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## BECOMING SUPREME: THE FEDERAL FOUNDATION OF JUDICIAL SUPREMACY

*Barry Friedman\* & Erin F. Delaney\*\**

*One of the longstanding questions that bedevils scholars in several disciplines is how judicial power gains traction. What, in particular, explains judicial supremacy? Theories abound, but each is lacking in some way. By looking at the answer to this question in the context of the Supreme Court of the United States, we demonstrate the vital role a federal system can play in both the rise and maintenance of judicial supremacy. In a unitary (nonfederal) system, a judiciary possessing the power of judicial review may well find itself frequently at odds with—and rarely helpful to—the governing regime. In contrast, in a federal system, the judiciary can provide vital support to the central government in suppressing outlier conduct. This “vertical” supremacy—the supremacy of the Supreme Court over state and local governments—ultimately transforms itself into “horizontal” supremacy—the binding effect of judicial pronouncements over the coordinate branches of the national government. This project is theoretical and historical both: It identifies the mechanisms for the transformation from vertical to horizontal supremacy, and recounts how this occurred in the United States.*

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## INTRODUCTION

We live in a world of judicial supremacy, in which the Supreme Court appears to have the “exclusive” power to determine the meaning of the Constitution, even with regard to the work of the coordinate branches of the national government.<sup>1</sup> The idea that the Supreme Court would be the final arbiter of critical political and social issues would have seemed laughable at other points in the nation’s history, which is replete with examples of those who refused to accept the premise that when the “Supreme Court has spoken,” the conversation must end.<sup>2</sup> Yet in modern America, although voices rail against the Court, neither executive nor congressional action seriously challenges it. Take the Supreme Court’s decision in *Citizens United v. Federal Election Commission*, one of its most unpopular and consequential decisions in decades.<sup>3</sup> Given strong condemnation from the Executive Branch and poll results demonstrating that “Americans of both parties overwhelmingly oppose” the ruling, a true challenge to the Supreme Court’s decision seemed in the offing.<sup>4</sup> But the leading statutory measure—which still has not been enacted into law—accepted the decision’s fundamental holding, simply tinkering around the edges.<sup>5</sup> One pundit echoed what was an almost universal

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1. See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 *Colum. L. Rev.* 237, 300–19 (2002) (describing decline of judicial deference to Congress’s constitutional judgments); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 *Harv. L. Rev.* 4, 14–15 (2001) [hereinafter *Kramer, We the Court*] (noting Court’s recent efforts to “protect its own exclusive custody of the Constitution”).

2. Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Delano Roosevelt, and, most recently, Ronald Reagan, have leveled challenges to the notion that the judiciary’s word is final on pressing constitutional questions. And the Kentucky and Virginia Resolutions of 1798 promoted the states as “legitimate judges of the constitutionality of federal laws,” a position used to support state defiance of federal rule throughout the antebellum years. Richard Hofstadter, *Preface to Virginia and Kentucky Resolutions (1798)*, in *2 Great Issues in American History: From the Revolution to the Civil War, 1765–1865*, at 176, 176 (Richard Hofstadter ed., 1958); *infra* notes 70–76 and accompanying text (discussing Kentucky and Virginia Resolutions). But see President’s News Conference of May 19, 1954, 1954 *Pub. Papers* 489, 491 [hereinafter *Eisenhower Press Conference*] (recording President Eisenhower’s statement that because “[t]he Supreme Court has spoken . . . I will obey”).

3. 130 S. Ct. 876 (2010); Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 *Sup. Ct. Rev.* 103, 105 (“Judged in any number of ways, *Citizens United* appears to be the most counter-majoritarian act of the Court in many decades.”); see also Gary Langer, *In Supreme Court Ruling on Campaign Finance, the Public Dissents*, ABC News, *The Numbers* (Feb. 17, 2010), <http://blogs.abcnews.com/thenumbers/2010/02/in-supreme-court-ruling-on-campaign-finance-the-public-dissents.html> (on file with the *Columbia Law Review*) (“Our latest ABC News/Washington Post poll finds that 80 percent of Americans . . . oppose the ruling [in *Citizens United*], including 65 percent who ‘strongly’ oppose it . . .”).

4. Dan Eggen, *Corporate Sponsorship Is Campaign Issue on Which Both Parties Can Agree*, *Wash. Post*, Feb. 18, 2010, at A15.

5. See Dan Eggen, *Senate GOP Blocks Measure to Require Greater Disclosure*, *Wash. Post*, Sept. 24, 2010, at A6 (reporting Senate’s latest failed attempt to pass DISCLOSE Act, which would “require corporations, unions, and other interest groups to provide more details about their political spending”); see also Press Release, White House, *Remarks by the President in State of*

acceptance of judicial power: “[G]iven the sweeping nature of the court’s ruling, there is little Congress can do.”<sup>6</sup>

What explains the Supreme Court’s remarkable judicial supremacy? More to the point, what explains the rise and maintenance of judicial supremacy in any judicial system? Although its normative implications are oft debated,<sup>7</sup> simply understanding the phenomenon itself is an endeavor that has frustrated and beguiled scholars at many times, in many places, and in several disciplines.<sup>8</sup>

This Article provides an explanation for judicial supremacy that most of the scholarship on the subject has failed to consider in any depth—the vital role a *federal* system can play in giving rise to, and establishing, a supreme judicial voice.<sup>9</sup> In nonfederal, or unitary, systems, the judiciary almost invariably finds its power juxtaposed against the governing political branches. Conflict is inevitable and often persistent. It *is* a puzzle how judicial supremacy gains traction. In a federal system, on the other hand, the judiciary

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the Union Address (Jan. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> (on file with the *Columbia Law Review*) (“With all due deference to separation of powers, [the decision] last week . . . will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. . . . I’d urge Democrats and Republicans to pass a bill that helps to correct some of these problems.”).

6. James Oliphant, *Congress Counters Corporation Ruling*, *L.A. Times*, Feb. 12, 2010, at A14.

7. See, e.g., Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 249–53 (2004) [hereinafter *Kramer, People Themselves*] (advocating “[j]udicial [r]eview [w]ithout [j]udicial [s]upremacy”); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 *Const. Comment.* 455, 482 (2000) (“[T]he functions of law have been better served, and will be better served in the future, if the Constitution is what the Supreme Court says it is.”); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *Harv. L. Rev.* 1359, 1360 (1997) (challenging “dominant view” that “nonjudicial officials, in exercising their own constitutional responsibilities . . . are not obliged to subjugate their constitutional judgments” to “judicial interpretations of constitutional provisions”); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 *Hastings Const. L.Q.* 359, 438 (1997) (arguing United States should “encourage nonjudicial interpretation, while retaining the precept that courts have the final say about constitutional meaning”); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Geo. L.J.* 217, 221 (1994) (“The power to interpret law is not the sole province of the judiciary; rather, it is a divided, *shared* power not delegated to any one branch . . .”); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 *Calif. L. Rev.* 1027, 1029 (2004) (“[J]udicial supremacy and popular constitutionalism . . . [are not] mutually exclusive systems of constitutional ordering . . . [but] are in fact dialectically interconnected and have long coexisted.”); Mark V. Tushnet, *The Constitution Outside the Courts: A Preliminary Inquiry*, 26 *Val. U. L. Rev.* 437, 438–39 (1992) (arguing that in some legal contexts, legislators should not simply “do what judges do when they face constitutional questions” but instead “*ought to* make political decisions” rather than “structure[e] their deliberations in the terms set by the doctrines elaborated by the courts”).

8. For a critique of the various theories of judicial supremacy from the perspective of law, political science, and political economy, see *infra* notes 24–49 and accompanying text.

9. For a discussion of what scholars have—and have not—said about federalism and judicial supremacy, see *infra* Part I.

can provide a vital service to the central government in suppressing undesired conduct by the constituent parts.<sup>10</sup> And this service, in turn, can provide a foothold to a broader form of judicial supremacy, in which the Court's word as to constitutional meaning is equated with the Constitution and governs the actions of even the coordinate branches.<sup>11</sup>

As this Article explains, understanding judicial supremacy in a federal system requires disaggregating it into two separate but interdependent dimensions: "vertical" and "horizontal." As the judiciary provides its vital service to the central government in suppressing undesired conduct by the constituent states, national officials come to support "vertical supremacy"—the idea that judicial pronouncements govern the subnational units in a hierarchical system of government. This theoretical explanation for vertical supremacy standing alone is a central contribution of this project. But having achieved vertical supremacy, a federal system will also provide mechanisms that aid in converting this vertical supremacy into "horizontal" supremacy, in which the pronouncements of the high court are understood to bind the coordinate branches of the national government as well.<sup>12</sup> This Article is unique in identifying and describing specific mechanisms by which vertical supremacy ultimately translates into horizontal (and thus complete) supremacy.

The account of judicial supremacy that follows is what might be termed an exercise in inductive theorizing. Judicial supremacy first got its start here in the United States, and our history provides examples and evidence of the theoretical intuitions outlined above. This project is largely an account of how the United States Supreme Court achieved judicial supremacy. Yet by identifying the systematic mechanisms linked to federalism that fostered judicial supremacy in the United States, it may also help provide insight into, and find application to, other judicial systems.<sup>13</sup>

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10. See *infra* Part II.

11. See *infra* Parts III–IV.

12. One might question the necessity of the vertical-to-horizontal move given judicial power in the states. Scholars such as William E. Nelson have observed that judicial review became common in the states more quickly than for the national government. See William E. Nelson, *The Historical Foundations of the American Judiciary*, in *The Judicial Branch* 3, 23 (Kermit L. Hall & Kevin T. McGuire eds., 2005) ("In 1803, the Marshall Court's assumption of the power of judicial review was hardly unprecedented; judicial review already had been widely accepted by most state courts."). But judicial supremacy is not the same as judicial review. See *infra* notes 21–22 and accompanying text (differentiating between judicial supremacy and judicial review). Well into the twentieth century, state high courts found their supremacy challenged when confronted with a strong reaction by the public or the other branches to their decisions. See Barry Friedman, *The Will of the People 186–87* (2009) [hereinafter *Friedman, Will of the People*] (describing actions taken against state courts in Progressive Era); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 *Ga. L. Rev.* 893, 954–62 (2003) (discussing states that adopted supermajority voting rules in response to anger over judicial rulings).

13. As judicial power has expanded worldwide, comparative studies have sought to assess new constitutional regimes in light of the American experience. See, e.g., Mauro Cappelletti & David Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on*

This account is relatively agnostic regarding the precise extent to which the Justices took advantage of the opportunities presented by the federal system, as opposed to the Court merely being the recipient of those opportunities. Undoubtedly, both are true. At some times, the mechanisms described below simply inured to the Court's benefit; at others, the Justices appeared to understand the direction in which supremacy lay. In either case, it was the federal system that was fostering judicial supremacy in ways that a unitary system could not.

Part I situates this Article in the existing scholarship. Most theories of the rise of judicial power fail to take sufficient—or even any—account of federalism. None of them disaggregate vertical and horizontal supremacy, attempting to show how one assists the other. Although many of the extant theories may help explain the maintenance of judicial power in an established system, none attends to what might best account for its initial success.

Part II provides an account of, and explanation for, the rise of *vertical* supremacy in the United States, one that is fully consistent with the thesis of this Article. Judicial power was “hardwired” into the United States Constitution. Although this alone might not have been sufficient to create vertical supremacy, over time national officials came to understand that the judiciary was an essential ally in their struggles with the states. Only with their support was vertical supremacy achieved.

Part III chronicles the beginnings of *horizontal* supremacy during the Gilded Age. During this period powerful economic and political constituencies turned to the judiciary, and particularly the Supreme Court, to address the problem of divergent state practices and protectionist state laws interfering with a national market. This part introduces the mechanisms of judicial supremacy: A powerful “constituency” supported the Court and provided the means for “jurisdictional expansion,” which in turn allowed the Supreme Court to develop constitutional doctrines in vertical cases that it would begin to apply against the national government in horizontal ones (“the tentacles of doctrine”).

Part IV then describes the great movement to horizontal supremacy following the New Deal. Franklin Roosevelt's plan to pack the Supreme Court chastened the Court, leading to what some have called its “[p]assive [p]eriod.”<sup>14</sup> By 1957, however, President Eisenhower concluded—in the context of justifying the Executive Branch's reaction to local defiance of school desegregation orders—that “the very basis of our individual rights and

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Integration, in 1 *Integration Through Law: Methods, Tools and Institutions* No. 2 *Political Organs, Integration Techniques and Judicial Process* 261, 306–10 (Mauro Cappelletti et al. eds., 1985) (examining role of European Court of Justice using American judicial system as reference point); Peter E. Quint, “The Most Extraordinarily Powerful Court of Law the World has Ever Known?”—Judicial Review in the United States and Germany, 65 *Md. L. Rev.* 152, 153 (2006) (discussing power of Germany's Constitutional Court).

14. John P. Frank, *Court and Constitution: The Passive Period*, 4 *Vand. L. Rev.* 400 (1951).

freedoms rests upon the certainty that the President and the Executive Branch of Government will support and insure the carrying out of the decisions of the Federal Courts.”<sup>15</sup> This section explores how, beginning in the Civil Rights Era, the Court was able to reconsolidate its vertical supremacy and—by relying on its constituencies—expand its jurisdictional and doctrinal reach.

Part V distills the mechanisms through which the Court was able to translate its vertical power into horizontal power and provides a theoretical basis for understanding how and why these mechanisms work. First, the federal nature of the government provides a “constituency” for the judiciary, as those discontent with state-level policies seek redress at the national level. Second, the need for access to the judiciary to perform this function offers a justification to expand the judiciary’s reach or “jurisdiction.” Finally, as the Court decides cases in the realm of vertical supremacy, the “tentacles of doctrine” woven in vertical judicial decisions come to enmesh the coordinate branches.

To speak of judicial supremacy as the final step in a progression, from which there is no return, is of course a gross mischaracterization. As has been clear throughout history, judicial power retains a certain fragility and always is subject to the overweening force of the political branches. Hamilton’s identification of the judiciary’s weakness, lacking both sword and purse, remains true today.<sup>16</sup> Still, it is clear that over time—both in the United States and across the globe—something fundamental has changed in the power exercised by judges.<sup>17</sup>

### I. THEORIZING SUPREMACY

At the turn of the twentieth century, the lawyer and historian William Montgomery Meigs expressed skepticism that the Supreme Court’s “judgment in a suit between A. and B.” could be taken as “finally and forever settling as to everybody and all departments of government the great questions of constitutional law.”<sup>18</sup> Nonetheless, he acknowledged that this understanding was so “ordinarily accepted” that “an argument on the other side runs a very good chance of not even being listened to.”<sup>19</sup> How the United States came to such a pass is a question that has puzzled many scholars.<sup>20</sup>

Around the time Meigs was writing, scholars coined the term “judicial supremacy” to describe the Court’s claim to exclusive power to interpret the

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15. Eisenhower Address on Little Rock Crisis, *N.Y. Times*, Sept. 25, 1957, at 14.

16. *The Federalist* No. 78, at 378 (Alexander Hamilton) (Terence Ball ed., 2003).

17. See generally *The Global Expansion of Judicial Power* (C. Neal Tate & Torbjörn Vallinder eds., 1995) (arguing “there is an expansion of judicial power afoot in the world’s political systems”).

18. Wm. M. Meigs, *The Relation of the Judiciary to the Constitution*, 19 *Am. L. Rev.* 175, 198 (1885).

19. *Id.* at 191.

20. See *infra* notes 24–49 and accompanying text (reviewing literature).

Constitution.<sup>21</sup> Judicial supremacy was a broader phenomenon than the related concepts of judicial independence and judicial review. It was an assertion that constitutional pronouncements of the judiciary or a high court in a specific case govern the actions of political actors, even outside the bounds of that case.

The literature theorizing explicitly about the rise and maintenance of judicial supremacy is thin, although it is a natural outgrowth of the vast literature on judicial review and judicial independence.<sup>22</sup> What is largely missing from that literature is an account of how the endeavor gets started in the first place, how judicial power emerges, and why others come to obey it. “Why,” as Matthew Stephenson has asked “would the government accept the limits imposed by a truly independent court?”<sup>23</sup>

Scholars who have attempted to explain the existence of judicial supremacy itself can be loosely grouped into two camps: those who view supremacy as power taken by the courts with permission, and those who view

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21. See Charles Grove Haines, *The American Doctrine of Judicial Supremacy* 1–17 (1914) (defining judicial supremacy).

22. Judicial independence describes the autonomy of judges and the judicial branch from control by other political actors; judicial review refers to the power to hold governmental acts to constitutional standards as interpreted by the judiciary. Scholars have long sought an explanation for the seemingly paradoxical existence of an independent judiciary possessing the power of judicial review. These theories focus on the self-interested incentives of political actors (or the public) to grant the power of judicial review to independent courts. Among them: Judicial review by independent judges can provide informational value to those in power, see James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction*, 45 *Am. J. Pol. Sci.* 84, 84 (2001); see also Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 *Vand. L. Rev.* 73, 114–15 (2000) (“Congress essentially charged the federal judiciary with the responsibility for ensuring that the federal government had not made a naked land transfer.”); judicial review can serve to legitimate governmental decisions, providing reassurance to citizens suspicious of executive and legislative power by upholding most laws, see, e.g., Charles L. Black, Jr., *The People and the Court: Judicial Review in a Democracy* 53 (1960) (describing Court’s “central function” as “unlocking the energies of government by stamping governmental actions as legitimate”); it can preserve the durability of legislative bargains, e.g., William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & Econ.* 875, 885 (1975); it can serve as a way for political actors to avoid controversial decisions, see, e.g., Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *Stud. Am. Pol. Dev.* 35, 36 (1993) (“[E]lected officials consciously invite the judiciary to resolve those political controversies that they cannot or would rather not address.”); or it can act as insurance against the vicissitudes of electoral politics, see, e.g., J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 *J. Legal Stud.* 721, 741 (1994) (“If rational politicians face significant odds of being in the minority party, however, they will try to reduce the variance to their political returns . . . by insulating the judicial system from political control.”); Matthew C. Stephenson, “When the Devil Turns . . .”: *The Political Foundations of Independent Judicial Review*, 32 *J. Legal Stud.* 59, 61 (2003) (“[A]n independent judiciary can facilitate tacit bargains between political competitors to exercise mutual moderation.”).

23. Stephenson, *supra* note 22, at 60; see also Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*, at xii (2007) [hereinafter Whittington, *Political Foundations*] (questioning “why politicians have been so eager to anoint the judges as the ‘ultimate interpreters’ of the Constitution”).

it as power granted to the courts by design. Though both approaches provide important insights, each leaves critical questions unanswered.

*A. Power by Permission*

The familiar “usurpation-and-acquiescence” thesis, and its variants, argue that from time to time, activist judges on the Supreme Court reach out, grab power, impose their preferences, and are allowed to do so by a phlegmatic populace or permissive political branch. From the aggressiveness of the Marshall Court, to the Rehnquist Court’s “insistence on having the last word,”<sup>24</sup> this descriptive theory claims that at critical junctures in American history the Justices have simply seized power and that the political branches and the public allowed it to happen.<sup>25</sup> Although complaints about acquiescence typically are leveled rhetorically in the political domain, as a serious theory it suffers in two ways: It fails to capture why those in power choose to acquiesce, and—because, under this thesis, supremacy apparently gets seized at critical moments—it does not engage with the possibility that the Court has accumulated power over time.

Ran Hirschl offers an elaborate and grounded theory to explain acquiescence to judicial supremacy: Elites favoring economic rights and elites favoring individual rights join to support the judiciary as a means to their favored end, one the public apparently disdains.<sup>26</sup> Yet, Hirschl’s theory fails to explain why these elites prevail over the public on an issue so vital. He relies on the concept of gridlock, but as Keith Krehbiel—the political scientist who popularized the idea—has acknowledged, an aroused public can break gridlock.<sup>27</sup>

Keith Whittington improved upon the concept of acquiescence by marrying it to positive political theory. According to Whittington, “[j]udicial

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24. Linda Greenhouse, *The Legal Spectacle; Divining the Consequences of a Court Divided*, N.Y. Times, Dec. 17, 2000, at WK1; see *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (“[I]t falls to this Court, not Congress, to define the substance of constitutional guarantees.”).

25. See Thomas Jefferson, *The Autobiography of Thomas Jefferson* (1821), reprinted in *The Life and Selected Writings of Thomas Jefferson* 3, 84 (Adrienne Koch & William Peden eds., 1944) (“We have seen, too, that contrary to all correct example, [the judges] are in the habit of going out of the question before them, to throw an anchor ahead, and grapple further hold for future advances of power.”); Whittington, *Political Foundations*, supra note 23, at 285 (“[T]he preeminence of the judiciary in defining constitutional terms . . . was something for which the judges and their supporters have had to struggle . . . [but] the judiciary has generally won that struggle . . .”).

26. Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* 11–12 (2004).

27. Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* 65–71 (1998) (noting that he believes, and there is “some independent evidence” to show, that “quadrennial [presidential] elections function as regular . . . shocks to the configurations of induced preferences of elected officials . . . [and thus] contract the gridlock interval and thereby lead to predictable increases in legislative productivity”).

supremacy itself rests on political foundations. The judiciary may assert its supremacy over constitutional interpretation, but such claims ultimately must be supported by other political actors making independent decisions about how the constitutional system should operate.<sup>28</sup> Whittington focuses on how the Executive Branch plays a central role in constructing judicial supremacy; importantly, he explains that some Presidents choose to acquiesce in the Court's constitutional interpretations, finding them useful in some way or another to executive power.<sup>29</sup>

Under Whittington's account, however, judicial power largely is ephemeral and seemingly could be ignored at any moment.<sup>30</sup> But scholars who have focused on the relationship between public opinion and judicial power have observed an accumulation of power over time, enough so that it may hem in the political branches against their wishes.<sup>31</sup> Moreover, treating the Court as a "handmaiden of the political branches"<sup>32</sup> ignores any institutional influence the Court might itself exert. Positive political theorists and institutionalists believe that institutions can engage in self-promotion, and institutional actions

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28. Whittington, *Political Foundations*, supra note 23, at 9.

29. Whittington categorizes Presidents into three subsets, based on the political circumstances each President faces upon election and the concomitant relationship each has with the Court. Reconstructive Presidents, such as Andrew Jackson or Franklin Roosevelt, are able to confront and challenge the Court, as well as a "variety of competitors for the authority to interpret the Constitution's meaning in a new historical context." *Id.* at 65. Affiliated Presidents, such as James Madison and William Howard Taft, adhere to the choices made by the reconstructive Presidents, and may need the Court to aid them in "enforcing compliance with the established [constitutional] regime." *Id.* at 85–86. Finally, preemptive Presidents, such as Woodrow Wilson and Bill Clinton, face political obstacles that "tempt them toward emulating their reconstructive cousins and asserting the presidential authority to say what the Constitution means," *id.* at 195, but they are politically unable to redefine the constitutional vision, and thus are likely to "chafe under the Court's constitutional leadership," *id.* at 161, 166.

30. Whittington does note that the "ongoing judicial elaboration of the constitutional inheritance" will make it more difficult for Presidents to change constitutional meaning and confront the Court, but he does not connect this "ongoing" duty to supremacy itself. *Id.* at 52.

31. See generally Friedman, *Will of the People*, supra note 12 (noting both that "[t]he nature and extent of the Supreme Court's authority have plainly grown over time, in ways that are both unmistakable and undeniable" and that "when judges rely on the Constitution to invalidate the actions of other branches of government, they are enforcing the will of the American people"); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 *Am. J. Pol. Sci.* 635, 639–61 (1992) ("[T]he mass public does not seem to condition its basic loyalty toward the Court . . . upon the satisfaction of demands for particular policies or ideological positions. . . . [S]upport truly does consist of a reservoir of goodwill and commitment among the mass public."); Jamal Greene, *Giving the Constitution to the Courts*, 117 *Yale L.J.* 886, 901–11 (2008) (reviewing Whittington, *Political Foundations*, supra note 23) ("[J]udicial supremacy has been threatened not by popular presidents but by unpopular judicial decisions . . . [and] likewise has been buoyed by the support of the people, not their politicians."). Whittington acknowledges the point, suggesting only that his account provides "one way in which courts have won that diffuse support." Whittington, *Political Foundations*, supra note 23, at 289. But it is unclear from Whittington precisely how or even why that support is won over time; under his theory, for example, reconstructive Presidents would have every incentive to challenge growing supremacy, as they have.

32. William H. Riker, *Federalism: Origin, Operation, Significance* 103 (1964).

“can’t be explained completely by reference to external political/social/economic factors.”<sup>33</sup> Whittington does suggest that the Supreme Court has taken action to “build[] its own authority to construe constitutional meaning,” but he fails to articulate how it has done so.<sup>34</sup>

### B. *Power by Design*

In contrast to those who would explain judicial supremacy in terms of political calculations, theorists of federation simply assume its existence. In a federal system, a constitution signifies an agreement between constituent units to join together, relinquish their sovereignty in certain areas, and form a government with the attributes of a state.<sup>35</sup> The mere fact of a codification of this agreement, however, does not serve to ensure its success. As leading scholars have written, “durable federal arrangements are possible only if two conditions hold. First, national forces must be . . . restrained from infringing on the federal bargain,” and “[s]econd, provincial temptations to renege on federal arrangements must be checked.”<sup>36</sup>

It is here that the judiciary comes in. Put simply, for federal theorists judicial supremacy exists because it must: Federations need a “supreme arbiter” to monitor the federal bargain.<sup>37</sup> Although theory holds out the

33. Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 40–41 (1998) [hereinafter Cushman, *Rethinking*] (quoting Robert W. Gordon, *Critical Legal Histories*, 36 *Stan. L. Rev.* 57, 101 (1984)); see Samuel Huntington, *Political Order in Changing Societies* 25 (1968) (“Institutional interests, however, exist through time; the proponent of the institution has to look to its welfare through an indefinite future. This consideration often means a limiting of immediate goals.”). See generally B. Guy Peters, *Institutional Theory in Political Science: The ‘New Institutionalism’* (1999) (“The basic argument [of the institutionalists] is that institutions *do* matter, and that they matter more than anything else that could be used to explain political decisions.”).

34. Whittington, *Political Foundations*, *supra* note 23, at 72 (explaining when “crucial judicial move” comes without describing how).

35. See *Federalism: The Solution?* 16 (D.J. Kriek et al. eds., 1992) (noting that one of two “basic considerations . . . that must be present . . . [for a federation to form is] a strong need and desire to shoulder common interests jointly”).

36. Jenna Bednar, William N. Eskridge Jr. & John Ferejohn, *A Political Theory of Federalism*, *in* *Constitutional Culture and Democratic Rule* 226 (John Ferejohn et al. eds., 2001).

37. See S. Rufus Davis, *The Federal Principle: A Journey Through Time in Quest of a Meaning* 122 (1978) (identifying fact that “jurisdictional disputes between the national government and . . . [state] governments . . . will be settled by judicial arbitration” as one of basic elements of American federalism); Ivo D. Duchacek, *Comparative Federalism: The Territorial Dimension of Politics* 207–08 (1970) (listing existence of “a judicial authority . . . standing above the central authority and the component units to determine their respective rights” as one of “ten yardsticks of federalism”); Ursula K. Hicks, *Federalism: Failure and Success* 7 (1978) (noting “it is essential [for a federation] to have a Supreme Court”); William S. Livingston, *Federalism and Constitutional Change* 10–11 (1956) (observing one “universal or essential” component of system of federalism is “some device or institution . . . by which . . . [constitutional] terms may be interpreted,” which is “[o]rordinarily . . . the judiciary”); P.-J. Proudhon, *The Principle of Federation* 41 (Richard Vernon trans., Univ. of Toronto Press 1979) (1863) (noting federation necessarily requires “an arbiter set above . . . [its component parts], at least for certain matters);

possibility that such an arbiter is not a court, in practice the role typically is assigned to the judiciary.<sup>38</sup> With its duty to police the boundaries of the spheres of sovereignty (i.e., the division of competences), the judiciary is placed at the apex of the constitutional scheme.<sup>39</sup>

What federal theorists cannot explain is how this judicial body comes to wield power, let alone exercise it, far beyond questions regarding the allocation of powers in the federal system.<sup>40</sup> Georg Vanberg and Cliff Carrubba suggest that the judicial arbiter only has authority when, in game theoretic terms, the parties' incentives justify compliance with its decisions.<sup>41</sup> Carrubba in particular provides a sophisticated model and much historical support.<sup>42</sup> But how does this beachhead become one from which supremacy over all constitutional interpretation follows? As K.C. Wheare has noted, this extension is "an increase in authority . . . not logically necessary for federalism."<sup>43</sup>

Beyond the stylized theories of the creation of federal systems, the role that the federal structure may play in fostering or maintaining judicial supremacy has not been examined. That there may be a link has been noted by a few scholars, though often in passing or with little analysis.<sup>44</sup> Carrubba

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Geoffrey Sawer, *Modern Federalism* 1–2 (1969) (numbering among "basic federal principles" requirement that "[t]he distribution of competence between [the central authority and its component parts] . . . is interpreted and policed by a judicial authority which can make authoritative determinations as to the validity of governmental acts"); K.C. Wheare, *Federal Government* 58–59 (4th ed. 1964) (observing that "most federal systems . . . have established some institution with power to decide disputes about the division of powers . . . [as well as] power to decide the meaning of the whole constitution").

38. See, e.g., Livingston, *supra* note 37, at 10 ("Ordinarily this function is performed by the judiciary . . .").

39. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 175–76 (Macmillan & Co. 10th ed. 1959) (1885) ("[I]n . . . the United States the courts become the pivot on which the constitutional arrangements of the country turn [because] . . . no legislature . . . is more than a subordinate law-making body . . . [and] the . . . executive . . . [is] limited by the constitution; the interpreters of the constitution are the judges.").

40. Even the fact that the judiciary can exercise this much authority is hardly a foregone conclusion. See *infra* Part II.B (describing tenuous evolution of judicial power in United States).

41. Clifford J. Carrubba, *Federalism, Public Opinion, and Judicial Authority in Comparative Perspective*, 2010 *Mich. St. L. Rev.* 697, 707 ("[A federal court] can facilitate compliance with a common regulatory regime that the state governments wish to see followed, but it can do so only to the degree that the state governments want it followed."); Clifford James Carrubba, *A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems*, 71 *J. Pol.* 55, 68 (2009) [hereinafter Carrubba, Model] (arguing "immature court[s]" that lack "public backing . . . cannot impose . . . [their] preferences over those of the governments [that empower them]" (internal quotation marks omitted)); Georg Vanberg, *The Will of the People: A Comparative Perspective on Friedman*, 2010 *Mich. St. L. Rev.* 717, 722 ("[G]iven the right configuration of competing interests in a federal hierarchy . . . the political struggles among *other* institutions is likely to provide a constitutional court with an environment in which it can . . . assert its powers.").

42. See Carrubba, Model, *supra* note 41.

43. Wheare, *supra* note 37, at 58.

44. In addition to those discussed in text, see Jenna Bednar, *The Dialogic Theory of Judicial Review: A New Social Science Research Agenda*, 78 *Geo. Wash. L. Rev.* 1178, 1183–84 (2010)

speculates, for example, that “the development of federal judicial review may be incidental to the development of review over state actions.”<sup>45</sup> Martin Shapiro, observing that “constitutional judicial review” “flourished” in only the United States, Canada, and Australia prior to World War II, floats the hypothesis that “successful constitutional review is caused by and may be requisite to successful federalism.”<sup>46</sup> Yet faced with contrary examples in the post-World War II era—such as France—Shapiro abandons his limited theory.<sup>47</sup> Keith Whittington has taken the connection the furthest. Focusing on the United States, Whittington recognizes that the Court has invalidated innumerable state and local laws, and concludes that especially in a “fragmented” political system like the United States, the judiciary can assist political leaders with “regime enforcement against constitutional outliers.”<sup>48</sup> But he too ultimately lets go of the idea, concluding that “[i]t is not obvious . . . that a judiciary that is valued for its capacity for maintaining the national government’s supremacy needs to be independent . . . [because] [i]n order to perform this function, the courts evidently need to be independent only of the state governments.”<sup>49</sup>

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In sum, although there are those that dance around the central insight that there is something special about a federal system in establishing judicial supremacy, they have failed to conduct a sustained examination of the idea. What follows corrects this oversight. It demonstrates the critical role federalism has played in the rise of the United States Supreme Court’s supremacy. It emphasizes that supremacy is not a monolith, but can and should be disaggregated into its vertical and horizontal aspects.<sup>50</sup> And, it describes the

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(“Perhaps federalism can be credited as a catalyst establishing the Court’s legitimacy, attracting public attention, seeding public confidence in it, and fostering the public acceptance of judicial review.”); Bednar, Eskridge & Ferejohn, *supra* note 36, at 256 (“[T]he Supreme Court can play an effective role in enforcing federalism.”). These scholars have not addressed the institutional mechanisms that the judiciary has used in order to cement its authority.

45. Carrubba, Model, *supra* note 41, at 68.

46. Martin Shapiro, *The Success of Judicial Review and Democracy in On Law, Politics, and Judicialization* 149, 149 (Martin Shapiro & Alec Stone Sweet eds., 2002).

47. *Id.* at 151–53.

48. Whittington, *Political Foundations*, *supra* note 23, at 85, 105–06 (citing Cong. Research Serv., Library of Cong., *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 108-19 (2004)).

49. Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 *Int’l J. Const. L.* 446, 457 (2003); see also Bednar, Eskridge & Ferejohn, *supra* note 36, at 262 (arguing that, while judicial review effectively monitors states, structural federalism best restrains federal government); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court’s “Unsteady Path”: A Theory of Judicial Enforcement of Federalism*, 68 *S. Cal. L. Rev.* 1447, 1480 (1995) (“Rules against state shirking, externalities, and protectionism usually have to be enforced at the national level, and the Court is best situated to enforce them. . . . The Court is not nearly as well situated to regulate congressional cheating.”).

50. Almost alone among scholars, Charles Grove Haines advanced a germ of this idea almost one hundred years ago. See *infra* notes 196–197 and accompanying text.

mechanisms by which supremacy leaps from the vertical to the horizontal plane.

## II. REALIZING THE PROMISE: ACHIEVING VERTICAL SUPREMACY

Despite a longstanding debate about whether the framers of the Constitution intended to adopt a system of horizontal judicial review, modern scholars agree that vertical judicial review was critical to the framers' plan for making the United States's federal system work.<sup>51</sup> But vertical judicial review does not necessarily translate into vertical judicial supremacy. From the beginning, the Supreme Court often faced defiance from the states.<sup>52</sup> Two factors created the conditions under which vertical judicial supremacy would blossom: the fact that vertical judicial review was hardwired into the Constitution, and the support of national leaders who, wary of the Court, nonetheless found themselves compelled to support the federal courts in order to foster their own authority in the face of state recalcitrance.

### A. *The Founders' Design*

The chief problem the delegates to the Philadelphia Convention faced was, in essence, one of vertical supremacy.<sup>53</sup> James Madison's *Vices of the Political System of the United States* catalogued why government under the Articles of Confederation was not working: "[f]ailure of the States to comply with the Constitutional requisitions"; "[e]ncroachments by the States on the federal authority"; "[t]respases of the States on the rights of each other"; and so on.<sup>54</sup> "It is no longer doubted," Madison concluded, "that a unanimous and punctual obedience of 13 independent bodies, to the acts of the federal Government, ought not to be calculated on."<sup>55</sup> The delegates to the Convention understood that what was needed was some way for the center to impose authority over its subordinate units.<sup>56</sup>

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51. See Kramer, *We the Court*, supra note 1, at 61 ("[T]he Framers clearly decided to adopt judicial review as a device for controlling state laws."); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 *Stan. L. Rev.* 1031, 1047 (1997) ("Undisputably, judicial review, conceived as a mechanism of federalism, was palpably and unequivocally a fundamental element of the original intention of the Constitution with the Supremacy Clause as its trumpet." (footnote omitted)).

52. See Friedman, *Will of the People*, supra note 12, at 72 ("[State officials] refused to appear when summoned, denied that the Supreme Court was the arbiter of the constitutionality of state laws, and blatantly defied judicial orders.").

53. See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 32–34 (1996) (describing events leading up to Convention and stating that "[w]hile the idea that the Union might devolve into regional confederacies still seemed incredible, events since 1783 had called into question the very idea of national interest").

54. James Madison, *Vices of the Political System of the United States* (1787), reprinted in *James Madison: Writings* 69, 69–70 (Jack N. Rakove ed., 1999).

55. *Id.* at 72. Madison's thinking in this period is described at length in Larry D. Kramer, *Madison's Audience*, 112 *Harv. L. Rev.* 611, 623–36 (1999) [hereinafter *Kramer, Audience*].

56. Virginia Governor Edmund Randolph underscored the problem: The confederation "cannot punish" a State that violates treaty obligations, it cannot "secure harmony to the States,"

In what ultimately would prove a good measure of luck for the judiciary, Madison's preferred solution to the vertical supremacy problem failed to obtain consensus at the Convention. Under the "Virginia Plan," Congress would have had a veto—called a "negative"—over state laws.<sup>57</sup> Although the Convention initially approved the idea, thereafter it was rejected repeatedly as being a stronger remedy than necessary and thus likely to generate intense opposition to the proposed Constitution.<sup>58</sup>

The Convention's alternative to the "negative" was to rely on the judiciary to assure national uniformity and supremacy by striking down acts inconsistent with federal law. This reliance was codified in two parts of the Constitution, what Daniel Webster would later refer to as "the key-stone of the arch" of the Constitution.<sup>59</sup> First, Article VI, the Supremacy Clause, was adopted by the Convention immediately after the failure of Madison's negative.<sup>60</sup> It mandated that in legal disputes, state judges were "bound" to follow "supreme" federal law when it conflicted with state law.<sup>61</sup> But what would make the state courts comply? The very next day Madison proposed federal judicial jurisdiction over questions of import to the central government—what today we call federal questions.<sup>62</sup> Madison, never happy about the failure of the negative, recognized that the success of the Supremacy Clause solution required not just a mandate to state courts, but enlistment of a federal judiciary to ensure federal law prevailed.<sup>63</sup> Delegates disagreed fiercely over the question of whether federal business should be assigned to a cadre of

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and "[i]t cannot defend itself against incroachments." 1 *The Records of the Federal Convention of 1787*, at 24–26 (Max Farrand ed., rev. ed. 1966) [hereinafter *Records*].

57. The "propensity of the States to pursue their particular interests in opposition to the general interest . . . will continue to disturb the system, unless effectually controuled," Madison insisted. "Nothing short of a negative on their laws will controul it." 2 *id.* at 27; see also Alison L. LaCroix, *The Authority for Federalism: Madison's Negative and the Origins of Federal Ideology*, 28 *Law & Hist. Rev.* 451, 464–72 (2010) (discussing Privy Council's *ex ante* legislative review and noting "Madison explicitly drew on this precedent" in championing proposed congressional negative). On Madison's attempts to introduce a national negative, and opposition thereto, see Kramer, *Audience*, *supra* note 55, at 649–53.

58. Gouverneur Morris, ordinarily Madison's staunch ally, said he was "more & more opposed to the negative. The proposal of it would disgust all the States." 2 *Records*, *supra* note 56, at 28; see also *id.* at 73–80 (chronicling various objections to national negative); Kramer, *Audience*, *supra* note 55, at 651 (noting many were concerned "an unlimited veto would needlessly injure the states while giving Congress more power than necessary").

59. Daniel Webster, *Speech of Mr. Webster, of Massachusetts* (Jan. 26–27, 1830), in *The Webster-Hayne Debate on the Nature of the Union* 81, 137 (Herman Belz ed., 2000) ("These two provisions, sir, cover the whole ground. They are, in truth, the key-stone of the arch. With these, it is a Constitution; without them, it is a Confederacy.")

60. James S. Liebman & William F. Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 *Colum. L. Rev.* 696, 729–31 (1998).

61. U.S. Const. art. VI, cl. 2.

62. Liebman & Ryan, *supra* note 60, at 731–33.

63. *Id.* at 709–10.

federal trial courts or left to the existing state court system.<sup>64</sup> But the single point on which no one disagreed was that there should be a national Supreme Court at the top of the pyramid.<sup>65</sup> In other words, state courts were to follow federal law, and the Supreme Court would review those decisions to ensure that superior federal law prevailed.<sup>66</sup> The system of vertical judicial review was born.

The first Congress confirmed the central role of the Supreme Court in assuring the supremacy of federal law in one of its most enduring statutes, the Judiciary Act of 1789. Section 25 of that Act gives the Court the power to review the decisions of the highest state courts when “the validity of a treaty or statute of” the United States is called into question, and “the decision is against their validity.”<sup>67</sup> In later years Supreme Court jurisdiction over the state courts would expand even further.<sup>68</sup>

#### B. *The Political Incentives to Support the Court*

Relying on the judiciary to assure vertical supremacy was one thing in theory, and a very different thing in practice. Between the early 1800s and the 1830s, the Supreme Court repeatedly asserted its authority over the states, only to have its will defied.<sup>69</sup> Because the framers had made the Court an essential aspect of controlling state authority, however, national figures ultimately were compelled to back the Court at critical moments, whatever their feelings about judicial power. What follows are three exemplary tales of how national political figures came to support the federal judiciary and vertical supremacy.

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64. See Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 58–62 (describing debate at Philadelphia Convention over competency of state courts to hear “certain heads of Article III business”).

65. The Convention ultimately resolved the disagreement by creating a Supreme Court and leaving it to Congress to “ordain and establish” such lower federal courts as it saw fit. U.S. Const. art. III, § 1. On the debates over the shape of the state and national judiciary and ultimate compromise, see Liebman & Ryan, *supra* note 60, at 731–33; see also Richard H. Fallon, Jr., The Ideologies of Federal Courts Law, 74 Va. L. Rev. 1141, 1143–45 (1988) (describing differences between “federalist” and “nationalist” models of judicial federalism and arguing each has roots in early constitutional debates).

66. See 1 Records, *supra* note 56, at 124 (arguing “the right of appeal to the supreme national tribunal” was “sufficient to secure the national rights & uniformity of Judgmts”).

67. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87 (current version at 28 U.S.C. § 1257 (2006)), cited in Saikrishna B. Prakash & John C. Yoo, The Origins of Judicial Review, 70 U. Chi. L. Rev. 887, 979 & nn.366–367 (2003).

68. See, e.g., *infra* Part III.B (describing expansion of federal court jurisdiction in late nineteenth century).

69. See Friedman, Will of the People, *supra* note 12, at 83–88 (“What made this period truly distinct in Supreme Court history was not that the Court was under attack . . . but that in the face of disagreement, the states regularly denied the authority of the Court to decide and simply determined not to comply.”); Leslie Friedman Goldstein, Constituting Federal Sovereignty: The European Union in Comparative Context 22–33 (2001) (providing “a . . . detailed chronology of state resistance to federal authority” during early decades of American nationhood). See generally Dwight Wiley Jessup, Reaction and Accommodation: The United States Supreme Court & Political Conflict, 1809–1835 (1987) (discussing Court’s assertion of power from 1809–1824 and its subsequent strategic accommodation of states’ rights from 1824–1835).

1. *The Father of the Constitution Backs the Court.* — During the constitutional deliberations, Madison orchestrated an important role for the Supreme Court in policing the states, but when partisan politics split the nation in the late 1790s, Madison changed his tune. After the Federalist Congress adopted the Alien and Sedition Acts, proto-Republicans Madison and Jefferson allied to draft the Virginia and Kentucky Resolutions, which condemned the Alien and Sedition Acts as unconstitutional and sought common cause with sister states.<sup>70</sup> Here was born the theory that the United States was a “compact” of “sovereign” states, each entitled to impose its own views about the meaning of the Constitution.<sup>71</sup> This theory, the very antithesis of vertical judicial supremacy, was later relied upon by Southern nullifiers and secessionists.<sup>72</sup>

The position Madison took in the Alien and Sedition Acts controversy denigrated federal judicial power. Should Congress engage in a “deliberate, palpable, and dangerous exercise” of powers “not granted by the said compact,” wrote Madison in the Virginia Resolution, “the states, who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties, appertaining to them.”<sup>73</sup> Forced to defend the Resolution, Madison took a more explicit swipe at the Supreme Court.<sup>74</sup> Answering claims that “the judicial authority is to be regarded as the sole expositor of the Constitution in the last resort,” Madison argued that “the judicial department, also, may exercise or sanction dangerous powers beyond the grant of the Constitution.”<sup>75</sup> Thus, he concluded, it was “the ultimate right of the parties to the Constitution [i.e., the states], to judge whether the compact has been dangerously violated.”<sup>76</sup> Madison’s was a flat denial of the existence of, let alone the need for, vertical supremacy.

No sooner had Madison become President, however, than he was

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70. Kentucky Resolutions of 1798 and 1799 (Nov. 10, 1798), reprinted in 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 540, 540–45 (Washington, D.C., Jonathan Elliot ed., 2d ed. 1836); Virginia Resolutions of 1798 (Dec. 21, 1798), reprinted in 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, supra, at 528, 529. For a useful background discussion, see generally Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime* 29–44 (2004).

71. Madison’s Report on the Virginia Resolutions, reprinted in 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, supra note 70, at 546, 548.

72. See generally John C. Calhoun, *Exposition and Protest* (1828), reprinted in John C. Calhoun: *Selected Writings and Speeches* 267 (H. Lee Cheek, Jr. ed., 2003) (arguing states have right of interposition).

73. Virginia Resolutions of 1798, supra note 70, at 528.

74. For a collection of the states’ responses to the Alien and Sedition Acts, see *State Documents on Federal Relations* 16–26 (Herman V. Ames ed., 1911); see also Forrest McDonald, *States’ Rights and the Union: Imperium in Imperio, 1776–1876*, at 43 (2000) (quoting states’ responses); Stone, supra note 70, at 45 (noting ten states explicitly “repudiated the resolutions,” and describing Federalist view).

75. Madison’s Report on the Virginia Resolutions, supra note 71, at 549.

76. *Id.*

compelled to do yet another reversal on Supreme Court authority. The immediate cause was a fight between the federal government and Pennsylvania over the proceeds of a prize vessel, a controversy that had actually come to arms when Pennsylvania determined to use force to defy a federal judicial order.<sup>77</sup> The Governor of Pennsylvania sought to gain Madison's support for Pennsylvania, appealing directly to the sentiments expressed in the Virginia Resolution.<sup>78</sup>

While it is difficult to say what Madison might have done had he confronted the Pennsylvania issue in isolation, complicating the situation considerably was a large problem on Madison's flank: New England had for some time been near rebellion over the Embargo, a measure taken to deal with British actions against American vessels that heavily burdened the northeastern states.<sup>79</sup> Claims of states' rights and threats of secession flowed so freely in New England that the press in formerly rebellious Virginia could not but note how their positions had switched: "Things Turned Topsy-Turvy . . . Federalists Turned Anti-Federalists."<sup>80</sup> Pennsylvania's Governor sought to distinguish Pennsylvania from New England, asking Madison to "justly discriminate between opposition to the constitution and laws of the United States, and that of resisting the decree of a judge, founded, as it is conceived, in a usurpation of power and jurisdiction not delegated to him by either."<sup>81</sup>

But facing a threat to national authority, Madison did what the Constitution suggested he should: He backed the Court. "[I]t would be unnecessary, if not improper, to enter into any examination of some of the questions" in the Governor's letter, he wrote, because "the Executive of the United States is not only unauthorized to prevent the execution of a decree sanctioned by the Supreme Court of the United States, but is expressly enjoined, by statute, to carry into effect any such decree where opposition may be made to it."<sup>82</sup> Pennsylvania caved.<sup>83</sup> Vertical supremacy began to take hold.

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77. The case at issue was *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809); see 1 Charles Warren, *The Supreme Court in United States History* 382 (rev. ed. 1926) (describing exchange between Madison and Governor Snyder over case).

78. Letter from Simon Snyder to James Madison (Apr. 6, 1809), in 2 *American State Papers: Miscellaneous* 11, 11–12 (Walter Lowrie & Walter S. Franklin eds., Washington, D.C., Gales & Seaton 1834).

79. See McDonald, *supra* note 74, at 64 (describing strong resistance of northern states to embargo); 1 Warren, *supra* note 77, at 358–60 (quoting northern newspaper articles and New England representatives' Senate speeches calling for nullification and secession over embargo issue).

80. "Things Turned Topsy-Turvy" or Federalists Turned Anti-Federalists—The Friends of Order Turned Jacobins, *Richmond Enquirer*, Feb. 14, 1809, at 3 (emphasis omitted).

81. Letter from Simon Snyder to James Madison, *supra* note 78, at 12.

82. Letter From James Madison to Simon Snyder (Apr. 13, 1809), in 2 *American State Papers: Miscellaneous*, *supra* note 78, at 12, 12.

83. On Pennsylvania's capitulation, see 1 Warren, *supra* note 77, at 381–85; Kenneth W. Treacy, *The Olmstead Case, 1778–1809*, 10 *W. Pol. Q.* 675, 689–90 (1976).

In the years following his retirement, Madison repeatedly made clear his support for vertical supremacy—that the Supreme Court was the body charged with ensuring that the states acted consistently with federal law. Oftentimes his statements were in private, but as Southern nullification captured the country’s imagination, Madison was forced publicly to disavow what everyone had understood to be the meaning of the Virginia Resolution and his report in support of it. In a letter to Edward Everett, the editor of the *North American Review*, written for apparent publication, Madison offered a strong defense of the Supreme Court’s role in assuring the “safe & successful operation” of the Constitution.<sup>84</sup> He pointed to the Supremacy Clause and Article III as the chief vehicles:

Those who have denied or doubted the supremacy of the judicial power of the U.S. & denounce at the same time nullifying power in a State, seem not to have sufficiently adverted to the utter inefficiency of a supremacy in a law of the land, without a supremacy in the exposition & execution of the law . . . .<sup>85</sup>

2. *Old Hickory Comes Around.* — Andrew Jackson’s biographer Robert Remini concluded, as have many, that “Jackson had a low opinion of judicial review.”<sup>86</sup> With regard to two issues central to Jackson’s campaign for reelection in 1832—the removal of the Cherokee from Georgia lands and the Bank of the United States—Jackson made statements suggesting his disdain for judicial power.<sup>87</sup> In a decision inconsistent with the thrust of Jackson’s support for Indian removal, the Supreme Court in *Worcester v. Georgia* ordered state officials to release two missionaries who had been arrested on Cherokee lands.<sup>88</sup> Jackson observed with no apparent regret that “[t]he decision of the supreme court has fell still born, and they find that they cannot coerce Georgia to yield to its mandate.”<sup>89</sup> Observers believed Jackson could have seen the decision enforced; his lack of action led people to attribute to him the statement “John Marshall has made his order, now let him enforce

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84. Letter from James Madison to Edward Everett (Aug. 28, 1830), in James Madison: Writings, supra note 54, at 842, 845. For Madison’s views expressed in private, see, e.g., Letter from James Madison to Thomas Jefferson (June 27, 1823), in James Madison: Writings, supra note 54, at 798, 802.

85. Letter from James Madison to Edward Everett, supra note 84, at 842, 847. Ultimately, Madison expressed his support for horizontal supremacy as well. See Kramer, *People Themselves*, supra note 7, at 145–46 (quoting Letter From James Madison to Mr. \_\_\_\_\_ (1834)).

86. 3 Robert V. Remini, *Andrew Jackson and the Course of American Democracy, 1833–1845*, at 262 (1984); see also Kramer, *We the Court*, supra note 1, at 110–11 (describing Jackson’s efforts to increase judicial accountability).

87. See Gerard N. Magliocca, *Andrew Jackson and the Constitution: The Rise and Fall of Generational Regimes 58–59* (2007) [hereinafter Magliocca, *Generational Regimes*] (noting both issues were prominent in election of 1832).

88. 31 U.S. (6 Pet.) 515, 595–96 (1832).

89. Letter from Andrew Jackson to John Coffee (Apr. 7, 1832), in 4 *Correspondence of Andrew Jackson* 429, 430 (John Spencer Bassett ed., 1929). Jackson also noted that “the arm of the [federal] government is not sufficiently strong to preserve [the Cherokee] from destruction.” *Id.*

it.”<sup>90</sup> As for the Bank, its constitutionality had been hotly contested since 1789, and Jackson was an opponent.<sup>91</sup> But Congress authorized the Second Bank of the United States, and in *McCulloch v. Maryland* the Supreme Court ratified the constitutionality of the Bank.<sup>92</sup> When Congress subsequently renewed the Bank’s charter, Jackson vetoed the bill. In his famous veto message, Jackson wrote, referring to the *McCulloch* precedent, that “[t]he 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.”<sup>93</sup>

Nonetheless, Jackson was forced to back the Supreme Court’s authority as the arbiter of constitutionality of even federal laws when, following his reelection, South Carolina acted to nullify the federal tariff law and threatened armed defiance.<sup>94</sup> Once faced with the threat of nullification, and even disunion, Jackson fell firmly behind the Supreme Court’s role in assuring the vertical supremacy of national law. In his Proclamation to South Carolina, he stressed the twin vehicles of the Supremacy Clause and the Court’s “arising under” jurisdiction, and pointed out that South Carolina, “has not . . . appealed in her own name to those tribunals which the Constitution has provided.”<sup>95</sup> Jackson then pushed his Force Act through Congress, which provided the means for enforcing federal authority in the face of state defiance, and enhanced access to the federal judiciary to see this done.<sup>96</sup> As he left office—

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90. Letter from Lewis Williams to William Lenoir (Apr. 9, 1832), quoted in Edwin A. Miles, *After John Marshall’s Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J.S. Hist. 519, 533 n.32 (1973) (“Gen. Jackson could by a nod of the head or a crook of the finger induce Georgia to submit to the law. It is by the promise or belief of his countenance and support that Georgia is stimulated to her disorderly and rebellious conduct.”). On Jackson’s apocryphal statement, see 1 Warren, *supra* note 77, at 759 & n.1.

91. See Gerard N. Magliocca, *Veto! The Jacksonian Revolution in Constitutional Law*, 78 Neb. L. Rev. 205, 230–42 (1999) (detailing controversy over and importance of Jackson’s bank veto).

92. 17 U.S. (4 Wheat.) 316, 425 (1819).

93. Andrew Jackson, *Veto Message—Bank of the United States* (July 10, 1832), reprinted in *The Statesmanship of Andrew Jackson as Told in His Writings and Speeches* 154, 163–64 (Francis Newton Thorpe ed., 1909). Read in full context, Jackson may have been saying a great deal less than readers then and still now assume, but critics used the statement to conclude Jackson would not act to enforce the decree in *Worcester* either. See Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 Stan. L. Rev. 500, 528–29 (1969) (arguing that Republican Party and press purposefully linked Bank issue with Cherokee removal question). On Jackson’s intentions regarding the statement, see Friedman, *Will of the People*, *supra* note 12, at 94–95; 1 Warren, *supra* note 77, at 762–64.

94. Ordinance of Nullification (Nov. 24, 1832), reprinted in William W. Freehling, *The Nullification Era* 150, 150–52 (1967); see also Magliocca, *Generational Regimes*, *supra* note 87, at 59–60 (describing events).

95. Andrew Jackson, *Message to Congress* (Jan. 16, 1833), in 2 *A Compilation of the Messages and Papers of the Presidents: 1789–1897*, at 610, 623 (James D. Richardson ed., n.p., 1899).

96. See Jill Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* 123–24 (1996) (noting “[g]eneral law governing federal judicial and executive power over the states was unclear” in years preceding passage of Force Act and listing several proposed legislative changes

by which time he had appointed critical members of the Court—Jackson was even clearer: “Unconstitutional or oppressive laws may no doubt be passed by Congress . . . [but] if they are within reach of judicial authority, the remedy is easy and peaceful . . . .”<sup>97</sup>

Once again, a national figure was compelled to support the Court’s vertical supremacy to ensure national policy was followed. Commentators widely regard Jackson as having flipped on the question of judicial power in light of the nullification crisis, and in doing so assisting judicial power.<sup>98</sup> As Michael Klarman concludes: “the national backlash against South Carolina’s reckless invocation of nullification and secession redounded to the benefit of the Court.”<sup>99</sup>

3. *The Reconstruction Congress Needs the Judiciary.* — One more example is apt, both to bring the story to the point at which vertical supremacy seems very much to have taken hold, and to emphasize that it is not simply Presidents who have been forced to back the Court—even when in conflict with it—in order to maintain national authority. The Reconstruction Congress, which found itself in a major struggle with the Supreme Court over the constitutionality of its Reconstruction program, nevertheless greatly expanded federal jurisdiction, including that of the Supreme Court, to safeguard federal interests throughout the South.

As Congress debated measures to restore the Union following the Civil War, it feared the Supreme Court might intervene and declare the entire military rule of the South unconstitutional.<sup>100</sup> The Court’s decisions in two recent cases—finding military tribunals unconstitutional in *Ex parte Milligan*,<sup>101</sup> and test oaths invalid in *Ex parte Garland*<sup>102</sup>—had led members of Congress to doubt the support of the Court in its struggle both with President Andrew Johnson and with Southerners unwilling to accept the

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designed to remedy problem that were eventually codified in Act); Burke, *supra* note 93, at 531 & n.168 (summarizing Force Act).

97. Andrew Jackson, Farewell Address (Mar. 4, 1837), in *The Statesmanship of Andrew Jackson as Told in His Writings and Speeches*, *supra* note 93, at 499.

98. See Michael J. Klarman, How Great Were the “Great” Marshall Court Decisions?, 87 *Va. L. Rev.* 1111, 1179 (2001) [hereinafter Klarman, How Great] (noting Jackson switched on states’ rights issue and on judicial supremacy in response to nullification crisis); see also Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States’ Rights, and the Nullification Crisis* 84–89 (1989) (stating Jackson’s Nullification Proclamation “differed radically from the states’ rights positions he had taken . . . in his annual address”); William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836*, at 267 (1992) (describing Jackson’s Nullification Proclamation as “repudiating both nullification and secession in sweeping terms”); Jessup, *supra* note 69, at 386 (noting switch).

99. Klarman, How Great, *supra* note 98, at 1178.

100. Friedman, *Will of the People*, *supra* note 12, at 127–28 (describing congressional opposition to any ruling by Court invalidating military rule).

101. 71 U.S. (4 Wall.) 2, 118–30 (1866).

102. 71 U.S. (4 Wall.) 333, 381 (1868). A “test oath” was a means of ensuring future loyalty to the Union.

congressional price for rejoining the Union.<sup>103</sup> Under the congressional scheme for restoring the Union on terms favorable to the North, a footrace was underway to see that the Fourteenth Amendment was ratified and the Southern states readmitted before the 1868 elections.<sup>104</sup> Southern antagonists were trying to use litigation in order to obtain a ruling from the Supreme Court before the election that military rule itself was unconstitutional, bringing an end to congressional plans.<sup>105</sup>

In order to avoid the possibility of the Supreme Court invalidating military rule of the South prior to completion of Reconstruction, Congress famously stripped the Court's jurisdiction to hear a pending case, *Ex parte McCardle*, which raised the Southerners' claims.<sup>106</sup> In *McCardle*, the Court acceded to this maneuver (albeit with an explicit mention in its opinion of other jurisdictional avenues that remained open for reaching the Court).<sup>107</sup> The Court did not have much of a choice: The Congress that was at that very moment trying Andrew Johnson's impeachment for meddling with its plans was hardly going to allow the Justices to interfere when the future of the Union was at stake.<sup>108</sup> At this point, the Court did not dare to claim *horizontal* supremacy.

Yet vertical supremacy was on a sound footing, precisely because the Reconstruction Congress needed the federal judiciary to keep state authorities in line. The Reconstruction Era Congress stripped the Court's jurisdiction in the *McCardle* controversy but also oversaw the broad expansion of federal judicial power as necessary to ensure its will became law throughout the South.<sup>109</sup> Many new federal jurisdictional grants were made in this era, including those allowing for removal to the federal courts to circumvent state courts entirely and the passage for the first time—in 1875—of a broad federal

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103. See 6 Charles Fairman, *History of the Supreme Court of the United States: Reconstruction and Reunion 1864–88 Part One*, at 236–37, 244–46 (Paul. A. Freund ed., 1971) (describing congressional reaction to *Milligan* and *Garland*); 2 Warren, *supra* note 77, at 442–45 (same).

104. Friedman, *Will of the People*, *supra* note 12, at 129; see also Eric Foner, *Reconstruction: America's Unfinished Revolution 1863–1877*, at 314–16 (1988) (noting that after 1867 elections, “it appeared certain . . . [that] the [Republican] party would strive to bring Reconstruction to a successful conclusion rather than press it forward”).

105. See Friedman, *Will of the People*, *supra* note 12, at 124–29 (noting Court's decision in *Ex Parte Milligan* could be read as “hint[ing] that military rule of the South was unconstitutional”).

106. Stanley I. Kutler, *Judicial Power and Reconstruction Politics* 46 (1968).

107. 74 U.S. (7 Wall.) 506, 514–15 (1868); see also Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 *Geo. L.J.* 1, 25–38 (2002) [hereinafter Friedman, *History Part II*] (analyzing case).

108. On the political milieu surrounding *McCardle*, see Kutler, *supra* note 106, at 30–47; Friedman, *History Part II*, *supra* note 107, at 16–25.

109. See Kutler, *supra* note 106, at 143 (arguing “Republicans regularly turned to the judicial system for protection and enforcement of particular legislation and for fulfillment of their nationalist impulses”).

question jurisdiction in the federal district courts.<sup>110</sup> In fact, the reason the Court even had statutory jurisdiction that required stripping in *McCardle* was because the Reconstruction Congress had bestowed it on the Court as part of its efforts to extend habeas corpus protections to freedmen.<sup>111</sup> And in the jurisdiction-stripping statute itself, Congress simultaneously expanded the Court's jurisdiction over another class of cases involving the national interest: revenue collection.<sup>112</sup>

In sum, just like Madison and Jackson, the Reconstruction Congress needed the Court. The framers had made the Justices the primary vehicle for assuring national hegemony. Even those leaders most crosswise with the Court had little choice but to enlist its energies in the national cause, ultimately enhancing its authority and assuring vertical supremacy.

### III. VERTICAL TO HORIZONTAL SUPREMACY: THE GILDED AGE

As Reconstruction ended, the Court's vertical supremacy seemed apparent, but given the wounds the Justices inflicted on themselves in the years immediately preceding and during the war and in its aftermath,<sup>113</sup> it was difficult to foresee horizontal supremacy taking firm hold anytime soon. Yet, as William Montgomery Meigs' words indicated, by the late nineteenth century this situation had reversed itself completely.<sup>114</sup> The events of the Gilded Age help to explain the dramatic shift.

The rise of horizontal supremacy was facilitated by a powerful constituency that needed the Supreme Court to ensure vertical authority over the states: business. As the industrial revolution reached full tilt, companies with national interests requiring uniform laws sought "an integrated national market free from the interference of states and localities."<sup>115</sup> For reasons involving both politics and doubts concerning its regulatory authority, "Congress often balked at passing federal regulatory legislation,"<sup>116</sup> creating a regulatory vacuum.<sup>117</sup> This was a vacuum the Supreme Court proved only too

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110. See Friedman, *Will of the People*, supra note 12, at 162–66 (providing overview of Reconstruction Era jurisdiction acts); Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 *Iowa L. Rev.* 717, 722–24 (1986) [hereinafter Collins, *Unhappy History*] (charting expansion of removal jurisdiction); William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 *Am. J. Legal Hist.* 333, 333 (1969) ("In no comparable period of our nation's history have the federal courts, lower and Supreme, enjoyed as great an expansion of their jurisdiction as they did in the years of Reconstruction, 1863 to 1876.").

111. Friedman, *History Part II*, supra note 107, at 27.

112. *Id.* at 29 & n.170; see also *Cong. Globe*, 40th Cong., 2d Sess. 1859–60 (1868) (recording passage of bill expanding Court's jurisdiction over revenue collection, as amended to include jurisdiction-stripping provision).

113. See, e.g., *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

114. See supra text accompanying notes 18–20 (discussing widespread acceptance of horizontal supremacy in late nineteenth century).

115. Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* 342 (2009).

116. Herbert Hovenkamp, *Enterprise and American Law 1836–1937*, at 80 (1991).

117. See Gabriel Kolko, *Railroads and Regulation 1877–1916*, at 39 (1965) (noting Senate

happy to fill. Meeting the needs of business required an expanded jurisdiction and new constitutional doctrines. Both, ultimately, would be used to extend the Court's supremacy from the vertical to the horizontal plane.

*A. Finding a Constituency: Business Supports the Court*

The railroads, precisely because of their territorial scope, were some of the first postwar corporations to struggle with the problem of differing state regulation. In the 1880s, *The Railway and Corporation Law Journal* despaired over the proliferation of commercial laws in the states, observing that “[w]e are growing so rapidly and our business is developing to such great proportions . . . [that] it would seem to be impossible to regulate the larger organizations of business by the methods which were devised by our forefathers.”<sup>118</sup> The railroads had been actively seeking federal regulation from Congress, but Congress was slow to act.<sup>119</sup> In the meantime, as one contemporary writer acknowledged, “[s]ome tribunal must be found in which all business can be dealt with that extends through two, three, often one-half dozen distinct States. The Federal courts afford such a forum.”<sup>120</sup>

The railroads were hardly alone when it came to suffering from a patchwork of state legislation and outright local protectionism. The commercial market, which heretofore had been dominated by two-party producer-consumer transactions, was converting to one of middlemen: Traveling “drummers” sought buyers for national products.<sup>121</sup> States passed “anti-drummer” measures licensing and taxing these interstate salespeople.<sup>122</sup> “Unless such laws were permitted to stand . . . ‘New York, Boston and Philadelphia will absorb the whole business of the country,’” explained one (perhaps too candid) member of the Charleston Board of Trade.<sup>123</sup> Similarly, whenever the economy faltered, local residents turned to the state legislatures for relief from mortgage foreclosures by national financial institutions.<sup>124</sup>

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had blocked railroad legislation for nearly ten years by 1886).

118. 5 *Railway & Corp. L.J.* 188 (1889).

119. See Kolko, *supra* note 117, at 34–35 (“By 1884 a large and important group of railroad men was ready and anxious to have federal railroad legislation—on their own terms.”).

120. Aldace F. Walker, *The Progressive Centralization of Power in the Federal Government*, Independent, June 7, 1894, at 11, 12.

121. Stanley C. Hollander, *Nineteenth Century Anti-Drummer Legislation in the United States*, 38 *Bus. Hist. Rev.* 479, 479, 481 (1964); Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875–1890*, 38 *J. Econ. Hist.* 631, 636–37 (1978).

122. Hollander, *supra* note 121, at 483–86, 500.

123. Harry N. Scheiber, *Federalism, the Southern Regional Economy, and Public Policy Since 1865*, in *Ambivalent Legacy: A Legal History of the South* 69, 82 (David J. Bodenhamer & James W. Ely, Jr. eds., 1984) (quoting Proceedings of the Second Annual Meeting of the National Board of Trade, Held in Cincinnati, December 1860, at 43 (Boston, 1870)).

124. See Friedman, *Will of the People*, *supra* note 12, at 152 (“States sought to project citizens who faced mortgage foreclosures.”); see also J.P. Dunn, Jr., *The Mortgage Evil*, 5 *Pol. Sci. Q.* 65, 69–70 (1890) (complaining that “considering the total volume of foreclosure, where the mortgagees are non-residents it is apparent that the money brought in [to Indiana] by loans

State court decisions made the problem of uniformity in commercial law intractable.<sup>125</sup> As early as 1829, a commentator complained that “these diversities would seem . . . to render the commercial and trading part of the community liable to perpetual mistakes, losses and vexations.”<sup>126</sup> In 1842, the Supreme Court, in *Swift v. Tyson*, claimed for itself the ability to determine the common law of commerce, unfettered by state decisional law.<sup>127</sup> Yet the state courts continued to provide an alternative forum, relying on state, rather than federal, common law. In addition, without employer liability statutes, regulation of health and safety measures at the workplace, or workmen’s compensation schemes, state tort law provided the sole means of compensating those injured on the dangerous jobs in the newly industrialized world. The high cost of tort verdicts was an expensive irritant to national business.<sup>128</sup>

On these and many other matters, given the regulatory vacuum left by Congress, business sought the protection of the federal courts. After the Civil War, as economic changes and technology moved faster than the law, the *Swift* doctrine made the realization of a “unified national common law . . . at least partially attainable.”<sup>129</sup> Similarly, personal injury cases were frequently before the Court on diversity grounds, and often the “question of the liability of the company was discussed as one of general law . . . [without reference] to the decisions of the State in which the injuries took place.”<sup>130</sup>

Favorable rules for business required sympathetic judges, so business and the railroads took the steps necessary throughout this period to ensure a reliable federal bench and “sound” Supreme Court appointees.<sup>131</sup> Railroads and national business interests allied with the Republican Party, and for much of this period the Republicans controlled the Senate and the Presidency.<sup>132</sup>

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has in some way disappeared, and that the financial parasite which before sucked the blood is now swallowing the flesh”).

125. See John William Wallace, *The Want of Uniformity in the Commercial Law Between the Different States of Our Union, A Discourse Delivered Before the Law Academy of Philadelphia* 27 (Philadelphia, L.R. Bailey 1851) (“All questions of commercial law go . . . to the State Courts. New courts are created with new States. No one State Court can be acquainted with the decisions of its sister State Courts even if it sought to be guided by them.”).

126. Tony Freyer, *Harmony & Dissonance: The Swift & Erie Cases in American Federalism* 19–20 (1981) (quoting commentary from *North American Review*).

127. 41 U.S. (16 Pet.) 1, 18–19 (1842).

128. See Tony A. Freyer, *The Federal Courts, Localism, and the National Economy, 1865–1900*, 53 *Bus. Hist. Rev.* 343, 348 (1979) [hereinafter Freyer, *The Federal Courts*] (“Jury verdicts in fellow-servant cases offered another instance of local resistance to railroads.”).

129. William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 *Tul. L. Rev.* 907, 943 (1988).

130. *Balt. & Ohio R.R. v. Baugh*, 149 U.S. 368, 376 (1893).

131. See Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 *Am. Pol. Sci. Rev.* 511, 513 (2002) [hereinafter Gillman, *Political Parties*] (“[T]he decisions of nonjudicial actors reconstructed and empowered the institution of the federal judiciary.”).

132. *Id.* at 515–21 (describing how Republican and commercial interests furthered national economic policies by restructuring federal courts and judicial appointments).

Business selected its political candidates based in large part on their views of the Court, and sought presidential candidates who would support a judiciary that understood corporate interests.<sup>133</sup> As Charles Elliot Perkins wrote in 1894 “[t]here are so many jack-asses about nowadays who think property has no rights, that the filling of the Supreme Court vacancies is the most important function of the presidential office.”<sup>134</sup>

Ultimately business got what it wanted.<sup>135</sup> As early as 1885 *The Nation* reported that “[t]he Republican party’s long lease of power has resulted in making the Federal judiciary almost entirely Republican in political faith.”<sup>136</sup> Republican and pro-business. As the *Central Law Journal* told its readers, “there is a well founded suspicion that men have been elevated to the supreme judicial tribunal in the land, if not at the behest of corporate interests, certainly with notice that their prejudices were naturally with those interests, and that they might be expected to care for their protection.”<sup>137</sup>

#### B. *Expanding Jurisdiction to Cement Power*

Corporate interests recognized that to obtain substantive results in judicial doctrine, they needed to empower the Court by expanding its jurisdiction and affirming its position at the apex of a restructured federal judiciary branch. Business successfully sought jurisdictional change from Congress. But the Justices also found ways to foster their new constituency by opening the federal courts to corporate and interstate interests.

The jurisdictional revolution began in Congress, with the Judiciary Act of 1875, which bestowed federal question jurisdiction upon the lower federal courts and created a broad removal power.<sup>138</sup> As the *Central Law Journal* editorialized, “[t]hat corporations are desirous of having all their causes removed to the Federal courts is a fact so well established that one would have great temerity to deny it.”<sup>139</sup> There is even evidence that corporate interests were in part behind the Act, notwithstanding the fact that it was adopted consistent with major civil rights legislation, and thus ostensibly meant to provide a forum for claims from freedmen.<sup>140</sup> The probusiness efforts were not

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133. See Freyer, *The Federal Courts*, supra note 128, at 345–46 (“One party manager wrote to James Garfield in 1880 to send ‘privately, for my own personal use . . . your general views on this question of the rights of corporations so that I could show it to Gould and perhaps Huntington.’”).

134. *Id.* at 345 (quoting Edward C. Kirkland, *Dream and Thought in the Business Community 1860–1900*, at 135 (Elephant Paperbacks 1990) (1956)).

135. See Gillman, *Political Parties*, supra note 131, at 512 (arguing “much of the expansion of [judicial] power” during this period was due to “Republican Party’s efforts . . . to facilitate national economic development”).

136. *The President and the Judiciary*, 40 *Nation* 336, 337 (1885).

137. *Current Topics*, 18 *Cent. L.J.* 281, 281–82 (1884).

138. Ch. 137, 18 *Stat.* 470, 470–72 (current version at 28 U.S.C. §§ 1331, 1441 (2006)).

139. *Current Topics*, supra note 137, at 281.

140. See Friedman, *Will of the People*, supra note 12, at 163; see also Kutler, supra note 106, at 157 (noting Representative Luke P. Poland of Vermont referred to “difficulties in the state courts in ‘other portions’ of the country,” perhaps referring to those courts’ responsiveness to

without response. Between 1879 and 1896, Representative David B. Culberson of Texas introduced into the House of Representatives numerous bills designed to narrow the federal removal power.<sup>141</sup> He was ultimately unsuccessful in his attempts.<sup>142</sup>

But when necessary, the Supreme Court also acted alone to serve its corporate constituents, limiting state jurisdiction and expanding that of the federal courts.<sup>143</sup> In *Pennoyer v. Neff*, the Court protected nonresidents from being haled into state court by concluding that a state had power to adjudicate a dispute involving a nonresident if, and only if, the nonresident defendant could be personally served or his property could be attached within the state.<sup>144</sup> In 1885, the Court found the fact that a corporation held a federal charter sufficient to make any case concerning that corporation one “arising under the laws of the United States,” thus allowing for removal to federal court.<sup>145</sup> Shortly thereafter in *Santa Clara v. South Pacific Railway Co.*, the Court simply announced that corporations were “persons” within the meaning of the Fourteenth Amendment, thus receiving its protection and the concomitant ability to raise constitutional claims in federal court by removal or appeal from a decision of the state supreme court.<sup>146</sup> Additionally, the Court had already eased the burdens of the complete diversity requirement in prior cases by adopting the fiction that a corporation’s place of incorporation, rather than the residences of its shareholders, constituted the corporation’s home.<sup>147</sup>

These jurisdictional changes had the altogether predictable effect of dramatically increasing the caseloads of the federal courts.<sup>148</sup> Felix Frankfurter

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antibusiness demands of Granger Movement).

141. Collins, *Unhappy History*, supra note 110, at 738–42. For example, his 1886 bill sought to amend section 3 of the Judiciary Act of 1875 by:

eliminat[ing] diversity jurisdiction for suits “between a corporation and a citizen of any State in which such corporation, at the time the cause of action accrued, may have been carrying on any business authorized by the law creating it . . . .” This amendment was designed to give states more control over tort litigation involving foreign corporations doing business and causing injuries within their boundaries.

Id. at 740 (quoting H.R. Rep. No. 49-1078, at 1–2 (1886)).

142. Frankfurter & Landis, supra note 140, at 90–93. By 1887, all Culberson was able to get through was a modest bill, increasing the amount in controversy for diversity actions from \$500 to \$2,000, but his more dramatic proposals failed. Id. at 93–96.

143. See *Ex parte Young*, 209 U.S. 123, 145 (1908) (permitting suit in federal court against state officials to enjoin unconstitutional state laws).

144. 95 U.S. 714, 723–24 (1878).

145. See *Pac. R.R. Removal Cases*, 115 U.S. 1, 11–14 (1885).

146. 118 U.S. 394, 396 (1886).

147. See Dudley O. McGovney, *A Supreme Court Fiction: Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts*, 56 *Harv. L. Rev.* 853, 873–77, 885–89 (1943) (describing Court’s decisions on fiction of corporate citizenship).

148. See Kutler, supra note 106, at 159–60 (noting “vast numbers of railroad and corporate cases poured into the friendlier environs of the federal courts, secure from aggressive and hostile state laws and courts”); Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958*, at 20 (1992) (observing that diversity cases were “the largest and most rapidly-increasing class of Federal cases”).

would explain the “swelling of the dockets” as a function of “the growth of the country’s business, the assumption of authority over cases heretofore left to the state courts, [and] the extension of the field of federal activity.”<sup>149</sup>

The growth of the Court’s docket demanded sweeping reform, and when it finally came in the Circuit Court of Appeals Act of 1891, or the Evarts Act, it served to augment judicial power.<sup>150</sup> The Evarts Act created the structure of the federal courts that is familiar today, serving as a vital step in cementing the supremacy of the Supreme Court. Senator Evarts, a prominent New York railroad and commercial lawyer, explicitly designed his bill to empower the federal judiciary and the Supreme Court.<sup>151</sup> The bill expanded the lower courts by creating federal Courts of Appeals, which were to serve as the courts of last resort in many cases, thereby reducing the Supreme Court’s docket.<sup>152</sup> Furthermore, for a set of cases, the Court’s review was made discretionary.<sup>153</sup> With more time to attend to each new case, the Court “could continue its development as a truly national institution, pursuing national political agendas.”<sup>154</sup>

In 1914, Congress expanded the Court’s docket even further, in a way that opened the door to greater vertical supremacy. A controversial decision by the New York Court of Appeals in *Ives v. South Buffalo Railway Co.* struck down a state workmen’s compensation statute as violating the state and federal constitutions.<sup>155</sup> But under section 25 of the Judiciary Act of 1789, the Supreme Court could not review a state supreme court decision that *upheld* a federal right.<sup>156</sup> Cases in New Jersey and Wisconsin that upheld similar workers’ compensation schemes highlighted the “geographic feature of constitutionality.”<sup>157</sup> The idea that the U.S. Constitution could “mean one thing in one State and the reverse in another” gave impetus to passing a bill to ensure the Supreme Court’s power to review even those state court decisions upholding federal law.<sup>158</sup>

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149. Frankfurter & Landis, *supra* note 140, at 60.

150. Ch. 517, 26 Stat. 826 (codified as amended in scattered sections of 28 U.S.C.).

151. See 21 Cong. Rec. 10,220 (1890) (statement of Sen. William M. Evarts) (“[T]he great point for us to meet is to provide intermediate courts that shall answer the purpose of our obligations under the Constitution, that shall leave entirely uncurtailed the authority of the Supreme Court in the greatest functions of its politico-legal relation to affairs . . . .”); Gillman, *Political Parties*, *supra* note 131, at 520 (providing brief biography of Senator Evarts).

152. § 1, 26 Stat. at 826.

153. *Id.* § 5, 26 Stat. at 827–28.

154. Gillman, *Political Parties*, *supra* note 131, at 521.

155. 94 N.E. 431, 439 (N.Y. 1911); see also *id.* at 433–35 (quoting in full An Act to Amend the Labor Law in Relation to Workmen’s Compensation in Certain Dangerous Employments, ch. 674, art. 14a, 1910 N.Y. Laws 1945).

156. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87 (current version at 28 U.S.C. § 1257 (2006)).

157. Frankfurter & Landis, *supra* note 140, at 197.

158. H.R. Rep. No. 63-1222, at 2 (1914); see also Act of Dec. 23, 1914, ch. 2, 38 Stat. 790, 790 (current version at 28 U.S.C. § 1257) (authorizing Supreme Court to review state supreme court decisions upholding state laws against constitutional challenge).

Having emphasized the Court's important role in assuring uniformity, Congress then was led to grant the Court discretionary jurisdiction for the same reasons. After the 1914 Act, the Court's docket grew even more unmanageable.<sup>159</sup> In the past, a wary Congress had recognized the link between a busy, overworked federal judiciary and weak federal judicial power.<sup>160</sup> But given the obvious need for federal courts to ensure uniformity, and under pressure from business, Congress could neither allow the Court to sink under the weight of its docket nor cut back on the Court's jurisdiction. Congress was forced to address the problem of the Court's workload and eventual backlog by giving the Court greater discretionary jurisdiction and control over its docket in the Judiciary Act of 1925.<sup>161</sup>

Passage of the Judiciary Act of 1925 demonstrated how vertical supremacy could be leveraged to further horizontal supremacy. During debates in Congress on the first iteration of the bill, Progressives—deeply suspicious of the judiciary—blocked its passage.<sup>162</sup> The negative reaction to giving the Court yet more control led proponents to shift tactics the next time the bill was proposed, defending the measure on vertical grounds—as a means to ensure the uniformity of federal law. Having seen their jurisdiction expanded to solve the problem of uniformity, the Justices testifying before Congress in favor of the bill emphasized the uniformity problems of the various Circuit Courts of Appeals.<sup>163</sup> Ultimately, the bill “transform[ed] the Court's fundamental purpose within the federal judicial hierarchy,” by making the Court an agenda-setting agency with largely free reign over its case selection, and by protecting it from losing jurisdiction due to congressional frustration (real or convenient) at delays and backlogs.<sup>164</sup>

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159. However, this increase in the docket was not solely a consequence of the 1914 Act. See Frankfurter & Landis, *supra* note 140, at 205–06 (explaining sharp increase in amount of cases before Supreme Court).

160. Gillman, *Political Parties*, *supra* note 131, at 520.

161. Frankfurter & Landis, *supra* note 140, at 280; see also Judiciary Act of 1925, ch. 229, 43 Stat. 936, 937–39 (current version at 28 U.S.C. § 1257).

162. In 1923, Chief Justice Taft argued before the House Judiciary Committee that the bill would allow the Supreme Court to perform its role, “expounding and stabilizing principles of law for the benefit of the people of the country.” Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 *Colum. L. Rev.* 1643, 1664–65 (2000). In response, Senator Thomas Walsh of Montana, a leading Progressive, decried the bill, arguing that it “exemplifies that truism, half legal and half political, that a good court always seeks to extend its jurisdiction, and that other maxim, wholly political, so often asserted by Jefferson, that the appetite for power grows as it is gratified.” 62 *Cong. Rec.* 8547 (1922). Walsh instead favored restricting original federal jurisdiction. 62 *Cong. Rec.* 8548–49.

163. *Procedure in Federal Courts: Hearings on S. 2060 and S. 2061 Before the Subcomm. of the S. Comm. on the Judiciary, 68th Cong.* 29 (1924) (statement of J. Van Devanter) (explaining Court selects cases for review by, *inter alia*, looking to “whether there is any conflict between the decision that is complained of and decisions on the same question in other circuit courts of appeal or in the Supreme Court”).

164. Jeremy Buchman, *Judicial Lobbying and the Politics of Judicial Structure: An Examination of the Judiciary Act of 1925*, 24 *Just. Sys. J.* 1, 10 (2003).

### C. *The Tentacles of Doctrine*

The Justices used their expanding jurisdiction as a basis for developing doctrines to regulate state, and ultimately national, power. The doctrine of substantive due process and the narrow interpretation of the commerce clause that would become so controversial when applied horizontally against the national government originally found their roots in vertical cases involving state regulation.

1. *Precursor: Substantive Due Process.* — Initially the Due Process Clause played virtually no substantive role in curtailing either state or federal legislation. In 1873, in the *Slaughter-House Cases*, the Court rejected a Fourteenth Amendment due process challenge to a Louisiana law regulating slaughterhouses.<sup>165</sup> Nonetheless, Justice Miller’s opinion resonated with themes of vertical supremacy, acknowledging that the federal government had a clear responsibility to police the states’ actions, and that this duty, placed “in the hands of the Federal government,” by necessity fell to the federal judiciary.<sup>166</sup> The explosion of state laws seeking to counter the expansion of the national market drew more and more lawyers to court on behalf of business clients, raising Fourteenth Amendment challenges. By the mid-1880s, the Court began to explore the possible content of “liberty or property” in the Fourteenth Amendment.<sup>167</sup>

The Court ultimately came to the view that “[i]f . . . a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law,” the Court would have a duty to hold the statute unconstitutional.<sup>168</sup> Initially, it announced the principle while upholding state laws, in cases like *Mugler v. Kansas*.<sup>169</sup> Then, in 1897 in *Allgeyer v. Louisiana*, the Court for the first time struck down a state law on this basis, concluding that the state’s efforts to regulate out-of-state insurance agencies overstepped constitutional bounds.<sup>170</sup> Substantive due process thus began its doctrinal march through the states, including the 1905 case of *Lochner v. New York*, which famously struck down a New York statute limiting the number of hours worked by bakers.<sup>171</sup>

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165. 83 U.S. (16 Wall.) 36 (1873).

166. *Id.* at 80.

167. See, e.g., *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888) (acknowledging Fourteenth Amendment protects privileges of pursuing trade and acquiring property); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (noting those “fundamental rights to life, liberty, and the pursuit of happiness” secured by constitutional law).

168. *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

169. *Id.*

170. 165 U.S. 578, 590–91 (1897). See generally Collins, *Unhappy History*, *supra* note 110, at 763 & n.208 (listing “hints” from Supreme Court in years preceding *Allgeyer* decision that it “might be ready to . . . strike down a state regulation on the express ground that federal due process served as a substantive check on state action”).

171. 198 U.S. 45, 49 (1905).

Once the idea of substantive due process review became familiar in the vertical context, the Court announced that the same rule applied to federal legislation. In *Adair v. United States*, the Court cited the vertical cases of *Lochner*, *Allgeyer*, and *Mugler* to bolster its contention that it had the power and duty to review the congressional enactments.<sup>172</sup> But because the Court ultimately concluded that Congress did not have the power to promulgate the law under the Commerce Clause, it did not have to resolve the question of whether the Due Process Clause would have served as a limitation on that power. Thus, “liberty of contract . . . entered the federal Constitution through the back door.”<sup>173</sup> Then, in 1923, substantive due process was used to invalidate a federal law. In *Adkins v. Children’s Hospital of the District of Columbia*, the Supreme Court held that a congressional act creating a Minimum Wage Board for the District was an unconstitutional exercise of the police power infringing on an individual’s right to contract for labor, protected under the Due Process Clause of the Fifth Amendment.<sup>174</sup>

*Adkins* generated an angry response, but one that underscored the rise of horizontal supremacy.<sup>175</sup> Notwithstanding the frustration felt at the Court’s “substitut[ing] its judgment of economic wisdom” in place of elected officials, *The Nation* concluded glumly that as a result of the Court’s having spoken, “the people of the United States are without power, unless they amend the Constitution.”<sup>176</sup> And although James Bradley Thayer had once suggested that the Court should be more deferential to Congress given that it was a coordinate department<sup>177</sup>—an argument that might have served to distinguish the application of the doctrine at the federal level—the majority of criticism of *Adkins* contended that the judiciary possessed no special expertise in determining the legislative facts used to make these policy decisions, whether at the state or federal levels.<sup>178</sup> In the end, “neither the balance of power nor the terms of the debate changed much in the ten years following *Adkins*.”<sup>179</sup> What happened soon thereafter, however, was an entirely different story.

2. *Aggressive Supremacy: The Commerce Clause.* — When it came to the Commerce Clause, the leap from vertical to horizontal supremacy had dramatically more of an impact on the Court and country both. In cases like

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172. 208 U.S. 161, 173 (1908).

173. Clyde E. Jacobs, *Law Writers and the Courts* 88 (1954).

174. 261 U.S. 525, 561–62 (1923).

175. See Thomas Reed Powell, *The Judiciality of Minimum-Wage Legislation*, 37 *Harv. L. Rev.* 545, 572 (1924) (stating decision “evoked a more nearly unanimous chorus of disapproval than any other decision in years”).

176. Editorial, *The Supreme Court Supplants Congress*, 116 *Nation* 484, 485 (1923).

177. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129, 150 (1893) (“The courts are revising the work of a coordinate department, and must not, even negatively, undertake to legislate.”).

178. See Friedman, *Will of the People*, *supra* note 12, at 192–93 (listing critiques of *Adkins* and other substantive due process decisions).

179. Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* 180 (1993).

*Schechter Poultry* and *Carter Coal*, the Justices drew lines today deemed formal between what was “commerce” (and thus within Congress’s power) and “manufacturing,” “agriculture,” or the like (immune from congressional regulation).<sup>180</sup> But as Barry Cushman aptly observes, “the Justices who had forged the categories to which [the Court] would later cling” had fashioned that law in the context of supervising state regulation of interstate commerce.<sup>181</sup>

“In the late nineteenth and early twentieth centuries, the central question in constitutional federalism was . . . the degree to which the ‘negative implications’ of [the Commerce Clause] limited the regulatory authority of state and local governments.”<sup>182</sup> Although the Court utilized a number of doctrinal tests in its dormant Commerce Clause jurisprudence, many of the key cases drew formal lines between that which was “commerce,” and thus properly national, and that—like “manufacturing”—which was local. Thus, “in the leading case of *Coe v Errol*,” the Justices upheld a state tax on timber cut and stored within the state prior to shipment to another state.<sup>183</sup> In another important precedent, *Kidd v. Pearson*, the Court sustained the state’s regulatory power over the manufacture of alcohol.<sup>184</sup> It observed that “[n]o distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce.”<sup>185</sup>

The precedents drawing lines in vertical circumstances ultimately found direct application in now-famous horizontal cases governing the scope of Congress’s exercise of its commerce power, like *United States v. E.C. Knight Co.*, prohibiting prosecution of the sugar trust,<sup>186</sup> and *Hammer v. Dagenhart*, striking down the child labor law.<sup>187</sup> In *E.C. Knight* the Court wrote:

[t]he fact that an article that is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to

180. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 299–301 (1936) (discussing “[t]he distinction between manufacture and commerce”); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) (observing “there is a necessary and well-established distinction between direct and indirect effects” of commerce when “determining how far the federal government may go in controlling intrastate transactions”).

181. Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. Chi. L. Rev. 1089, 1101 (2000) [hereinafter Cushman, *Formalism*]. Cushman’s argument is meant to debunk claims that the Court’s jurisprudence was result-oriented empty formalism; without regard to that defense, his arguments amply establish the move from vertical to horizontal application.

182. *Id.*

183. *Id.* at 1118–19; see *Coe v. Errol*, 116 U.S. 517, 528–29 (1886).

184. 128 U.S. 1, 26 (1888).

185. *Id.* at 20.

186. 156 U.S. 1 (1895).

187. 247 U.S. 251 (1918).

commerce. This was so ruled in *Coe v. Errol* . . . .<sup>188</sup>

Similarly, in *Hammer* the Court noted that:

[o]ver interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation. . . . This principle has been recognized often in this Court. *Coe v. Errol* . . . . If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States . . . *Kidd v. Pearson*.<sup>189</sup>

And so on.

The leap from vertical to horizontal supremacy in cases like *Hammer*, which struck down a federal child labor law, led to a storm of outrage.<sup>190</sup> *The New York Evening Mail* cried out: “A nation that will give its blood and money on the battle-field for the freedom of mankind throughout the world will surely find a way, despite five to four decisions, to release from slavery the children of its own hearthstone.”<sup>191</sup> The decision signaled a turning point in the American Federation of Labor’s (AFL) relationship with the judiciary, with Samuel Gompers calling for action by saying the AFL ““must regulate the veto power of the Supreme Court and eliminate an intolerable situation that enables five men to defeat the will of the nation.””<sup>192</sup>

The response of leading progressive thinkers—such as Oliver Wendell Holmes, James Bradley Thayer, and Charles Grove Haines—was to try to distinguish horizontal supremacy that threatened national progressive measures from vertical supremacy, well-accepted by that time. “I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States,” proclaimed Holmes in what became an oft-repeated phrase.<sup>193</sup> Thayer, in his iconic *The Origin and Scope of the American Doctrine of Constitutional Law*, advocated for a “clear error” rule before courts would strike down congressional enactments.<sup>194</sup> Most forget, though, that Thayer accepted that “when the question is whether State action be or be not conformable to the paramount constitution, the supreme law of the land, we have a different matter in hand.”<sup>195</sup> Similarly, Haines’s

188. *E.C. Knight*, 156 U.S. at 13.

189. *Hammer*, 247 U.S. at 272–73 (citations omitted).

190. See William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937*, at 169 (1994) (“*Dagenhart* was the spark that ignited new fires that raged from 1922 to 1924.”).

191. *The Child-Labor Defeat*, *Literary Dig.*, June 15, 1918, at 16.

192. Ross, *supra* note 190, at 169, 170–71 (quoting Samuel Gompers, *Child Life Must be Conserved*, 25 *Am. Federationist* 692, 692 (1918)).

193. Oliver Wendell Holmes, *Law and the Court*, Speech at a Dinner of the Harvard Law School Association of New York (Feb. 15, 1913), in *Collected Legal Papers* 291, 295–96 (1921).

194. Thayer, *supra* note 177, at 144.

195. *Id.* at 154–55 (“The judiciary now speaks as representing a paramount constitution and government, whose duty it is, in all its departments, to allow to that constitution nothing less than

magisterial challenge to judicial power, *The American Doctrine of Judicial Supremacy*, criticized the concept of horizontal supremacy, which gave the judiciary “the sole right to place an authoritative interpretation upon the fundamental written law.”<sup>196</sup> But he distinguished the vertical dimension of supremacy: “The exercise of such authority usually is a part of the regular procedure of federal systems.”<sup>197</sup>

Despite the theorizing and intense controversy, horizontal supremacy stuck. Thomas Reed Powell, writing on *Hammer* in *The Nation*, said “we must bow to the decision until it is overruled.”<sup>198</sup> Similarly, Rabbi Stephen S. Wise, of Free Synagogue of New York City and a trustee of the National Child Labor Committee said, “[t]he decision is one that, as law-abiding citizens we must accept as valid.”<sup>199</sup> The proposed remedy was precisely what one would expect in a system with a supreme judiciary: a constitutional amendment—one that was in fact never adopted.<sup>200</sup> And when the Court handed down its blockbuster decisions invalidating major New Deal measures in 1935 and 1936, it again built on these vertical and horizontal precedents.<sup>201</sup>

The story of the Supreme Court’s aggressive use of substantive due process and Commerce Clause doctrine to strike down state and federal legislation during the Great Depression is a familiar one, and it did not end well for the Court.<sup>202</sup> By late 1936, neither the country nor the President was

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its just and true interpretation; and having fixed this, to guard it against any inroads from without.”).

196. Haines, *supra* note 21, at 5.

197. *Id.* at 6–7 (“The notion that subordinate branches of government [the States] may be held in check by a superior authority . . . is often confused with the right of courts of justice to refuse to give force and effect to regular and *bona fide* enactments of coordinate branches of government.”).

198. Thomas Reed Powell, *The Child-Labor Decision*, 106 *Nation* 730, 731 (1918).

199. *Federal Child Labor Law Invalid*, 40 *Survey* 283, 284 (1918).

200. See H.R.J. Res. 184, 68th Cong. (1924) (proposing constitutional amendment that would give “Congress . . . power to limit, regulate, and prohibit the labor of persons under eighteen years of age”).

201. See Cushman, *Formalism*, *supra* note 181, at 1126 (“Affirmative Commerce Clause doctrine during this period . . . was the flip side of the Court’s dormant Commerce Clause jurisprudence.”). In *Carter Coal*, for example, the Court relied on *Coe v. Errol* and *Kidd v. Pearson*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 299, 301 (1936), as well as horizontal precedents establishing the Court’s authority to determine the bounds of the Commerce Clause. *Id.* at 305 (citing *Stafford v. Wallace*, 258 U.S. 495 (1922); *Swift & Co. v. United States*, 196 U.S. 375 (1905)).

202. See, e.g., *United States v. Lopez*, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) (“The modern respect for the competence and primacy of Congress in matters affecting commerce developed only after one of this Court’s most chastening experiences, when it perforce repudiated an earlier and untenably expansive conception of judicial review in derogation of congressional commerce power.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 862 (1992) (plurality opinion) (“[T]he Court lost something by its misperception [in *Lochner*], or its lack of prescience, and the Court-packing crisis only magnified the loss . . . .”); Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court* 218–38 (2010) (describing “sustained controversy, scrutiny, and scorn” aroused by Court because of its decisions during its 1935 fall term).

feeling particularly acquiescent about judicial supremacy. Even before President Franklin Roosevelt introduced his plan to pack the Supreme Court, countless bills had been filed in Congress to resolve the situation.<sup>203</sup> After Roosevelt threatened to pack the Court in 1937, the Justices apparently capitulated.<sup>204</sup> In any event, Roosevelt soon reconstituted the Court through attrition, and the Court abandoned its aggressive approach to the national economy.<sup>205</sup> Following the fight over President Roosevelt's plan, it was a chastened Court. Note that, strictly speaking, the remedies suggested to rein in the Court did not threaten supremacy. Rather, in the face of the Court's aggressiveness, members of Congress for the most part sought to control the instances in which the Court could speak—in effect a concession of supremacy.<sup>206</sup> Nonetheless, in the following years the Court exercised horizontal judicial review only rarely, taking care not to run afoul of the other branches.<sup>207</sup>

#### IV. HORIZONTAL SUPREMACY ASCENDANT: THE CIVIL RIGHTS ERA

Roughly twenty years after the political and institutional crisis that rocked the Court in 1937, the Warren Court demonstrated that horizontal judicial supremacy could be reinvigorated through the very same means used in the nineteenth century. The Court followed the lead of an aggressive constituency favoring civil rights. It then incorporated the Bill of Rights against the states, hugely increasing its jurisdictional reach. And as it spun doctrine in incorporation cases protecting civil rights against state action, the federal government became caught in that web.

##### A. *The Rights (and Powers) Constituency*

One of the primary lessons of the New Deal fight was that a court ought not to take on the coordinate branches without an adequate constituency. As the Court slowly regained power in the 1940s, the Justices relied upon the

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203. Friedman, *Will of the People*, supra note 12, at 212.

204. See, e.g., Shesol, supra note 202, at 434 (noting those involved in court-packing fight believed that Supreme Court “simply surrendered”); see also Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *Yale L.J.* 453, 511 (1989) (“Just as President Johnson responded to the threat of impeachment . . . so too did the Old Court make its famous ‘switch in time.’”). Contra Cushman, *Rethinking*, supra note 33, at 5 (“[T]here is ample evidence to suggest that the external account [viewing the decisions of 1937 as a political response] is not nearly as compelling as has conventionally been thought, that it certainly has been overstated, and that it may very well be just plain wrong.”).

205. See Cushman, *Rethinking*, supra note 33, at 224 (stating Democratic victory in election of 1936 “enabled Franklin Roosevelt, through the power of appointment, to refashion the High Court in his own image”); Peter Charles Hoffer et al., *The Supreme Court: An Essential History* 281–87 (2007) (describing composition of Stone Court).

206. Friedman, *Will of the People*, supra note 12, at 212 (noting proposed amendments included “requiring a supermajority of the Court to hold a law unconstitutional . . . [and] stripping the power of judicial review over particular laws altogether”).

207. See Frank, supra note 14, at 425–26 (1951) (describing Court fight's effect on Justices); Walton H. Hamilton & George D. Braden, *The Special Competence of the Supreme Court*, 50 *Yale L.J.* 1319, 1323 (1941) (noting Court had “receded from the front pages”).

alliance that had saved the Court in 1937: a coalition deeply interested in civil liberties and racial justice.

The primary reason offered against President Roosevelt's plan to pack the Court was that an independent judiciary was needed to protect civil liberties, both against offending states and against the dangers of totalitarianism.<sup>208</sup> The Justices were seen by some as the final bulwark of constitutional liberty.<sup>209</sup> As the intellectual Max Lerner explained, the confluence of events supported "judicial supremacy": "[T]he decline of laissez-faire" had made "the businessmen and the judges turn increasingly to the rhetoric of civil liberties" while "the spread of fascism in Europe and the fear of it in America . . . has made the liberals and the middle classes more ready to accept the Court's guardianship of civil liberties."<sup>210</sup>

The New Deal fight also signaled the existence of a national constituency that would support the goal of racial justice through the extension of civil liberties to African Americans. In the late 1920s and early 1930s, the NAACP began to turn to the federal courts in its quest for racial justice.<sup>211</sup> And speakers against President Roosevelt's plan regularly recurred to the theme of the courts protecting minority groups.<sup>212</sup> The Senate report related that "[m]inority political groups, no less than religious and racial groups, have never failed when forced to appeal to the Supreme Court of the United States, to find in its opinions the reassurance and protection of their constitutional rights."<sup>213</sup> *Carolene Products'* famous footnote four was a judicial response to

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208. See S. Rep. No. 75-711, at 15 (1937) ("The condition of the world abroad must . . . cause us to . . . refuse to enact any law that would impair the independence of . . . an independent judicial branch . . ."); id. at 20 ("[T]he only place the citizen has been able to go . . . for protection against the abridgment of his rights, has been to an independent and uncontrolled and incorruptible judiciary."); Shesol, *supra* note 202, at 303 (asserting "dictatorship" was "most common charge" against court-packing plan).

209. See William E. Leuchtenberg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 139 (1995) (noting some critics of court-packing plan believed that Court was "sole bulwark" of personal liberty); Shesol, *supra* note 202, at 316 (noting growing "appreciation of the Court's role as a defender of civil liberties"); see also Friedman, *Will of the People*, *supra* note 12, at 219 ("An independent judiciary was . . . vaunted as the antidote to accumulating government power.").

210. Max Lerner, *Ideas Are Weapons: The History and Uses of Ideas* 461–62, 468 (1939).

211. As early as 1926, the NAACP annual report identified the federal courts as the best option it had. See Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925–1950*, at 1 (1987). See generally Chas. H. Thompson, *Court Action the Only Reasonable Alternative to Remedy Immediate Abuses of the Negro Separate School*, 4 *J. Negro Educ.* 419 (1935) (arguing "advantages . . . outweigh the disadvantages" of using court system to remedy school segregation).

212. In a radio address, Frank Gannett, founder of the National Committee to Uphold Constitutional Government, related the story of his Jewish barber who said, "I realize that if it were not for the Supreme Court, I might be treated here as they treat the Jews in Germany." Frank E. Gannett, *The People's Fight*, in 1 *Documentary History of the Franklin D. Roosevelt Presidency* 316, 316 (George McJimsey ed., 2001).

213. Senate Comm. on the Judiciary, *Reorganization of the Federal Judiciary*, S. Rep. No. 75-711, at 20 (1937).

its new constituency, a casting about for new ways to make judicial review meaningful (and, as it happened, enhancing judicial supremacy) in the years after the Court fight and World War II.<sup>214</sup> And the leading edge of that thrust for civil liberties was the NAACP's fight for racial equality.

The Civil Rights Era began with a key example of how vertical supremacy could lead to horizontal power. The very day *Brown v. Board of Education* was decided, the Court rendered its decision in *Bolling v. Sharpe*.<sup>215</sup> In *Bolling*, the Court directly applied the substance of its vertical doctrinal decision in *Brown* to the federal government.<sup>216</sup> To do so, the Court had to reverse incorporate the Equal Protection Clause of the Fourteenth Amendment into the Due Process Clause of the Fifth Amendment—no easy doctrinal task.<sup>217</sup> Yet, as the Court explained: “In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”<sup>218</sup> The aftermath of *Brown* led to the Court's strongest statement of supremacy to date, *Cooper v. Aaron*, a decision that not only reaffirmed the Court's vertical supremacy, but signaled the force of horizontal supremacy as well.<sup>219</sup>

*Cooper* resulted from the defiance of court-ordered desegregation orchestrated by the Governor of Arkansas, Orval Faubus. Faubus used the State Guard to bar African American students' access to Central High School in Little Rock, Arkansas. Eisenhower responded by sending in federal troops. Once order was restored, the school board sought delay of the desegregation order, the denial of which the Supreme Court affirmed. In a remarkable opinion signed by all members of the Court, the Justices went further, deeming it necessary that “we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case.”<sup>220</sup> Stating that “[i]t is necessary only to recall some basic constitutional propositions which are settled doctrine,” the Court made its case:

Article VI of the Constitution makes the Constitution the “supreme Law of the Land.” In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as “the fundamental and paramount law of the nation,” declared in the notable case of

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214. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

215. 347 U.S. 497, 498 (1954).

216. *Id.* at 500. Like *Adkins*, *Bolling* concerned a congressional law regulating the District of Columbia. The Court thus struck down a law of limited scope, as well as one in which the Congress was acting in its role as “state” government.

217. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 83–84 (1990) (arguing that reverse incorporation of Equal Protection Clause into Fifth Amendment's Due Process Clause “rested on no precedent or history”). In *Bolling* the Court relied on similar application of the Fifth Amendment in a notable vertical case, *Buchanan v. Warley*, 245 U.S. 60 (1917). *Bolling*, 347 U.S. at 499.

218. *Bolling*, 347 U.S. at 500.

219. 358 U.S. 1, 17–19 (1958).

220. *Id.* at 17.

*Marbury v. Madison* that “It is emphatically the province and duty of the judicial department to say what the law is.” *This decision declared the basic principle that 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. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land,* and Art. VI of the Constitution makes it of binding effect on the States “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, “to support this Constitution.” . . .

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.<sup>221</sup>

The critical lesson of *Cooper* was one of both vertical and horizontal supremacy. Like Jackson and others before him, Eisenhower could not tolerate defiance of national authority. He sent troops in support of judicial power. But Jackson mustered force to fulfill national legislative and, critically, executive policy; Eisenhower felt compelled to support judicial authority against his own policy preferences. By all accounts, Eisenhower was unenthusiastic about the Court’s decision in *Brown*. Though his administration had filed a brief in *Brown* supporting overruling *Plessy v. Ferguson*, Eisenhower himself did not agree with the Court’s decision to desegregate the schools.<sup>222</sup> Moreover, he had declared only a short time earlier that “I can’t imagine any set of circumstances that would ever induce me to send Federal troops . . . into any area to enforce the orders of a federal court.”<sup>223</sup> But in his public address on the crisis, Eisenhower went beyond the vertical problem of Arkansas’s defiance. He both accepted the Court’s role in interpreting the Constitution and his obligation to support it:

It is important that the reasons for my action be understood by all our citizens. As you know, the Supreme Court of the United States has decided that separate public educational facilities for the races are inherently unequal and therefore compulsory school segregation laws are unconstitutional.

Our personal opinions about the decision have no bearing on the matter of enforcement; *the responsibility and authority of the Supreme Court to interpret the Constitution are very clear*. Local Federal Courts were instructed by the Supreme Court to issue such orders and decrees as might be necessary to achieve admission to public schools without regard to race—and with all deliberate speed.

. . . .

221. *Id.* at 17–18 (emphasis added) (citations omitted).

222. See, e.g., Elmo Richardson, *The Presidency of Dwight D. Eisenhower* 109 (1979) (describing Eisenhower as “disappointed” with *Brown* decision).

223. Dwight D. Eisenhower, *The White House Years: Waging Peace, 1956–1961*, at 170 (1965).

...[W]hen large gatherings of obstructionists made it impossible for the decrees of the Court to be carried out, both the law and the national interest demanded that the President take action.<sup>224</sup>

Part of the pressure on Eisenhower to support the Court no doubt stemmed from the growth of a national constituency for the Court's substantive decision in *Brown*. When the Little Rock controversy arose, polls indicated that a majority of Americans supported the decision in *Brown*.<sup>225</sup> And, as Michael Klarman explains, "[m]ost Americans believed that judicial rulings should be obeyed, even by those who strongly disagreed with them."<sup>226</sup> But beyond political pressure, the themes of obeying court orders and following the rule of law present in Eisenhower's Little Rock address remained frequent subjects even in his private correspondence during this time.<sup>227</sup>

#### B. *The Further Expansion of "Jurisdiction"*

In the aftermath of *Brown*, the Court turned to an aggressive civil liberties agenda that required substantial expansion of its jurisdictional reach. The issue was not, technically speaking, "jurisdiction": Reconstruction Era changes were more than adequate to that job. The problem, rather, was causes of action. As during the Gilded Age, Congress was helpful in this regard. But as before, the Justices proved they could innovate on their own when necessary.

No doctrinal mechanism was of more profound importance than the process of incorporation. As Justice Brennan explained, looking back on the process: "The agenda of the national Court was radically altered by the nationalization of the first eight amendments. . . . The Court's reinvigorated construction of the Fourteenth Amendment, and particularly the nationalization of the Bill of Rights through the Due Process Clause, are the primary reasons

224. Eisenhower Address on Little Rock Crisis, N.Y. Times, Sept. 25, 1957, at 14 (emphasis added). This was not the first time Eisenhower had displayed his acceptance of judicial supremacy. See Eisenhower Press Conference, *supra* note 2, at 491 ("The Supreme Court has spoken and I am sworn to uphold the constitutional processes in this country; and I will obey.").

225. See 2 George H. Gallup, *The Gallup Poll: Public Opinion 1935-1971*, at 1332-33, 1507 (1972); see also Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty*, Part Five, 112 *Yale L.J.* 153, 186 & n.132 (2002) (noting evidence of "widespread approval" of *Brown*).

226. Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 421 (2004) [hereinafter Klarman, Jim Crow].

227. See, e.g., Letter from Dwight D. Eisenhower to Senator John C. Stennis (Oct. 7, 1957), available at [http://www.eisenhower.archives.gov/research/online\\_documents/civil\\_rights\\_little\\_rock.html](http://www.eisenhower.archives.gov/research/online_documents/civil_rights_little_rock.html) (on file with the *Columbia Law Review*) ("The Executive responsibility is presently confined to carrying out such duties as are placed upon it to support the orders of the District Courts."); Telegram from Dwight D. Eisenhower to Senator Russell of Georgia Regarding the Use of Federal Troops at Little Rock, 1957 Pub. Papers 695, 695 (Sept. 27, 1957) ("Few times in my life have I felt as saddened as when the obligations of my office required me to order the use of force within a state to carry out the decisions of a Federal Court.").

for that development.”<sup>228</sup>

The process of incorporation had been a slow one. In 1833, in *Barron v. Baltimore*, the Court had held that the Bill of Rights did not apply to the states.<sup>229</sup> The Reconstruction Congress may have intended to reverse this conclusion, via the Privileges or Immunities Clause of the Fourteenth Amendment, but the *Slaughter-House Cases* neutered that clause.<sup>230</sup> As early as 1897, the Justices considered claims that various state practices that would have violated the Bill of Rights were cognizable under the Due Process Clause of the Fourteenth Amendment.<sup>231</sup> But even when petitioners prevailed, the Justices were clear that the content of those rights that applied against the states remained distinct from the content of the Bill of Rights provisions themselves.<sup>232</sup> In 1947, in *Adamson v. California*, Justice Black argued “one of the chief objects that the provisions of the Amendment’s first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.”<sup>233</sup> But the most votes he ever achieved for that position was four.<sup>234</sup>

The breakthrough came in 1964, when—using the process of “selective incorporation”—the Court in *Malloy v. Hogan* held that the Fifth Amendment’s Self-Incrimination Clause bound the states.<sup>235</sup> Eventually almost everything but the grand jury and civil jury provisions similarly were applicable against the states.<sup>236</sup> Here is how Justice Harlan, an opponent of the practice, explained the Court’s process:

The recent history of constitutional adjudication in state criminal cases is the ascendancy of the doctrine of ad hoc (“selective”) incorporation, an approach that absorbs one-by-one individual guarantees of the federal Bill of Rights into the Due

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228. William J. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 545 (1986).

229. 32 U.S. (7 Pet.) 243, 250–51 (1833).

230. 83 U.S. (16 Wall.) 36, 55 (1872).

231. See *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897) (holding that taking of private property by state without just compensation violates Fourteenth Amendment’s Due Process Clause).

232. See *id.* at 236 (“The requirement that . . . property shall not be taken for public use without just compensation is but ‘an affirmance of a great doctrine established by the common law for the protection of private property. It is . . . laid down by jurists as a principle of universal law.’” (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1790, at 568–70 (Melville M. Bigelow ed., Boston, Little, Brown & Co. 5th ed. 1891))).

233. 332 U.S. 46, 71–72 (1947) (Black, J., dissenting).

234. *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960) (aff’d by an equally divided Court per curiam).

235. 378 U.S. 1, 3 (1964).

236. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034–35 & nn.13–14 (2010) (“[The] only rights not fully incorporated are (1) the Third Amendment’s protection against quartering of soldiers; (2) the Fifth Amendment’s grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment’s prohibition on excessive fines.”).

Process Clause of the Fourteenth Amendment, and holds them applicable to the States with all the subtleties and refinements born of history and embodied in case experience developed in the context of federal adjudication. Thus, with few exceptions the Court has “incorporated,” each time over my protest, almost all the criminal protections found within the first eight Amendments to the Constitution, and made them “jot-for-jot and case-for-case” applicable to the States.<sup>237</sup>

Incorporation provided an enormous engine allowing the justices to develop federal law in state criminal proceedings, but the Court went even further. One problem with incorporation was that the Court could only take so many criminal cases from the states at any given time.<sup>238</sup> So the Court vastly increased the supervisory capacity of the federal courts—and, as an inevitable consequence, enhanced its own authority—by expanding the availability of federal habeas corpus for prisoners in state custody.<sup>239</sup> Notably, in this period when Congress passed habeas legislation, it largely was following the Court’s lead.<sup>240</sup>

What decisions like *Brown v. Allen* did on the criminal side of the docket, *Monroe v. Pape* accomplished on the civil side.<sup>241</sup> That 1961 decision took a ninety-year-old congressional statute that had lain largely dormant and turned it into a powerful weapon allowing individuals to enforce constitutional guarantees against state actors. *Monroe* held that any action by a state official in violation of the Constitution was actionable in federal court, even if the action had not received any sanction in state law.<sup>242</sup> Subsequent cases expanded *Monroe*’s reach, applying it to local governments and even states in injunctive actions.<sup>243</sup> Congress also supported the cause: the Civil Rights Attorneys’ Fees Act of 1976 provided that anyone prevailing in a civil rights case could obtain their attorneys’ fees from the defendant.<sup>244</sup>

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237. *Baldwin v. New York*, 399 U.S. 66, 130–31 (1970) (Harlan, J., dissenting).

238. See Anthony G. Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 380 (1964) (noting “[the v]olume of cases and inadequate state procedures make reliance on the Supreme Court [for federal habeas corpus relief] unsatisfactory”); see also *Stone v. Powell*, 428 U.S. 465, 526 (1976) (Brennan, J., dissenting) (stating “institutional constraints totally preclude any possibility that this Court can adequately oversee whether state courts have properly applied federal law”).

239. E.g., *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Brown v. Allen*, 344 U.S. 443 (1953).

240. See Barry Friedman, A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction, 85 Nw. U. L. Rev. 1, 11–13 (1990).

241. 365 U.S. 167 (1961).

242. *Id.* at 172.

243. See *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (holding “[a] municipality may not assert the good faith of its officers . . . as a defense to liability under § 1983”); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978) (providing that local governments can be sued under § 1983 “when execution of a government’s policy or custom . . . inflicts the injury”).

244. Pub. L. No. 94-559, § 2, 90 Stat. 2641 (codified as amended at 24 U.S.C. § 1988(b)).

In tandem with the Court's efforts through selective incorporation, the federal government itself was given broad powers to bring actions in federal courts.<sup>245</sup> The Civil Rights Act of 1964 was intended to make the promise of *Brown v. Board of Education* and the nation's commitment to racial equality a reality, both by prohibiting racial (and gender) discrimination, and by providing numerous judicial causes of action to enforce the equality rights.<sup>246</sup> As President Kennedy explained in supporting the legislation: "The Federal courts, pursuant to the 1954 decision [in *Brown*] and earlier decisions on institutions of higher learning, have shown both competence and courage in directing the desegregation of schools on the local level. It is appropriate to keep this responsibility largely within the judicial arena."<sup>247</sup>

The 1964 Act reiterated the importance of the federal courts in redressing racial injustice, particularly in the States, and Congress enhanced the vertical supremacy of the Supreme Court in passing this legislation. Critically, however, the Act also served to strengthen the Court's horizontal power, as even opponents of the Act agreed civil rights enforcement should take place in the federal courts rather than in administrative agencies.<sup>248</sup>

### C. *The Tentacles of Doctrine*

The Court's aggressive expansion of its and the lower courts' jurisdictional reach provided it the means to develop a broad body of doctrine giving meaning to civil liberties guarantees. This expansion continued long after the Warren Court was history. And although the federal story told here is not the only reason for the extensive horizontal supremacy the Court enjoys today, several examples demonstrate how the doctrinal tentacles of vertical doctrine came to ensnare the national government as well.

Incorporation provides a counterintuitive example. The incorporation

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(2006)).

245. See John F. Kennedy, Special Message to the Congress on Civil Rights and Job Opportunities, 1963 Pub. Papers 483, 487 (June 19, 1963) [hereinafter Kennedy, Special Message] ("[I]t is unfair and unrealistic to expect that the burden of initiating [school desegregation] cases can be wholly borne by private litigants.").

246. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-h (2006)).

247. Kennedy, Special Message, supra note 245, at 487.

248. Opponents of the legislation were particularly concerned about the moves to give enforcement power over the Act to the new Equal Employment Opportunity Commission. Compare H.R. Rep. No. 92-238, at 3 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2139 ("It is essential that seven years after the passage of the Civil Rights Act of 1964, effective enforcement procedures be provided the Equal Employment Opportunity Commission to strengthen its efforts to reduce discrimination in employment."), with George P. Sape & Thomas J. Hart, Title VII Reconsidered: The Equal Employment Opportunity Act of 1972, 40 Geo. Wash. L. Rev. 824, 840-42 (1972) (noting Nixon administration and "business groups . . . opposed [giving the EEOC] cease-and-desist enforcement power, favoring instead the court enforcement approach"). The compromise, inuring to the Court's benefit, was to allow state agencies time to resolve complaints, and then to permit suits (by the EEOC or private parties) in federal courts. See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e (2006)).

principle assures state compliance with federal constitutional guaranties that already (ostensibly) apply against the federal government. But, as Akhil Amar has explained, some protections in the Bill of Rights received little content or application until they first were applied against the states:

In area after area, incorporation enabled judges first to invalidate state and local laws, and *then, with this doctrinal base thus built up, to keep Congress in check*. . . . Not until 1965 did the Supreme Court strike down an Act of Congress on First Amendment grounds, and when it did so, it relied squarely on doctrine built up in earlier cases involving states. . . .

. . . But without incorporation, and the steady flow of cases created by state and local laws, the Supreme Court would have had far fewer opportunities to be part of the ongoing American conversation about liberty.<sup>249</sup>

Nowhere was this more evident than with regard to the First Amendment, the “preferred freedom,” and the vehicle by which the modern Court has struck down numerous national laws touching on subjects as wide-ranging as flag burning, child pornography, animal cruelty, and yes, campaign finance.<sup>250</sup> The trajectory Amar notes was not universally the case; in areas of criminal procedure such as the exclusionary rule, application to the federal government preceded the states.<sup>251</sup> Nonetheless, through incorporation much substantive constitutional doctrine was created vertically and later applied horizontally.

This process of ensnaring Congress in vertical tentacles of doctrine was hardly confined to the Warren Court. In the early 1970s, under Chief Justice Burger, the law governing women’s equality similarly leapt from the vertical to the horizontal plane. *Frontiero v. Richardson*, the first case in which the

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249. Akhil Reed Amar, 2000 Daniel J. Meador Lecture: Hugo Black and the Hall of Fame, 53 Ala. L. Rev. 1221, 1231–32 (2002) (emphasis added).

250. See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (“Freedom of press, freedom of speech, freedom of religion are in a preferred position.”).

251. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding exclusionary rule applies to states); *Weeks v. United States*, 232 U.S. 383, 393 (1914) (establishing exclusionary rule); *Boyd v. United States*, 116 U.S. 616, 634–35 (1886) (finding “compulsory production of . . . private books and papers . . . is the equivalent of . . . an unreasonable search and seizure” under Fourth Amendment); Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 Am. Crim. L. Rev. 1123, 1124–25 (1996) (discussing evolution of constitutional criminal procedure). Still, even here the doctrine has fed upon itself, with judicial decisions regarding the states motivating the Court’s pronouncements of constitutionally required behavior. The Court’s command that wiretapping fell within the Fourth Amendment, in *Katz v. United States*, 389 U.S. 347, 353 (1967), and also *Berger v. New York*, 388 U.S. 41, 64 (1967), led to adoption of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the federal wiretapping law of enormous import. Pub. L. No. 90-351, tit. III, 82 Stat. 197, 211–25 (codified as amended at 18 U.S.C. §§ 2510–2520 (2006)). Similarly, the Court’s decision that the Fourth Amendment did not govern acquisition in “third-party” hands (such as banks), *United States v. Miller*, 425 U.S. 435, 443 (1976), itself triggered critical federal legislation to fill the gap, see *Electronic Communications Privacy Act of 1986*, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.).

federal government was bound by norms of women's equality, relied directly on *Reed v. Reed*, a vertical case.<sup>252</sup> The standard that ultimately governed review of the federal government's actions, intermediate scrutiny, was also initially set out in a state case, *Craig v. Boren*.<sup>253</sup>

Remedies against federal officials under the *Bivens* doctrine provide another example. In passing the Civil Rights Act of 1964, Congress explicitly excluded its own membership as well as the Federal Government from liability, but the Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* introduced the concept of a private damages action under the Constitution against a federal official.<sup>254</sup> In *Davis v. Passman*, the Court was squarely presented with a case of congressional misdeed: A woman sought a private damages remedy under the Constitution against a member of Congress who she alleged had engaged in gender discrimination.<sup>255</sup> The Court ruled in her favor, resting its decision on *Bivens*, which in turn was an echo of the 1961 decision in *Monroe v. Pape* (albeit not grounded in a federal statute).<sup>256</sup> In holding that the Fifth Amendment governed the defendant's conduct in *Davis*, the Court cited a mishmash of cases revealing the crossover of vertical and horizontal precedents, and thus used the expansion of its powers in the vertical arena to trump the efforts by Congress to except itself from liability.<sup>257</sup>

Of course, the transfer of doctrine from the vertical to the horizontal plane need not move only in one direction. As the Court became more conservative, the same dynamic that had expanded rights served to limit them as well. *Brown's* legacy in the area of affirmative action demonstrates how the Court's general distaste for race-based legislation, even when adopted to help a racial

252. *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (citing *Reed v. Reed*, 404 U.S. 71 (1971)).

253. 429 U.S. 190, 197, 199 (1976); see also *Davis v. Passman*, 442 U.S. 228, 234–35 (1979) (citing *Craig* and granting petitioner “federal constitutional right to be free from gender discrimination” which cannot satisfy intermediate scrutiny (footnote omitted)).

254. 403 U.S. 388, 397 (1971).

255. 442 U.S. at 230–31.

256. *Id.* at 234; *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

257. The Court stated:

In numerous decisions, this Court “has held that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws. E.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976); *Buckley v. Valeo*, 424 U.S. 1, 93, (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).” *Vance v. Bradley*, 440 U.S. 93, 95 n.1 (1979). “To withstand scrutiny under the equal protection component of the Fifth Amendment’s Due Process Clause, ‘classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.’ *Craig v. Boren*, 429 U.S. 190, 197 (1976).” *Califano v. Webster*, 430 U.S. 313, 316–317 (1977). The equal protection component of the Due Process Clause thus confers on petitioner a federal constitutional right to be free from gender discrimination which cannot meet these requirements.

*Davis*, 442 U.S. at 234–35 (footnotes omitted).

minority, moved from the vertical plane to the horizontal. When announcing that strict scrutiny would bind the federal government's use of racial classifications in *Adarand Constructors, Inc. v. Peña*, the Court explicitly took the view that in this area there must be "congruence: '[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.'"<sup>258</sup> Significantly, the Court cited three Fifth Amendment cases—*Buckley v. Valeo*, *Weinberger v. Wiesenfeld*, and *Bolling v. Sharpe*—in support of its statement.<sup>259</sup>

## V. THE MECHANISMS OF JUDICIAL SUPREMACY

As the preceding Parts have demonstrated, the American historical experience provides ample evidence that federalism has served to foster judicial supremacy. Part I explained the mechanism of vertical supremacy. This Part offers more of a theoretical backbone regarding the three mechanisms through which the Court's vertical supremacy has lent support to its horizontal power. Straightforward principles of institutional choice and positive political theory explain both why constituents seek out courts (and courts cater to constituents) and how that mutually reinforcing exchange leads to jurisdictional expansion. What is somewhat more intricate, and so the explanation here is accordingly more provisional, is how "the tentacles of vertical doctrine" come to enmesh the national government.

While exploring these questions largely from a theoretical perspective, this Part returns one last time to United States history, in particular the last third of the twentieth century. It was during this period that angry complaints frequently were heard about the Supreme Court's overreaching and supremacy; often those complaints involved the Court's "federalism revolution," decisions such as *Board of Trustees of the University of Alabama v. Garrett*, *United States v. Morrison*, *City of Boerne v. Flores*, and *United States v. Lopez*.<sup>260</sup> This Part shows how the mechanisms of judicial supremacy contributed to this set of controversial decisions, which underscore the Court's present-day supremacy.

### A. Understanding Constituency

A central insight motivating this Article is that a federal system allows the judiciary to establish a toehold. But just as the Court achieves vertical supremacy by favoring its "first" constituency, the coordinate branches, it similarly risks jeopardizing its supremacy when it begins to assert horizontal power. Success, therefore, ultimately turns on finding other constituents that

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258. 515 U.S. 200, 224 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (per curiam)).

259. *Id.*

260. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

will support the Court's project. But when and why is it that constituents seek out the courts? And why do courts respond? This Section elaborates, but the core idea is apparent: The two serve one another's needs. No supplicants, no business; no business, no power.

Litigants come to court when the judiciary is in the best position to help. In a federal system, the overarching tension is one of divergence: Outlier states may seek to defy the federal center or refuse to assimilate to the mainstream constitutional norms that the rest of the country has adopted, leaving their citizens situated differently from those in other states. In some cases, an outlier state may be a first mover—an early adopter of new policies or regulations that threaten those with national interests. Or innovation may create incongruence between the territorial dimension of the state and the arena that the state would like to regulate.<sup>261</sup> Thus, new groups of constituents emerge with political, societal, and technological change. Those who want to act nationally or who wish to be assured a set of rights or privileges not provided by their home state but available in others seek Supreme Court review of state laws. The Court is able to respond to these concerns because through its vertical supremacy, it can impose uniformity to some degree.

In addition, the Court may well be the only hope for the relief needed.<sup>262</sup> One of the notable aspects of a federal system is that there are various bodies to which those seeking regulatory relief can turn. As scholars of political economy note, “[f]ailure in one venue can lead to resignation, but it can just as likely lead to a search for a new venue.”<sup>263</sup> The judiciary may not be in a position to provide as effective or wide-ranging relief as a legislature, but sometimes that is all one has. The political resolution of vertical pressures might be hampered by the existence of regulatory vacuums at the national congressional level, due to Congress's understanding of its own power,<sup>264</sup>

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261. See Harry N. Scheiber, *Federalism and the American Economic Order, 1789–1910*, 10 *Law & Soc’y Rev.* 57, 70 (1975) (“Even if a state government enjoyed unchallenged formal authority to adopt public policy over some subject matter, and . . . also enjoyed entirely sufficient fiscal and personnel resources . . . truly effective action might be precluded . . . [because] the state’s areal jurisdiction did not extend far enough to make effective action possible.”).

262. See William N. Eskridge, Jr., *The Judicial Review Game*, 88 *Nw. U. L. Rev.* 382, 384–85 (1993) (describing relationship between interest groups and judiciary, where losers in Congress and at “the agency level can seek judicial review which either interprets the statute to invalidate the agency’s interpretation or invalidates the statute as unconstitutional, or something of both”).

263. Frank R. Baumgartner & Bryan D. Jones, *Agendas and Instability in American Politics* 233 (1993); accord David C. Nice, *Federalism: The Politics of Intergovernmental Relations* 23 (1987) (“[C]ontestants in intergovernmental politics seek the scope of conflict and decision-making arena most likely to produce the desired policy decision.”); cf. Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 *Harv. L. Rev.* 553, 573 (2001) (describing automobile industry’s support for federal emissions standards in response to more stringent state emissions legislation).

264. See *supra* notes 100–112 and accompanying text (discussing Reconstruction Congress).

regulatory lag in the face of innovation,<sup>265</sup> or national political gridlock.<sup>266</sup> This is why, repeatedly throughout history, those who could not achieve success in other venues turned to the courts. During the Gilded Age, with Congress unwilling or unable to act, big business brought its case to the federal courts. The two quickly found themselves in a symbiotic partnership that inured to the benefit of both.<sup>267</sup> The same was true of civil rights plaintiffs in the mid-twentieth century.<sup>268</sup>

And, ironically, it is here that the federalism revolution has its beginnings. Given the rate at which the Court was striking down state laws during the Civil Rights Era, one would not have expected the states to become one of the Court's primary constituencies, but they did. As the 1960s and 1970s progressed, congressional acts to control state action and preempt state law left states with little recourse through the political branches. States sought protection from the Supreme Court. Groups like the National Association of Attorneys General (NAAG) organized states for Supreme Court litigation, and the State and Local Legal Center was created to file amicus briefs offering the states' point of view.<sup>269</sup> Amicus participation of the states in the Supreme Court grew exponentially beginning in the 1970s, both at the merits and certiorari stages.<sup>270</sup> And state participation as parties appellant also rose markedly;<sup>271</sup> the burgeoning authority of the national government made the

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265. See *supra* notes 114–117 and accompanying text (discussing federal regulation of business during Gilded Age).

266. See *supra* notes 211–214 and accompanying text (discussing civil rights litigants' use of court system).

267. See Freyer, *The Federal Courts*, *supra* note 128, at 362 (“In a time when federal regulation was just emerging, the federal courts were perhaps the only institution capable of formulating a uniform policy toward interstate business.”); see also Robert H. Wiebe, *The Search for Order, 1877–1920*, at 80–81 (1967) (“To the degree a general government policy existed in the years following reconstruction, Federal courts had usually supplied it.”).

268. See *supra* notes 211–214 and accompanying text.

269. See Cornell W. Clayton & Jack McGuire, *State Litigation Strategies and Policymaking in the U.S. Supreme Court*, 11 *Kan. J.L. & Pub. Pol’y* 17, 23–24 (2001) (tracing evolution of NAAG’s strategy on Supreme Court advocacy); Richard J. Lazarus, *Restoring What’s Environmental About Environmental Law in the Supreme Court*, 47 *UCLA L. Rev.* 703, 770–71 (2000) (describing activities of State and Local Legal Center); Joseph F. Zimmerman, *Interstate Cooperation: The Role of State Attorneys General*, 28 *Publius* 71, 74–78 (1998) (describing NAAG’s policymaking, enforcement, advocacy, and educational activities).

270. See Eric N. Waltenburg & Bill Swinford, *Litigating Federalism: The States Before the U.S. Supreme Court* 59 (1999) (noting that states’ activity as precertiorari amici “remained both low and episodic until the latter half of the 1970s”); *id.* at 62 (“[S]tate participation before the Court has grown steadily since the first days of the Warren Court.”); Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?*, 52 *J. Pol.* 782, 793–94 (1990) (observing that states frequently participated as amici in Court’s 1982 Term). States sometimes sided with federal authority. Twenty-two states filed a single amicus brief favoring federal authority in *Gideon v. Wainwright*, 372 U.S. 335, 336 (1963), and thirty-six states filed amicus briefs supporting the federal government in *United States v. Morrison*, 529 U.S. 598, 600–01 (2000).

271. See Waltenburg & Swinford, *supra* note 270, at 62–63 (noting increasing state participation before Court as appellants over time).

federal courts an increasingly common place for states to come seeking redress.

### B. *Understanding Jurisdictional Expansion*

A similar dynamic explains the expansion of jurisdiction. Courts need to have the means to make doctrine, and that can require throwing the courtroom doors open even wider. Litigants have every incentive to ask courts to do so, and courts have their own incentives to do as they are asked, for the reasons identified above. But jurisdiction is frequently the source of power struggles between the Court and Congress—though courts may benefit from expansive jurisdiction, political actors often want limitations.<sup>272</sup>

One puzzle, then, is why these jurisdictional expansions are often so enduring.<sup>273</sup> The courts might benefit from expansive jurisdiction, but political actors might frown upon it. And this tension is likely to be present in exactly those cases in which a new constituency turns to the federal courts when relief is not forthcoming elsewhere. Are not judicial jurisdictional decisions subject to being rolled back?

Especially in times of divided government, when courts seize the initiative to expand their jurisdiction, they are usually assured of long-term success. What courts and their constituencies have going for them is the idea commonly referred to as “veto gates.”<sup>274</sup> Getting major legislation passed regarding the courts is no easy matter, as the history of the Gilded Age and the Progressive Era indicates.<sup>275</sup> There are many interests rightly cognizant that jurisdictional change will affect them; partisan maneuvering occurs as well, for the enacting majority that creates courts often determines the ideology of appointees.<sup>276</sup> Once the judiciary extends its own jurisdiction, however, it is

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272. Woodrow Wilson identified congressional power as able to “overcome a hostile majority . . . even in the Supreme Court itself, by a sufficient increase in the number of judges and an adroit manipulation of jurisdictions.” Woodrow Wilson, *Constitutional Government in the United States* 166 (1908).

273. Instances of congressional restrictions of federal jurisdiction are infrequent. But see Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 31 (6th ed. 2009) [hereinafter Fallon, Hart and Wechsler’s] (describing passage of Tax Injunction Act of 1937, ch. 726, 50 Stat. 738 (current version at 28 U.S.C. § 1341 (2006)), Johnson Act, ch. 283, 48 Stat. 775 (1934) (current version at 28 U.S.C. § 1342 (2006)), and Norris-LaGuardia Act of 1932, ch. 90, 47 Stat. 70 (current version at 29 U.S.C. §§ 101-115 (2006)) in early twentieth century).

274. See, e.g., Sarah A. Binder & Steven S. Smith, *Politics or Principle?: Filibustering in the United States Senate* 1–4 (1997); Gary W. Cox & Mathew D. McCubbins, *Legislative Leviathan: Party Government in the House* 1–2 (1993); Krehbiel, *supra* note 27, at 4–5; Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 *J. Pol. Econ.* 132, 157–60 (1988).

275. See *supra* notes 113–207 and accompanying text (detailing Court’s increase in horizontal supremacy due to legislative inaction in Gilded Age and Progressive Era).

276. See John M. de Figueiredo et al., *Congress and the Political Expansion of the U.S. District Courts*, 2 *Am. L. & Econ. Rev.* 107, 123 (2000) (“[P]olitics affects the timing of an expansion in the U.S. district courts.”); John M. de Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the*

easier to prevent rollback legislation from being enacted—only one House of Congress or the President is needed to block any change.<sup>277</sup> Even a determined committee chair can do so.<sup>278</sup> Often the constituents that support the Court will hold power in one of these veto gates.<sup>279</sup>

The pressure for expansive jurisdiction may at times also build upon itself. As a court expands its jurisdiction, it then may be overwhelmed by its caseload. And to the extent that the expanded jurisdiction either aids a powerful constituency or resonates with federal pressures for uniformity, the legislature will be unlikely to strip jurisdiction in response to a burgeoning docket. Instead, it may well expand the Court's discretionary jurisdiction. This explains the long legislative process that led to the Evarts Act.<sup>280</sup> Discretionary jurisdiction, by its own turn, fosters judicial supremacy by increasing the independence of the institution, and providing it with a means of insulating itself from backlash.<sup>281</sup> Allowing the Court to choose the cases it hears not only enhances the Court's image as a decider of important issues, but a court might then exercise political savvy in deciding what can be addressed to its advantage, and what must be ducked.<sup>282</sup>

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Federal Judiciary, 39 J.L. & Econ. 435, 460 (1996) (“[W]hen compared with caseload pressure, political alignment was the most important determinant in deciding when an [appellate court] expansion would occur.”).

277. See Krehbiel, *supra* note 27, at 32–33 (“[G]iven a status quo point and a profile of preferences . . . , the veto-pivotal voter . . . must be made to favor the bill or to be indifferent between the bill and the status quo for a new law to be passed.”).

278. See Andrew D. Martin & Christina Wolbrecht, *Partisanship and Pre-Floor Behavior: The Equal Rights and School Prayer Amendments*, 53 Pol. Res. Q. 711, 712–18 (2000) (examining Congress's consideration of Equal Rights Amendment, including opposition of Judiciary Committee Chair Emmanuel Celler); David M. Primo et al., *Who Consents? Competing Pivots in Federal Judicial Selection*, 52 Am. J. Pol. Sci. 471, 472–73 (2008) (analyzing pivots created by institutional rules in Senate which constrain presidential appointment power).

279. See, e.g., Fallon, Hart & Wechsler's, *supra* note 273, at 277–78 (detailing many efforts to strip federal court jurisdiction in 1970s, 1980s, and 2000s, all of which died in Congress).

280. As with the Judiciary Acts of 1891 and 1925, Congress responded to the Court's increasing case load in the latter part of the twentieth century by giving the Court discretion in order to preserve its uniformity function. See Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (codified in scattered sections of 28 U.S.C) (providing increased discretion to Supreme Court to decide what cases to review); H.R. Rep. No. 100-660, at 13–14 (1988), reprinted in 1988 U.S.C.C.A.N. 766, 779 (acknowledging that Court's role in deciding cases of “wide public importance or governmental interest” and “ensur[ing] uniformity and consistency in the law” would not be hindered by eliminating mandatory cases from Court's docket); S. Rep. No. 100-300, at 4 (1988) (noting that Court's “mandatory functions . . . tend[] to weaken the Court's capacity both to control its own docket and to confine its labors to those cases of national importance”); *supra* notes 150–164 and accompanying text (examining forces behind Judiciary Acts of 1891 and 1925).

281. On backlash, see Klarman, *Jim Crow*, *supra* note 226, at 464–66 (describing backlashes to major judicial decisions such as *Brown*).

282. On how the Supreme Court has and should maximize this power, see, e.g., Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 111–98 (2d ed. 1986) (discussing passive virtues). For a normative take on judicial minimalism, see generally Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999).

Again, this same dynamic was present in the Supreme Court's federalism revolution. Ironically, the Supreme Court furthered the interests of state constituents by cutting back on *lower* federal court jurisdiction in order to enhance its own power over substantive law. "Judicial federalism" was the name scholars gave to the process by which the Court adopted abstention and jurisdictional doctrines to limit access to the lower federal courts by those challenging state authority.<sup>283</sup> Curtailing lower federal court jurisdiction was particularly necessary to the extent that lower courts were not always sympathetic with the federalism agenda of the Supreme Court and its constituent states.<sup>284</sup> In areas as diverse as habeas corpus, civil rights actions, and criminal cases, the Court curtailed lower federal court jurisdiction. But by doing so, it made itself the focal point for rolling back civil liberties in favor of state power.<sup>285</sup> When Congress did the same, then, in legislation like the Antiterrorism and Effective Death Penalty Act of 1996, it again largely was following the Court's lead.<sup>286</sup>

*C. Estoppel: The Power of Precedent*

The more complicated question is determining how the tentacles of doctrine come to bind. As Thayer and Haines pointed out long ago, national officials—and litigants favoring national policies—can always claim that

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283. See, e.g., Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. Pa. L. Rev. 1459, 1564 (1997); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71, 74 (1984); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 584 n.254 (1985).

284. As positive scholars understand, the Court, as principal, seeks to reign in its agents, the lower courts. See Jeffrey R. Lax, *Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation, and the Rule of Four*, 15 J. Theoretical Pol. 61, 61–62 (2003) (suggesting that "discretionary docket has become one of the key weapons in the fight to compel compliance in the judicial hierarchy, allowing the justices themselves to determine which battles to fight with the lower courts"); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. Cal. L. Rev. 1631, 1633 (1995) (noting Supreme Court has to "induce lower courts to adhere more or less faithfully to its doctrine" to achieve its policy objectives); Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 Am. J. Pol. Sci. 673, 673 (1994) (examining "extent to which control mechanisms by the principal [the Supreme Court] can minimize shirking [by the appeals courts]").

285. See, e.g., Larry W. Yackle, *Reclaiming the Federal Courts 2* (1994) ("The Supreme Court's decisions in recent years have taken far too much decision-making authority away from the federal courts and given it to the courts of the states."); Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 Harv. L. Rev. 1485, 1487 (1987) ("[T]he division of judicial opinion about federal jurisdictional doctrines is traceable to the differing interests that motivate judges to redraw the boundary around states' separate spheres."); cf. Barry Friedman, *Habeas and Hubris*, 45 Vand. L. Rev. 797, 819–20 (1992) (arguing Supreme Court reduced role of habeas courts to narrow constitutional rights).

286. Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218–19 (1996) (codified as amended at 28 U.S.C. § 2254 (2006)); see also Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 Duke L.J. 1, 4–22 (1997) (describing how Court preceded Congress in habeas reform).

vertical doctrines simply do not apply horizontally.<sup>287</sup> The national government can support vertical judicial power and the doctrine it generates; yet when the worm turns, it can argue “not me.”

The critical word in the preceding sentence, however, turns out to be “argue.” It is the nature of law that *reasons* for departures from precedents must be given, what David Dyzenhaus has called “the compulsion of legality.”<sup>288</sup> Fashioning reasons why vertical doctrines do not have horizontal application proves trickier than it seems and—in any event—once supremacy is conceded, the decision on those arguments ultimately rests in the Court’s hands. When one thinks rigorously through the arguments that will be made to fend off horizontal supremacy, it becomes easier to see how doctrine becomes binding even over the objections of the coordinate branches.

What one might call “the concession of supremacy” constitutes the vital first step: acknowledging that the Court has power to decide the case. The concession gets made in part by the enormous consequences of arguing otherwise. A government body can always deny judicial power over it and threaten to ignore judicial rulings. But this is a claim that cannot be made lightly. Scholars such as Clifford Carrubba and Jenna Bednar have explained that governments in federal systems sign on to judicial power precisely because they need it to solve collective action and monitoring problems.<sup>289</sup> To deny judicial power, then, is to deny the collective endeavor itself. That, no doubt, is why flat-out denials of judicial power over a governmental body are relatively rare occurrences.

Having made the concession of supremacy, however, what follows are a series of moves gradually buying into judicial power, and thus making it more difficult to evade. The next argument against doctrinal expansion concedes the Court’s *power* over the central government, but claims that the Court either cannot or should not hear this *sort of case*. But once the argument proceeds this far, the game may already be over. For example, arguments that the political question doctrine insulates a subject from review are still addressed to the Court for resolution. *It* decides.<sup>290</sup> There are legal grounds offered as to why the Court should abstain, but the claim itself acknowledges that it is for the Court ultimately to decide. The same is true of the oft-advanced but seldom-heeded argument about the political safeguards of federalism.<sup>291</sup> Scholars

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287. See *supra* notes 194–197 and accompanying text.

288. David Dyzenhaus, *The Compulsion of Legality, in Emergencies and the Limits of Legality* 33, 34 (Victor V. Ramraj ed., 2008).

289. See Jenna Bednar, *The Robust Federation: Principles of Design* 121–22 (2009) (observing that Court often acts “as a focal point provider” which allows it to “coordinate[] [public] opinion or even . . . act[] as a catalyst for a public dialogue”); *supra* notes 41–45 and accompanying text (discussing Bednar’s and Carrubba’s writings).

290. See *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (describing political question doctrine); *Baker v. Carr*, 369 U.S. 186, 217 (1962) (listing factors for determining existence of political question).

291. See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of*

insist the Court should not protect federalism because that is done adequately in the political branches. Yet how likely is it that the Court will accede to this claim? It is one thing for a Court to duck problematic issues, thereby safeguarding its accumulation of power.<sup>292</sup> It is quite another for a Court to deem itself irrelevant to a set of questions.<sup>293</sup> In practice, courts rarely deny their own power.<sup>294</sup>

Moreover, evading judicial doctrine becomes all the more complicated if the party seeking to avoid judicial power previously sought its aid. History provides ample evidence of this “estoppel effect.” For example, conservatives, who had praised and supported judicial power from the Gilded Age through the New Deal, were dismayed by the work of the Warren Court. They challenged it on the merits repeatedly. But for the most part, they did not deny the Court’s authority to rule on the issues.<sup>295</sup> Even the Southern Manifesto—authored by leading Southern Senators (many reputed constitutionalists) after *Brown v. Board of Education*, and decrying the Court’s decision as unprincipled because it used “naked judicial power” to undermine “established legal principle”—did not question the Court’s power to decide the matter, only

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Federalism, 100 Colum. L. Rev. 215, 219 (2000) (“[F]ederalism in the United States has been safeguarded by a complex system of informal political institutions (of which political parties have historically been the most important) . . . .”); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 559 (1954) (“Federal intervention as against the states is . . . primarily a matter for congressional determination . . . .”). But see Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847, 849 (1979) (“The political branches . . . may no longer be . . . well suited . . . to the task of . . . protecting the fundamental values of federalism. Changes in both political practices and the direction and breadth of national initiatives suggest a new basis for judicial intervention.” (footnotes omitted)).

292. The “passive virtues” scholarship indicates that the Court uses such doctrines strategically. See Bickel, *supra* note 282, at 71 (arguing passive virtues are “techniques that allow leeway to expediency without abandoning principle”). Some commentators complain that the passive virtues themselves are unprincipled. See Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1, 25 (1964) (“Bickel’s ‘virtues’ are ‘passive’ in name and appearance only: a virulent variety of free-wheeling interventionism lies at the core of his devices of restraint.”).

293. It is neither a secret nor a mystery why the political question doctrine has been narrowed substantially. See Barkow, *supra* note 1, at 300 (“The Supreme Court’s failure even to consider the political question doctrine reflects a broader trend in which the Court overestimates its own powers and prowess vis-à-vis the political branches.”); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. Rev. 1203, 1204 (2002) (“In providing reasons for invoking the [political question] doctrine, the Court creates a doctrine that inevitably undermines the possibility of deploying the political question doctrine in the service of prudent judgment, for it is precisely the characteristic of prudential judgment that *cannot* be captured in rules.”).

294. But see Abram Chayes, *Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 8–26 (1982) (chronicling expansion and narrowing of standing doctrine).

295. There were exceptions. An argument against reapportionment was that it was a political question, although this argument was dismissed by the Court. See *Baker*, 369 U.S. at 209.

its abandonment of *Plessy* without “legal basis.”<sup>296</sup> Similarly, industry in the late nineteenth century sought a capacious definition of “commerce” to serve its interests.<sup>297</sup> Then, when the national government sought to expand its own reach during the New Deal, industrial concerns cried foul. To the Court again they returned—and prevailed until the “switch in time” of 1937.<sup>298</sup> When the Court flipped in the late 1930s and 1940s, business interests argued against congressional power over them but did not deny the Justices’ power to hear and resolve the cases.<sup>299</sup>

Once supremacy is conceded, and the Court is granted the power to enter a subject area, all that remains to argue is that *under the judicial doctrine itself* a case should come out a certain way. But doctrine is not entirely elastic—this is what gives law its bite. Consider the substantive Due Process and Commerce Clause examples from the Gilded Age. Long before these doctrines were applied against the national government, they were applied to limit state power—often with the sanction of those in control of the national government. When those doctrines were turned against the federal government, few argued that this was impermissible. For example, though he was concerned about horizontal supremacy, Progressive James Bradley Thayer’s chief argument was not that the federal government was immune from judicial review, but that the Court—for reasons of institutional deference—should only rule against it in clear cases.<sup>300</sup>

This “compulsion of legality” was fully in evidence in the line of cases that culminated with the Court using its supremacy to curtail national power. Litigating the New Deal Commerce Clause cases, the federal government effectively accepted the Court’s power to decide the issue, and urged the Court to adopt a broad understanding of the commerce power.<sup>301</sup> Over time, in

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296. Text of 96 Congressmen’s Declaration on Integration, N.Y. Times, Mar. 12, 1956, at 19.

297. See supra Part III.C.2.

298. See supra notes 202–206 and accompanying text.

299. See, e.g., Brief for Respondent at 13–14, *Wickard v. Filburn*, 317 U.S. 111 (1942) (No. 59) (“All of the decisions of this Court in the case [sic] cited recognize, respect and uphold a limitation—a constitutional limitation—upon the power of Congress . . . .”); Brief for Respondent at 27, *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937) (No. 419) (“An unbroken line of decisions under the commerce clause has established that manufacturing and production activities are not in or a part of interstate commerce . . . .”); Brief for Petitioner at 26, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1934) (No. 854) (“[T]his Court has not infrequently had occasion to pass on alleged delegations of legislative power by Congress. . . . We believe, however, that there is no great difficulty in distinguishing all of these cases . . . .”); see also Brief for Respondent at 11, *United States v. Morrison*, 529 U.S. 598 (1999) (Nos. 99-5, 99-29) (“[T]his Court recently confirmed the limits to two of those powers—the Commerce Clause and Section 5 of the Fourteenth Amendment—in *Lopez* and *City of Boerne*.”); Brief for Respondent at 6, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260) (“This Court has consistently required Congress to indicate clearly and explicitly its intention to alter the balance between state and federal power . . . by way of its commerce . . . powers.”).

300. Thayer, supra note 177, at 144.

301. See, e.g., Brief for Petitioner at 13, *Jones & Laughlin Steel Co.*, 301 U.S. 1 (No. 419)

response to the pleas of the national government, the Court took the commerce power to new heights in *Wickard v. Filburn* and the cases sustaining congressional power under the Civil Rights Act of 1964.<sup>302</sup> Thereafter, when *Lopez v. United States* and *United States v. Morrison* arose, all the federal government could argue was that under the established doctrinal tests it should prevail.<sup>303</sup> Having asked the Court to interpret the commerce power in its favor for so long, the government could hardly deny that interpretive authority altogether, even if deploring the results.

This very same phenomenon was present in the equally controversial Eleventh Amendment decisions such as *Board of Trustees of the University of Alabama v. Garrett*.<sup>304</sup> Those cases began with *City of Boerne v. Flores*, in which the Court batted away Congress's attempt to overturn the Justices' decision in *Employment Division v. Smith* regarding the Free Exercise Clause.<sup>305</sup> The *Boerne* Court explained how in cases like *Katzenbach v. Morgan* and *South Carolina v. Katzenbach* it had given Congress great leeway: "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference."<sup>306</sup> But in the later cases the Court qualified its grant to Congress, stating: "Congress' discretion is not unlimited . . . and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution."<sup>307</sup> This *had* to be true, the Court explained, because:

[i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be

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("This Court . . . has further laid down general principles which furnish standards for the proper appreciation of the full scope of that power."); Brief for Respondent at 141, *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495 (No. 854) ("[T]here are many decisions by this Court and by the lower Federal courts defining the scope of commerce power and the range of activities which may be controlled under that power.").

302. 317 U.S. 111 (1942); see *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (upholding congressional power under Commerce Clause to limit racial discrimination in businesses such as motels).

303. See Brief for Petitioner at 27, *Morrison*, 529 U.S. 598 (Nos. 99-5, 99-29) ("The burden that Congress found to be imposed on interstate commerce by gender-motivated violence is analogous . . . to the burden that Congress found to be imposed on interstate commerce by racial discrimination in places of public accommodation."); *id.* at 17 ("Congress had far more than the rational basis that this Court has required to conclude that gender-motivated violence substantially affects interstate commerce."); Brief for Petitioner at 14, *Lopez*, 514 U.S. 549 (No. 93-1260) ("A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." (quoting *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981))); *id.* at 9 ("In determining whether particular legislation represents a valid exercise of Congress's commerce power, courts must employ a 'rational basis' standard . . .").

304. 531 U.S. 356, 360 (2001).

305. *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

306. *Id.* at 536.

307. *Id.*

“superior paramount law, unchangeable by ordinary means.” It would be “on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.” *Marbury v. Madison*, 1 Cranch, at 177, 2 L.Ed. 60. Under this approach, it is difficult to conceive of a principle that would limit congressional power. . . . Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.<sup>308</sup>

Of course, the Court itself had long ago “circumvent[ed] the difficult and detailed amendment process contained in Article V.”<sup>309</sup> But by now, this had become an accepted fact of life. It was the *Court’s* job to expound upon the meaning of the Constitution, and those interpretations were generally accepted to bind state and federal governments alike. The tentacles of doctrine had ensnared the federal government.

### CONCLUSION: SUPREMACY’S PINNACLE

In the half century since *Cooper v. Aaron*, the Supreme Court has consolidated its position as the highest legal authority in the land. In 2000, the Supreme Court had the last word in a presidential election, and the orderly transition of power following its decision in *Bush v. Gore* was clear evidence of the institution’s strength.<sup>310</sup> The Court claimed the same authority over Congress in *Boerne*. Numerous state and national statutes have been wiped from the books, on issues as diverse as affirmative action, the rights of the disabled, and internet pornography. The chorus of complaints that regularly meets the Justices only underscores the point that precisely because what the Court says goes, there is bound to be loud disagreement with its rulings. Books like *The Most Activist Supreme Court in History*, *Men in Black*, *The Supremacists*, and *Radicals in Robes* are a testament to the Court’s power.<sup>311</sup>

Scholars are right to look for answers as to how judicial supremacy occurs. Judicial power plays an important role in the rule of law, even while it comes frequently into tension with norms of democratic rule. And as the foregoing surely underscores, what accounts for supremacy at any moment, in any place, is highly contingent. Many theories offer insight. But we hope to have established the central role of one factor too often neglected: the boost a federal system can give to getting judicial supremacy off the ground and rolling. Here in the United States, at least, the federal system has had a huge hand in establishing our highest court as precisely what its name implies:

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308. *Id.* at 529 (citation omitted).

309. *Id.*

310. 531 U.S. 98 (2000).

311. Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (2004); Mark R. Levin, *Men in Black: How the Supreme Court Is Destroying America* (2005); Phyllis Schlafly, *The Supremacists: The Tyranny of Judges and How to Stop It* (2004); Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* (2005).

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