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### Collaborative Departmentalism

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## ARTICLE

### Collaborative Departmentalism

MATTHEW STEILEN<sup>†</sup>

*It is thus borne in upon one that the principle of departmental autonomy does not necessarily spell departmental conflict, but that mutual consultation and collaboration are quite as logical deductions from it.*

—Edward Corwin

#### INTRODUCTION

Presidential independence in matters of constitutional interpretation is almost always controversial. Any hint of it generates heat. In late March 2012, for instance, as the country strained to read the tea leaves in the oral argument

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<sup>†</sup> Associate Professor, SUNY Buffalo Law School. I received helpful comments and criticisms from Guyora Binder, Vincent Chiao, Matt Dimick, Jim Gardner, Howard Kaplan, Tony O'Rourke, Jack Schlegel, and (especially) Jim Wooten. Thanks also to members of the law school's Junior Faculty Forum, to the University at Buffalo Department of Philosophy, and to participants at the Loyola University of Chicago's Third Annual Constitutional Law Colloquium, where earlier versions of this Article were presented. Finally, thanks to Joe Gerken for excellent research assistance.

in *Nat'l Fed'n of Indep. Bus. v. Sebelius*<sup>1</sup>—the health care case—it was reported that Judge Kavanaugh of the D.C. Circuit had given the “thumbs up” to the suggestion that, even if the law was upheld by the Supreme Court, a Republican president could simply decline to enforce it because the president believed the law unconstitutional.<sup>2</sup> A legal journalist reporting on Judge Kavanaugh’s comments described the view as “bizarre.”<sup>3</sup> In response, a prominent academic wrote a letter to the editor, suggesting that the journalist was unfamiliar with basic constitutional history.<sup>4</sup> Some cheered the letter,<sup>5</sup> but others did not, and one week later the academic sought to clarify his position.<sup>6</sup>

The exchange, the passion, and the variety of views are all typical of this topic. A similar fusillade followed the announcement by President Obama that the Department of Justice would no longer defend the Defense of Marriage Act (DOMA), having concluded the law was unconstitutional.<sup>7</sup> And, of course, all of this pales in comparison to the collective hand-wringing over the constitutional views announced by the Bush administration.<sup>8</sup> So why is it that independent presidential interpretation of the Constitution

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1. No. 11-393, slip op.; oral argument, *Nat'l Fed'n Indep. Bus. v. Sebelius*, 567 U.S. \_\_\_, 132 S. Ct. 2566 (2012), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-393.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-393.pdf).

2. See Jeffrey Toobin,  *Holding Court*, NEW YORKER, Mar. 26, 2012, at 41.

3. *Id.*

4. See Michael Dorf, *A Letter in Response to Jeffrey Toobin's Article*, NEW YORKER, Apr. 9, 2012, at 3.

5. Jonathan H. Adler, *Professor Dorf Takes Jeffrey Toobin Back to School*, THE VOLOKH CONSPIRACY (Apr. 3, 2012, 3:48 PM), [www.volokh.com/2012/04/03/professor-dorf-takes-jeffrey-toobin-back-to-school/](http://www.volokh.com/2012/04/03/professor-dorf-takes-jeffrey-toobin-back-to-school/).

6. Michael Dorf, *Was I as Sloppy as Jeffrey Toobin?*, DORF ON LAW (Apr. 11, 2012, 12:30 AM), [www.dorfonlaw.org/2012/04/was-i-as-sloppy-as-jeff-toobin.html](http://www.dorfonlaw.org/2012/04/was-i-as-sloppy-as-jeff-toobin.html).

7. See, e.g., Jonathan H. Adler, *The Incoherence of President Obama's Stance on Gay Marriage*, THE VOLOKH CONSPIRACY (May 10, 2012, 12:59 PM), [www.volokh.com/2012/05/10/the-incoherence-of-president-obamas-stance-on-gay-marriage/](http://www.volokh.com/2012/05/10/the-incoherence-of-president-obamas-stance-on-gay-marriage/).

8. See Dawn E. Johnsen, *What's a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 395-96 (2008).

generates such controversy? Why isn't it familiar and comfortable for lawyers, despite its considerable historical pedigree? One answer touches on *presidential control*. The Constitution is supposed to control the president. If the president can interpret it himself, how can it do this? Won't he just interpret the Constitution in a way that slacks control, or even adds to his power?

The idea developed in this Article is that judicial supremacy in matters of constitutional interpretation is unnecessary for presidential control—and that it may be, in fact, counterproductive. “Judicial supremacy” is the view that the Supreme Court is the last and highest expositor of constitutional meaning.<sup>9</sup> As the Court put it in *Cooper v. Aaron*, “the federal judiciary is supreme in the exposition of the law of the Constitution.”<sup>10</sup> The usual view is that judicial supremacy is necessary for legal control of the political branches. This is the view taken by the Court, which recently described judicial supremacy in terms that suggested it was necessary for constitutional governance.<sup>11</sup> And, of course, there is something to be said for this view. “Departmentalism”—the idea that each branch of the federal government enjoys *independent* authority to interpret the Constitution—is usually associated with recalcitrance and resistance to the rule of law. Indeed, all the major historical examples of departmentalism can be made to fit this pattern. Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt are all famous for their battles with the courts, and for their assertions that they were ungoverned by certain judicial pronouncements.<sup>12</sup> As one political scientist put it, writing

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

10. *Id.*; see *United States v. Nixon*, 418 U.S. 683, 704 (1974) (“[T]his Court [is the] ultimate interpreter of the Constitution.” (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962))).

11. See *City of Boerne v. Flores*, 521 U.S. 507, 529, 535-36 (1997).

12. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 28-81 (2007).

in the early 1970s, departmentalism is in effect a doctrine of “executive supremacy.”<sup>13</sup>

Even defenders of departmentalism take this view. For present purposes, we can think of defenders as dividing into three camps: presidentialists, popular constitutionalists, and critics of judicial supremacy. Each has its reasons for endorsing departmentalism. Presidentialists cast departmentalism as essential to the leadership task of transforming government to meet the problems of the day.<sup>14</sup> The strong president, they suggest, will find the theory necessary to his effort to remake the constitutional regime.<sup>15</sup> Popular constitutionalists argue that departmentalism preserves the role of the people as the Constitution’s ultimate expositor.<sup>16</sup> The people’s views, they say, are better reflected in the constitutional constructions of the political branches, which departmentalism protects.<sup>17</sup> Lastly, critics of judicial supremacy endorse departmentalism to the

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13. ROBERT SCIGLIANO, *THE SUPREME COURT AND THE PRESIDENCY* 16 (1971). Scigliano intended the argument as a criticism; but proponents of departmentalism and expansive presidential power make the same argument. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 277-78 (1994) [hereinafter Paulsen, *The Most Dangerous Branch*].

14. See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 69-71, 96-99, 168-69 (2008); DANIEL FARBER, *LINCOLN’S CONSTITUTION* 115-96 (2003); WHITTINGTON, *supra* note 12, at 28-81; Michael J. Gerhardt, *Constitutional Construction and Departmentalism: A Case Study of the Demise of the Whig Presidency*, 12 U. PA. J. CONST. L. 425, 435-57 (2010); cf. EDWARD S. CORWIN, *COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT* 69-84 (1938) (identifying presidential assertions of departmentalism).

15. See, e.g., WHITTINGTON, *supra* note 12, at 52.

16. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 3-8 (2004); MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 6-32 (1999); see also Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1031-34 (2004) (discussing Kramer’s scholarship).

17. See KRAMER, *supra* note 16, at 106-14, 201; cf. Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1341, 1350-53 (2001) (defending congressional supremacy on the grounds that the legislature better reflects the people’s views).

extent that it entails abandoning the unilateral judicial determination of constitutional meaning, a practice that is undesirable for a variety of reasons.<sup>18</sup> What unites these camps is obviously a specific vision of government. That vision emphasizes the importance of “constitutional politics”—i.e., the significance of non-judicial action for constitutional meaning—and limits the role of the federal courts.<sup>19</sup> The two parts of the vision are related, since the struggle over constitutional meaning is assumed to be a zero-sum game.<sup>20</sup> In other words, according to its defenders, departmentalism reduces the authority of the courts *in*

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18. See, e.g., JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 96-152 (1984) (arguing that judicial supremacy is inconsistent with the proper role of the court in constitutional democracy); SUSAN R. BURGESS, *CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATE* 109-26 (1992) (arguing that departmentalism fosters respect among the political branches for constitutional boundaries); ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 353-75 (1992) (arguing that judicial supremacy is inconsistent with mutual respect in constitutional discourse); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* 231-74 (1988) (arguing that departmentalism and justiciability doctrines facilitate interbranch dialogue about constitutional meaning); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 84 (1998) (arguing judicial exclusivity is undesirable); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 578 (1993) (suggesting that a need to legitimize judicial review has misled scholarship); Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401, 401-02 (1986) (arguing that constitutional interpretation sometimes requires non-judicial determination); cf. Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 67, 82 (2000) (“Because constitutional meaning is so wrapped up in broader questions of governance, constitutional interpretation should be a shared endeavor among (at the least) all the branches of the national, state, and local governments.”).

19. See, e.g., TUSHNET, *supra* note 16, at 6-14; Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 43-45 (1993) (arguing departmentalism would lessen the authority of the federal courts). For an implicit acknowledgement that presidentialists and populists are allied on this issue, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1361 (1997).

20. See, e.g., WHITTINGTON, *supra* note 12, at 52 (“The president and the judiciary compete over the same constitutional space, with the authority of presidents to reconstruct the inherited order supplanting judicial authority to settled disputed constitutional meaning.”).

*order to* strengthen the hand of some other player—the president, or the people, or the national legislature.

Yet, critics and defenders aside, there are reasons to think the zero-sum logic is mistaken. My aim in this Article is to substantiate these reasons. To that end, I argue that a regime I call “moderate” departmentalism actually enhances the ability of the federal courts to restrict the exercise of presidential power. How could it possibly have such an effect? The core reason involves a familiar set of ideas about regulatory “governance,” applied in a new way.<sup>21</sup> Consider the following features of constitutional law. Constitutional law is fundamental law. Unlike ordinary law, which government enacts to restrain the people, fundamental law is “created by the people to regulate and restrain the government.”<sup>22</sup> In this way, the president, as the head of a branch of government, is a stakeholder in the determination of constitutional meaning. His policies and the limits of his authority are at stake. Giving this stakeholder—the chief executive stakeholder—a role in the determination of constitutional meaning encourages his genuine involvement in deliberation about that meaning.<sup>23</sup>

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21. See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 4 (1992); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. REV.* 1, 2 (1997); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *MINN. L. REV.* 342, 342-49 (2004); Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 *FORDHAM URB. L.J.* 1611, 1611-15 (2001). A related body of literature draws on parallels to engineering and industrial organization. See William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US* 37-38 (Gráinne de Búrca & Joanne Scott eds., 2006); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *COLUM. L. REV.* 267, 267-78 (1998). Collaborative governance and stakeholder participation are also leading themes in research on environmental regulation and dispute resolution. See, e.g., MARK SAGOFF, *PRICE, PRINCIPLE, AND THE ENVIRONMENT* 27, 201, 216-31 (2004) (discussing the Quincy Library Group); Daniel J. Fiorino, *Rethinking Environmental Regulation: Perspectives on Law and Governance*, 23 *HARV. ENVTL. L. REV.* 441, 441-45 (1999).

22. KRAMER, *supra* note 16, at 29.

23. See Devins & Fisher, *supra* note 18, at 100-01; discussion *infra* Part II.C. Open contestation of constitutional meaning among the branches also

And an executive with a hand in formulating constitutional rules is more likely to be bound by them in practice.<sup>24</sup> In this respect, the president is no different from many business firms; firms that participate in making the administrative rules to which they are subject develop a kind of “ownership” over them—and ownership brings fidelity.

Moderate departmentalism requires no major alternations to the basic constitutional scheme. Rather, it assumes that scheme, along with the “dialogical” process of lawmaking, litigation, and executive action that the scheme engenders. The difference comes in the informal norms guiding this process. Consider, again, the legal challenge to the constitutionality of the Affordable Care Act. The Court holds a hearing on the challenge and considers the views of executive attorneys on the matter. Suppose, this time, that the Supreme Court *does* strike down the law as exceeding Congress’s constitutional authority. In coming to this conclusion, the Court announces its considered view of the meaning of the Commerce Clause and the Taxing and Spending Clause, and shows why the clauses do not support the law. Under moderate departmentalism, the president need not accept those interpretations. He may, in the exercise of his constitutional powers, be guided by his own considered views. What concrete effects this has will depend on context; the president might decide to enforce the Affordable Care Act despite the Court’s decision invalidating it, but he might not, for reasons I discuss below. He might decline to enforce the Act, but continue to enforce laws resting on similar constructions of the Commerce Clause or the Taxing and Spending Clause. Whatever the president decides to do, the possibility of his acting independently encourages the Court to seriously consider his views and to fashion a rule that reflects them. Instead of the Court binding the president to fundamental law, departmentalism conceives of the president as binding

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incentivizes *the people* to actively involve themselves in determining constitutional meaning. See BURGESS, *supra* note 18, at 13-14, 121-26.

24. See Merrill, *supra* note 19, at 73 (“If the political branches strongly disagree with the [legally binding] judicial understanding, it will be ignored or distinguished or limited to its facts.”).



*himself* to law that he has influenced, and whose continued observance is supported, from his perspective, by a variety of moral, legal, and strategic reasons.

Indeed, the last point is significant, since the president's compliance with constitutional rules is not meant to follow from the logic of participation alone. Under moderate departmentalism, there are also important strategic reasons for the president to voluntarily comply with constitutional rules. The logic of what political scientists call "repeat play" supplements the logic of participation.<sup>25</sup> Where the president's participation in shaping a constitutional rule does not convince him, on balance, that he should comply with it, he may nonetheless comply to take advantage of certain future benefits.<sup>26</sup> I argue that two future benefits are particularly important in this regard: first, avoiding future litigation losses that would likely follow from ignoring a constitutional rule announced by the Supreme Court; and second, obtaining future gains available only to a president with a reputation for compliance with constitutional law—a matter of significance in a political system like our own.<sup>27</sup> Such reasons make compliance rational for the president even where it comes at his present cost, say, by preventing him from using the full resources of the executive branch to achieve a favored policy.<sup>28</sup> Additionally, a president who wants to avoid these costs will have reason to more fully participate in interbranch processes for determining constitutional meaning.<sup>29</sup>

This, in a nutshell, is the case for moderate departmentalism I develop below. The argument cuts across the extant departmentalism literature in an unusual way. One can identify in the literature distinct approaches to the study of presidential interpretation. One approach is

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25. See AYRES & BRAITHWAITE, *supra* note 21, at 51; discussion *infra* Part II.D.1.

26. See discussion *infra* Part II.D.

27. See *id.*

28. See *id.*

29. Cf. AYRES & BRAITHWAITE, *supra* note 21, at 47 (discussing mutual cooperativeness, which results in long term beneficial payoffs).

institutional in focus. These studies describe historical patterns of competition over interpretative authority between the institutions of government.<sup>30</sup> Scholarship in this line tends to be both empirical and normative; it is empirical insofar as its methods and subject are historical, and it is normative insofar as it betrays (as it usually does) some approval of departmentalism. A second approach is legal, or “analytic,” in focus.<sup>31</sup> These studies examine which

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30. See, e.g., AGRESTO, *supra* note 18, at 9-10 (arguing constitutional interpretation was never intended to be in the sole province of the courts); BURGESS, *supra* note 18, at x-xii, 107 (examining congressional challenges to presidential assertions of authority in the war powers debates); FISHER, *supra* note 18, at 200-70 (analyzing the methods used by the president to curb judiciary overreaches); WHITTINGTON, *supra* note 12, at 5, 15 (examining how the doctrine of separation of powers is affected by the institutional struggle for constitutional leadership); Gerhardt, *supra* note 14, at 425-59 (examining departmentalism during the demise of the Whig conception of the presidency); Mark A. Graber, *Establishing Judicial Review? Schooner Peggy and the Early Marshall Court*, 51 POL. RES. Q. 221, 224, 232-35 (1998) [hereinafter Graber, *Establishing Judicial Review?*] (arguing the early Marshall Court sought to preserve judicial power by asserting its existence, while not attempting to challenge executive or legislative authority in any controversial way); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36-37 (1993) [hereinafter Graber, *The Nonmajoritarian Difficulty*] (arguing scholars should think about judicial review as presenting the nonmajoritarian difficulty because the real controversy is not between the elected officials and the judiciary, but rather between the different members of the dominant coalition).

31. This body of scholarship is already considerable and still growing. See, e.g., William Baude, *The Judgment Power*, 96 GEO. L.J. 1807 (2008); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000) [hereinafter Johnsen, *Presidential Non-Enforcement*]; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373 (1994); Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1994); Merrill, *supra* note 19; Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389 (1987); Paulsen, *The Most Dangerous Branch*, *supra* note 13; Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993); Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008); Neomi Rao, *The President’s Sphere of Action*, 45 WILLAMETTE L. REV. 527 (2009); David A. Strauss, *Presidential Interpretation of*

allocations of interpretative authority are lawful. Naturally, legal studies adduce traditional sources of constitutional argument—text, structure, and history—to defend a particular separation of judicial and executive power. Like the institutional studies, they tend to combine the descriptive and the normative.

This Article falls in neither category. It is largely an institutional analysis, not a legal one; but it is also a theoretical analysis, not an empirical one. My hope is the approach speaks to both bodies of literature, and thus shows how institutional analysis can inform structural and doctrinal conclusions about the proper division of interpretative authority. Just to pick one example: a Court without the authority to decide constitutional questions for the other branches—as departmentalism envisions—need not rely on justiciability doctrines to limit the reach of its decisions. Its opinion on, say, the president’s war powers, is just that—its opinion. Whether the opinion is followed depends not on the Court’s *ipse dixit*, but on “organic” factors: on whether the president meaningfully participated in its formulation, thus giving him a reason to adopt the Court’s view as his own.

### I. THE IDEA OF “MODERATE” DEPARTMENTALISM

The terms of the debate over departmentalism are by now relatively familiar. For a variety of reasons, it has become largely a debate about the relative interpretative roles of the Supreme Court and the president, not Congress.<sup>32</sup> The central question posed in this debate is the extent of presidential interpretative power.<sup>33</sup> A president may exercise the power of interpretation in a number of

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*the Constitution*, 15 CARDOZO L. REV. 113 (1993) [hereinafter Strauss, *Presidential Interpretation*]; Daniel J. Crooks, III, *In Defense of the Obama Administration’s Non-Defense of DOMA*, 4 LEGIS. & POL’Y BRIEF (Aug. 5, 2012), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1037&context=lpb>.

32. See WHITTINGTON, *supra* note 12, at 16-17. This is not to say that there are no important questions regarding Congress’s interpretative powers. See TUSHNET, *supra* note 16, at 17; Katyal, *supra* note 17, at 336.

33. See, e.g., Lawson & Moore, *supra* note 31, at 1271.

different ways; each raises a question about executive authority. For example, may the president decline to enforce a statute he believes is unconstitutional? What about a judgment? What about his obligation to defend laws challenged in court—may he decline to defend a law he believes is unconstitutional?

In this Part, I answer some of these questions. I defend what I call (rather tentatively) “moderate” departmentalism.<sup>34</sup> In my usage, moderate departmentalism is the view that judicial precedent does not bind the president.<sup>35</sup> *Stare decisis* is given “vertical” scope, within the federal courts (and state courts, where they interpret federal law), but zero “horizontal” scope among the branches of the federal government. Although precedent does not bind the president, a valid legal judgment may—at least when it requires the president to do something.<sup>36</sup> The ultimate burden of the Article is to show that this form of departmentalism engenders interbranch collaboration about the content of constitutional law—in short, that “moderate” departmentalism is “collaborative” departmentalism. Before I get there, however, I need to describe moderate departmentalism in more detail.

#### A. *The Argument from Coordinacy*

Moderate departmentalism is a view about judicial precedent. Specifically, it is a view about which institutions of government are bound by judicial precedent. The core idea is that whether an institution is bound depends on its “rank” or “status” in the constitutional system.

The framers regarded the departments created by the opening sections of Articles I, II, and III as being equal in

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34. This appellation has also been used to describe a different theory—Strauss’s view that the president has the same relationship to Supreme Court precedent as the Court itself does. *Id.* at 1298. The usage has not gained currency.

35. Thomas Merrill is probably the leading defender of this view. *See* Merrill, *supra* note 19, at 43-44.

36. *See, e.g.*, Baude, *supra* note 31, at 1812.

status.<sup>37</sup> In the language of the eighteenth century, the departments were “co-ordinate.”<sup>38</sup> The issue came up as the framers tried to imagine how governmental violations of the Constitution might be corrected. For example, in the proposed constitution appended to his *Notes on the State of Virginia*, Jefferson suggested that such violations should be determined and corrected by a convention of the people.<sup>39</sup> The people, he thought, were the only ones with the authority to do such a thing.<sup>40</sup> Madison took up the suggestion in *The Federalist No. 49*. He agreed with Jefferson that the design of the federal government seemed to necessitate popular appeal in such a circumstance; after all, no single department had been given the authority to correct the transgressions of the others.<sup>41</sup> Instead, he wrote, the people had made the departments “perfectly co-ordinate by the terms of their common commission.”<sup>42</sup> The point fit neatly in the framers’ emerging theory of separation of powers, which understood the departments not as representing different orders or estates of society, but as “essentially indistinguishable” representatives of the American people.<sup>43</sup>

Coordinacy was an idea familiar to the framers from English oppositional thought in the seventeenth and eighteenth centuries. Indeed, coordinacy had played a lead role in the exchange of pamphlets between parliamentarians and royalists at the opening of the

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37. See SCIGLIANO, *supra* note 13, at 7; Paulsen, *The Most Dangerous Branch*, *supra* note 13, at 231-32, 324-35.

38. See, e.g., THE FEDERALIST NO. 49, at 273 (James Madison) (J.R. Pole ed., 2005) [hereinafter THE FEDERALIST NO. 49].

39. See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, 233-34 (Forgotten Books 2012) (1829).

40. See *id.* at 172-79, 233-34.

41. THE FEDERALIST NO. 49, *supra* note 38, at 273.

42. *Id.*

43. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 453 (1998 ed. 1998); see also JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 276-77 (1996). The medieval English estates were the “lords temporal,” “lords spiritual,” and “commons,” which, in conjunction with the king, made up Parliament.

English Civil War.<sup>44</sup> In response to the commons and lords' assertion that they possessed several powers traditionally regarded as royal, Charles I had argued that the houses were equal in status to the king.<sup>45</sup> Each, he said, was an "estate" in the English government. Yet Charles's description of king, lords, and commons as estates was a marked contrast with the traditional view, which had recognized *bishops*, lords, and commons as the estates, making the king the head of the government.<sup>46</sup> Parliamentarians seized on Charles's concession as proof that English government had always been "mixt," its exercises of power the result of "coordination" between king, lords, and commons.<sup>47</sup> Each of these estates, they argued, must consent to enact a law; and each estate necessarily enjoyed the power to resist the actions of the others.<sup>48</sup> This would be possible only if the estates were equal in status or rank ("co-ordinate," or "coordinative," as Charles Herle termed it); otherwise one part would subordinate the others.<sup>49</sup> The idea proved to have staying power. It persisted through England's experiment with republicanism in the

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44. J.W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* 88-89 (1955). This literature was familiar to the framers. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 34 (1992 ed.).

45. W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION* 25 (1965).

46. See, e.g., M.R.L.L. Kelly, *Historical Analysis of Goldsworthy's Sovereignty of Parliament*, 27 *AUSTL. J. LEG. PHIL.* 156, 166 (2002); C. C. Weston, *The Theory of Mixed Monarchy Under Charles I and After*, 75 *ENG. HIST. REV.* 426, 428 (1960).

47. Charles Herle, *A Fuller Answer to a Treatise Written by Doctor Ferne* (1642), in 1 *THE STRUGGLE FOR SOVEREIGNTY: SEVENTEENTH-CENTURY ENGLISH POLITICAL TRACTS* 157-59 (Joyce Lee Malcom ed., 1999); see J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* 361-71 (1975); Weston, *supra* note 46, at 431-35.

48. See Herle, *supra* note 47.

49. See *id.* In a later pamphlet, Herle advanced the view that Commons was superior to the King in the lawmaking function, but coordinate in the executive function. See M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 43-44 (2d ed. 1998).

Commonwealth period and the Restoration at century's end.<sup>50</sup>

Coordinacy was thus firmly rooted in the vocabulary of eighteenth century political theory, and it is no surprise that it figured centrally in several American framers' plans. As we have already seen, Madison thought it essential to understanding how constitutional boundaries would be enforced. Thus, in *Federalist No. 49*, he argued that because the departments were "co-ordinate by terms of their common commission," no single department could "pretend to an exclusive or superior right of settling the boundaries between their respective powers."<sup>51</sup> Enforcement had to utilize another mechanism. That mechanism, of course, is described in *Federalist No. 51*: departmental boundaries would be enforced not by a superior department, but by arranging the coordinate departments so that each checked the others by the exercise of its own powers.<sup>52</sup> As Herle had suggested, the departments would only be able to resist one another if they were equal in status. Making one department "exclusive or superior" in questions of constitutional interpretation would be inconsistent with this design.<sup>53</sup>

While the lesson of *Federalist No. 51* is a familiar one, Madison left the connection to interpretative authority somewhat underdeveloped. Yet it is fairly straightforward to imagine how the argument might go. Consider the following, which expands on Madison's claims.<sup>54</sup> The departments are coordinate. This means they are equal in status. Since each branch is equal in status to the others, each is entitled to determine for itself how it should exercise

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50. See VILE, *supra* note 49, at 44, 75, 120.

51. THE FEDERALIST NO. 49, *supra* note 38, at 273.

52. THE FEDERALIST NO. 51, at 281 (James Madison) (J.R. Pole ed., 2005); see KRAMER, *supra* note 16, at 47.

53. THE FEDERALIST NO. 49, *supra* note 38, at 273; see Paulsen, *The Most Dangerous Branch*, *supra* note 13, at 233-35.

54. The following draws heavily on arguments made by Michael Stokes Paulsen and David Strauss. See Paulsen, *The Most Dangerous Branch*, *supra* note 13, at 228-40; Strauss, *Presidential Interpretation*, *supra* note 31, at 121; see also Lawson & Moore, *supra* note 31, at 1287.

its expressly delegated powers. In other words, each is “independent” in the sense of being *autonomous*: no branch decides for another how the latter should act. What less could “coordinacy” mean? Now consider the power of constitutional interpretation. None of the branches is expressly delegated this power. Since constitutional interpretation gives content and scope to the expressly delegated powers, each branch must also be entitled to conduct the requisite constitutional interpretation according to its own best judgment.

A variant of the same argument can be made using a comparison to the courts. A lower federal court is bound by the constitutional interpretations of the Supreme Court. This is because lower federal courts are “inferior,” in the language of Article III, to the Supreme Court.<sup>55</sup> But the president is not inferior to the Supreme Court; the president is equal in rank to the Supreme Court, as head of a coordinate branch of the federal government. Therefore, the president is not similarly obliged to follow the constitutional interpretations of the Supreme Court—unless there is an independent argument to that end that is otherwise consistent with coordinacy.<sup>56</sup> With respect to Supreme Court precedent, the president should be in the same position as the Court itself is: namely, as always possessing the authority to depart from precedent where doing so is appropriate.<sup>57</sup>

It may help to run the argument in the other direction. Suppose that the president does *not* have the authority to independently interpret the Constitution. What, then, do we make of the pardon power? It is accepted that the president may invoke constitutional grounds to pardon an individual duly convicted of a crime in a federal court.<sup>58</sup> Indeed, given that the pardon power limits the actions of the federal judiciary, it would constitute a radical rethinking of that

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55. The argument treats this assertion as an assumption. It need not be. See Baude, *supra* note 31, at 1845 & n.213.

56. See Strauss, *Presidential Interpretation*, *supra* note 31, at 120.

57. See *id.*

58. See Paulsen, *The Most Dangerous Branch*, *supra* note 13, at 264-65.



power to insist that it could be exercised only in conformance with judicial constructions of the Constitution.<sup>59</sup> Much the same can be said for the veto power; no one expects that the president should be confined to judicial precedent in deciding whether to veto a presented bill on constitutional grounds.<sup>60</sup>

This is the argument from coordinacy. It begins with the idea that the departments are equal in status or rank. Its conclusion is that each department must enjoy authority to independently interpret the Constitution. No one department is the Constitution's exclusive or superior interpreter.

### B. *What Coordinacy Does and Does Not Imply*

All this is rather abstract. What does coordinacy mean for the specific questions, posed above, about executive authority?

Consider first the familiar issue of "non-enforcement." Non-enforcement is the president's power to refuse to carry out the law because he believes it unconstitutional. A well-known example is President Reagan's refusal to enforce provisions of the Competition in Contracting Act of 1984.<sup>61</sup> The Act permitted losing bidders on federal contracts to lodge a "protest" with the Comptroller General's Office.<sup>62</sup> The Comptroller General was tasked with investigating the protest, during the pendency of which the contract could not be awarded to the winning bidder.<sup>63</sup> Reagan's

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59. This is not to say that the pardon is merely an instrument of "clemency." The pardon has a key law enforcement function as well, especially when used in exchange for favorable testimony or to incentivize compromise. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 180-81 (5th rev. ed. 1984) [hereinafter CORWIN, *THE PRESIDENT*]; *THE FEDERALIST* NO. 74, at 397-98 (Alexander Hamilton) (J.R. Pole ed., 2005). Yet this function rests on the judiciary-limiting effect of the pardon.

60. See Paulsen, *The Most Dangerous Branch*, *supra* note 13, at 264-65.

61. 98 Stat. 1199 (1984) (codified as amended at 31 U.S.C. §§ 3551-3556 (2006 & Supp. IV 2011)); see also *Lear Siegler, Inc., Energy Prod. Div. v. Lehman*, 842 F.2d 1102, 1104-05 (9th Cir. 1988).

62. See § 3552.

63. See § 3553(c)(1), (d)(1).

administration instructed the agencies to disregard this stay provision; according to its view, the provision delegated to an officer of Congress (the Comptroller General) duties that belonged to executive officials, thus violating the separation of powers.<sup>64</sup> Federal courts were highly critical of the administration's conduct at the time.<sup>65</sup> Yet since that time, judgment on the matter has shifted, at least among scholars of presidential power;<sup>66</sup> today, most conclude that the Constitution supports some form of presidential non-enforcement power.<sup>67</sup>

Coordinacy is agnostic about non-enforcement. In other words, it is consistent with the conclusion that the president enjoys such a power, and with the conclusion that he does not. This is contrary to how coordinacy is sometimes presented.<sup>68</sup> The reason coordinacy is consistent with both views is that the case for non-enforcement turns on the construction of the Take Care Clause and the Article II Oath Clause, and coordinacy is logically independent of the best construction of those clauses.<sup>69</sup> Read either clause in a certain way, and it defeats the case for non-enforcement. Coordinacy cannot rule these readings out.

Consider, for example, the Take Care Clause, which requires that the president "take Care that the Laws be faithfully executed."<sup>70</sup> The plain language of the clause

64. See *Lehman*, 842 F.2d at 1102, 1105, 1119-20.

65. See, e.g., *id.* at 1126; cf. *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 889-90 & 889 n.11 (3d Cir. 1986).

66. This is true across the political spectrum. Compare Paulsen, *The Most Dangerous Branch*, *supra* note 13, at 268-70, with Johnsen, *Presidential Non-Enforcement*, *supra* note 31, at 14-15.

67. For a recent summary of the literature, see Prakash, *supra* note 31, at 1618-28.

68. See, e.g., Paulsen, *The Most Dangerous Branch*, *supra* note 13, at 240, 267 (stating that it is a "logical consequence" of Madison's statement of coordinacy that the President enjoys interpretative powers including non-enforcement).

69. See Strauss, *Presidential Interpretation*, *supra* note 31, at 117. The following argument focuses on the Take Care Clause. For the reading of the Oath Clause that poses a problem for non-enforcement, see Paulsen, *The Most Dangerous Branch*, *supra* note 13, at 260.

70. U.S. CONST. art. II, § 3.

imposes a duty on the president to see that the law is enforced. The question is whether that duty extends to laws the president regards as unconstitutional. There is some reason to think that it does; a number of (now well-known) historical and structural considerations support an affirmative answer.<sup>71</sup> The principal evidence is the interlocking character of the Take Care Clause and the Presentment Clause. Presentment empowers Congress to override a president's constitutional veto.<sup>72</sup> The framers thus contemplated that the president would be faced with enforcing a law he believed unconstitutional, and plain language suggests that Take Care was intended to require the president to do just this—ruling out a power of non-enforcement.<sup>73</sup>

The point is not to endorse this particular reading of the Take Care Clause. The point is, rather, that (1) it is a reasonable reading, (2) it would rule out a power of non-enforcement, and (3) coordinacy does not require its rejection. For those who disagree that it is a reasonable reading (perhaps because it does not permit exceptions to the duty to enforce), other constructions are also possible; a number of these constructions do allow exceptions but rule out a broad power of non-enforcement.<sup>74</sup> Coordinacy does not exclude these possibilities—indeed, it simply does not require *any* particular construction of the Take Care Clause.<sup>75</sup> Of course, coordinacy might weigh in favor of one

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71. These considerations can be found in Johnsen, *Presidential Non-Enforcement*, *supra* note 31, and May, *supra* note 31.

72. See U.S. CONST. art. I, § 7.

73. See May, *supra* note 31, at 876-81. A full defense of this position would require addressing the differences between the veto and non-enforcement, the issue posed by laws enacted prior to the president's term, and the relevant founding-era evidence on presidential power.

74. See, e.g., Strauss, *Presidential Interpretation*, *supra* note 31, at 118 ("Or suppose the correct interpretation of the Take Care Clause is that the President must comply with any statute that is not clearly unconstitutional unless that statute infringes the President's prerogatives.").

75. See *id.* at 117-19. No one—with the possible exception of Paulsen—maintains that non-enforcement follows from coordinacy *alone*. See Paulsen, *The Most Dangerous Branch*, *supra* note 13, at 241-44, 256-57. Instead, it is said to follow from presidential powers implied by the Take Care Clause, the Oath

interpretation and against another. But it is unclear which way this should cut. Would it be more appropriate to reject a construction of the Take Care Clause because it conflicted with coordinacy or conclude that the clause was meant to mark coordinacy's outer limits? A well-supported construction of the Take Care Clause might teach us what coordinacy can and cannot mean.<sup>76</sup>

Coordinacy is thus agnostic with respect to the non-enforcement power. The same cannot be said for what is sometimes called "non-acquiescence." Coordinacy does imply non-acquiescence, and thus, if one accepts the principle of coordinacy, one ought to support a presidential power of non-acquiescence.

Non-acquiescence is the power to refuse to adopt a legal rule outside the context of the specific lawsuit in which it is announced.<sup>77</sup> Like non-enforcement, it has a rather long history. Recent times again afford the example of President

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Clause, and the Article II Vesting Clause, in addition to the principle of coordinacy. See, e.g., Lawson & Moore, *supra* note 31, at 1280; Easterbrook, *supra* note 31, at 910, 920. This implies that if alternative readings of those clauses are available, one can (consistently) endorse coordinacy but not non-enforcement.

76. Here is how Take Care might shed light on coordinacy. Some argue that coordinacy implies what we might call "strong departmental independence." Strong departmental independence means that each department may freely interpret the Constitution, *regardless of the actions* taken by the others. In other words, no department can force another to take action inconsistent with the latter's understanding of the Constitution. See, e.g., FARBER, *supra* note 14, at 182; Paulsen, *The Most Dangerous Branch*, *supra* note 13, at 221-22. This principle, however, is likely too strong, since it implies a freedom from interference or constraint, which (on its face, at least) is in tension with the doctrine of checks and balances. See FISHER, *supra* note 18, at 238-39. In contrast, departmental autonomy is the idea that each department is "independent" in the sense of being *self-directed*, but not immune from interference by the actions of others. See discussion *supra* Part I.A. This view contemplates that a department might be prevented, by the actions of another, from taking action to realize its view of the Constitution. A Take Care duty to enforce captures this idea perfectly: it requires the president to implement Congress's views of the Constitution.

77. See, e.g., Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 687 (1989); Paulsen, *The Most Dangerous Branch*, *supra* note 13, at 272; Strauss, *Presidential Interpretation*, *supra* note 31, at 120-21.

Reagan, under whom certain agencies developed a practice of refusing to adopt in administrative proceedings the judicial precedents of the reviewing court of appeals.<sup>78</sup> Yet intra-circuit non-acquiescence (as it was lovingly called) was not really departmentalism, since, as its defenders conceded, the Supreme Court remained the final arbiter of the meaning of federal law.<sup>79</sup> Non-acquiescence to the Supreme Court is instead exemplified by the more distant example of President Lincoln and the *Dred Scott* decision.<sup>80</sup> In his First Inaugural Address, Lincoln suggested that while the decision of the Supreme Court “must be binding in any case, upon the parties to a suit, as to the object of that suit,” it did not bind others, including members of Congress and the administration.<sup>81</sup> It was inconsistent with popular rule, he argued, for the “policy of the government, upon vital questions, affecting the whole people” to be set by the Court alone.<sup>82</sup> As he had put it during the campaign:

[W]e . . . oppose that decision [i.e., *Dred Scott*] as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the president to favor no measure that does not actually concur with the principles of that decision. We do not propose to be bound by it as a political rule in that way.<sup>83</sup>

Lincoln thus distinguished a judicial decision from what might be called the constitutional “rule” on which it was based, and exempted presidents from a legal obligation to

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78. See Estreicher & Revesz, *supra* note 77, at 694, 706.

79. See *id.* at 723, 725 (arguing that “the co-equal branch analogy” defended by Reagan Attorney General Edwin Meese is inconsistent with the interpretative role of the Court as described in *Cooper v. Aaron*, 358 U.S. 1 (1958)).

80. *Scott v. Sanford*, 60 U.S. 393 (1856).

81. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953); see also FARBER, *supra* note 14, at 179.

82. Lincoln, *supra* note 81, at 268.

83. Paulsen, *The Most Dangerous Branch*, *supra* note 13, at 275 (quoting Abraham Lincoln, Sixth Debate with Stephen A. Douglas, at Quincy, Ill. (Oct. 13, 1858), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 81, at 245, 255); see also AGRESTO, *supra* note 18, at 128.

adopt the latter.<sup>84</sup> Indeed, President Lincoln went on to take action inconsistent with constitutional “rules” in *Dred Scott*.<sup>85</sup>

It should be fairly clear that “non-acquiescence” in this sense is implied by the principle of coordinacy. If the political departments were obligated to adopt the rules announced by the Court, they would consequently not be free, as coordinacy requires, to exercise their powers according to their own understanding of the Constitution. What is somewhat harder to grasp is what non-acquiescence means in practice. The impact of the president’s refusal to adopt a constitutional interpretation announced by the Supreme Court will depend on the context. For example, because the president’s decision to pardon someone is regarded as judicially unreviewable, it is unlikely to lead to further legal action, even if it is based on a view of the Constitution at odds with the Court.<sup>86</sup> Something similar goes for the veto.<sup>87</sup> In these contexts, a regime of non-acquiescence is functionally indistinguishable from a regime of judicial supremacy.

The matter gets more complicated when we consider other forms of presidential non-acquiescence. Suppose the Court applies the canon of constitutional avoidance to construe a statute so that it complies with the Constitution, and in so doing narrows a grant of executive power conferred under that statute. In this case, the president’s decision not to adopt the Court’s construction could have a number of consequences whose effect is to force him to adopt the Court’s view. Most obviously, the president’s decision to non-acquiesce would give rise to further litigation that, governed by the Supreme Court’s rule, would lead to the same outcome—although the matter is somewhat more complicated, as I consider below.

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84. As Herbert Wechsler summarized Lincoln’s view, “the Court decides a case; it does not pass a statute calling for obedience by all within the purview of the rule that is declared.” Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965).

85. See Paulsen, *The Most Dangerous Branch*, *supra* note 13, at 276.

86. See *id.* at 265.

87. See *id.* at 264-65.

Alternatively, Congress might decide to side with the Court, and use its lawmaking power to amend the language of the statute so as to reflect the Court's views.<sup>88</sup> Depending on one's view of the Take Care Clause, this could create an obligation in the president to accede to Congress's view. Yet these mechanisms, as well as the many other means of controlling the president available to the Congress and the Court<sup>89</sup> hardly eliminate the effects of non-acquiescence. Where federal courts lack jurisdiction, judicial review of the president's non-acquiescence will be unavailable. Congress may take action to limit or strip jurisdiction so as to protect the president's constitutional views.<sup>90</sup> Even where jurisdiction exists, not all those affected by the president's policy will be able to bring suit.<sup>91</sup> The reality is that the president, more than any other federal officer or legislator, conducts a large amount of activity without external supervision, and over a time scale and in conditions that effectively preclude interference by another branch.<sup>92</sup>

In short, a presidential policy of non-acquiescence would matter.<sup>93</sup> Going forward, I will use the expression "moderate departmentalism" to describe presidential interpretative powers, rather than non-enforcement or non-acquiescence. This expression is intended to describe an allocation of interpretative authority that, as I have argued, follows from

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88. *Cf.* Rao, *supra* note 31, at 534-35 (discussing Congress's use of the lawmaking power to advance its view of constitutional meaning).

89. The devices are numerous, and include, on the congressional side, (1) impeachment, (2) amendment, (3) eliminating executive funding, (4) impeding appointments, and (5) conducting investigations, as well as others. *See generally id.* On the judicial side, mechanisms of control include injunctions and contempt.

90. The classic exploration of this idea is in Wechsler, *supra* note 84, at 1004-06.

91. Standing doctrine will narrow those who can bring suit. *See* *Allen v. Wright*, 468 U.S. 737, 750-52 (1984).

92. *See* ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 7-12 (2010).

93. Indeed, when Reagan's Attorney General Edwin Meese defended what was essentially moderate departmentalism, it caused a political firestorm. *See* Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991, 991-93 (1987).

the principle of coordinacy—namely, non-acquiescence without a general power of non-enforcement.<sup>94</sup> In addition, as described above, I assume the president is obliged to enforce valid legal judgments. I take no position on the many other questions of presidential interpretative authority, such as the duty to defend a law in court.<sup>95</sup> Below, I describe this suite of presidential powers and obligations as the elimination of the “horizontal” dimension of stare decisis.<sup>96</sup>

## II. WHY MODERATE DEPARTMENTALISM IS COLLABORATIVE

My argument in this Part is that moderate departmentalism is collaborative. In other words, I want to show how moderate departmentalism results not in presidential interpretative supremacy, but in a collaborative effort to determine constitutional meaning and in greater presidential compliance with the law.

This argument challenges certain prevailing views in the institutional literature on departmentalism. In particular, the literature describes departmentalism as a kind of zero-sum contest over the allocation of interpretative authority, and thus regards presidential assertions of interpretative authority as ipso facto judicial deprivations. The analysis is important and insightful, but it also limits our understanding of departmentalism. I want to show how this is the case by examining the work of Keith Whittington and Stephen Skowronek on presidential leadership and the Supreme Court.

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94. This view of presidential interpretative authority has been defended before, but appears to have been eclipsed somewhat by the movement in recent scholarship towards non-enforcement power. See AGRESTO, *supra* note 18, at 128-29; Neuborne, *supra* note 93; cf. BURGESS, *supra* note 18, at 109-26; FISHER, *supra* note 18, at 231-47, 275-79; Murphy, *supra* note 18, at 417.

95. I do assume that the president has the power to decline to enforce a law the Supreme Court has invalidated, or a law similar to one invalidated. He also has the authority to pardon and veto on the basis of his views about constitutional meaning.

96. Cf. Paulsen, *The Most Dangerous Branch*, *supra* note 13, at 237 (invoking similar terminology to analyze theories of judicial supremacy).



A. *Two Views of Departmentalism*

1. *From Skowronek to Whittington on Presidential Leadership.* I begin with Skowronek's model of leadership. Presidential leadership, argues Skowronek, is a matter of the president's authority to exercise his powers in ways that give effect to his vision for society.<sup>97</sup> This authority is not fixed, but depends on political context. Thus, although the office of the presidency is, by its nature, potentially disruptive of the existing "constitutional regime," few presidents are able to realize this potential.<sup>98</sup> Most find themselves in a political context in which so using their power would be impossible or irrational given the cost. Indeed, there is only one major exception. According to Skowronek, when the extant regime is weak, or failing, and the president enters office openly opposed to it, a "reconstructive" politics of leadership is possible, in which the president uses the powers of his office to essentially "remake" American government.<sup>99</sup> Think, says Skowronek, of Jefferson, Jackson, Lincoln, and Franklin Roosevelt, who came into office as the constitutional regime was crumbling, who had campaigned essentially against that regime, and who succeeded in replacing it with one premised on a very different view of political society.<sup>100</sup> For such presidents, he says, the "order-shattering" and "order-affirming" dimensions of the presidency converge: the president disposes of the failing regime and creates a new one by reinterpreting the "mythic" first principles of our system.<sup>101</sup>

Keith Whittington extends Skowronek's analysis to the constitutional dimension of leadership. According to Whittington, constitutional claims are an essential aspect of

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97. See STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE* 24 (1993).

98. In this context, "constitutional regime" refers to the basic "arrangement" of the institutions of government and to the "commitments of ideology and interest[s]" those arrangements embody. See *id.* at 34; see also Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. Rev. 1129, 1135 (2012) (defining "constitutional regime").

99. See SKOWRONEK, *supra* note 97, at 37.

100. *Id.* at 36-37.

101. See *id.* at 20, 37.

political leadership, and thus, a variety of political actors assert such claims. History evidences major shifts in whose constitutional claims are regarded as authoritative; as Whittington describes, presidents, legislative leaders, the Supreme Court, state governors, citizens, and associations have all claimed, and exercised, independent interpretative authority.<sup>102</sup> Success for one of these actors comes at the expense of the others. Leaders strengthen their position by resting their agenda on constitutional foundations, and by undermining the interpretative claims of their competitors. The result, at least at times, is an open struggle for interpretative supremacy. As Whittington describes it, “various political actors have struggled for the authority to interpret the Constitution. They have sought to displace other potential constitutional interpreters, and to assert their own primary authority to determine the content of contested constitutional principles.”<sup>103</sup>

Reconstructive presidents, in particular, regard interpretative authority as essential to their task.<sup>104</sup> Consider again the features of reconstructive politics, in which the president comes to power while the extant regime is faltering, perhaps because it has failed to meet the challenges of the day. The reconstructive president stakes his “warrant” for exercising power on a fundamental opposition to that regime.<sup>105</sup> That opposition, argues Whittington, must be expressed in constitutional terms. Reconstructive efforts rest on the ability of the president to articulate a compelling “constitutional vision”: a “positive vision of how political power should be used” that is both rooted in the Constitution and supports the president’s specific public policy objectives.<sup>106</sup> For example, Jefferson’s

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102. See WHITTINGTON, *supra* note 12, at 15, 51; cf. Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 729 (2011) [hereinafter Levinson, *Parchment and Politics*] (describing the shift of powers between Congress and other institutions and actors).

103. WHITTINGTON, *supra* note 12, at 15.

104. See *id.* at 49-71 (describing the reconstructive presidents).

105. See SKOWRONEK, *supra* note 97, at 34.

106. WHITTINGTON, *supra* note 12, at 53-54.

election in 1800 “meant saving the Constitution from the Federalists’ centralizing and monarchical tendencies.”<sup>107</sup> Similarly, Roosevelt’s defense of the New Deal aimed to provide a constitutional basis for policies securing economic social justice.<sup>108</sup>

These claims bring the president into conflict with the courts. The judiciary, Whittington says, poses “an intrinsic challenge” to the president’s effort to articulate a new constitutional vision, and ongoing judicial interpretation of the Constitution “necessarily frustrates” presidential reconstructive ambitions.<sup>109</sup> This is true regardless of whether the courts actively attack presidential initiatives; their authority alone constitutes a “threat” to the reconstruction.<sup>110</sup> The threat leads reconstructive presidents to attack the courts, framing any judicial efforts to defend the dominant regime as “political” interference rather than proper “legal” decision-making.<sup>111</sup> Once the Court is viewed as “simply taking sides,” the president’s interpretative authority is enhanced.<sup>112</sup> In Whittington’s words, the reconstructive president and the judiciary “*compete over the same constitutional space*, with the authority of presidents to reconstruct the inherited order supplanting judicial authority to settle disputed constitutional meaning.”<sup>113</sup>

2. *Transferring Authority and Sharing Authority.* Nothing in Whittington’s argument implies that departmentalism is necessarily reconstructive. The argument runs in the other direction. Yet if certain aspects of the argument are emphasized, the connection between departmentalism and reconstruction becomes so strong that

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107. *Id.* at 54.

108. *See id.* at 57-58.

109. *Id.* at 52. *But cf. id.* at 53 (“Reconstructive presidents need not be hostile to courts per se or judicial review in general. For most presidents, there may be occasional disagreements with the Court and efforts to alter the trajectory of constitutional law, but there is no crisis of, or challenge to, judicial authority.”).

110. *Id.* at 74.

111. *See id.* at 66.

112. *Id.* at 69-70.

113. *Id.* at 52 (emphasis added).

it is difficult to understand how departmentalism is possible outside the reconstructive enterprise. Departmentalism, we might say, emphasizing a strand in the argument above, is essentially a presidential justification for *taking interpretative power away from another political actor*. Yet taking interpretative power is something possible and desirable only within the politics of reconstruction (more precisely, it defines such a politics).<sup>114</sup> Skowronek’s “affiliated” presidents have little interest in exercising such a power, given its costs. And Skowronek’s “preemptive” leaders—presidents opposed to a vibrant (not failing) regime—generally lack the political strength to mount the challenge.<sup>115</sup> From this perspective, departmentalism is best understood as a tool, or means, of reconstruction. But if it is a means of reconstruction, then a fortiori it is limited to reconstruction.

What’s being emphasized, in effect, is the “zero-sum” character of changes in interpretative authority.<sup>116</sup> An examination of Whittington’s language suggests the emphasis is a fair one. He tells us, for example, that the president and the courts “compete over the same constitutional space,”<sup>117</sup> that the reconstructive president must “supplant[] judicial authority to settle disputed

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114. To be sure, Whittington doesn’t associate departmentalism exclusively with reconstructive presidents. He explores the use of the veto power by non-reconstructive presidents to advance their interpretations of the Constitution. *See id.* at 170-95. Yet this “domesticated departmentalism,” as Whittington calls it, is quite modest. *See id.* at 170. In fact, it is not clear whether domesticated departmentalism is properly regarded as departmentalism at all; according to Whittington, non-reconstructive presidents who used the veto to advance their constitutional interpretations were “careful to recognize the superior warrants of the Court to act as the ultimate constitutional interpreter.” *Id.* at 171. This, however, is judicial supremacy. Moreover, elsewhere Whittington does suggest that (non-domesticated) departmentalism is “fundamentally connected to the politics of reconstruction.” *See id.* at 50, 77-80.

115. *See* WHITTINGTON, *supra* note 12, at 161.

116. Here I mean to draw on the idea of zero-sum games as developed in game theory. *See* DAVID LEWIS, CONVENTION 13-14 (2002); ANATOL RAPOPORT, TWO-PERSON GAME THEORY: THE ESSENTIAL IDEAS 94-95 (1966); Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 218-19 (2009).

117. WHITTINGTON, *supra* note 12, at 52.

constitutional meaning,”<sup>118</sup> that “[t]he president reclaims the authority of [interpreting] the Constitution by delegitimizing the supremacy of the Court,”<sup>119</sup> that “[s]hifting the right to render authoritative decisions regarding contested constitutional meaning from presidents and legislators to judges increases the power of the latter at the expense of the former,”<sup>120</sup> that “[i]nterpretative authority cannot be wrested from the judiciary without being placed elsewhere,”<sup>121</sup> and that, “[a]s presidential authority to interpret the Constitution wanes, judicial authority waxes.”<sup>122</sup> In these places—and indeed throughout *Political Foundations of Judicial Supremacy*—it appears that Whittington conceives of changes in the allocation of interpretative power as being essentially zero-sum. Presidential gain is associated with an equivalent loss in another branch, usually the Supreme Court.

In other words, for Whittington, changes in interpretative authority are *transfers*. Presidential assertions of authority do not create interpretative power, or destroy it, but merely cause its redistribution from one actor to another. To be sure, the direction of the redistribution is variable. In periods of reconstruction, the president finds it desirable to take interpretative authority for himself, while in other periods, he finds it desirable to give interpretative authority to the Court, perhaps to avoid blame for resolving a contentious issue, or permit his coalition to engage in “position taking.”<sup>123</sup> In either case, however, the game of interpretative authority is clearly

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118. *Id.*

119. *Id.* at 74.

120. *Id.* at 84.

121. *Id.* at 22.

122. *Id.* at 287.

123. See *id.* at 84-87; cf. Levinson, *Parchment and Politics*, *supra* note 102, at 726-28. That it is to the president's advantage to cede interpretative power does not show that the game is non-zero-sum. The dispositive matter is whether interpretative authority increases or decreases. What utility the president assigns to his interpretative authority is up to him. See RAPOPORT, *supra* note 116, at 36 (“How one assigns utilities to outcomes is the decision-maker's private affair.”).

zero-sum, or “purely competitive,” since one player’s loss is the other player’s gain.<sup>124</sup>

Consider for a moment whether it is possible to play a *non-zero-sum* game of interpretative authority. This is what some game theorists call a game of “coordination” (as opposed to game of “competition”), although it is probably not a game of pure coordination.<sup>125</sup> In posing this question, what I want to know is whether it is possible for the president and the Supreme Court to act in ways that *increase the interpretative authority of both actors*. It is tempting to suppose that such a thing must be impossible. After all, if the president decides on the meaning of the Constitution, then the Supreme Court cannot, and vice versa.<sup>126</sup> But the temptation is not quite right. In another sense of “decide,” both the president and the Court surely can decide on the meaning of the Constitution. They can decide *together*. This is a thing we normally say (about decisions, if not constitutional ones specifically); it reflects the intuition that some decisions are made jointly. If, indeed, it is possible for the president and the Court to decide together on constitutional meaning, then it is possible to play a non-zero-sum game of interpretative authority. And if it is possible to play such a game, then we have reason to conclude that departmentalism is something more, or something else, than a means of presidential reconstruction.

What would it mean, precisely, for the president and the Supreme Court to decide on constitutional meaning together? One possibility makes use of the idea of “collaboration.” In his influential study of the presidency,

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124. See *supra* note 116 (describing these concepts). This is not to say that it would be impossible to model a different non-zero-sum game on Whittington’s account; but it would not be a game whose payoff was solely interpretative authority.

125. See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 83-89 (1960). Note that Richard McAdams uses the expression “coordination problem” differently, to refer to non-trivial games of coordination, thus distinguishing the Stag Hunt, Battle of the Sexes, and Hawk-Dove from the non-iterated Prisoner’s Dilemma. See McAdams, *supra* note 116, at 218-19.

126. See WHITTINGTON, *supra* note 12, at 84.

Edward S. Corwin argued that “departmental autonomy”—an expression he used to describe the view that, among other things, each branch of the federal government should “be guided by its own opinion of the Constitution”—could result in collaborative decision-making between the president and Congress.<sup>127</sup> Corwin pointed to a dispute between President James Monroe and Representative Henry Clay over the recognition of newly formed governments in 1820s South America. Clay had made several attempts in Congress to recognize governments in Chile and Buenos Aires. His efforts irritated some of Monroe’s cabinet members, who considered recognition a purely presidential authority. In response, Virginia Representative George Tucker defended Clay’s actions as simply an effort to communicate the congressional view of the matter to the president.<sup>128</sup> And, indeed, after further such efforts, President Monroe delivered a message to Congress stating, in effect, “that the time had come to recognize the new republics and inviting Congress, if it concurred in that view, to make the necessary appropriations for carrying it into effect.”<sup>129</sup>

The Clay-Monroe exchange prompted Corwin to remark, “[i]t is thus borne in upon one that the principle of departmental autonomy does not necessarily spell departmental conflict, but that mutual consultation and collaboration are quite as logical deductions from it.”<sup>130</sup> As Corwin understood it, each branch, guided by its own understanding of the Constitution, exercised its powers in ways that invited responsive actions by the other, resulting in a collaborative policy.<sup>131</sup>

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127. See CORWIN, *THE PRESIDENT*, *supra* note 59, at 21, 205, 469 n.19.

128. See *id.* at 217 (citing VI U.S. CONGRESS & THOMAS HART BENTON, *ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856*, at 168 (1857)).

129. *Id.* at 218 (internal citations omitted).

130. *Id.*

131. In this case, the *policy* was the object of collaboration. In other cases, constitutional *meaning*—the allocation of constitutional powers—is the object of collaboration. I draw no bright line between these two topics of interbranch collaboration.

This, in a nutshell, is the second of “two views of departmentalism.” The first view is the familiar one, based on the idea of interbranch competition over interpretative authority. The second view of departmentalism is based instead on the idea of interbranch collaboration. This view is much less familiar, but it is not unknown.

### B. *The Idea of Interbranch Collaboration*

By using the term “collaboration,” I mean to invoke something more than the general idea of dialogue. Interbranch dialogue is consistent with a regime of judicial supremacy, as many others have shown.<sup>132</sup> Interbranch collaboration, I shall argue, is a unique benefit of moderate departmentalism. What do I mean by “collaboration”? Collaboration means *jointly developing a solution to a common problem*. It involves dialogue, but more than dialogue. What more, precisely? Here I want to draw upon the model of collaboration developed in the scholarship on “new governance”<sup>133</sup> or “collaborative governance.”<sup>134</sup> This literature ranges widely, but, in general, it describes the features of what might be called “administrative collaboration”: collaboration between government agencies and business firms over the content, implementation, and enforcement of administrative rules. What is distinctive

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132. See, e.g., FISHER, *supra* note 18; Dorf & Friedman, *supra* note 18, at 62; see also Friedman, *supra* note 18.

133. See Lobel, *supra* note 21, at 344 (describing the model as decentralization that integrates law, economics, and critical legal scholarship, and promising dialogue between the interested, opposing parties); Salamon, *supra* note 21 (defining its collaborative approach that acknowledges both its opportunities and challenges as “new governance”).

134. See Freeman, *supra* note 21, at 22 (describing the five features that characterize “collaborative governance”); *id.* at 6 (characterizing a collaborative administrative process as “a problem-solving exercise in which parties share responsibility for all stages of the rule-making process”). Incidentally, where this literature defines “collaboration,” the definition resembles my own. See, e.g., Jill Purdy, *A Framework for Assessing Power in Collaborative Governance Processes*, 72 PUB. ADMIN. REV. 409, 409 (2012) (defining collaboration as a “process through which parties who see different aspects of a problem can constructively explore their differences and search for solutions” (quoting BARBARA GRAY, *COLLABORATING: FINDING COMMON GROUND FOR MULTIPARTY PROBLEMS* 5 (1st ed. 1989))).



about this body of literature is how it reconceives of these processes and the relationships between agencies and firms embodied in them. I will describe the details of this shift in a moment. For now, note that one of its effects appears to be what I was after above: a game of cooperation. As Orly Lobel puts it, “[a] shift from adversarial legalism to collaboration entails a move from an image of win-lose situations to a win-win environment. All actors come to realize their interlocking interest in the processes of governance.”<sup>135</sup>

The language is suggestive. Administrative collaboration promises to transform an adversarial encounter in which agency and firm compete over regulatory control into a collaborative one. To understand how this might be, and the implications for moderate departmentalism, I want to isolate two key ideas in the new governance literature on collaborative decision-making. I will use these ideas to compare administrative collaboration to inter-branch constitutional interpretation under a regime of moderate departmentalism.

1. *Administrative Collaboration: Peers and Non-Coercion.* The first idea is that collaboration involves *the interaction of peers*. Peers are equal in authority. Thus, administrative collaboration takes place, the literature tells us, within a “horizontal network[]” of public and private entities, rather than a vertical hierarchy of authority headed by the agency.<sup>136</sup> The intended point of contrast is with New Deal theories of public administration.<sup>137</sup>

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135. Lobel, *supra* note 21, at 379; *see also id.* at 405-06 tbl.2; Salamon, *supra* note 21, at 1633 (noting that in new governance “*collaboration* replaces *competition* as the defining feature of sectoral relationships”).

136. *See* Lisa Blomgren Bingham et al., *The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government*, 65 PUB. ADMIN. REV. 547, 547 (2005) (“[H]orizontal networks of public, private, and nonprofit organizations [constitute] the new structures of governance as opposed to hierarchical organizational decision making.”); Lobel, *supra* note 21, at 377.

137. *See* Dorf & Sabel, *supra* note 21, at 270-72 (discussing the ineffectiveness of the New Deal constitutionalism and the call for decentralization and limitation of national authority); Freeman, *supra* note 21, at 3 (comparing, generally, the contestation of administration to that present during the New

Traditional theory conceived of government agencies as possessing complete control over the operation of their programs; thus, a major task of that body of theory was to describe how control should be exercised to accomplish program goals consistent with values of efficiency and democratic legitimacy.<sup>138</sup> In contrast, new governance acknowledges that agencies have only partial control over their programs.<sup>139</sup> Agencies and firms are thus interdependent in ways that blur the line between public and private orders.<sup>140</sup> For example, government agencies depend on regulated entities and industry associations to gather information and provide feedback on policy effectiveness; regulated entities, in turn, depend on government to provide a framework of rules and institutions in which goods and services can profitably be delivered.<sup>141</sup>

But agency dependence on firms and other private entities goes much deeper than this. Firms, industry associations, and public interest groups are often the source of the norms by which firm behavior is measured. In this way, interdependence gives substance to the idea that agencies and the firms they regulate are “peers.”<sup>142</sup> Consider

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Deal); Lobel, *supra* note 21, at 351-54 (discussing the regulatory development of the New Deal and the emergence of a new paradigm).

138. See Salamon, *supra* note 21, at 1628-29 (discussing the shift “from hierarchic agencies to *organizational networks*”).

139. See *id.*

140. See *id.* at 1631 (stating that, under the network theory, “the standard relationship among actors is one of interdependence”); Dorf & Sabel, *supra* note 21, at 354-55 (discussing the dynamic of agencies, requiring them to be interdependent, yet involved in the very interests they regulate); Fiorino, *supra* note 21, at 452 (finding that the complexity of the problems and the level of interdependence create a need for cooperation); Freeman, *supra* note 21, at 30 (discussing that collaboration will involve arrangements that cross the public-private divide).

141. See Dorf & Sabel, *supra* note 21, at 317-19 (discussing the ongoing exchange between agency and regulated entity results in agency learning and collaborative development of rules); Salamon, *supra* note 21, at 1628-29, 1635 (discussing the need for strong governmental involvement in the private sector).

142. See Lobel, *supra* note 21, at 425-26 (“Under such a regime, public authorities allow for cooperative implementation in which government relies upon agents or employees of the regulated entities to help interpret, implement, and enforce applicable rules.” (internal citation omitted)).

the development and enforcement of administrative rules. Regulated entities may be tasked with developing their own company-specific rules that meet general benchmarks or targets described by the agency.<sup>143</sup> Such rules have the benefit of being appropriately tailored to the circumstances and business practices of the firm in question.<sup>144</sup> Their content does not seem “foreign,” misconceived, or unrealistic to firm employees—who may, in fact, play a role in developing the rules.<sup>145</sup> Firms may also enforce rules themselves using internal inspection procedures, backed by governmental audit and sanction processes.<sup>146</sup> Sharing enforcement tasks may benefit all involved. Internal inspectors often enjoy powers considerably greater than government inspectors, and may be able to root out non-compliance behaviors hidden or obscure to an outside observer.<sup>147</sup>

The second key idea is that collaboration is *non-coercive*. Administrative collaboration requires both agency and firm to employ the techniques of obtaining freely given consent: negotiation and persuasion. The need for negotiation and persuasion follows closely from agencies’ lack of complete control over their regulatory programs, and their resulting dependence on regulated entities. As Lester Salamon describes the connection, “[g]iven the pervasive interdependence that characterizes [horizontal] networks, no entity . . . is in a position to enforce its will on the others over the long run. In these circumstances, negotiation and persuasion replace command and control as the preferred management approach.”<sup>148</sup> Simple examples again illustrate the idea. Consider the task of gathering information from regulated entities. Accessing and analyzing firm

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143. See AYRES & BRAITHWAITE, *supra* note 21, at 106-08.

144. See *id.*

145. See *id.* at 110 (recognizing that rules can be simple and specific, rather than having to account for an endless range of activities or strategies used industry-wide).

146. See *id.* at 35-38 (discussing sanctions and compliance); Freeman, *supra* note 21, at 30-31 (discussing a system of monitoring compliance internally).

147. See AYRES & BRAITHWAITE, *supra* note 21, at 104-05.

148. Salamon, *supra* note 21, at 1635 (emphasis omitted).

information is vital to the rule-making, implementation, and enforcement tasks. Yet government agencies lack the resources to collect and fully understand much of this information. As Ayres and Braithwaite report, even in cases like nuclear regulation, “the facts of life are that the wealthiest state in the world monitors only 1 or 2 percent of ‘safety-related’ activities at nuclear plants annually.”<sup>149</sup> To determine whether firms are complying with rules, regulators must rely on the firms themselves, as well as industry associations and public interest groups, to gather and analyze relevant information. Agencies must negotiate standards and protocols governing collection and access to such information, and must persuade firms, their associations, and key public interest groups to take an active and comprehensive approach to information-management tasks.

Nothing about this argument presupposes that regulators will be able to negotiate favorable terms or persuade firms to cooperate in every instance. This may prove difficult, or in some cases impossible. I am unaware of any new-governance scholars who assume that regulators and firms will share a basic understanding of the purposes of regulation or its relative importance, and will thus be able to “deliberate” about best rules and how to enforce them.<sup>150</sup> Agencies are nonetheless often successful because negotiation and persuasion are desirable strategies for all involved. They are relatively non-invasive, and they are less costly for both agency and firm than adversarial measures. From the agency perspective, employing persuasion can help to develop a culture of compliance at a firm. Ayres and Braithwaite have shown that if regulators signal to firm employees that they regard them as responsible, it encourages employees to take a positive, public-regarding approach to regulatory compliance, instead of a cynical

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149. See AYRES & BRAITHWAITE, *supra* note 21, at 103 (citing Peter K. Manning, *The Limits of Knowledge: The Role of Information in Regulation*, in MAKING REGULATORY POLICY 49 (Keith Hawkins & John M. Thomas eds., 1989)).

150. See *id.* at 35-36; Dorf & Sabel, *supra* note 21, at 321-22 (noting that collaboration can aid problem-solving deliberation); Lobel, *supra* note 21, at 311 (explaining how soft law allows for open communication and deliberation).

one.<sup>151</sup> From the firm perspective, such a culture promotes lawful behavior. More broadly, the use of negotiation and persuasion can encourage agency and firm to approach rule-making and enforcement with a “problem-solving” attitude, rather than an adversarial one—a result associated with reduced costs.<sup>152</sup>

2. *Comparing Administrative Collaboration and Moderate Departmentalism.* Peer interdependence and non-coercion suggest a natural comparison between administrative collaboration and departmentalism. Inter-branch constitutional interpretation under conditions of moderate departmentalism exhibits both of these features.

First, it involves peer interactions. Equality of rank, or branch coordinacy, was a premise in the argument above for moderate departmentalism. Coordinacy, it was argued, implies that each branch is free to exercise its powers as it sees fit, and, by implication, that it may interpret the content and scope of those powers. This autonomy—what Corwin called “departmental autonomy”—implies that each branch enjoys an imperfect control over constitutional meaning.<sup>153</sup> If the president has an implied authority to determine for himself the meaning of “reasonable suspicion,” then the Supreme Court lacks complete control over the meaning of the Fourth Amendment, the content of the body of fundamental law governing police practices. Similarly, a president who wishes to operate under a certain construction of the Fourth Amendment depends on the Supreme Court to affirm that construction in the context of litigation. Just as in the administrative context, incomplete control generates a kind of institutional “interdependence” among the branches. Indeed, the implication was not lost on the framers. As Paulsen has pointed out, James Wilson

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151. See AYRES & BRAITHWAITE, *supra* note 21, at 47-51.

152. See Freeman, *supra* note 21, at 22-23; see, e.g., *id.* at 41-49 (demonstrating how the EPA used negotiation and persuasion in rulemaking).

153. See CORWIN, THE PRESIDENT, *supra* note 59, at 21, 205, 469 n.19.

drew much the same conclusion about the effects of departmental independence on the president.<sup>154</sup>

Second, as a corollary, moderate departmentalism necessitates the use of non-coercive techniques of obtaining consent, particularly persuasion. The reasoning is much the same as it was in the context of administrative regulation. The president and the Court lack complete control over the determination of constitutional meaning. Each has various tools to encourage the other to adopt its favored construction, but neither will be able to force its view on the other over the political long run.<sup>155</sup> It appears, then, that under a regime of moderate departmentalism, both the president and the Court will need to engage in some amount of persuasion to achieve goals that depend on interbranch cooperation.<sup>156</sup> Of course, efforts to persuade may or may not be successful; the branches may go their own ways. I will return to this point at length below. But when persuasion does produce a shared solution, there is some reason to expect the benefits of the “problem-solving” orientation discussed above. A solution freely chosen by both departments is likely to embody, to some degree, the understanding and priorities of each, since each will have had an opportunity to urge the merits of its view on the

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154. Paulsen, *The Most Dangerous Branch*, *supra* note 13, at 239 (“Wilson maintained that this independence of the departments would create a mutual *dependence* (or inter-dependence), because, in the same way that each branch would possess autonomous power within its sphere, none of the branches would be bound by the ‘proceedings’ of the others.”). Viscount Bolingbroke also advanced a similar argument. VILE, *supra* note 49, at 81 (“Bolingbroke then presented a defence of his view that the independence of the parts of the government . . . was perfectly compatible with their ‘mutual dependency.’ The parts of the government have each the power to exercise some control over the others, and they are therefore mutually dependent.”).

155. See WHITTINGTON, *supra* note 12, at 77-78 (portraying the judiciary as representative of outdated interests, giving a president with a mandate to remake politics the upper hand); SKOWRONEK, *supra* note 97, at 27-28 (discussing the paradox that, for presidents, “*the power to recreate order hinges on the authority to repudiate it*”).

156. I do not mean to rule out negotiation, but it seems likely that negotiation between the Court and the other branches will almost always be tacit, due to the norms governing judicial decision-making and judicial ethics more broadly.

other, and to withhold approval until the proposed solution reflects that perspective.<sup>157</sup>

In these respects, then, moderate departmentalism resembles regulatory collaboration between agencies and firms. The comparison is rather straightforward. The Supreme Court resembles the government agency. Its “program” is the determination of constitutional meaning. Under a regime of moderate departmentalism, the Court lacks complete control over this program. The president is a regulated entity: he is subject to constitutional law. Since the president has equal authority to determine constitutional meaning, the Court must depend on him as a source of constitutional norms. The Court cannot force the president to adopt its own view of the law, at least over the long run. It must thus obtain his freely-given consent, principally by persuasion.

3. *The Effect of Moderate Departmentalism on the President.* Consider, now, how these features of moderate departmentalism affect the role of the executive in constitutional litigation. Executive attorneys, of course, currently play a significant role in constitutional litigation. They contribute to the development, in litigation, of an extensive written record reflecting the executive understanding of the Constitution; they engage in repeated face-to-face deliberations with judges, other governmental actors, and private litigants concerning this understanding; and they play a role in determining the agenda of constitutional litigation before the Supreme Court.<sup>158</sup> Moderate departmentalism enhances this already significant role. Under a regime of moderate departmentalism, the president is free to issue orders that incorporate or ignore the Court’s determination of a point of constitutional law. Because moderate departmentalism is non-coercive in this way, it transforms the tone and function

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157. See Fiorino, *supra* note 21, at 458-61 (describing “social learning”).

158. David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 245 (2009) (finding that when the Court calls for the views of the SG, it is thirty-seven times more likely to grant a cert petition).

of the adjudicative proceedings in which the executive takes part. The incentive of a court is to use such proceedings to gather information from executive attorneys about the president's view of the law, and to persuade those attorneys of the court's own view. The cumulative effect is to make the president's participation in the interbranch constitutional dialogue much more meaningful.

"Meaningful participation" transforms the relationship between the president and the resultant constitutional doctrine. To see this, consider again the basic analogy between the president and stakeholders in collaborative decision-making. The president is a stakeholder in the determination of constitutional meaning. An interpretation may limit presidential powers and make it considerably more difficult for the president to achieve his agenda and manage his political coalition. Such stakeholders, who have considerable risk exposure, are more likely to abide by decisions when they are made with their input. As Ayres and Braithwaite report, "considerable evidence indicates that participation in a decision-making process increases the acceptance and improves the execution of the decisions reached."<sup>159</sup> Jody Freeman explains the reasoning: "Giving stakeholders an opportunity to participate directly in the rule-making process grants them a degree of 'ownership' over a rule and increases their commitment to its successful implementation."<sup>160</sup> Meaningful participation, in the language of public administration, brings "buy in."<sup>161</sup>

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159. AYRES & BRAITHWAITE, *supra* note 21, at 113 (citing Victor H. Vroom, *Industrial Social Psychology*, in V THE HANDBOOK OF SOCIAL PSYCHOLOGY 196-268 (2d ed. 1969)).

160. Freeman, *supra* note 21, at 23-24 (citing Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 658-60 (1976); *see also id.* at 27 ("Meaningful participation . . . gives [affected parties] some *responsibility* for the regulatory regime."); *cf.* Fiorino, *supra* note 21, at 447-48 (describing the regime of "reflexive law," which gives regulated parties internal incentives to comply).

161. Of course, the point is not limited to studies of public administration but is the basis of broader empirical research on adjudicative legitimacy. For an influential defense of the significance of participation to the legitimacy of the law, see TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 94-104, 172-73 (1990) (arguing that procedural justice is central to the legitimacy of adjudication).



Participation is more likely to be “meaningful” when process enables a party to make its voice heard, to directly challenge competing views, and to object to the resulting decision or even decline to implement it. In the context of negotiated rulemaking, excessive assertions of authority by agency officials may lead regulated entities to conclude that negotiation is a sham, or “mere process,” and that the agency will independently decide on the appropriate rule itself.<sup>162</sup> In this case, the president’s residual authority to act on his own view of constitutional meaning suggests that a rational Court will seriously consider his views, which in turn encourages a greater investment by the president in the process. If the view later announced by the Court expressly reflects the president’s concerns as stated on the record and in the public view, the president will have greater reason to take “ownership” over that rule.

Consider the converse situation. A stakeholder with no role in making a decision in which he has considerable exposure is unlikely to abide by that conclusion over the long run.<sup>163</sup> This is especially the case where the excluded party retains some discretion and has special expertise in the regulated area; when a situation arises in which the party believes that his interests (or overall social welfare) would be advanced by ignoring the prior decision, he will find little difficulty in concluding that the belief is justified.<sup>164</sup> The president, of course, can call on a number of reasons for following such a course of action. The Court and the Congress are unfamiliar with the demands of

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162. See Freeman, *supra* note 21, at 37-40 (describing the process of negotiated rulemaking under the federal Negotiated Rulemaking Act); *id.* at 27-28 (“The administrative law landscape is littered with process reforms that have failed to provide meaningful participation, particularly in environmental decision making, because the responsible agency has reacted defensively to them or because public input has had little discernible impact on the way in which problems and solutions are conceived.”) (internal citation omitted).

163. See Freeman, *supra* note 21, at 23 & n.60.

164. See AYRES AND BRAITHWAITE, *supra* note 21, at 104-05 (“While anyone telling us how to do our job is a pain in the ass, interventions from ‘outsiders’ are harder to take.”); *cf.* Salamon, *supra* note 21, at 1635 (arguing that, under the contemporary framework of administrative law, “no entity, including the state, is in a position to enforce its will on the others over the long run”).

suppressing rebellion and carrying out war, and largely unequipped to manage such tasks.<sup>165</sup> Where the stakes are so high, the president may ignore or undermine a determination of constitutional meaning that he regards as inappropriate to his task.<sup>166</sup>

The logic is quite different if the president has meaningfully participated in the process by which constitutional meaning was settled. Suppose the question of the balance of war powers between Articles I and II comes before the federal courts. Executive attorneys appear in the courts to articulate the president's view. In the Supreme Court, the Solicitor General describes the view and responds to the concerns of the justices and other stakeholders (perhaps Congress). The Court, aware that the president may choose to go his own way, sensibly incorporates his views into its opinion. This undermines the basis cited above for the president to ignore the constitutional determination of another branch. The president can no longer complain that the rule was fashioned without regard for the demands imposed by armed conflict or other unique presidential responsibilities.

In this way, moderate departmentalism enhances the authority of *both* the president and the Supreme Court over the determination of constitutional meaning. Begin with the president. Moderate departmentalism recognizes his authority to refuse to adopt a constitutional interpretation proffered by the Court. Since the president enjoys no such authority under the current regime of judicial supremacy, this represents an increase in authority. Now consider the Supreme Court. The Supreme Court gives up the authority to make final and supreme determinations of the meaning

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165. The point is a common one. See, e.g., David Gray Adler, *Foreign Policy and the Separation of Powers: The Influence of the Judiciary*, in *JUDGING THE CONSTITUTION: CRITICAL ESSAYS ON JUDICIAL LAWMAKING* 154, 172 (Michael W. McCann & Gerald L. Houseman eds., 1989) [hereinafter Adler, *Foreign Policy*]; cf. POSNER & VERMEULE, *supra* note 92, at 10 ("When the hour of crisis tolls, Congress has little incentive or capacity to enforce such attempted precommitments.").

166. See, e.g., Merrill, *supra* note 19, at 73 ("If the political branches strongly disagree with the [legally binding] judicial understanding, it will be ignored or distinguished or limited to its facts.").

of the Constitution. Yet, at the same time, the Court's *informal* authority to pronounce constitutional rules is increased, since the president's participation gives him reason to regard the Court's announced rules as legitimate. To the extent that this legitimacy is lacking under a regime of judicial supremacy, this represents an increase in authority for the Court. Thus the total amount of interpretative authority is increased, rather than being transferred from one department to another. What we have, I suggest, is a model for understanding how coordinate departments can decide *together* on the meaning of the Constitution.

C. *Agency Powers of Enforcement, and Other Complications*

The comparison between administrative collaboration and moderate departmentalism is suggestive. Yet it raises a number of obvious questions. Consider, for example, the role of the agency in new governance theory. Even though agencies do not possess complete control over the operation of their programs, they possess considerable authority, and the use of this authority is essential, in a variety of ways, to the success of administrative collaboration.<sup>167</sup>

To begin, agencies convene collaborative rulemaking processes. For example, under the Negotiated Rulemaking Act of 1990, which governs the negotiation of administrative rules between agencies and stakeholders, the agency itself determines when it is necessary to formulate a new administrative rule.<sup>168</sup> If the agency plans to negotiate the rule with interested parties, it may appoint one of its own officials as "convener," a position tasked with determining

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167. There are other complicating factors beyond agency powers. For example, the framework of administrative law, which provides for judicial review of the resulting administrative rule, establishes key boundaries on agency and firm behavior. Public-interest groups are also key players and may prevent cooperation from evolving into agency capture. See AYRES & BRAITHWAITE, *supra* note 21, at 54-60.

168. Negotiated Rulemaking Act of 1990, 5 U.S.C. § 563(a) (2006) ("Determination of Need for Negotiated Rulemaking Committee"); see also Freeman, *supra* note 21, at 38 (discussing the process behind formulating a new rule).

who should be invited to participate in the negotiation.<sup>169</sup> After consulting with regulated entities, industry groups, public interest groups, and various other entities, the convener establishes an agenda for negotiation.<sup>170</sup> These controls give the agency tremendous influence over the content and tone of the negotiation—factors essential to successful collaboration.<sup>171</sup> As one might expect, it also falls to agency officials to facilitate deliberations by encouraging stakeholders to actively participate and to invest in the process.<sup>172</sup> Agencies also provide the forum within which collaboration can take place. This means at least a physical setting where parties can meet and deliberate, face-to-face, over an extended period of time. The point is not a superficial one; research supports the conclusion that extended face-to-face interaction encourages parties to take a cooperative, problem-solving stance towards dispute resolution, whereas the exchange of a paper record is associated with excessively adversarial behavior and posturing.<sup>173</sup>

It is in enforcement, however, that government agencies play their most important role. This point is not lost on new governance scholars, despite their well-known support of self-enforcement processes.<sup>174</sup> Ayres and Braithwaite observe “a long history of barren disputation” between those

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169. 5 U.S.C. § 563(b); Freeman, *supra* note 21, at 38 (citing NEGOTIATED RULEMAKING SOURCEBOOK 123-31 (David M. Pritzker & Deborah S. Dalton eds., 1995)).

170. Freeman, *supra* note 21, at 38.

171. *See, e.g.*, Purdy, *supra* note 134, at 411.

172. *See* Freeman, *supra* note 21, at 37-38.

173. *See* AYRES & BRAITHWAITE, *supra* note 21, at 91 (“Empirically, there can be no doubt that dialogue transforms the nature of regulatory encounters.”); Freeman, *supra* note 21, at 22-24; Lobel, *supra* note 21, at 383; *see also* Chris Huxham & Siv Vangen, *Leadership in the Shaping and Implementation of Collaboration Agendas: How Things Happen in a (Not Quite) Joined-Up World*, 2000 ACAD. MGMT. J. 1159, 1170-71 (2000) (noting the effect of face-to-face contact on environmental partnership).

174. *See, e.g.*, AYRES & BRAITHWAITE, *supra* note 21, at 19-53 (discussing the importance of strong punishment to promote self-enforcement); Freeman, *supra* note 21, at 32.; *cf.* Fiorino, *supra* note 21, at 456 (explaining the need for agency independence).

who—unlike themselves—believe that “gentle persuasion works in securing business compliance with the law,” and those who—also unlike themselves—treat firms like bad actors and expect their compliance “only when confronted with tough sanctions.”<sup>175</sup> The new governance strategy is to transcend this debate by describing enforcement processes that *mix* strategies of persuasion and sanction.<sup>176</sup> Thus, according to Ayres and Braithwaite, building on work by John Scholz, agencies should employ a tit-for-tat enforcement strategy in which firm non-compliance is met with an escalating series of sanctions, graded appropriately to the severity and degree of noncompliance.<sup>177</sup> The concomitant distribution of enforcement practices can be represented as a layered “enforcement pyramid”: at the base of the pyramid, the thickest layer (and thus the activity most often engaged in) is persuasion, on top of which lie successively smaller layers of increasingly severe sanctions.<sup>178</sup> Instrumental to the solution is the existence, at the very top of the pyramid, of a “benign big gun.” The big gun is an “enormous” agency power, such as the ability to revoke a firm license or shutter a business.<sup>179</sup> Although empirical studies suggest that agencies rarely use big guns (thus they are “benign”), the existence of such a power affects other, lesser agency powers.<sup>180</sup> According to Ayres and Braithwaite, the greater the sanction available to an agency, the more the agency will be able to “push regulation down to the cooperative base of the [enforcement] pyramid,” and thus employ enforcement strategies like persuasion.<sup>181</sup> Indeed, some kind of significant sanction is necessary if firms are to consistently adopt a public-regarding approach

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175. AYRES & BRAITHWAITE, *supra* note 21, at 20.

176. *Id.* at 21.

177. *Id.* at 20-21, 35-40. Tit-for-tat is a strategy in an iterated game, in which a player initially cooperates, but then defects if the other player defects. See John T. Scholz, *Voluntary Compliance and Regulatory Enforcement*, 6 LAW & POLY 385, 392-93 (1984).

178. See AYRES & BRAITHWAITE, *supra* note 21, at 35-36.

179. *Id.* at 40.

180. *Id.* at 40-41.

181. *Id.* at 40-44.

to regulatory enforcement, rather than a narrowly self-interested one: “[W]ithout the spectre of sanctions in the background, . . . social responsibility concerns would not occupy the foreground of our deliberation.”<sup>182</sup>

These differences threaten to undermine the very simple comparison drawn above between administrative collaboration and moderate departmentalism. Specifically, the absence of a judicial “big gun” suggests that, under a regime of moderate departmentalism, the president has little reason to abide by rules announced by the Court if they do not advance his interests. It is to this objection that I turn in the remainder of this Article. My strategy will be to argue that, despite the differences canvassed above, the Supreme Court *does* have a kind of judicial “big gun.” Avoiding this sanction encourages the president to participate with the Court in constitutional interpretation and to comply with its results.

#### D. *The Rationality of Constitutional Collaboration*

We can begin to consider why, under moderate departmentalism, the president would adopt an unfriendly constitutional rule by drawing on a body of scholarship that considers why political actors ever voluntarily comply with adjudication.<sup>183</sup> It is usually supposed that political actors comply with the exercise of judicial power because they respect formal constitutional and statutory boundaries. But

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182. *Id.* at 47.

183. See, e.g., WHITTINGTON, *supra* note 12; Graber, *Establishing Judicial Review?*, *supra* note 30; Graber, *The Nonmajoritarian Difficulty*, *supra* note 30; David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723 (2009); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975); Levinson, *Parchment and Politics*, *supra* note 102, at 658, 661; McAdams, *supra* note 116, at 239-41, 248-49; Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043 (2005) [hereinafter McAdams, *Expressive power of Adjudication*]; J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994); Matthew C. Stephenson, “When the Devil Turns . . .”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 62-63 (2003); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997).

a little reflection suggests the answer is incomplete.<sup>184</sup> For it is not obvious why powerful political actors would obey formal legal boundaries when doing so handicaps them. The judiciary cannot compel their obedience; it is the political actors who control the powers of sanction. As Matthew Stephenson put it in a now oft-quoted line, “[w]hy would people with money and guns ever submit to people armed only with gavels?”<sup>185</sup>

The answer proposed by this line of scholarship is that obeying formal constitutional boundaries actually *benefits* political actors. Compliance enables political actors to advance their agenda—for example, by achieving a policy result or satisfying the demands of a lobbyist or coalition member. Recall Keith Whittington’s argument that a president might transfer interpretative authority back to the judiciary to avoid blame for resolving a politically divisive issue.<sup>186</sup> Delegation thus advances, not harms, the interests of political actors; it allows them to preserve their own popularity and prevent the fracture of their political coalition.<sup>187</sup>

Other arguments make use of the logic of coordination. For example, building on an earlier model described by Barry Weingast, David Law has recently argued that judicial review solves a coordination problem associated with the popular control of governmental actors.<sup>188</sup> Coordination problems are what I called above “non-zero-sum” games of strategy; they are games in which both players stand to benefit if they can settle on the right combination of moves. According to Law, all forms of representative constitutional government pose such a

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184. For a recent account of the explanatory deficit, see Levinson, *Parchment and Politics*, *supra* note 102, at 659-61.

185. Stephenson, *supra* note 183, at 60.

186. See WHITTINGTON, *supra* note 12, and accompanying text.

187. See Graber, *The Nonmajoritarian Difficulty*, *supra* note 30, at 37-45; Stephenson, *supra* note 183, at 62-63.

188. See Law, *supra* note 183, at 723; see also Weingast, *supra* note 183, at 246-52.

problem.<sup>189</sup> The interests of political actors diverge from the interests of citizens, and this divergence can lead political actors to exceed or abuse their grants of power. Yet a citizen who tries *on his own* to enforce constitutional boundaries against the government is likely to pay a very high cost for doing so (and be unsuccessful), while working *together* will produce success at much lower a cost.<sup>190</sup> This suggests that individuals will resist unconstitutional action only if they expect other individuals to resist, and expect that other individuals expect the same of them. Judicial decisions create such expectations by “generating common beliefs and common knowledge about both the constitutionality of government conduct and the ways in which other citizens will react.”<sup>191</sup> Courts thus enable citizens to coordinate their responses to governmental action.<sup>192</sup>

These ideas pose two important questions for my defense of moderate departmentalism: (1) Does moderate departmentalism provide the president any strategic reasons to comply with constitutional rules announced by the Supreme Court, even if they are unfriendly? If so, then we can answer the skepticism, expressed above, that the president would ever comply with such rules. (2) Does moderate departmentalism *interfere with* the strategic benefits associated with judicial review under a regime of judicial supremacy? In other words, is judicial supremacy an assumption in the accounts offered by Whittington, Graber, Law, Weingast, and others?

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189. See Law, *supra* note 183, at 730-31 (citing Martin Shapiro, *The Success of Judicial Review and Democracy*, in MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 149, 182 (2002)).

190. See Weingast, *supra* note 183, at 247-48.

191. Law, *supra* note 183, at 732; cf. Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 999 (2008) [hereinafter Posner & Vermeule, *Constitutional Showdowns*]; David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 910-19 (1996). More specifically, court judgments create a “focal point” by signaling the existence of a constitutional violation.

192. For other examples of this kind of argument, see Levinson, *Parchment and Politics*, *supra* note 102, at 708-10, and McAdams, *Expressive Power of Adjudication*, *supra* note, 183, at 1074-80.



It is to these questions that I turn below. In taking up these issues, I do not assume that the logic described in the previous Part—the president’s meaningful participation in the determination of constitutional meaning—is insufficient to explain his voluntarily compliance with constitutional rules announced by the Supreme Court. Indeed, I argued above that, as an empirical matter, meaningful participation in the formulation of a rule makes it more likely that one will freely comply with it.<sup>193</sup> This is the case even when resultant rules come at significant cost to the actor in question.<sup>194</sup> Yet this cannot, and should not, be the whole of the case for moderate departmentalism. As Ayres and Braithwaite have persuasively argued, the best regulatory enforcement strategies are *dynamic*; they recognize that a plurality of considerations influence individual decisions—legal, moral, and strategic—and adapt in response to individual choices.<sup>195</sup> Firm leaders, the authors suggest, have “multiple selves”: they are profit-maximizers, perfectionists about their products or services, law-abiders, and so on.<sup>196</sup> We hope that firm personnel will respond to regulators with their best, most public-regarding selves—but we know it may not come to pass. I assume that presidents are much the same, and, thus, that moderate departmentalism must support a dynamic strategy of “constitutional enforcement.” It must be prepared for the multiple selves of the modern American president.

1. *Strategic Compliance Under Moderate Departmentalism*. It has long been understood that the logic of *repeat play* is central to voluntary compliance with the

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193. See, e.g., AYRES & BRAITHWAITE, *supra* note 21, at 113.

194. See Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 759, 780-81 (2010); cf. TYLER, *supra* note 161, at 94-105.

195. See AYRES & BRAITHWAITE, *supra* note 21, at 35-47.

196. See *id.* at 19-20; see also Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1519 (2000) (“Individuals have multiple conflicting identities, both collective and individual. Sometimes individual members of a group act in accordance with a decision frame in which they regard themselves as ‘I’s rather than as ‘we.’ . . . [W]e observe far more cooperation and successful collective action than can be explained by rational choice theory.”).

law.<sup>197</sup> In 1984, John Scholz modeled what he called the “enforcement dilemma” as a prisoners’ dilemma-type game between regulators and firms. The game works as follows. Regulator and firm are each given the choice of cooperating or defecting. In the case of the regulator, defection means “harassing” the firm; and in the case of the firm, it means evading the regulator.<sup>198</sup> Payoffs in the game follow the distribution of the prisoners’ dilemma. The firm pays the highest compliance costs if it cooperates but the regulator harasses; and the lowest costs if it evades and the regulator cooperates. The regulator obtains the least pollution reduction (for example) if it cooperates but the firm evades; and the greatest reduction if it harasses and the firm cooperates. This distribution, of course, makes mutual cooperation impossible. The firm’s best strategy (for reducing costs) is to evade, whatever the regulator does; and the regulator’s best strategy (for reducing pollution) is to harass, whatever the firm does. The equilibrium is thus harassment and evasion. Meanwhile, the optimal strategy—mutual cooperation—is impossible, at least on the assumptions of the game.<sup>199</sup>

All this is changed by repeat play. Repeat play requires one to consider the prospect of *future* payoffs. Since players in future rounds may consider the choices made now, one’s present choice can affect future payoffs. Thus, future payoffs matter to rational actors’ present choices. If the present value of future cooperative payoffs is higher than the firm’s payoff from evading in the present round, then it will be rational for the firm to cooperate. Indeed, it can be demonstrated that if the agency adopts a reciprocal strategy, such as tit-for-tat (cooperate as long as the other

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197. See, e.g., Scholz, *supra* note 177. For an example in the separation of powers context, see Ramseyer, *supra* note 183, at 722.

198. More precisely, Scholz called the evasion payoff for the firm “temptation,” see Scholz, *supra* note 177, at 389, but “temptation” is a term sometimes used to refer to *any* defection strategy associated with a high individual payoff. I therefore use the term “evasion,” which naturally calls to mind a familiar firm behavior in the face of regulation.

199. See *id.* at 390; see also McAdams, *supra* note 116, at 215-16. One of the assumptions of the game is that each player will act rationally, given their interests. In an actual encounter, of course, this may not be the case.

player does), a firm can guarantee itself a higher long-term payoff by cooperating every round than by using any strategy involving evasion.<sup>200</sup> In this way, repeated interactions make voluntary cooperation possible.

We can use the idea of repeat play to show why it is rational, under a system of moderate departmentalism, for the president to voluntarily comply with unfriendly constitutional rules. Suppose the president meaningfully participates in an interbranch process of constitutional interpretation, as described above, and that the Court announces a constitutional rule unfriendly to his interests. Suppose further the president's participation in the process does not lead him to adopt the Court's view. Even so—even where the president is, on balance, unmoved by his participation in the interpretative process—he must still consider the prospect of *future* interbranch relations. Voluntarily complying with a constitutional rule announced by the Supreme Court will affect the president's future interactions with the Court, the Congress, and the people, and will affect the benefits he can hope to obtain from these future interactions.

The core idea can be developed in a number of ways, but here are two specific future consequences that a rational president will consider. First, ignoring the Supreme Court may produce a *higher-order conflict* the president will lose. Simply ignoring an opinion of the Supreme Court is likely to generate litigation, which could result in an order from a federal court reflecting the Supreme Court's previously expressed views. Ignoring *that* order would touch off a higher-order dispute about the presidential power to ignore valid court orders—a dispute in which the president is unlikely to prevail. As I will explain below, the shift to the higher-order dispute reproduces something like the dynamic of Ayres and Braithwaite's "enforcement pyramid." Second,

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200. See Scholz, *supra* note 177, at 392-93. Certain conditions must obtain. Principally, the value of the future cooperative payoffs must exceed the value of the present payoff associated with harassment or evasion. See *id.* at 392. The game must also continue indefinitely. See RAPOPORT, *supra* note 116, at 131-32. And there must be no ambiguity about what counts as cooperation. See Levinson, *Parchment and Politics*, *supra* note 102, at 685.

even if the matter on which the Court announces an unfriendly rule is crucially important to the president, he may ultimately gain by voluntarily accepting the construction of the Court. In a political regime where legitimacy can enhance constitutional authority, engaging in deliberation and freely complying with its results can enhance the *reputational* authority of the complying actor. It thus makes future benefits possible that might be impossible otherwise.

a. Higher-Order Conflict. Imagine the following case. The president interprets a statute authorizing indefinite military detentions of enemy combatants as impliedly suspending the writ of habeas corpus.<sup>201</sup> The statute provides for an administrative determination of combatant status, but no opportunity to subsequently challenge the determination by presenting evidence or confronting witnesses. After the president announces his view, an enemy combatant held pursuant to the law petitions a federal district court for a writ of habeas corpus, challenging his detention. The district court denies the petition and the denial is upheld on appeal, but the Supreme Court reverses the decision, holding that the statute in question did not suspend habeas, and that the combatants are entitled to a more extensive legal process for challenging the status determination. On remand, the district court grants the petition and executive officers comply with the court's orders.

Now imagine that the president refuses to comply with *future* court orders based on the Supreme Court's decision, citing his disagreement with the Court's construction of the statute, constitutional law, and the crucial national interests at stake.<sup>202</sup> Consider the president's options in such a case. If a district court issues a writ of habeas corpus, the president may appeal the order, but he is likely to lose in the court of appeals, which is bound by the same precedent as the district court. He may then seek a writ of

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201. *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (discussing a similar set of facts).

202. *See* Easterbrook, *supra* note 31, at 926 & n.57 (acknowledging this possibility).

certiorari from the Supreme Court, but given the Court's recent determination of the issue, the writ is unlikely to be granted.<sup>203</sup> If the president refuses to enforce the habeas writ on remand from the court of appeals, the petitioner will ask the district court to enforce it.

At this point, the picture doesn't look good for the president. Absent extraordinary political circumstances, it seems unlikely that the president will be able to simply refuse the orders of the district court to enforce the writ. Crucially, the issue at this point becomes entirely general: the question is whether the president has the duty to execute valid orders with which he disagrees. Nearly all scholars of presidential power agree that he has such an obligation.<sup>204</sup> Moreover, even if the president were to succeed in persuading the Supreme Court to issue a writ of certiorari, he would be faced with the task of persuading the Court to give up a rule it had, *ex hypothesi*, only just announced. Without a strong reason for urging the Court to reverse itself, he is unlikely to succeed.<sup>205</sup> If he knows he is unlikely to succeed, he is unlikely to try.<sup>206</sup>

This is what I call the case of *higher-order conflict*. Where the president's interpretation of the Constitution can give rise to litigation, simply ignoring a recent decision of

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203. A "straight deny" would be most likely. See SUP. CT. R. 10 (explaining none of the criteria for certiorari would exist in a suit concerning an issue that has just been resolved by the Court). But see Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1115 (1988) (when federal government petitions, cert is "significantly more likely"); Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 750-51 (2001) (finding a positive correlation between grant of cert and the import of the issue in the case, such as "core governmental powers").

204. Post & Siegel, *supra* note 16, at 1033.

205. In this respect, Barry Friedman's account of the "constitutional dialogue" that followed *Roe v. Wade* feels somewhat forced; for surely, under a regime of judicial supremacy, the dialogue would *not* have permitted Congress to reject the reasoning of the Supreme Court, as President Reagan in fact urged it to do. See Friedman, *supra* note 18, at 661-68. To be sure, even under a regime of departmentalism, the *states* would not be authorized to disregard a decision of the Supreme Court—I am not defending *nullification* or "state review."

206. Cf. Posner & Vermeule, *Constitutional Showdowns*, *supra* note 191, at 1009.

the Supreme Court is likely to result in litigation the president will lose. The president will then be tasked with making the *general* case that he can ignore court orders, and this will be extremely difficult to do. Given this array of options, the president is unlikely to ignore the Supreme Court's interpretation of the Constitution where doing so creates a justiciable case or controversy. It risks creating a higher-order conflict he cannot win.

One response to my argument might be the following: "Even if you are right about this, I don't see the advantage over judicial supremacy with respect to limiting the exercise of executive power. Isn't the result just the same? Isn't the president already required to abide by the Court's view of the Constitution? You would just be creating *more* litigation, which is the last thing we need. We'd also be left with many more judicial opinions to make sense of. In fact, wouldn't the result be a kind of 'pointillist' body of precedent governing executive power?<sup>207</sup> How is that desirable?"

It is indeed correct that departmentalism of the variety I defend here is not far from judicial supremacy. As long as we keep intact the general obligation for the president to comply with valid legal judgments, we will not end up with an executive branch bound only by political forces.<sup>208</sup> But this is a strength of the account, not a weakness. It shows that moderate departmentalism is hardly a radical position.

Moreover, my opponent's response is incorrect in the following sense: there is a beneficial difference between the departmentalism described above and a regime of judicial supremacy. The difference is easiest to see if we focus on the question of when the president is likely to seek, and likely to obtain, a writ of certiorari in a case putatively governed by a recent decision of the Supreme Court. The president will be likely to seek a writ, and likely to obtain it, if he can convince the Court that they were mistaken, for some reason, about their recent construction of the Constitution. The easiest way to succeed in this effort is surely to show

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207. The analogy is due to Post & Siegel, *supra* note 16, at 1040-41.

208. See POSNER & VERMEULE, *supra* note 92, at 3-18.

the Court that it has been *factually mistaken about a matter of executive power*—not that the Court has been legally mistaken, since the Court is (and regards itself as being) highly conversant in the governing law and is therefore unlikely to abandon a construction so soon after announcing it. In contrast, a focus on factual mistake advantages the executive where the matter lies within its expertise, such as the conduct of foreign relations, hostilities, or the execution of the law. After all, the Court has, of its own avail, developed a body of law limiting its ability to hear cases on such questions in light of, among other things, a purported lack of competence.<sup>209</sup> The president is thus incentivized to seek review of a recent decision by the Court where, in light of his office, he can provide critical insight on the Court's construction of the law—for example, by drawing on a feature of the conduct of hostilities overlooked or distorted by the Court. In this way, departmentalism incentivizes the president to act on his own views of the Constitution when he has strong, objective reasons to think the Court is mistaken on a matter within his bailiwick.<sup>210</sup>

Where the president judges that he will be unable to prevail in either litigation over the underlying substantive issue or a collateral enforcement proceeding, he will be unlikely to simply ignore the recently announced view of the Supreme Court. There is no reason to suppose a president with finite resources and a limited political “warrant” will seek out higher-order conflicts he is unable to win.<sup>211</sup> And surely he will be unable to win in most cases—which is to say, surely, in most cases, the president will be without a convincing, objective argument that (1) the Supreme Court's

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209. See Adler, *Foreign Policy*, *supra* note 165, at 168-70.

210. In this way, moderate departmentalism would effect an executive version of the “judicial second-look” doctrine described by Neil Katyal. See Katyal, *supra* note 17, at 1359-60.

211. See, e.g., WHITTINGTON, *supra* note 12, at 18-21 (describing the presidential task of achieving imperatives in the face of a variety of significant constraints). Note that the president's political warrant is limited in more dimensions than quantity; as Skowronek has explained, the president's warrant, or authority, is premised on a particular relationship to the extant regime. Warrants are thus imbued with a particular *message*. Certain messages make it difficult for the president to broadly contest the authority of the courts.

articulation of the law reflects a factual mistake about a matter within his executive expertise; or, (2) even if the Court did not clearly make a mistake, it should not interfere with the president for some more general reason. The implication is that the president will freely comply with the Court's view in most cases. This is why a "pointillist" body of law will not evolve.

In this way, repeat play transforms the logic of the president's decision about whether to comply with an unfriendly constitutional rule announced by the Supreme Court. Where the Court's views bind lower courts ("vertical" stare decisis), the president can count on repeated litigation if he ignores the Court's view. Such litigation imposes costs on the president. A rational President will consider the avoidance of future costs in presently deciding whether to voluntarily comply. Moreover, there is a dynamic quality to the encounter between the president and the courts, since repeated litigation potentially transforms the nature and significance of the dispute. The longer the president insists on refusing to comply with the rule announced by the Court, the greater the possibility that the dispute transforms into one in which the president appears to challenge judicial power *simpliciter*. Such a conflict will impose significant political costs on the president. Perhaps the best known example of this result is the political effect of Roosevelt's court-packing plan,<sup>212</sup> but more recent presidents have also mismanaged disagreements with the Court, causing them to metastasize.<sup>213</sup> Moreover, higher-order disputes tend to give rise to broader and deeper exercises of the judicial power. Courts can change the scope of the orders they enter. Compare the judicial order resolving initial litigation, which concerns the parties and the subject matter of their dispute, with the judicial order in a higher-order dispute, which

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212. See Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 130-32 (2010).

213. Consider, for example, the costs suffered by President George W. Bush in repeated conflicts with the courts over the rights of those detained during the so-called "war on terror." See Johnsen, *supra* note 8, at 395 ("President George W. Bush and his executive branch lawyers have earned widespread and often scathing criticism for their extreme positions and practices regarding the scope of presidential authority.").



concerns the very exercise of executive power and may affect executive officers beyond those involved in the initial litigation. In this way, “vertical” stare decisis transforms specific disputes into more general ones.

What we have before us, I argue, is the “big gun” of the judiciary under a regime of moderate departmentalism. Because a rational president will avoid higher-order conflicts, the big gun is likely to be “benign,” just as it was in the regulatory context.<sup>214</sup> Avoiding such conflicts incentivizes the president to comply even with unfriendly constitutional rules announced by the Court.<sup>215</sup> The regulatory logic thus plays out to the same effect: the existence of the big gun incentivizes the president to voluntarily adopt the Court’s constitutional rule, creating a kind of “enforcement pyramid,” in which the more severe sanctions are relatively rare, and most “enforcement” takes place through “persuasion” (the voluntary adoption of the Court’s interpretation).

b. The Appearance of Legitimacy. We are considering the effect of repeat play on the president’s voluntary compliance with unfriendly constitutional rules. We have seen how the present value of future conflicts affects the president’s choice of whether to comply. There is a second mechanism, as well, through which repeat play can affect the president’s present choice: *reputation*.

As I am using it here, the logic of reputation is concerned with repeated games involving different partners.<sup>216</sup> Recall Scholz’s “enforcement dilemma” described above. Imagine now that the game repeats, but that multiple firms are involved. In the first game, the regulator must choose whether to cooperate or harass, and the firm must choose whether to cooperate or evade. In the second round, a second firm must choose whether to cooperate or

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214. See *supra* notes 187-89, and accompanying text.

215. See discussion *supra* Part II.C and accompanying notes.

216. With some modification, I am following the development of this idea in David M. Kreps, *Corporate Culture and Economic Theory*, in PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 90, 106 (James E. Alt & Kenneth A. Shepsle eds., 1990).

evade; and in the third round, a third firm; and so on. To say that we are dealing with a repeated game, rather than a series of discrete games, is to say that each firm has knowledge of how the regulator treated previous firms. Imagine, now, that each firm employs the following strategy: *cooperate with the regulator if it has a perfect track record of cooperating, and otherwise evade*. If we suppose that the regulator begins with perfect track record—a perfect “reputation,” if you will—then the first firm will cooperate rather than evade. The regulator will cooperate if the present value of future cooperation is sufficiently high. Reputation thus makes it possible to sustain a strategy of mutual cooperation between the regulator and different firms.<sup>217</sup>

Now consider the effect of the president’s reputation on his interaction with the Supreme Court.<sup>218</sup> As Daryl Levinson has recently observed, reputation gives political actors a reason to comply with formal constitutional constraints.<sup>219</sup> Here the idea is slightly different, since by assumption the president is authorized to reject constitutional interpretations advanced by the Court. Nevertheless, where the president engages the Court in public argument about the meaning of the Constitution, but the Court is generally thought to have of the better argument, he *violates a norm of constitutional government* if he nonetheless refuses to voluntarily comply.<sup>220</sup> This imposes a reputational cost.

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217. *See id.* Note we need not assume that a regulatory agency is controlled by *the same personnel* over the course of repeated games. *See id.* at 108-11 (detailing reputation and multiple ownership of a business firm).

218. The case of the president is significantly different from the example. We have been analogizing the president to the *firm*, not the regulator. So we are not dealing with a multiple-firm repeated game. Rather, we are contemplating that there is one firm that will, in effect, play repeated games with a variety of entities, and that those entities will be aware of the firm’s reputation from its games with the regulator.

219. Levinson, *Parchment and Politics*, *supra* note 102, at 685, 711.

220. I have deliberately not specified *who* is judging the Court to have prevailed in argument against the president. Fill in whom you like. Perhaps it is “the people,” “the elites,” or “other governmental actors.” I don’t think the choice matters much here.

Let me elaborate. I begin with a basic idea: in our political system, prevailing in free deliberation among equals enhances the legitimacy of one's actions. This is not to say that political legitimacy *depends* on the ability to prevail in free deliberation; legitimacy presumably turns on many factors. The relative weighting of those factors may be context-dependent or tiered in some way. (In some cases, I imagine, the loser in free deliberation may enjoy a greater political legitimacy than his opponent.) Nor is this to say that prevailing in free deliberation *constitutes*, or creates, political legitimacy. In my usage, legitimacy is not a binary value but an indefinite one. Prevailing in deliberation *enhances* legitimacy in the sense that it increases the measure of propriety associated with the governmental action subject to debate. That, more or less, is all I want to assume.

In a regime where this is true—where prevailing in free deliberation among equals enhances political legitimacy—there are reasons to freely comply with the perceived results of a deliberative exchange, *even if one does not prevail*. This is a result of the enhanced legitimacy enjoyed by the prevailing opponent. If prevailing in deliberation enhances legitimacy, complying with the course of conduct defended by the prevailing party permits the complying party to share in the enhanced legitimacy. Since he acts just as the prevailing party suggested, the complier enjoys the increased measure of propriety won by prevailing party. This encourages opposed political actors to seek out deliberative exchange as a means of resolving legal disagreements, since they have an expectation that participants will bind themselves according to the results.<sup>221</sup> The president thus can increase the likelihood of systemic cooperation by publicly, clearly, and voluntarily complying with unfriendly rules announced by the Supreme Court. Conversely, when the president refuses to abide by a prevailing constitutional rule, it discourages other political actors from seeking out future deliberative exchanges. His

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221. See Levinson, *Parchment and Politics*, *supra* note 102 (applying similar logic to explain compliance with electoral outcomes by the loser).

tarnished outcome forecloses future beneficial outcomes that depend on mutual cooperation.

We can refine this argument by contrasting the reputational benefits of voluntary compliance with the now-familiar technique of blame avoidance, as practiced under a regime of judicial supremacy.<sup>222</sup> Blame avoidance is a tactic of Skowronek's "affiliated" president, who attempts to preserve his political coalition by relegating divisive issues to the Supreme Court.<sup>223</sup> Litigation is brought to the Court, the Court weighs in, and the president declares he is bound by its holding—whatever his personal beliefs on the matter happen to be. The best example of the tactic, at least in recent memory, is abortion.<sup>224</sup> But as the example suggests, the technique is rarely successful, at least over the long run. The Court's ability to resolve highly charged issues—issues that truly divide the public and the governing coalition—is limited. It has no special ability to broker political compromises. Its decision inflames the losers, who have a strong incentive to charge the Court with politicking, thereby recalling the issue to the arena of political dispute.<sup>225</sup> (Their case, moreover, is strong.) At the same time, the Court incurs reputational costs by attempting to resolve a highly charged matter using the blunderbuss techniques of legal reasoning.<sup>226</sup>

For its part, departmentalism limits the president's ability to engage in blame avoidance. A president with equal authority to interpret the Constitution cannot claim to have his hands tied by the Court's determination of constitutional meaning. Executive interpretations of the Constitution are "traceable" to the president. There are obvious advantages to this state of affairs. First, it permits

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222. See, e.g., Graber, *The Nonmajoritarian Difficulty*, *supra* note 30, at 37-45.

223. SKOWRONEK, *supra* note 97; see discussion *supra* Part II.A.

224. See WHITTINGTON, *supra* note 12, at 66-67; Graber, *The Nonmajoritarian Difficulty*, *supra* note 30, at 40.

225. See, e.g., BURT, *supra* note 18, at 33, 353-54; Graber, *The Nonmajoritarian Difficulty*, *supra* note 30, at 42.

226. See WHITTINGTON, *supra* note 12, at 69-70 (describing the politicization of the judiciary by a reconstructive president).

the public to determine more easily who is accountable for a specific government policy. Second, it lowers the reputational costs to the Court associated with an attempt to resolve a politically divisive issue using the techniques of legal reasoning. This is because, once blame avoidance is undermined, fewer such issues will be relegated to the Court; and because the Court's decision will have a much narrower impact—the Court won't be capable of resolving the issue entirely.

A third advantage is that departmentalism leaves the president with those avoidance techniques whose effects are more salutary and encourage him to genuinely engage the issue at hand. Consider how the president might go about adopting the Supreme Court's resolution of a divisive issue. He cannot claim his hands are tied. Rather, he has two options. The president must either defend the Court's supremacy to determine this particular constitutional rule—say, because it pertains to a matter uniquely within the Court's expertise, such as a rule of legal procedure or a protection afforded criminal defendants in the courtroom—or, he must adopt the Court's view as his own by defending the view on its merits. In doing the former, the president is still attempting to place responsibility for governmental conduct on a divisive issue with the Court; but he does so freely, because it properly belongs with the Court as the institution of government best suited to resolve the issue. Moreover, the president cannot simply assert this; he will have to defend the assertion, since political opponents will disagree that the matter was best resolved by the Court. Where the president chooses instead to defend the Court's view on its merits, he must embrace the substance of the view as his own, and in doing so he can claim the strategic advantages of complying with the rule of law. Where he chooses to disagree, he must best the Court on its terms, and face the political consequences of staking out his own position.

By controlling blame avoidance, moderate departmentalism increases the accountability of the president and places greater emphasis on the interbranch interpretative process. Giving this process pride of place further increases the president's stake in constitutional collaboration, and thus the future benefits available with an

untarnished reputation. Thus there is something like a feedback effect.

2. *Strategic Compliance Under Judicial Supremacy.* Preventing higher-order conflict and preserving a positive reputation are two reasons the president should voluntarily comply with unfriendly constitutional rules. They are “strategic benefits,” as it were, of moderate departmentalism. But what about the costs? Are there strategic reasons to comply with judicial rulings *unique* to a regime of judicial supremacy? Of course, judicial supremacy supposes that the president is already obligated to adopt the constitutional rules announced by the Supreme Court, since the Court is the ultimate arbiter of constitutional meaning. Yet as we have seen, it is puzzling why powerful political actors would comply with such rules, given the actors’ monopoly over governmental force.

It seems clear that moderate departmentalism would affect the current logic of voluntary compliance, but how it would do so is not entirely clear. Some strategic considerations would be unaffected; not all of the work on voluntary compliance with the exercise of judicial power is premised on judicial supremacy. For example, drawing on work by Mark Ramseyer and Barry Weingast, Matthew Stephenson argues that parties comply with judicial review because it allows them to reduce risks associated with political competition.<sup>227</sup> In particular, argues Stephenson, judicial review requires the party in power to sacrifice some policy objectives, which is presently beneficial to that party because it will lose power in some future period.<sup>228</sup> Note that the assumption of political competitiveness alone does not support judicial review. Ideally, political parties in a competitive system could simply *agree* to exercise a degree of constraint when in power.<sup>229</sup> Parties could then employ a reciprocal strategy, like those outlined in the repeated games above, in order to sustain the mutual restraint of

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227. Stephenson, *supra* note 183, at 63-64; *see also* Ramseyer, *supra* note 183, at 739-40; Weingast, *supra* note 183, at 246.

228. Stephenson, *supra* note 183, at 63-64.

229. *See* Stephenson, *supra* note 183, at 68.

power. However, in Stephenson's model, the signals sent by the parties in power are "noisy," which is to say, they are equivocal between cooperation and non-cooperation, from the perspective of the party out of power.<sup>230</sup> The party out of power thus does not know whether it should behave non-cooperatively in the next round. A third-party signal correlated with the actual behavior of the party in power enables the parties to coordinate.<sup>231</sup> The third party, of course, is the independent judiciary.

Nothing in the model supposes that the political parties are obligated to adopt the judiciary's view of the law. Stephenson is explicit about this. His model envisions only a judicial declaration of the legality or illegality of government policy. The government is not bound by the declaration. As Stephenson puts it, "[T]he judiciary *does not have the power to 'veto' a government policy on grounds of illegality*. All the judiciary can do is make a declaration of illegality. The government can choose to modify its policy . . . , but it need not."<sup>232</sup> Conceptually, it is relatively easy to see why this should be so. The judiciary's only role in Stephenson's model is to send a public signal about the conduct of the party in power. A public signal enables the parties to sustain coordination themselves by using a reciprocal strategy of some kind.<sup>233</sup>

Other models, however, do appear to presuppose judicial supremacy, at least at first glance. In some cases, the benefit associated with judicial power depends on the *certainty* that a single voice provides.<sup>234</sup> The presence of multiple constitutional interpretations can interfere with

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230. *Id.* ("[P]olitical parties cannot enforce mutual restraint on their own because each party can never be sure that its opponent is cooperating and that its opponent knows that it is cooperating.")

231. *See id.* at 69.

232. *Id.* at 66.

233. For similar reasons, Ramseyer's analysis, as well as a theory due to William Landes and Richard Posner, do not presuppose judicial supremacy. *See generally* Ramseyer, *supra* note 183 (developing a theory of judicial supremacy based on future benefits to those currently in power); Landes & Posner, *supra* note 183 (similar).

234. *See* Alexander & Schauer, *supra* note 19, at 1371.

the coordinating function ascribed to the courts. If there are conflicting signals as to the constitutionality of government action, then parties must somehow settle on one of those signals to use in coordination. Others must be identified as “interlopers.”<sup>235</sup>

We can see the effect of departmentalism on coordination-based theories of judicial review by revisiting David Law’s theory of judicial review, described briefly above. Law is a majoritarian about judicial review. He argues that judicial review enhances popular control over political actors by solving the principal-agent problem that affects all forms of representative constitutional government.<sup>236</sup> If people must act together to effectively resist unconstitutional exercises of power, they need a signal for their coordination. The signal shapes expectations about how others will react. It ensures that, in Law’s formulation, “everyone [] know[s] not only that the [government] has misbehaved, but also that everyone knows, and that everyone knows that everyone knows.”<sup>237</sup> The people themselves are unable to directly monitor the government because, in Law’s view, “[l]egal information is not easy for ordinary people to obtain and absorb.”<sup>238</sup> Even assuming people possessed the requisite expertise, they would be likely to disagree on a regular basis as to whether there was, in fact, unconstitutional governmental action.<sup>239</sup> Crucially, they would lack a basis for believing it *common knowledge* that the government had acted unconstitutionally. The Supreme Court, however, can play this role. Its decisions create a public signal of constitutionality that all citizens expect to be treated as a

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235. McAdams, *Expressive Power of Adjudication*, *supra* note 183, at 1058-59.

236. I omit for clarity Law’s second explanation of how the courts solve the principal-agent problem: by providing the people with information about governmental action. Law, *supra* note 183, at 731-32.

237. *Id.* at 742.

238. *Id.* at 743, 773.

239. *Id.* at 773.



basis for action.<sup>240</sup> In the language of game theory, the Court's views serve as a "focal point."<sup>241</sup>

As Law points out, a focal point must be unique.<sup>242</sup> Competing signals about the constitutionality of government action defeat the purpose of generating a shared expectation as to how others will act. It is here, of course, that departmentalism would appear to run into trouble; for it contemplates the publication of constitutional interpretations by each branch as part of an ongoing process of constitutional collaboration. No one participant in the process enjoys a definitive or ultimate power of interpretation. Suppose that Congress enacts a law and that the president signs it, agreeing that it is constitutional; but, sometime later, the Supreme Court refuses to enforce the law, on the grounds that it exceeds Congress's power under the Constitution. Can the Court's opinion generate common knowledge among the people about how they will respond to the continued enforcement of the law by the president?

Well, why not? As Law admits, there are, in any democratic system of government, "a cacophony of competing voices as to the constitutionality of government conduct."<sup>243</sup> What privileges the voice of the Court, he says, is that it comes from "an organ of government with various trappings of authority and formal responsibility for interpretation of the constitution."<sup>244</sup> In other words, it is the Court's publicly known *positive* status as the organ of government charged with constitutional interpretation that makes its opinion a focal point. Law draws an analogy to a traffic intersection with a police officer and a number of private interlopers, each attempting to direct traffic using hand signals.<sup>245</sup> "Only one of those people," Law observes, "is

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240. *See id.* at 770-71.

241. *Id.* at 771.

242. *Id.*

243. *Id.* at 774.

244. *Id.*

245. *Id.* at 775.

wearing a dark blue uniform and a badge that reads ‘traffic enforcement.’”<sup>246</sup>

But of course, there is nothing in Article III that bestows such an interpretative privilege on the Court. It has no interpretative badge. Judicial supremacy is a political artifact. As Whittington has shown, it was fought for—sometimes by the Court, and sometimes by the president or the Congress—and represents a particular point of development in the political history of the United States.<sup>247</sup> We also know that judicial supremacy was preceded by a significant and widespread practice of popular enforcement of the Constitution.<sup>248</sup> And although our system today is neither departmentalist nor (deeply) popular, there are, under our current constitutional regime, spheres of executive independence and judicial deference in constitutional interpretation.<sup>249</sup> In short, judicial supremacy is an accidental feature of our constitutional regime. Notably, nothing about this history violates formal theory. As Law acknowledges, game theory allows for coordination in the presence of multiple interpreters. Even if there were two constitutional courts, he says, “a strategy of responding only when both courts agree, and not when the courts send contradictory signals” would likely be a focal point.<sup>250</sup>

Therein lies our solution. It bears repeating that Law’s theory is meant to describe cases of *mass resistance* or *revolution*, not ordinary political conduct.<sup>251</sup> It seems likely that treating the opinion of a single court as a focal point will overpredict such forms of collective political action. The

246. *Id.*

247. See generally WHITTINGTON, *supra* note 12 (arguing that judicial supremacy was a political accomplishment); Graber, *Establishing Judicial Review?*, *supra* note 30 (similar).

248. See KRAMER, *supra* note 16, at 3-8. This is precisely the sort of enforcement practice that Law imagines is *necessarily* impossible.

249. The political question doctrine is the leading example, but other justiciability doctrines play a similar role. For the impact of political question on presidential powers over foreign policy, see Adler, *Foreign Policy*, *supra* note 165, at 168-69.

250. Law, *supra* note 183, at 775-76.

251. See *id.* at 764-70.

explanation has to be made to bear the weight of sustained disagreement about the constitutionality of government action, and to include the views of the people themselves, who, contrary to Law's supposition, are perfectly equipped to form reasonable views about the meaning of the Constitution. Imagine, then, that the people are constantly receiving multiple, conflicting "official" signals about the constitutionality of government action, as they would be under moderate departmentalism. It would seem that the following strategy would be focal: resist only if there is a *public, commonly persuasive* view that the government has exceeded its constitutional authority. Since most such views are not commonly persuasive, we should expect widespread resistance to be rare. Such resistance would occur when it naturally would under a constitutional system: when there is no reasonable question that the government has exceeded its authority. Under this strategy, the more voices the better, since each voice has the potential to expose unconstitutional governmental action.

#### CONCLUSION

I have advanced two arguments in favor of moderate departmentalism. First, moderate departmentalism is collaborative, in the sense that it enhances the presidential role in the dialogical process of constitutional interpretation. The president's meaningful participation in this process gives him ownership over the resulting constitutional rule, making it more likely that he will comply with that rule. Second, under moderate departmentalism there are strategic reasons, based in the logic of repeat play, for the president to comply even with facially unfriendly constitutional rules. These reasons include avoiding the future costs of repeat litigation and gaining the future benefits of being publicly seen to freely adopt a rule announced by the Supreme Court. Taken together, these arguments suggest that we should reconsider the standard view of the relationship between departmentalism and presidential control. There are reasons to think that departmentalism promises not to unbind the president from the fundamental law, but to given him reason to bind himself to that law—a far more

effective strategy for achieving compliance over the long run.