all actors, political and nonpolitical, to follow. By invalidating a congressional action, the Missouri Compromise, Taney practiced judicial review. He assumed, in making that decision that Congress would comply with the Court's opinion and either discard the legislation or change it to conform to the standards set out by Taney.

Thus, prior to Lincoln's presidency, the Dred Scott decision placed Lincoln in direct opposition with the Court, acting as precursor to a future relationship of constitutional

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[71] Maltz, *Slavery and the Supreme Court,* 20.
[72] McGinty *Lincoln and the Court* (Cambridge: Harvard University Press, 2008), 52.
[73] Dred Scott v. Sanford, 60 U.S. 393 (1857).
[74] Maltz, Slavery and the Supreme Court, 80.

disagreement. When *Dred Scott* was announced on March 6th, 1857, Lincoln was running as the Republican candidate for senator of Illinois against Stephen A. Douglas.[75] As a result of the vast implications of the decision, *Dred Scott* acted as a primary topic of discussion in the debates between Lincoln and Douglas.

Lincoln's challenge to *Dred Scott* employed the theory of popular constitutionalism. As an American citizen, Lincoln believed it was his duty to interpret the Constitution as it was the duty of all other people. Gary Jacobson argues, "Lincoln's response, to ignore the decision as a political rule, was predicated on the view that those sworn to uphold the Constitution have an obligation to advance the cause of constitutional principle, to the end of realizing the ideals of the Declaration of Independence."[76] In defending his conflicting opinion with the Dred Scott decision, Lincoln maintained that the American people were the only body that could decide the finality of constitutional questions.

In confronting the Judiciary, Lincoln did not attack the role of the Court but the finality of their decision. Instead of questioning the Court's role in settling constitutional questions, Lincoln argued that there was a distinction between settled and unsettled judgments. In his first public reaction to the Dred Scott ruling, Lincoln criticized the Court's interpretation of Dred Scott by explaining a series of flaws within the decision, which he argued made it "erroneous."[77] In his evaluation, Lincoln explicated that judicial decisions could only apply to "general policy" when they were "fully settled," creating his own rule for appropriate disagreement with the Court.[78]

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[75] McGinty, *Lincoln and the Court*, 58.
[76] Gary J. Jacobson, "Abraham Lincoln "On This Question of Judicial Authority": The Theory of Constitutional Aspiration," *The Western Political Quarterly* 36 (1983): 68.
[77] Abraham Lincoln, "Speech in Springfield, Illinois, June 26, 1857," in *Abraham Lincoln: Complete Works, Volume One*, ed. John G. Nicholay and John Hay (New York: The Century Co., 1902), 226-235.
[78] Lincoln, "Speech in Springfield, Illinois, June 26, 1857," 226-235.

Lincoln found *Dred Scott* to be especially problematic because it lacked the support of a unified Court. Emphasizing his argument during his Speech at Springfield, Lincoln pointed out that *Dred Scott* was "made by a divided court-dividing differently on the different points."[79] Of the eight justices who adjudicated on the case, half of them disagreed with Taney. The most powerful of these disagreements came in the form of Justice Curtis's dissenting opinion. In his dissent, Curtis argued that, in contradiction to Taney's ruling, Dred Scott was a United States citizen. Utilizing article II, section I of the Constitution, which states that "no person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President," Curtis argued that African Americans were considered citizens at the time of enactment. In light of the five states under the Articles of Confederation granting free African Americans the right to vote, Curtis reasoned that the Founders did understand African Americans to be citizens.[80] Upon establishing this point, Curtis further discredited Taney's opinion by highlighting Dred Scott's supposed lack of standing. In the event that Scott did not have the right to sue, as Taney had claimed, Curtis argued that Taney's sweeping opinion would be considered invalid.[81] By highlighting the historical and logical flaws in Chief Justice Taney's majority opinion, Curtis's dissent demonstrated Lincoln's claim of judicial discord.

In light of his claims as to the unsettled nature of *Dred Scott*, Lincoln argued that the finality of the case belonged to the people. In his First Inaugural Address, Lincoln defends his assertion by defining the jurisdiction of the Court over constitutional questions,

> I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon

[79] Lincoln, "Speech in Springfield, Illinois, June 26, 1857," 226-235.
[80] McGinty, *Lincoln and the Court*, 55.
[81] McGinty, *Lincoln and the Court*, 55.

> the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decisions may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.[82]

In his argument, Lincoln emphasized that in cases of vital importance or decisions involving substantive matter, the American people maintained the right to question the binding nature of the Court's judgment just as Lincoln did in response to *Dred Scott.* In his work, Jacobson expands on this argument, "in a republican polity the realization of substantive ideals must engage the people as active participants in a common quest. The Court may have a special role in this process, but it was never intended for it to go it alone."[83] Thus in his challenge to *Dred Scott*, Lincoln championed popular constitutionalism to promote popular dominance over "vital questions."

[82] Abraham Lincoln,"First Inaugural Address, March 4, 1861," in *Abraham Lincoln: Collected Works, Volume Two*, ed. John G. Nicolay and John Hay (New York: The Century Co., 1902), 5.
[83] Jacobson, "Abraham Lincoln "On This Question of Judicial Authority,"" 68.

Ex parte Merryman- The Constitutionality of Noncompliance

Although the institution of slavery was not the only source of tension between the North and the South during the 1800's, it was certainly a major point of disagreement leading up to the Civil War. Following the Supreme Court's decision in *Dred Scott* and Abraham Lincoln's victory in the 1860 presidential election, the friction between the two regions could no longer be suppressed by congressional compromise. On December 20, 1860, South Carolina was the first state to secede from the Union, followed shortly by Georgia, Mississippi, Florida, Alabama, Louisiana, and Texas.[84] Thus, by the time Lincoln gave his First Inaugural Address, it was clear that the Union had fallen apart and the Confederacy was forming.

Thus, Lincoln's presidency was plagued with crises from the start. On December 26, 1860, Major Anderson moved from Fort Moultrie to Fort Sumter near Charleston, South Carolina sparking Southern hostility as the base was considered Confederate territory.[85] Tension continued to build until the insurrection officially began with the attack of Fort Sumter on April 12, 1861. The battle was sparked after Lincoln authorized the shipment of supplies to the military base.[86] After two days of fighting amongst Lincoln's forces and the Confederate rebels, the armed forces of the federal government were forced to surrender.[87] In response to the attack, Lincoln issued an executive proclamation, calling for state militias to send 75,000 troops to the Capital to crush the rebellion. In the conclusion of his proclamation, Lincoln scheduled a congressional convention for July 4th, giving him several months to handle the budding conflict alone. It is at this time that Scott M. Matheson Jr. notes that Lincoln began his "twelve weeks of

[84] Farber, *Lincoln's Constitution,* 15.
[85] Farber, *Lincoln's Constitution,* 15.
[86] Farber, *Lincoln's Constitution,* 15.
[87] Scott M. Matheson, *Presidential Constitutionalism in Perilous Times* (Cambridge: Harvard University Press, 2009), 34.

unilateral president actions." By April 27 1861, secessionists had consistently impeded Lincoln's Northern militias from entering Washington, D.C. and prompted several brutal riots throughout Maryland. In response to the persisting rebellion, Lincoln authorized the Commanding General of the United States Army to suspend the writ of habeas corpus, sparking a crucial discrepancy between Lincoln and the Court over the constitutionality of his actions.[88]

The writ, by its terms, provides that all imprisoned persons have the right to petition for a review of their arrest before a federal court.[89] As it had been ingrained in the American legal tradition since pre-Revolutionary common law practices, the Framers were careful to include a clause within the Constitution, limiting the circumstances by which the writ could be suspended.[90] In Article 1, Section 9 known as the Suspension Clause, the Constitution proscribes, "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."[91]

Despite the obvious rebellion occurring against the Union, Lincoln's suspension of the writ was controversial because the majority of the American public believed that the power was reserved solely for Congress. Clinton Rossiter elaborates on this controversy, "[The suspension of the writ] was done by the President in the face of almost unanimous opinion that the constitutional clause regulating the suspension of the writ of habeas corpus was directed to Congress alone, and that the President did not share in the power of suspension."[92] Thus, Lincoln understood the Suspension Clause in contrast to the traditional interpretation that the authority belonged to Congress.

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[88] Clinton Rossiter. *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948) 227.
[89] McGinty, *Lincoln and the Court*, 69.
[90] McGinty, *Lincoln and the Court*, 68.
[91] McGinty, *Lincoln and the Court*, 69.
[92] Rossiter, *Constitutional Dictatorship*, 227.

On May 25, 1861, John Merryman was arrested in Baltimore for committing "acts of treason," which included raising an armed group to fight the federal militias and burning railroad bridges to impede their travel.[93] Almost immediately after his arrest, Merryman's lawyer, George H. Williams constructed a petition for a writ of habeas corpus directly from Chief Justice Taney.[94] In response to William's proposal, Taney issued a federal order to hear Merryman's case.[95]

On May 27th, however, Merryman did not appear before the Chief Justice. Instead, Lincoln defied the order of the Court and authorized the continued holding of Merryman.[96] In light of the President's defiance, Chief Justice Taney constructed an opinion for the case known as *Ex parte Merryman.* In his opinion, Taney declared that "the only power therefore which the President possesses, where the "life, liberty, or property" of a private citizen is concerned, is the power and duty prescribed in the 3rd section of the 2nd Article, which requires "That he Shall take care that the laws be faithfully executed.""[97] In light of the President's strict duty to execute the laws, Taney argued, "…He is not authorized to execute them himself or through agents or officers civil or military appointed by himself, but he is to take care that they be faithfully carried into Execution as they are expounded and adjudged of by the Coordinate Branch of the Government to which that duty is assigned by the Constitution."[98] Thus, Taney argued, Lincoln acted beyond his constitutional duties by suspending the writ and refusing to release Merryman. By failing to obey an order made by the federal courts, Taney further contended that Lincoln

[93] Matheson, *Presidential Constitutionalism in Perilous Times*, 34-35.
[94] McGinty, *Lincoln and the Court*, 72.
[95] McGinty, *Lincoln and the Court*, 73.
[96] McGinty, *Lincoln and the Court*, 72.
[97] Ex parte Merryman, 17 F. Cas. 144 (1861).
[98] Ex parte Merryman, 17 F. Cas. 144 (1861).

violated his duty to "faithfully execute" the laws. By challenging judicial supremacy and ignoring a federal order, Taney argued that Lincoln exceeded his constitutional limitations.

In the defense of his challenge to judicial supremacy, President Lincoln employs the theory of departmentalism to justify his interpretation. To strengthen his argument, Lincoln authorizes his independent understanding of the Suspension clause through the claims of executive prerogative and constitutional ambiguity. In his first defense, Lincoln utilizes the theory of executive prerogative to explain his use of presidential war powers during his message to Congress,

> The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?[99]

For Lincoln, the fact that the government was in danger of being "overthrown" and facing an insurrection authorized his use of extraordinary powers without congressional approval. In making this claim, Lincoln utilized the theory of "executive" or "Lockean" prerogative, stemming from John Locke's "Two Treatises of Government." On the subject of presidential power, Locke writes,

> This Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, is that which is called *Prerogative.* For since

[99] Abraham Lincoln, "Message to Congress in Special Session, July 4, 1861," in *Abraham Lincoln: Collected Works,* ed. John G. Nicolay and John Hay (New York: The Century Co., 1902), 60.

> in some Governments the Law-making Power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to Execution: and because also it is impossible to foresee, and so by laws to provide for, all Accidents and Necessities that may concern the publick; or to make such Laws, as will do no harm, if they are Executed with an inflexible rigour, on all occasions, and upon all Persons, that may come in their way, therefore there is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe.[100]

Because the president is a unique position to respond quickly, Locke reasoned that the executive must be given flexibility during "accidents and necessities that may concern the publick." Because Congress was not scheduled to convene for months, Lincoln believed that he had the right to "act according to discretion, for the publick good, without the prescription of the Law." Therefore, Lincoln utilized executive prerogative as one component in his defense to Congress.

After putting forth this argument, however, Lincoln denied making any violation to the Constitution, concluding that he did, in fact, have a right to suspend the writ of habeas corpus. Focusing on the lack of clarity within the Suspension Clause, Lincoln utilized the ambiguity of the Constitution to defend his conflict with the Court. In applying this theory of defense, Lincoln questioned the common belief that the suspension clause was reserved for Congress. Arguing that the Constitution was "silent" as to which Federal Department the power belonged to, Lincoln upheld his behavior as constitutional.

A closer analysis of the Constitution is useful for considering Lincoln's interpretation. The section preceding the suspension clause, Article 1, Section 8, outlines the powers of Congress including the power to collect taxes, to regulate commerce, and to declare war.[101] In

[100] John Locke, *Two Treatises of Government* (New York: Classic of Liberty Library, 1992), 422.
[101] U.S. Constitution, Art. 1, Sect. 8.

this section, the power to suspend the writ of habeas corpus is not included. One might reasonably argue that if the Founders had wanted to reserve the suspension of the writ for Congress, they would have placed it within the section outlining the exclusive powers of the Legislature. Instead, the Suspension Clause is placed within Article 1, Section 9, which for the most part, works to place limitations on Congress.

In the majority of the clauses of section 9, the Founders made it clear that the text applies directly to Congress. For example, the first clause directly includes the word "Congress" in limiting the Legislature's ability to prohibit slavery before 1808.[102] Although not explicit, the content of the third clause implies that the text is also reserved for Congress. In prohibiting the passage of an "ex post facto Law," the text implicitly addresses the Legislature because law making is solely under their authority.[103] The fifth clause works in much the same way, inferring a reserved application to Congress by the nature of the clause, which deals with collection of taxes.[104] However, unlike these clauses, the text of the Suspension Clause never explicitly or implicitly reserves the power of suspension to anyone. Thus, in comparison to the surrounding clauses, the power to suspend the writ is clearly more ambiguous, giving Lincoln a reasonable case to interpret the text in his own way.

After denying the unconstitutionality of his behavior in suspending the writ, Lincoln lastly utilized explicitly the theory of departmentalism to justify his defiance of the Supreme Court. On July 5, 1861, Lincoln's Attorney General Edward Bates issues a statement on his behalf, arguing that the Court did not have the authority to review the President's action,

> …the President, as the chief civil magistrate of the nation, and the most active department in the government, is eminently and exclusively political in all his principal functions. As

[102] U.S. Constitution, Art. 1, Sect. 9.
[103] U.S. Constitution, Art. 1, Sect. 9.
[104] U.S. Constitution, Art. 1, Sect. 9.

> the political chief of the nation, the Constitution charges him with its preservation, protection, and defence, and requires him to take care that the laws be faithfully executed. . . . And the judiciary department has no political powers and claims none, and therefore (as well as for other reasons already assigned) no court or judge can take cognizance of the political acts of the President, or undertake to revise and reverse his political decisions.[105]

As "co-ordinate departments," Bates argued, the Executive cannot be subordinate to the Judiciary. Therefore, Bates concluded that Lincoln's noncompliance with the Court was simply supporting the premise that all three branches must remain equal in authority.

The Implications of Lincoln's Challenge

In light of the confrontations between Abraham Lincoln and the Court discussed in this chapter, it is clear that both popular constitutionalism and departmentalism played distinct roles in the constitutional dialogue of the Civil War period. To defend his alternative interpretations of the Constitution, Lincoln employed both the theories as justifications for his challenge to judicial supremacy. Although Lincoln achieved success in championing popular constitutionalism in questioning *Dred Scott*, his departmentalist arguments in suspending the writ proved to be incompatible with the power dynamics of the time.

Lincoln's successful encouragement of popular constitutionalism in his challenge to *Dred Scott* is evident by the enactment of the Thirteenth and Fourteenth Amendments. Ratified on December 6, 1865, the Thirteenth Amendment abolished slavery within all territories of the

[105] Edward Bates, **"**Opinion of Attorney General Edward Bates, July 5, 1861," in *History of the Federal Judiciary*, Federal Judicial Center.

United States.[106] Following shortly, the Fourteenth Amendment was ratified on July 9, 1868, officially overturning the Dred Scott decision by granting citizenship to all persons "born or naturalized in the United States" and providing them with "equal protection under the laws," particularly applying to former slaves.[107] Just as Lincoln had contended in his evaluation of the decision, the finality of the ruling was reserved for the American people. Thus, in amending the Constitution to reverse the decision of Court, the public successfully utilized popular constitutionalism.

Despite his success in promoting popular constitutionalism, however, Lincoln's employment of departmentalism in *Ex parte Merryman* proved to push the boundaries of his executive authority too far. In light of Lincoln's refusal to obey a judicial order, some scholars have dubbed Lincoln's behavior an act of "executive nullification." As defined by Michael Stokes Paulsen, executive nullification refers to the executive power to void judgments and ultimately "means there is no such thing as judicial supremacy: the President has legitimate constitutional authority to disregard any judicial decree or precedent he chooses."[108] As this theory authorizes presidential defiance, it is largely considered to be dangerous to the separation of powers. Paulsen elaborates,

> The virtually unanimous view of the legal community today is that Lincoln and Bates carried the logic of coordinacy too far… The prevailing consensus is that Lincoln's actions were wrong as a matter of constitutional law, at least in principle: the final judgments of the judicial branch must be enforced by the executive; orders of the courts -

106 U.S. Constitution, Am. 13.
107 U.S. Constitution, Am. 14.
[108] Paulsen, "Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation," 83.

> even orders directed to the President - are the law of the land and must be obeyed and enforced. The Merryman power is thus generally thought to be over the line.[109]

Although Lincoln defended his behavior as a feature of departmentalism, his defiance of a judicial order exerted more than independent interpretative authority. By threatening the legitimacy of the Court as an institution, Paulsen argues, Lincoln threatened the overall legitimacy of the government.

Other scholars have argued, however, that Lincoln's defiance of the Court cannot be characterized as "executive nullification" because the President received "retroactive ratification." On August 6, 1861, Congress passed legislation approving Lincoln's war actions, "as if they had been issued and done under the previous express authority and direction of the Congress of the United States." In a subsequent congressional session, Congress authorized the President to continue to suspend the writ of habeas corpus during the remainder of the rebellion.[110] In light of retrospective congressional approval for Lincoln's actions, David Gray Adler argues that Lincoln's defiance of the Court must be deemed constitutional.[111] In support of his claim, Adler reviews Thomas Jefferson's personal thoughts on retroactive ratification. Adler cites Jefferson's Letter to J.B. Colvin on September 20, 1810,

> The officer who is called to act on this superior ground, does indeed risk himself on the justice of the controlling powers of the Constitution, and his station makes it his duty to incur that risk. But those controlling powers, and his fellow citizens generally, are bound to judge {him} according to the circumstances under which he acted…

[109] Paulsen, "Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation," 98-99.
[110] Matheson, *Presidential Constitutionalism in Perilous Times*, 39
[111] David Gray Adler, "The Framers and Executive Prerogative: A Constitutional and Historical Rebuke," *Presidential Studies Quarterly* 42 (2012): 388.

> The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justices of his country and the rectitude of his motives.[112]

In explicating the historical basis for retroactive ratification, Adler argues that in the case of Lincoln's suspension of the writ of habeas corpus, Lincoln's behavior would be considered constitutional.

In addition to receiving "retroactive ratification," Lincoln's actions also remained unchallenged by the Supreme Court in subsequent cases throughout the Civil War. In the *Prize Cases,* when the constitutionality of Lincoln's authorization for the blockade of Confederate ports was questioned, the Court approved of Lincoln's response to the insurrection. In the majority opinion, Grier writes, "Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government…The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact."[113] The Court continued to support Lincoln's suspension of the writ in *Ex parte Vallandigham* when the justices refused to hear the case as it was reserved for the military commission.[114] Only after the war, in the case of *Ex parte Milligan,* did the Court rule the use of military commissions was illegal in regions not involved in "military operations."[115] Thus, the Court concluded that in Milligan's case, "an ordained and establish court was better able to judge

[112] Thomas Jefferson, "Letter from Jefferson to J.B. Colvin, September 20, 1810," in Adler, "The Framers and Executive Prerogative," 387.
[113] McGinty, *Lincoln and the Court,* 139.
[114] Grandall, *Lincoln: The Liberal Statesman,* 129.
[115] Ex parte Milligan, 71 U.S. 2 (1866).

of this than a military tribunal composed of gentlemen not trained to the profession of the law."[116]

Lincoln's interpretation of the Constitution, predicated on departmentalism, was accepted as an anomaly. Congress and the Court saw the emergency of the Civil War as a justification for his independent interpretation but made clear that it was only warranted under specific circumstances. Lincoln's employment of departmentalism, thus, depicts the difficulty with which departmentalist arguments can be employed to challenge judicial supremacy. Even in the midst of civil war, Lincoln received substantial opposition to his conception that the Executive could independently interpret the Constitution.

[116] Ex parte Milligan, 71 U.S. 2 (1866).

Franklin D. Roosevelt v. The Hughes Court

Chapter Three

Just as Abraham Lincoln was elected to office at the brink of the American Civil War, Franklin D. Roosevelt, too, entered his presidency at the height of a national crisis. And just as Lincoln saw himself in need of unprecedented executive authority in handling the conflict, Roosevelt also believed that the extraordinary circumstances of his time required flexibility in constitutional powers. In the midst of America's greatest economic emergency, the Great Depression, Roosevelt took his oath and pledged his loyalty to the nation, promising to end economic suffering and restore prosperity to the American people. To do this, Roosevelt and Congress would enact emergency measures that in ordinary times would not have passed constitutional muster. In their attempt to reconstruct the economic policy upheld by the Supreme Court, Roosevelt and Congress were met with judicial opposition, consisting of a series of legislative invalidations that Robert McCloskey refers to as "the most ambitious dragon-fight in its long and checkered history."[117] In response to the Court's asserted dominance over economic policy, Roosevelt employs the theories of popular constitutionalism and departmentalism to confront the Judiciary in a time of heightened judicial supremacy.

Historical Foundations of Constitutional Controversy

Known as the "laissez faire" era, the early 1900's became defined by the notorious *Lochner v. New York* case in which the Supreme Court established that limitations on labor hours

[117] McCloskey, *The American Supreme Court,* 110.

violated the "liberty of contract" of the Fourteenth Amendment's due process clause.[118] The implications of the case were extensive, sparking an era of economic conservatism that was enforced by continued judicial precedent. According to David O'Brien, "For four decades (from 1897 to 1937) the philosophy of laissez-faire capitalism and defensive stand against special interests' protective legislation held sway with a majority of the Court under Chief Justices Waite, Melville Fuller (1888-1910), Edward White (1910-1921), William Howard Taft (1921-1930), and Charles Evans Hughes (1930-1941). Never before or since were economic regulations more severely scrutinized."[119] Thus, when encountered with the crisis of the Great Depression, the Supreme Court was dominated by the conservative ideology of the *Lochner* era and accustomed to invalidating government regulation of business.

As the Great Depression approached, however, the ideological composition of the Court encountered greater variance, creating a frequently divided Judiciary. Two ideological blocs made up the New Deal Court that emerged. The first consisted of four conservative justices known as "The Four Horsemen", including Justices McReynolds, Van Devanter, Sutherland, and Butler. The other ideological bloc consisted of three liberal-minded justices including Justices Brandeis, Stone, and Cardozo.[120] The two remaining justices, Chief Justice Hughes and Justice Roberts were considered moderate conservatives and were therefore frequently swing voters.[121] The divided nature of the Court provided a foundation for constitutional disagreement both amongst the justices themselves and with other political actors such as President Roosevelt.

At the onset of the Depression, the justices appeared divided in their understanding of emergency powers. In the case *Home Building & Loan Association v. Blaisdell,* the two

[118] O'Brien, *Constitutional Law and Politics*, 1042.
[119] O'Brien, *Constitutional Law and Politics*, 1043.
[120] Melvin Urofsky, *Supreme Decisions: Great Constitutional Cases and Their Impact* (Boulder: Westview Press, 2012), 241.
[121] Urofsky, *Supreme Decisions*, 241.

ideological blocs of the Court presented contrasting opinions on the use of extraordinary powers in times of crisis. The Court considered a Minnesota state law that provided mortgage relief by extending the time in which the debt must be repaid.[122] Arguing that the legislation was unconstitutional, the plaintiff claimed that the state had violated Article I, Section 10, the Contract Clause, by interfering in his private contract. [123] In the 5-4-majority opinion, Chief Justice Hughes concluded that the law was constitutional because the economic emergency necessitated the use of the state's police power over the "contract clause," reasoning that mortgage relief worked to "protect the vital interests of the community."[124] Thus Hughes established, "that although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed."[125] In the dissenting opinion, however, the conservative justices argued that the economic emergency did not warrant the amplification of constitutional power. Representing the dissenters, Justice Sutherland argued, "The present exigency is nothing new. From the beginning of our existence as a nation, periods of depression, of industrial failure, of financial distress, of unpaid and unpayable indebtedness, have alternated with years of plenty." For the conservative members of the Court, the emergency did not excuse a person's responsibility to pay their bills. Instead, Sutherland argued,

> "The vital lesson that expenditure beyond income begets poverty, that public or private extravagance, financed by promises to pay, either must end in complete or partial repudiation or the promises be fulfilled by self-denial and painful effort, though constantly taught by bitter experience, seems never to be learned, and the attempt by

[122] Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934).
[123] Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934).
[124] Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934).
[125] Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934).

> legislative devices to shift the misfortune of the debtor to the shoulders of the creditor without coming into conflict with the contract impairment clause has been persistent and oft-repeated."[126]

Sutherland's opinion demonstrated the conservative ideology of the Court by discouraging government interference in private business. The disagreement amongst the justices over the Minnesota state law revealed that the justices did not fundamentally agree on how the Constitution should be interpreted to account for the Depression.

As the Depression wore on, however, the justices appeared to come to a consensus. In *Schechter Poultry Corporation v. United States*, the justices agreed that emergencies did not warrant the expansion of constitutional powers. As Chief Justice Hughes explicated on behalf of a unanimous Court,

> Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.[127]

Despite their disagreement in the case previously mentioned, it clear that by 1935 when the *Schechter* case was decided, the justices agreed that the economic emergency facing the nation could not justify the expansion of constitutional powers. To meet the needs of the Depression, the Court argued, the Constitution must be interpreted in the same way it had been in the years leading up to crisis.

[126] Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934).
[127] Schechter Poultry Corporation v. United States, 295 U.S. 495 (1935).

The Great Depression and Extraordinary Circumstances

On March 4th, 1933, Roosevelt focused his first Inaugural Address on the dire economic problems at hand,

> Values have shrunken to fantastic levels; taxes have risen; our ability to pay has fallen; government of all kinds is faced by serious curtailment of income; the means of exchange are frozen in the currents of trade; the withered leaves of industrial enterprise lie on every side; farmers find no markets for their produce; the savings of many years in thousands of families are gone. More important, a host of unemployed citizens face the grim problem of existence, and an equally great number toil with little return. Only a foolish optimist can deny the dark realities of the moment.[128]

Roosevelt's description was accurate**.** Following the crash of the stock market in 1929, the American economy spiraled completely out of control. The production rate in factories dropped more than 50 percent, as steel plants functioned at 12 percent of their potential capacity.[129] By the time Roosevelt was elected, 5,000 banks had declared bankruptcy, two million people had lost their homes and 13 million people were considered unemployed.[130] The Great Depression had left the entire world "profoundly depressed, economically and psychologically."[131]

As Roosevelt continued to explain in his Inaugural Address, the effects of the Depression had created a nationwide state of emergency that could only be met with swift government action. Comparing the current economic state to a state of war, the President urged the Federal

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[128] Franklin D. Roosevelt, "First Inaugural Address, March 4, 1933," in *Significant Documents Collection* col. Franklin D. Roosevelt Presidential Library & Museum.
[129] Urofsky, *Supreme Decisions*, 242.
[130] Urofsky, *Supreme Decisions*, 242.
[131] Conrad Black, *Franklin Delano Roosevelt: Champion of Freedom* (New York: Public Affairs, 2003), 251.

departments to work in collaboration with one another to restore economic stability. Introducing his program of government intervention, Roosevelt declared,

> Our greatest primary task is to put people to work. This is no unsolvable problem if we face it wisely and courageously. It can be accomplished in part by direct recruiting by the Government itself, treating the task as we would treat the emergency of a war, but at the same time, through this employment, accomplishing greatly needed projects to stimulate and reorganize the use of our natural resources.[132]

For the President, economic suffering had to be countered by a unified government force, similar to the cooperation exercised during times of war.

In his approach to economic recovery, Roosevelt employed the theories of departmentalism and popular constitutionalism to create a series of economic programs to aid specific sectors of the economy. These programs constituted his legislative agenda, which was termed the "New Deal." Roosevelt applied the theory of departmentalism by working with Congress to equally interpret the scope of the government's constitutionally provided power, particularly in times of economic emergency. In drafting and proposing regulatory programs, Roosevelt believed that both the executive and the legislature were capable of determining the meaning of Congress's constitutional powers. Unlike Lincoln who believed that the emergency of the Civil War required immediate executive action, Roosevelt saw the Depression as a crisis in which all three branches must respond to together. Roosevelt frequently employed the image of the government as a "three-horse team provided by the Constitution to the American people so that their field might by plowed." Thus, Roosevelt, calling Congress immediately into special session, viewed all three departments of government equally obligated to protect the people and equally qualified to determine the meaning of that obligation.

[132] Roosevelt, "First Inaugural Address, March 4, 1933."

In creating his "New Deal" legislation, Roosevelt also utilized the theory of popular constitutionalism. In light of his recent election, the President saw himself as the chosen leader of the people and thus, the representative of their will. In his Inaugural Address, Roosevelt declares himself as the leader of "this great army of our people dedicated to a disciplined attack upon our common problems."[133] Thus, Roosevelt promised to use his constitutional powers to take care of the people, "I am prepared under my constitutional duty to recommend the measures that a stricken nation in the midst of a stricken world may require. These measures, or such other measures as the Congress may build out of its experience and wisdom, I shall seek, within my constitutional authority, to bring to speedy adoption."[134] Roosevelt saw his relief programs as a reflection of what the people wanted and more importantly, what the people needed. Thus, in his interpretation of the Constitution in creating the "New Deal," Roosevelt believed himself to represent the people's interpretation of the text.

Despite his intention to unite the federal departments and represent the people's will, Roosevelt's approach to economic recovery raised serious constitutional questions. As Roosevelt applied the theories of departmentalism and popular constitutionalism, the Supreme Court simultaneously upheld the theory of judicial supremacy to assess and determine the validity of Roosevelt's legislation. The interpretational discrepancies over his legislative agenda culminated in Roosevelt's notorious challenge against the Supreme Court known as his "Court-packing plan." As this chapter will demonstrate, departmentalism and popular constitutionalism not only played a vital role in the creation of these programs, but also in Roosevelt's attack on judicial supremacy.

[133] Roosevelt, "First Inaugural Address, March 4, 1933."
[134] Roosevelt, "First Inaugural Address, March 4, 1933."

The "New Deal" and Judicial Supremacy

The source of conflict between President Roosevelt and the Supreme Court are rooted in the fundamental constitutional disagreements between the two departments. In contrast with the Court, Roosevelt understood the Constitution to be a flexible document, in which the text could be narrowed or broadened to meet the needs of any existing situation. Roosevelt described his constitutional understanding in the conclusion of his First Inaugural Address, "Our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form."[135]

Roosevelt's political philosophy functioned on the primary belief "that the government ought to help the people in distress."[136] In holding that as true, the President believed that the Constitution had the flexibility to grant the government the ability to "try new remedies for the failing economy."[137] Thus, Roosevelt's "New Deal" utilized broad constitutional powers to target four main areas of economic concern: the crash of the financial sector, rising unemployment**,** the lack of an effective "safety net", and the lack of industrial regulations. Although the Court challenged important components of the New Deal, the Judiciary did not take up issue with all four areas of the President's agenda. Instead, with the exception of regulatory legislation, the Court practiced judicial restraint when adjudicating on Roosevelt's legislation.

When the President's policies to restore the financial sector were brought before the Court, the majority opinion ultimately consented to his approach, although narrowly in regards to the removal of the gold standard. Roosevelt's financial legislation commenced with the

[135] Roosevelt, "First Inaugural Address, March 4, 1933."
[136] Burt Solomon, *FDR v. The Constitution* (New York: Walker & Company, 2009), 35.
[137] Urofsky, *Supreme Decisions*, 246.

Emergency Banking Act, effectively shutting down, inspecting and reopening thousands of banks nationwide to restore public confidence in the banking system.[138] Roosevelt followed this "bank holiday" with a proposal to combat deflation by cancelling all gold clauses within public and private contracts, prompting the 1933 Joint Resolution removing all gold obligations.[139]

While Roosevelt's banking legislation remained unchallenged by the Court, the President's invalidation of the gold clause spurred opposition resulting in the *Gold Clause Cases.* Although several Court justices expressed personal concern over the implications of the legislation[140], the Judiciary ultimately upheld Roosevelt's policy. In the first of the cases, *Norman v. Baltimore and Ohio Railroad Co.*, the Court held that Congress had the authority to regulate the value of money and that congressional power could not be diminished by private contracts.[141] In the second case, however, the Court offered a more aggressive opinion, concluding that the congressional Joint Resolution was unconstitutional. Upon declaring its unconstitutionality, however, the Court refused to adjudicate on the case due to the plaintiff's lack of standing.[142] Despite objections to the constitutionality of Roosevelt's financial recovery program, the Court ultimately conceded to the President's interpretation of congressional power. By upholding the congressional action in *Norman v. Baltimore and Ohio Railroad Co* and refusing to make a ruling in *Perry v. United States*, the Court demonstrated judicial restraint.

Similarly, the Court gave the President authority to enact programs designed to increase the employment rate and create a social safety net. To confront rising unemployment, Roosevelt and his advisors proposed the creation of numerous agencies designed to employ more people on

[138] Solomon, *FDR v. The Constitution,* 34.
[139] Gerard N Magliocca, "The Gold Clause Cases and Constitutional Necessity," *Florida Law Review* 64.5 (2012): 1252.
[140] Magliocca, "The Gold Clause Cases and Constitutional Necessity," 1253.
[141] Magliocca, "The Gold Clause Cases and Constitutional Necessity," 1268.
[142] Magliocca, "The Gold Clause Cases and Constitutional Necessity," 1271.

public works such as the Civil Conservation Corps (CCC), the Civil Works Administration (CWA), the Public Works Administration (PWA), the Tennessee Valley Authority (TVA), and the Works Progress Administration (WPA).[143] In response to these employment programs, the Court adjudicated favorably. When the TVA was brought before the Court in *Ashwander v. TVA*, for example, the majority emphasized the importance of judicial self-restraint by avoiding ruling on the constitutionality of the entire program.[144] Despite articulating their desire to avoid the constitutional question, however, the Court judged in favor of the program.[145] Thus, the Court practiced a degree of restraint in reviewing the authority of the President and Congress to enact legislation geared toward recovering the employment rate. Similarly, the Court upheld Roosevelt's Social Security Act, which worked to establish a stable pension system for the elderly upon retirement.[146] Confirming the constitutionality of the legislation under a broad interpretation of the "general welfare" clause, the Court also practiced a high degree of judicial restraint in the area of social security.[147]

Roosevelt's fourth area of legislation, the regulation of industry, however, proved too constitutionally problematic for the Court to ignore with avoidance or restraint. The President's strategy to implement economic regulations, using the congressional power to regulate commerce "among the several states,"[148] conflicted with the Court's evolving understanding of the interstate-intrastate commerce dichotomy. As a result of the conflicting interpretations between the Court and Roosevelt over the scope of interstate commerce, three major New Deal

[143] Solomon, *FDR v. The Constitution*, 37-39.
[144] O'Brien *Constitutional Law and Politics*, 165, 171
[145] Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. The Supreme Court* (New York: W.W. Norton & Company, 2010), 221.
[146] Solomon, *FDR v. The Constitution,* 203.
[147] Solomon, *FDR v. The Constitution,* 204.
[148] U.S. Constitution, Art.1, Sect. 8.

programs were nullified including the National Industrial Recovery Act (NIRA), the Agriculture Adjustment Act (AAA), and the Bituminous Coal Conservation Act.

Beginning in the later half of the nineteenth century, the Supreme Court had begun to limit congressional control over commercial activity by defining commerce more narrowly.[149] In the opinion of *United States v. E.C. Knight Company,* Chief Justice Fuller established two tests to narrow the domain of congressional regulation. The first test limited the authority of federal regulation to activities involved in the *transportation* of commerce. Thus, activities involved in the *production* of commerce fell under the jurisdiction of the States.[150] The second test established a distinction between "direct" and "indirect" effects on commerce, concluding that economic regulations could not be instituted unless the targeted activity had a clear and purposeful effect on commerce.[151]

In light of these rules created to narrow the definition of interstate commerce, three of Roosevelt's regulatory programs were invalidated. The first of the three programs to be nullified was the NIRA, a program orchestrated by the National Recovery Administration (NRA) under the Commerce Clause. By regulating minimum wages, maximum hours, and production quotas, the program worked to implement and enforce calculated "industrial codes."[152] The functionality of the program, however, raised economic concerns. As explained by Conrad Black, "The basic problem of the NIRA and the National Recovery Administration (NRA) which implemented it was that they provided an incentive to raise prices and wages, but raising the two together would not raise employment, shrink unemployment, or raise profits and therefore dividends or

[149] O'Brien, *Constitutional Law and Politics*, 575.
[150] United States v. E.C. Knight Company 156 U.S. 1 (1895).
[151] United States v. E.C. Knight Company 156 U.S. 1 (1895).
[152] Solomon, *FDR v. The Constitution,* 38-39.

investment."[153] In light of the complications of the NIRA, the program was brought before the Supreme Court. In the case of *Schechter Poultry Corporation v. United States*, the Court struck down the code-making component of NIRA and ultimately the entire program, arguing that it was an unconstitutional delegation of legislative power to the executive.[154] In addition, the Court also determined that the program was an invalid utilization of the commerce clause. Because they sold their products locally, the Court argued, the Schechter Corporation had no "direct" effect on interstate commerce and could not be regulated by the federal government.[155]

The second of the New Deal programs struck down by the Supreme Court was the Agricultural Adjustment Act. Enacted under the congressional taxing power, the AAA was designed to stabilize the agricultural sector through production quotas. In exchange for abiding by the established quotas, farmers received government subsidies funded through imposed taxes on "cotton mills, beef packagers, and other processors of whatever the farmers produced."[156] During the summer of 1935, "about five new lawsuits were filed each day against the Agricultural Adjustment Act alone. During this period, more than 100 district court judges held acts of Congress unconstitutional; federal courts issued more than 1,600 injunctions blocking the enforcement of New Deal laws."[157] Although the program had successfully brought relief to farmers, saving many from bankruptcy and increasing the prices of farm goods, it also infuriated companies that processed farm goods as they were funding the program through a newly imposed tax.[158] When the program was brought before the Court in *United States v. Butler,* the Court invalidated the AAA, ruling that the program was an invalid use of the commerce clause

[153] Black, *Franklin Delano Roosevelt,* 303.
[154] Schechter Poultry Corporation v. United States 295 U.S. 495 (1935).
[155] Schechter Poultry Corporation v. United States 295 U.S. 495 (1935).
[156] Solomon, *FDR v. The Constitution,* 37.
[157] Shesol, *Supreme Power,* 169.
[158] Shesol, *Supreme Power* 174.

concealed under the taxing power. In the majority opinion, Justice Roberts explained, "We conclude that the act is one regulating agricultural production, that the tax is a mere incident of such regulation…"[159] Due to the "local" nature of agriculture, the Court determined that regulation of the agricultural sector must be reserved for the states.[160]

The last of the New Deal programs invalided by the Supreme Court was the Bituminous Coal Conservation Act. Similar to the NIRA, the Bituminous Coal Conservation Act established industrial codes designed specifically for the coal industry.[161] In the case nullifying the legislation *Carter v. Carter Coal Company,* the Court established a more narrow definition of "direct" effect on commerce, further limiting the scope of congressional authority over the economy. In the majority opinion, Justice Sutherland writes,

> The word "direct" implies that the activity or condition invoked or blamed shall operate proximately-not mediately, remotely, or collaterally- to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the case or effect, but merely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment…affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined.[162]

[159] United States v. Butler, 297 U.S. 1 (1936).
[160] United States v. Butler, 297 U.S. 1 (1936).
[161] O'Brien, *Constitutional Law and Politics,* 578.
[162] Carter v. Carter Coal Company, 298 U.S. 238 (1936).

By arguing that the "magnitude" of the impact was irrelevant to definition of "direct" effect on commerce, Sutherland created a rule that further narrowed the authority of the federal government to regulate the economy. In doing so, the Court directly challenged the agenda of Roosevelt and Congress in providing economic relief. In turn, the nullification of the President's three major New Deal programs acted as a clear exposition of judicial supremacy.

Popular Constitutionalism and the Election of 1936

After the Court had dealt its blows to the President's regulatory agenda, it was clear that judicial supremacy had defeated any arguments Franklin D. Roosevelt had made in defense of his constitutional interpretation. The Court had ruled that three major New Deal programs were unconstitutional and thus, the New Deal programs were eradicated. Judicial supremacy had prevailed. But the constitutional disagreement between the two departments did dissolve with the legislation. Roosevelt took the opportunity in his response to the Court's invalidations to launch his assault on the judicial supremacy of the Court. In order to delegitimize the Judiciary, Roosevelt utilized the theory of popular constitutionalism by encouraging greater public awareness of case rulings and political participation in the upcoming election.

Following the Court's announcement of *Schechter,* Roosevelt was given a public forum to express his reaction by way of a press conference. In his reply to the invalidation of the NIRA, Roosevelt encouraged popular constitutionalism by urging the American people to pay attention to the decisions of the Court and understand their vast implications. To promote a heightened awareness, Roosevelt compared the damaging implications of *Schechter* to those of *Dred Scott,* a case that ultimately resulted in a civil war,

> For the benefit of those of you who haven't read it through, I think I can put it this way: that the implications of this decision are much more important than almost certainly any decision of my lifetime or yours, more important than any decision probably since the Dred Scott case, because they bring the country as a whole up against a very practical question. That is in spite of what one gentleman said in the paper this morning, that I resented the decision. Nobody resents a Supreme Court decision. You can deplore a Supreme Court decision and you can point out the effect of it. You can call the attention of the country to what the implications are as to the future, what the results of that decision are if future decisions follow this decision.[163]

Upon instructing the American public to consider the implications of the Court's opinion in *Schechter*, Roosevelt argued that the Court had reverted to a "horse-and-buggy definition of interstate commerce."[164] By urging the public to pay attention to the Court's decision and its implications, Roosevelt emphasized the consequences of judicial opinions on the American people as a whole. In light of these consequences, Roosevelt argued that public has a right to consider and disagree with the Court's behavior as it directly impacts their lives. In alerting the public to the harmful ramifications of *Schechter,* Roosevelt attempted to incite the rise of popular constitutionalism to combat the judicial supremacy that killed his legislation.

In a later reaction to the invalidation of his regulatory legislation, Roosevelt once again urged the public to consider the implications of the judicial decisions. By nullifying his regulations, Roosevelt argued, the Judiciary crafted a conservative economic policy,

> It seems to be fairly clear, as a result of this decision and former decisions, using this question of minimum wage as an example, that the "no-man's-land" where no

[163] Franklin D. Roosevelt, "Press Conference, May 31, 1935," in *Press Conferences of President Franklin D. Roosevelt, 1933-1945*, col. Franklin D. Roosevelt Presidential Library & Museum.
[164] Roosevelt, "Press Conference, May 31, 1935."

> Government—State or Federal—can function is being more clearly defined. A State cannot do it, and the Federal Government cannot do it. I think, from the layman's point of view, that is the easiest way of putting it and about all we can say on it.[165]

Thus, Roosevelt believed that the Court was making policy by determining what the government should and should not interfere with. In turn, Roosevelt responded by addressing the people, "…the only thing I can say is that it will be and is of very great interest to practically everybody in the United States. They should read all three opinions."[166] Just as he had handled the *Schechter* decision, the President replied to further invalidations by advising the people to read the decisions and understand their meaning.

In his efforts to promote popular constitutionalism, Roosevelt understood the election of 1936 to be a defining moment for constitutional interpretation. As a direct representation of the will of the American people, the election would provide a clear demonstration of public support, or lack there of, for Roosevelt's policies. Thus in his campaign efforts, Roosevelt makes it clear that upon his re-election, he will continue to pursue New Deal-type programs regardless of the Court's invalidations. In his final campaign speech in November 1936, Roosevelt explicitly spells out his objectives for the following four years,

> Of course we will continue to seek to improve working conditions for the workers of America-to reduce hours over-long, to increase wages that spell starvation, to end the labor of children, to wipe out sweatshops….
>
> Of course we will continue every effort to end monopoly in business, to support collective bargaining, to stop unfair competition, to abolish dishonorably trade practices. For all these we have only just begun to fight….

[165] Franklin D. Roosevelt, "Press Conference, June 2, 1936," in *Press Conferences of President Franklin D. Roosevelt, 1933-1945*, col. Franklin D. Roosevelt Presidential Library & Museum.
[166] Roosevelt, "Press Conference, June 2, 1936."

Of course we will continue to work for cheaper electricity in the homes and farms of America….

Of course we will continue our efforts in behalf of the farmers of America…

Of course we will provide useful work for the needy unemployed.[167]

In light of the Court's recent nullifications, Roosevelt's promises to "improve working conditions" and "end monopoly in business" reveal that the President intended to create further legislation to regulate industry regardless of the precedents set by the Court. Thus, for Roosevelt, the election would demonstrate whether Americans approved of his constitutional interpretation and wished him to challenge the Court or sided with the Judiciary and desired judicial supremacy to be upheld.

The argument that the election would serve as clear indication of popular will was reiterated by former president Herbert Hoover in his opposition to the Roosevelt's re-election. In his critique of the President, Hoover called the New Deal an "attack upon free institutions," arguing that the Supreme Court justices remained "true to their oaths to support the Constitution" and "saved us temporarily" by invalidating key components. [168] In light of the approaching election, Hoover urged the American people to vote against Roosevelt in order move the nation from "a system of personal centralized government to the ideals of liberty."[169] Thus, just as Roosevelt saw the election as an indication of public support, Hoover believed the election would serve as a demonstration of public disapproval of Roosevelt's agenda.

On November 3, 1936, the American public could not have made their preferences more clear. In the one the greatest landslide victories of the nation's history, Roosevelt had defeated

[167] Franklin D. Roosevelt, "We Have Just Begun to Fight," *Vital Speeches of the Day* 3.3 (1936): 66-69.
[168] Herbert Hoover, "This Challenge to Liberty" in *Addresses Upon the American Road, 1933-1938* (New York: D. Van Nostrand Company, Inc., 1938), 216.
[169] Hoover, "This Challenge to Liberty," 216.

his political opponent with 61 percent of the popular vote, taking 46 states and becoming one of the most popular presidents of American history.[170] As the theory of popular constitutionalism entails, the election served as an undisputed verification of the public's support for the New Deal and Roosevelt's understanding of the Constitution.

Departmentalism and Restructuring the Judiciary

In his second presidential term, President Roosevelt modified his approach to judicial supremacy, utilizing the recent election to support his departmentalist arguments. With the newly evident approval of the American people, Roosevelt felt confident championing the independent constitutional interpretations of both the Legislative and Executive branches. In his State of the Union address, Roosevelt proclaimed,

> The United States of America, within itself, must continue the task of making democracy succeed. In that task the Legislative branch of our Government will, I am confident, continue to meet the demands of democracy whether they relate to the curbing of abuses, the extension of help to those who need help, or the better balancing of our interdependent economies. So, too, the Executive branch of the Government must move forward in this task, and, at the same time, provide better management for administrative action of all kinds. *The Judicial branch also is asked by the people to do its part in making democracy successful* [emphasis added]. We do not ask the Courts to call non-existent powers into being, but we have a right to expect that conceded powers or those legitimately implied shall be made effective

[170] Black, *Franklin Delano Roosevelt,* 390.

> instruments for the common good. The process of our democracy must not be imperiled by the denial of essential powers of free government.[171]

In urging the Judiciary to conform to the constitutional interpretation understood by the Executive and Legislative branches, Roosevelt makes it clear that all three branches have equal authority over the Constitution. With the approval of the public, the President determines that popular constitutionalism necessitates that the Judiciary alter its constitutional understanding.

Upon championing the three branches as equal interpreters, however, Roosevelt pushes the boundaries of departmentalism too far. To weaken the dominating authority of the Supreme Court, Roosevelt attempts to alter the structure of the judicial branch under the rationale that it will improve the productivity of the department. In presenting his plan to the American public and Congress on February 5, 1937, Roosevelt argued that the justices were too old to manage their workload. In light of the continuing increase in the "volume, importance, and complexity" of cases put before the Court, Roosevelt reasoned that there must be an additional judge for all justices over the age of seventy to improve the efficiency of the Judiciary.[172]

In addition to justifying the plan as a means of structural improvement, Roosevelt also admitted his intent to reconstruct the jurisprudence of the conservative Court. In his famous "fireside chat," Roosevelt defended the "court-packing plan" as a mode of "saving" the Court,[173]

> We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do

[171] Franklin D. Roosevelt, "State of the Union," *Vital Speeches of the Day* 3.7 (1937): 194-197.
[172] Franklin D. Roosevelt, "Press Conference, February 5, 1937," in *Press Conferences of President Franklin D. Roosevelt, 1933-1945*, col. Franklin D. Roosevelt Presidential Library & Museum.
[173] Franklin D. Roosevelt, "The Coming Crisis in Recovery," *Vital Speech of the Day* 3.11 (1937): 349-354.

justice under the Constitution- not over it. In our courts we want a government of laws and not of men.[174]

For Roosevelt, the Supreme Court had violated their duty to uphold the Constitution by invalidating the New Deal programs. Thus, Roosevelt depicts his plan as restorative, ensuring the American people that "This plan of mine is no attack on the Court; it seeks to restore the Court to its rightful and historic place in our system of constitutional government and to have it resume its high task of building anew on the Constitution "a system of living law."[175] In his plan to modify the structure of the Court, however, Roosevelt obstructed the confines of departmentalism. As the president, he was awarded limited space to interpret the Constitution. As the election of 1936 had indicated, the New Deal fell into that designed sphere of authority. However, modifying the ideology of the Court to fit the political climate of the moment breached the theory of departmentalism. In light of this obstruction of power, Roosevelt encountered a high degree of opposition.

Judicial Supremacy Upheld

Despite Roosevelt's persistent defense of the court-packing plan, the scheme was ultimately destroyed in Congress. After months of debate and open opposition, the bill was sent back to committee where the provision to add additional justices was discarded.[176] With the abandonment of the plan, it was clear that judicial supremacy had survived Roosevelt's challenge. The reasons for this can be attributed to two events: the overwhelming backlash against Roosevelt's plan and the Constitutional Revolution of 1937.

[174] Roosevelt, "The Coming Crisis in Recovery," 349-354.
[175] Roosevelt, "The Coming Crisis in Recovery," 349-354.
[176] Black, *Franklin Delano Roosevelt*, 345.

In response to the Roosevelt's court-packing plan, political and non-political actors alike came to the defense of judicial supremacy. As to be expected, Republican congressmen immediately voiced their opposition to the plan. More damaging, however, was the emerging disapproval by the Democratic Party led by Senator Burton Wheeler. Comparing the President's plan to the strategies used by notorious dictators, Wheeler argued that Roosevelt violated the bounds of his authority,

> Why should we be zealous about this cause? When we look at world affairs we realize that in Germany there is a dictator, under whose iron heel are 70,000,000 people. How did he come into power? On what plea did he come into office? He came in under the constitution of Germany. Every step that was taken by him at first was taken in a constitutional way. Mr. Hitler acted "to meet the needs of the times.[177]

In addition to congressional opposition, the Court itself responded to the plan with expected disapproval. In a letter addressed to Senator Wheeler, Chief Justice Hughes argued that Roosevelt's accusations as to the inefficiency of the judicial system were simply inaccurate,

> I think it safe to say that about 60 per cent of the applications for certiorari are wholly without merit and ought never to have been made. There are probably about 20 per cent or so in addition which have a fair degree of plausibility but which fail to survive critical examination. The remainder, falling short, I believe, of 20 per cent, show substantial grounds and are granted. I think that it is the view of the members of the court that if any error is made in dealing with these applications it is on the side of liberality.[178]

The plan also encountered popular opposition due to the deeply problematic undertone of the strategy. For many, Roosevelt was simply trying to restructure the Court to adhere to his political

[177] Burton K. Wheeler, "Appeals to the Prejudices of the People," in *Vital Speeches of the Day* 3.11 (1937): 614.
[178] Charles Hughes, "Chief Justice Hughes' Letter to Senator Wheeler," in New Deal Document Library.

policies. According to Solomon, "there was something hallowed in the only institution of government unblemished by the people. A 1936 opinion poll had found that nearly twice as many Americans believed that the Supreme Court protected them against rash legislation than worried that it was blocking the popular will."[179] Although the concept that justices determined the meaning of law was controversial, the idea that a President could dictate constitutional meaning was even more alarming for Americans. In response, Senator Josiah W. Bailey of North Carolina argued that in undermining the Court, the President undermined the Constitution,

> The Court and the Constitution:- They stand to fall together. The Constitution creates the Court, and the Court declares and maintains the Constitution. To weaken one is to weaken the other. To destroy one is to destroy the other. To weaken either is to weaken the foundations of our Republic; to destroy either is to destroy the Republic.[180]

By weakening the legitimacy of the Court, Bailey argued, the President was threatening the legitimacy of the government as whole.

As people voiced their concerns over the "court-packing plan," the Supreme Court also started to rule in accordance with public will, giving life to what McCloskey calls the "Constitutional Revolution of 1937."[181] Described as the "switch in time that saved nine," the Court overturned itself in *West Coast Hotel Company v. Parrish*, upholding a state minimum wage law and ruled in favor of the New Deal law, National Labor Relations Act, in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*.[182] In addition to practicing judicial restraint, the Court also conceded, in part, to Roosevelt's reorganization plan. On May 18, 1937, Justice Van Devanter announced his retirement, giving the President the ability to

[179] Solomon, *FDR v. The Constitution*, 110.
[180] Josiah W. Bailey, "The Supreme Court, the Constitution, and the People," *Vital Speeches of the Day* 3.10 (1937): 291-295.
[181] McCloskey, *The American Supreme Court*, 117.
[182] O'Brien, *Constitutional Law and Politics*, 590.

nominate a new justice to the Court. The combination of these various factors led to the ultimate failure of Roosevelt's attempt to challenge the Court.

The Implications of Roosevelt's Challenge

In light of President Roosevelt's challenge to the Supreme Court, it is clear that judicial supremacy must interact carefully with popular constitutionalism. As a government body bound by the text of the Constitution, the Supreme Court must maintain its judicial independence, a fact made clear by the overwhelming opposition to Roosevelt's attempt to politicize the Court. At the same time, however, the Court must also concede, to some degree, to the will of the people. In just one month after Roosevelt's announcement to pack the Court, the majority altered its position. It had become clear to everyone, even the Justices themselves, that something had to give. But, that 'something' could never be a congressionally mandated change to the ideology of the Judiciary. In turn, Roosevelt's court-packing plan was not only destroyed but remembered as an inappropriate political manipulation.

Although judicial supremacy was clearly upheld and judicial independence was fervently defended, Roosevelt's challenge prompted an enlightened perception of popular constitutionalism by the Court. As willed by the people, 1937 marked the end of the *Lochner* era for the Judiciary. With the failure of the court-packing plan, the Supreme Court would embark on its new position as the champion of civil rights.[183] The new Court that would emerge from the Roosevelt confrontation would combat some of the greatest civil injustices in our nation's history including racial discrimination, racial segregation and gender discrimination and protect our most important civil liberties including the freedom of speech and the freedom of religion.

[183] McCloskey, *The American Supreme Court*, 141.

The Court, protected by the survival of judicial supremacy and enlightened by a new understanding of public support, would now work to secure its dominance over constitutional meaning by entering a phase of protecting individual liberties.

Rethinking the Authority of the Court

Chapter Four

In our modern political system, constitutional interpretation is largely understood to be a task reserved for the Supreme Court. When the nation encounters a constitutional debate, it is commonplace for the parties of the dispute to bring the issue before the Judiciary to determine a proper settlement. Upon the announcement of the judicial decision, the American people and the members of government are expected to adhere to that judgment, however controversial it may be. For example, on June 25, 2013, when a slight majority of the Court determined that sections of the Voting Rights Act were unconstitutional, those sections were no longer enforced.[184] Despite considerable evidence proving the importance of those sections in preventing voting discrimination and the substantial backlash occurring from their invalidation, the policy of the Court was implemented.[185] President Obama even expressed his dissatisfaction with the judgment, urging Congress "to pass legislation to ensure every American has equal access to the polls."[186] Regardless of his own position on the issue, however, the President did not refuse its enforcement. Judicial supremacy necessitated that all Americans consider the Court's decision in *Shelby County v. Holder* as binding.

However, this dominating narrative of constitutional interpretation is not infallible. In light of the two case studies presented in my work, it is clear that there is space for alternative interpretations in modern constitutional dialogue. In the confrontations posed by both Abraham Lincoln and Franklin D. Roosevelt, popular constitutionalism successfully asserted itself over the

[184] Shelby County v. Holder, 557 U.S. 193 (2013).
[185] "History of Federal Voting Rights Laws," *The United States Department of Justice.* http://www.justice.gov/crt/about/vot/intro/intro_b.php.
[186] U.S. President. *Statement by the President on the Supreme Court Ruling on Shelby County v. Holder*. Jun.25, 2013. Text from: White House Press Releases, Fact Sheets and Briefings.

supremacy of the Court. In the first case, when the American people disagreed with Chief Justice Taney's decision in *Dred Scott v. Sanford,* they turned to the amendment process. Through the enactment of the Thirteenth and Fourteenth Amendments, popular will demanded the reversal of *Dred Scott* and Taney's interpretation of the Constitution. In a similar fashion, the American people practiced popular constitutionalism to successfully undermine the Court's dominance over economic policy during Roosevelt's presidency. To challenge the constitutional interpretation of the Court and assert their approval of Roosevelt's regulation legislation, the American people expressed their will by reelecting Roosevelt in the election of 1936. Thus, during the presidencies of Lincoln and Roosevelt, the American people successfully demanded that popular will act as the authoritative voice over problematic judicial decisions.

In considering the successes of popular constitutionalism in these two case studies, however, it is clear that popular constitutionalism advanced as the legitimacy of Supreme Court was weakened. Prior to the passage of the Civil War Amendments and the reelection of 1936, both Lincoln and Roosevelt initiated formidable assaults on the supremacy of the Supreme Court. In his challenge to *Dred Scott,* Lincoln questions the finality of the ruling and calls into question the jurisdiction of the Supreme Court over "vital" questions. Roosevelt also confronts the legitimacy of the Court in his challenge, proposing a reorganizational scheme to make the Judiciary more 'effective' with the addition of younger justices. Although it is not clear that these presidents were the catalyst for popular constitutionalism during their presidencies, it is a pattern in their challenges that cannot be ignored.

Although popular constitutional effectively altered the direction of the Court in both cases, the departmentalist theories put forth by Lincoln and Roosevelt to promote alternate methods of interpretation proved to be problematic. In Lincoln's challenge to *Ex parte Merryman,* his

defiance of a judicial order was thought to violate the proper power dynamics of government and threaten the authority of the Court as a federal branch.[187] In Roosevelt's challenge, similarly, the President's proposal to restructure the judicial branch with the addition of justices received considerable backlash because it threatened the political independence of the Court. In defending their constitutional discrepancies with the Court, both presidents asserted that they, as a coordinate branch of government, had equal authority to interpret the Constitution. In reconciling their differences with the Court, however, both presidents exceeded the limitations of the departmentalist theory. In light of the backlash both presidents received, it is clear that the coordinate construction theory does not allow for political actors to threaten the legitimacy or independence of the Courts. Thus, although popular constitutionalism succeeded through the weakening of judicial supremacy in my two case studies, departmentalism could not.

Although the American government is not on the brink of a Civil War nor encountering the grave economic hardships of the 1930's, the authority to answer constitutional questions remains just as crucial to national policy now as it did then. After the Court's Constitutional Revolution of 1937, the impact of the Court expanded tremendously. With the passage of cases like *Brown v. Board of Education*, *Roe v. Wade and Furman v. Georgia*, the Supreme Court was credited with settling some of the nation's most controversial social issues.[188] With the extension of judicial influence, the theory of judicial supremacy was no longer assumed but proclaimed as reality. In *Cooper v. Aaron*, all nine justices agreed, "…the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[189]

[187] Paulsen, "Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation," 98-99.
[188] Kramer, *The People Themselves*, 220.
[189] Cooper v. Aaron, 358 U.S. 1 (1958).

Judicial supremacy did not have to be defended, according to Chief Justice Warren, for it was an essential characteristic of the American government.

With the proclamation of judicial supremacy as a legitimate feature of government, the theories of departmentalism and popular sovereignty have also evolved. Popular constitutionalism has, in light of diminished popular resistance to judicial decisions, become an extension of judicial supremacy. According to Larry Kramer, *Brown v. Board of Education,* the landmark case invalidating racial segregation, launched an era of public acceptance for judicial supremacy.[190] Thus, by the time the Warren Court had made its confident claims in *Cooper v. Aaron,* the American people had already accepted the Court as final arbiters of the Constitution.

Along with the evolution of popular constitutionalism, two areas of constitutionalism have also developed in respect to departmentalism. The first development has been the narrowing of the Political Questions Doctrine, a former tool of judicial self-restraint. Originated in the opinion of *Marbury v. Madison,* Chief Justice Marshall reasoned, "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[191] In his opinion, Marshall created a limitation on the Court's jurisdiction: in all cases where the issue should be resolved by another branch of government, the Court would defer the question to that respective department. The Political Question Doctrine, in theory, is a direct mechanism of departmentalism. However, as Louis Henkin argues, the practice of employing the doctrine is in itself a testament to judicial supremacy. In his essay, Henkin writes, "(the Supreme Court) is not refusing to pass on the power of the political branches; it passes upon it, only to affirm that they had the power which had been challenged and that nothing in the Constitution

[190] Kramer, "Judicial Supremacy and the End of Judicial Restraint," 630.
[191] Louis Henkin, "Is There a 'Political Question' Doctrine?" *Yale Law Journal* 85, 1976, 606.

prohibited the particular exercise of it."[192] Thus, it is not surprising to find that the Judiciary has consistently narrowed the definition of a "political question," resulting in cases like *Baker v. Carr* and *Davis v. Bandemer* where the Court determines they do in fact have jurisdiction over political questions.[193]

A second implication of heightened judicial supremacy has resulted in the introduction of alternative mechanisms of departmentalism. In the cases of Lincoln and Roosevelt, both presidents appealed directly to the American people or to Congress to receive approval of their departmentalist claims. Today, the use of "signing statements" has become one method employed by presidents to put forth their own constitutional interpretations without the need for approbation. Made controversial during the presidency of George W. Bush, signing statements allow presidents to enact their own interpretation of a bill when signing a piece of congressional legislation into law.

For example, when current president Barack Obama signed the 2013 National Defense Authorization Act into law, he included in his "signing statement" that he did not support the limitation on "the president's ability to transfer detainees out of military prisons in Guantanamo Bay and Afghanistan." In light of his disagreement as to the constitutionality of that provision, he declared, "In the event that these statutory restrictions operate in a manner that violate constitutional separation of powers principles, my administration will implement them in a manner that avoids the constitutional conflict." Thus, by including his disagreement with the limitation provision in his signing statement, President Obama made it clear that the executive branch would enforce his interpretation of the National Defense Authorization Act. In asserting this claim, the President is practicing an independent right to interpret the text, embodying the

[192] Henkin, "Is There a 'Political Question' Doctrine?" 606.
[193] O'Brien, *Constitutional Law and Politics,* 123.

theory of departmentalism. Although the constitutionality of signing statements has not yet been determined, this emerging mechanism of departmentalism has served as a clear evolution of the arguments and plans posed by Lincoln and Roosevelt under more turbulent times.

Although it is impossible to determine the future of constitutional dialogue, it is clear that the theories of popular constitutionalism and departmentalism remain applicable theories of constitutional interpretation. Although the theory of judicial supremacy acts as the dominant narrative in modern discourse, alternative modes of constitutionalism have succeeded in the past and may certainly assume dominance in the future. Whether they will exist harmoniously with judicial supremacy or require the weakening of the Court's legitimacy is a question that remains to be answered in the constitutional conflicts of our future. In the event that our nation sees another crisis like those witnessed by Lincoln and Roosevelt, we may just find out.

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