Contest for Constitutional Authority: The Abortion & War Powers Debates

SUSAN R. BURGESS

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For the Little One . . .
who showed me that fierce protectiveness
and compassionate sensitivity are,
after all, two sides of the same coin.

Posterity may know that we have not, through silence,
permitted things to pass away, as in a dream.

—Richard Hooker

Thought speaks with authority about who we are and how we should live only when it puts our ideals and self-understandings through the skeptic's flame, risking nihilism for the sake of insight.

—Roberto Unger

PREFACE

Judicial supremacy is a political practice that gives the federal judiciary final and indisputable say in constitutional interpretation. Under judicial supremacy, when the Supreme Court interprets it forecloses any further discussion. The other branches (and the states) must accept the Court's interpretation in the case at hand and follow it in all similar cases that arise subsequently. Departmentalism is a political practice that challenges judicial supremacy. Under departmentalism, each branch of government (or "department"—hence the term "departmentalism"[1]) has a right or perhaps a duty to interpret the Constitution, even if that interpretation challenges the judiciary's constitutional interpretation. Thus, if the other branches (or the states) find the Court's interpretation to be errant, they are not obligated to follow it in subsequent cases. Advocates of departmentalism point out that, in principle, judicial supremacy gives the Supreme Court absolute authority over constitutional matters and that such a grant of authority counters the principle of limited, constitutional democracy. They contend that a dialogue among the several branches of the federal government (and perhaps the states) fosters the practices or civic culture necessary to maintain limited and decent government. Accordingly, they reject the judicial monologue.

Without exploring the empirical consequences of congressional constitutional interpretation, some scholars and public officials have pessimistically asserted that constitutional authority would be damaged if Congress practiced departmentalism.[2] They say that skepticism about constitutional authority and the rule of law would deepen considerably. Others, however, have contended that constitutional author-

ity would be deepened and the rule of law would be strengthened by a congressional-judicial dialogue that focuses on constitutional meaning. They hope that when Congress interprets the Constitution independently, all the "departments" will be compelled to define and redefine their positions on constitutional issues, thereby creating a dialogue about constitutional meaning that will improve the constitutional discourse and broaden constitutional authority. Thus the question I explore in this book is this: Is constitutional authority broadened and the rule of law strengthened when Congress practices departmentalism?

I address this question through a detailed examination of two extremely intense constitutional debates: the congressional-judicial debate about the constitutional status of the right to abortion and the congressional-executive debate about the constitutional allocation of the war powers. The abortion debate takes place in the context of judicial activism. Congress practiced departmentalism by challenging *Roe v. Wade* and judicial supremacy in the 1981 human life bill debates as well as in the 1985 debates on the proposed Abortion Funding Restriction Act. The Court continued to actively interpret the Constitution in the abortion debate, issuing major rulings in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 421 (1983), and *Thornburgh v. American College of Gynecologists and Obstetricians*, 476 U.S. 747 (1986). The war powers debate takes place in the context of judicial self-restraint and involves the executive and Congress in conflict about the constitutional allocation of the war powers. Although the Court has traditionally deferred to the wisdom of the "political" branches in cases that have raised questions concerning military issues and foreign affairs, this deference has not undercut the Court's self-asserted supremacy over "legal" matters. However, the Court's deference has made it possible for the executive to assert its supremacy in military and foreign policy matters. The legislature frequently has automatically deferred to executive authority and thus abdicated responsibility for participating in military and foreign policy decisions. However, following the initial challenge by Congress to executive supremacy in the 1974 War Powers Act, Congress again practiced departmentalism by challenging executive supremacy in the 1987 Persian Gulf debates.

The abortion and war powers cases have parallel as well as contrasting aspects. Both cases explore the same fundamental question: Does constitutional authority broaden when Congress practices departmentalism? Both cases take place in a political and legal culture that largely embraces a fundamental assumption: Once the Court speaks,

its word is final. However, the extent of judicial finality appears to be more narrowly construed in the war powers case because the Court has chosen not to address the constitutional allocation of the war powers. Thus, in that case Congress practices departmentalism most obviously by challenging the supremacy of the executive. Yet Congress is challenging executive supremacy in a broader political and legal context that remains characterized and shaped by judicial supremacy—even if the assertion of judicial supremacy is much narrower in extent in the war powers case.

Many scholars and public officials say that constitutional conflicts of the kind discussed in this book do not, or at least should not, occur, mainly because they believe the Court's constitutional interpretation is not, or should not be, contestable. However, I will show that Congress, in fact, does from time to time challenge judicial decisions on the grounds that the Court's decisions are based on errant interpretations of the Constitution. On the basis of this congressional practice, I articulate an alternative model of constitutional authority called the levels of constitutional consciousness.

In Chapter One, I set the debate about judicial authority and departmentalism in its scholarly and political context. I show that widespread acceptance of judicial supremacy dominates and constricts the contemporary constitutional debate. I discuss departmentalism (an alternative form of constitutional interpretation that challenges judicial supremacy), review the theoretical claims that scholars have made for and against it, and then critique the rigidity as well as the panhistoricity of the "benefit-cost" framework of analysis that flows from these claims. Finally, I introduce the framework of analysis I will use to evaluate whether departmentalism is a viable alternative to judicial supremacy, namely the levels of constitutional consciousness.

In Chapters Two and Three, I compare the theoretical claims that scholars and public officials have made about departmentalism with Congress' practice of departmentalism in the abortion and war powers debates. I explore whether departmentalism strengthens or weakens constitutional authority through a detailed reconstruction and interpretive analysis of those two debates. Some scholars and public officials claim that constitutional authority will deepen only if Congress challenges judicial supremacy in the context of judicial activism. Thus, in Chapter Two, I explore departmental practice in the context of judicial activism in the abortion debate. I examine Congress' consideration of the constitutional status of a woman's right to choose to terminate pregnancy in the human life bill debates and the Abortion

Funding Restriction Act debates, as well as subsequent judicial and public discussion of these matters.

Other scholars and public officials claim that constitutional authority will deepen only if Congress challenges judicial supremacy in the context of judicial self-restraint. Thus, in Chapter Three, I explore departmental practice in the context of judicial self-restraint in the war powers debate. I examine Congress' consideration of the Constitution's allocation of the war powers with respect to committing troops to hostilities. I compare the 1964 Tonkin Gulf debates, which occurred before Congress passed the War Powers Act, with the Persian Gulf debates, which occurred after Congress passed the War Powers Act.

In Chapter Four, I discuss my findings and evaluate departmentalism as an alternative to judicial supremacy. I find that constitutional authority did significantly broaden when Congress practiced departmentalism in both the abortion and the war powers cases, but not as much as some scholars may have hoped. Thus, I address concerns and resistances that were raised in those debates which may have obstructed broadening constitutional authority. I also consider the import that alternative perceptions of intense conflict may have for constitutional authority and discuss the kind of constitutional consciousness that the polity must foster in order to continue to broaden constitutional authority.

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CONTENTS

CHAPTER ONE

Who Shall Interpret the Constitution? Judicial Supremacy or Departmentalism

JUDICIAL SUPREMACY, SCHOLARLY RESEARCH, AND THE LIMITATIONS OF CONTEMPORARY CONSTITUTIONAL INTERPRETATION

Judicial supremacy is an institutional arrangement that gives the federal judiciary final and indisputable say in constitutional interpretation. As Walter Murphy has noted, while judicial review grants the Court the authority to strike down legislative and executive acts, judicial finality (or judicial supremacy) further obliges the elected branches "not only to obey that ruling [in the specific case at hand], but to follow its reasoning in future deliberations."[1] Under judicial supremacy, once the Court has interpreted the Constitution, its word is final and cannot be questioned by the other branches.

Perhaps not surprisingly, the judiciary itself has propagated the notion that the Court is the "ultimate interpreter" of the Constitution. However, it is often overlooked that the Court did not explicitly declare itself the ultimate interpreter until 1958 in *Cooper v. Aaron*.[2] *Cooper* addressed the state of Arkansas' noncompliance with *Brown v. Board of Education*,[3] the famous school desegregation decision of 1954. In *Cooper*, the Court asserted that the principle that "[t]he federal judiciary is *supreme* in the exposition of the law of the Constitution" is a "*permanent and indispensable* feature of our constitutional system."[4]

In *Baker v. Carr*, the 1962 case that declared that issues of legislative apportionment and districting were justiciable rather than political questions,[5] the Court once again asserted finality: "Deciding whether a matter has in any measure been committed by the Consti-

tution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this court as *ultimate interpreter* of the Constitution."[6] In 1969, the court reaffirmed its adherence to judicial finality in *Powell v. McCormack*,[7] a case that declared that the Court, not Congress, would have the final say about qualifications for membership into the House. In *Powell*, the Court once again asserted that "it is the responsibility of this Court to act as the *ultimate interpreter* of the Constitution."[8] In *U.S. v. Nixon*,[9] the Court declared itself supreme over the executive branch, citing both *Powell* and *Baker* to support the claim that the Court is the ultimate constitutional interpreter. Taken together, in *Cooper, Baker, Powell*, and *Nixon* the Court explicitly declared supremacy over the states, Congress, and the executive.

Many scholars and public officials assume that *Marbury v. Madison*,[10] the famous case in which the Court first exercised judicial review in 1803,[11] established the same sort of judicial supremacy that is evident in *Cooper, Baker, Powell*, and *Nixon*.[12] However, *Marbury* itself did not claim finality. Furthermore, finality was certainly not an accepted practice at that time. The *Marbury* Court did assert that it had the authority to interpret the law when it claimed that "it is emphatically the province and the duty of the judicial department to say what the law is."[13] Coupling that assertion with the establishment of judicial review may very well have made it possible for the Court to claim at a later date that judicial constitutional interpretation is final and unchallengeable. Indeed, the Court cited *Marbury* as precedent each time it claimed to be the ultimate constitutional interpreter in *Cooper, Baker, Powell*, and *Nixon*.[14] This may explain why scholars and public officials assume that *Marbury* established not only judicial review but also judicial supremacy. However, creating the opportunity for judicial review to become inextricably linked with judicial supremacy is not the same as establishing a widely accepted practice.[15]

Furthermore, although *Marbury* and other cases that strongly support judicial power, such as *Dred Scott v. Sandford*[16] and *U.S. v. Butler*,[17] may have paved the way for the Court to claim ultimate interpreter status at a later date, they do not expressly support the idea that the Court's word is final. For example, although the ultimate interpreter assertion collapses constitutional and judicial authority, *Dred Scott* seems to maintain the possibility of distinguishing constitutional from judicial authority. There, the Court stated that "if the authority [to enact the Missouri Compromise] is not given [to Con-

gress] by that instrument [the Constitution], it is the duty of the Court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the laws of any one of the States."[18] Similarly, *U.S. v. Butler* recognized broad judicial power, yet clearly fell short of declaring finality. Thus, *Butler*, which signified the beginning of the Court's acceptance of the New Deal, declared that "the *only* check on our own exercise of power is our own sense of self-restraint."[19] Although *Scott* and *Butler* indicate the growing power of the Court and thus perhaps a movement toward judicial finality, the fact remains that the Court simply did not declare itself to be the ultimate interpreter of the Constitution before *Cooper v. Aaron* in 1958.[20]

When this historical examination is extended beyond judicial materials, support for judicial supremacy in American political development decreases further. Several presidents, including Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Ronald Reagan, rejected the ultimate interpreter reading by challenging the constitutionality of particular judicial decisions. On several occasions Congress also offered constitutional interpretations that rivaled the Court's. Contending that the Court could interpret the Constitution incorrectly, both Congress and the executive have argued that *constitutional* supremacy requires each branch to remain faithful to its best understanding of the Constitution rather than to accept automatically the Court's interpretation. Arguing that the Court rather than the Constitution would rule if other branches followed errant judicial decisions, various executives and members of Congress have claimed that fidelity to the Constitution obliged them to oppose such errant rulings.

Even though the federal judiciary upheld the Sedition Act of 1798,[21] as president, Thomas Jefferson announced that he thought that the act was unconstitutional. Jefferson argued that fidelity to the Constitution obliged him to use executive power to pardon those who had been punished and prosecuted under the act. Explaining the reasoning behind his position, he distinguished constitutional authority from judicial authority. He argued that each branch had the right and duty to determine the constitutionality of laws and actions in the course of performing its own functions.

> The Judges, believing the Sedition Law constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it because the power has been confided to him

> by the Constitution. The instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the Judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislative and Executive also in their spheres, would make the Judiciary a despotic branch.[22]

In 1840, Congress also distinguished constitutional from judicial authority, arguing that the Sedition Act was "unconstitutional, null, and void, passed under a mistaken exercise of undelegated power, and that the mistake ought to be corrected" by returning all fines that the government had previously collected as punishment for the act.[23] In 1964, the Court itself admitted that the act had been struck down by "the court of history."[24]

As president, Andrew Jackson also rejected judicial supremacy by distinguishing constitutional from judicial authority, contrary to the ultimate interpreter approach. His "Veto Message," written in 1832, explained why he thought Congress' attempt to recharter the Bank of the United States was unconstitutional, despite the Court's proclamation in *McCulloch v. Maryland* that Congress' establishment of the Bank was constitutional.[25] Jackson maintained that his adherence to constitutional rather than judicial supremacy prompted him to challenge *McCulloch*, which he regarded as an errant, or unconstitutional, decision. Opposed to the supremacy of any one branch, Jackson argued for the coequality of Congress, the executive, and the judiciary in constitutional interpretation.

> It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.[26]

He argued that the conflict that would inevitably arise under departmentalism would be resolved in part by distinguishing stronger from weaker arguments. "The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when

acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."

Emphasizing the important role that the people would play under departmentalism, Jackson stated that "mere judicial precedent . . . should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled."[27] And, he concluded, the question of the constitutionality of the Bank was far from being settled. Senate debate on the Bank bill subsequent to Jackson's veto reveals that several senators also distinguished constitutional from judicial authority and thus found Jackson's action appropriate. For example, Senator Hugh Lawson White claimed that Supreme Court finality extended only to the parties involved in the particular case before the Court. According to White, the Constitution does not oblige the other branches of government to follow the Supreme Court's interpretation in subsequent, similar cases. He argued that

> whenever a suit is commenced and prosecuted in the courts of the United States, of which they have jurisdiction, and such suit is decided by the Supreme Court, as that is the court of the last resort, its decision is final and conclusive between the parties. But as an authority, it does not bind either the Congress or the President of the United States. If either of these co-ordinate departments is afterwards called upon to perform an official act, and conscientiously believe the performance of that act will be a violation of the constitution, they are not bound to perform it, but on the contrary are as much at liberty to decline acting, as if no such decision had been made.[28]

Abraham Lincoln also challenged judicial supremacy and distinguished constitutional from judicial authority. Arguing that the *Dred Scott* case was an unconstitutional ruling, he conceded that the particular parties to a case (for example, Dred Scott and John F. A. Sanford) were obliged to accept the Court's decision as final. However, Lincoln also maintained that the other branches of government were not duty bound to follow the Supreme Court's reasoning in subsequent actions if they thought that the Court's constitutional interpretation was errant. In his first inaugural address, he stated:

> I do not forget the position, assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny