

# A Theory of Judicial Power and Judicial Review

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*Judicial review has long been characterized by constitutional scholars as countermajoritarian and antidemocratic. This Article employs insights from political science and game theory to argue that the opposite is true: judicial review supports popular sovereignty by mitigating the principal-agent problem that lies at the heart of democratic government. In a system of constitutional government premised upon popular sovereignty, the government acts as the agent of the people and is supposed to exercise power consistent with the terms and conditions imposed by the people in the form of a constitution. But the interests of principal and agent may diverge: those entrusted with public power may seek to seize more power than has been given them, or to turn the power they have been given against the people themselves. The people thus face the challenge of asserting effective control over a potentially treacherous government, and they cannot meet this challenge without first overcoming two potentially serious obstacles. One is an information problem: the people cannot respond to bad behavior by the government if they remain unaware of that behavior. Another is a coordination problem: even if the people acting together are capable of replacing the government, such action may require widespread coordination that can be difficult to achieve.*

*Courts that engage in judicial review perform monitoring and coordinating functions that help the people to solve both of these problems. First, a court engaged in judicial review serves the function of a whistleblower or fire alarm: it provides the people with reliable, low-cost information about whether their government has overstepped the bounds of its delegated power. Second, courts can coordinate popular action against usurping governments. People are unlikely to act openly against a tyrannical government unless they believe that others will act as well. They are therefore in need of a highly public signal that creates such beliefs on a large scale. A court can provide such a signal by ruling publicly against the government. The fact that constitutional courts*

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*perform monitoring and coordinating functions helps, in turn, to solve the puzzle of why governments obey them, notwithstanding the fact that they lack the power of either the purse or the sword. The ability of a court to mobilize the people against the government means that government disobedience of the court's decisions carries potentially severe consequences.*

*This account has important empirical implications that directly contradict the conventional wisdom about the purported relationship between judicial legitimacy and judicial power. In particular, it is often thought that courts jeopardize their legitimacy, and thus their power, by rendering unpopular decisions. The theory proposed here suggests, however, that the opposite may be true. When a court renders an unpopular decision that nevertheless receives widespread compliance, it generates and reinforces strategic expectations about its efficacy in future cases. Thus, the successful exercise of judicial power in the face of opposition or criticism merely begets even more judicial power. The theory also helps to explain both judicial independence and public support for the courts in the face of decisions that may sometimes defy the wishes of a majority: because constitutional courts perform a watchdog function, the people have reason to support their independence even if specific judicial decisions happen to be unpopular.*

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INTRODUCTION

This Article proposes a theory of judicial power that addresses two difficult and seemingly disparate questions about judicial review. First, why do political actors, such as presidents and legislatures, comply with acts of judicial review that limit their power? Second, is the relationship between judicial review and popular rule necessarily an antagonistic one?

The first question is a difficult one because courts lack any obvious means of enforcing their decisions against other government actors. Insofar as they lack enforcement power, however, constitutional courts engaged in the exercise of judicial review are hardly unique. Throughout history, courts have thrived under circumstances in which state enforcement of judicial decisions has been nonexistent or impossible. The Icelandic courts of the tenth through thirteenth centuries functioned within a system of government that lacked any executive or police apparatus.<sup>1</sup> The merchants of medieval Europe who acted as private judges in applying the *lex mercatoria* were backed by no state apparatus at all.<sup>2</sup> The decisions of the *alcalde*, the government official responsible for hearing

1. See THRÁINN EGGERTSSON, ECONOMIC BEHAVIOR AND INSTITUTIONS 306 (1990) (noting that early Icelandic society had legislative and judicial bodies, but no executive branch with a monopoly on the legitimate use of force); WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND 228–47 (1990) (seeking to explain why the inhabitants of medieval Iceland made frequent resort to the courts, notwithstanding the absence of “any state enforcement mechanism”); David Friedman, *Private Creation and Enforcement of Law: A Historical Case*, 8 J. LEGAL STUD. 399, 401, 404–06 (1979) (describing how the Icelandic legal system developed “without any central authority” capable of enforcing judgments); Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1241–42 (2004); Richard A. Posner, *Medieval Iceland and Modern Legal Scholarship*, 90 MICH. L. REV. 1495, 1496–98 (1992) (reviewing MILLER, *supra*).

2. See AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE 315–49 (2006) (concluding that trade relations in medieval Europe reflected the operation of a “community responsibility system” sustained in part by the “imperfect monitoring” that courts performed with respect to traders); Paul R. Milgrom et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1, 2–5 (1990) (arguing

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legal disputes in nineteenth-century Mexican California, were not subject to enforcement in civil cases.<sup>3</sup> International courts, such as the International Court of Justice, have no plausible means of enforcing their judgments in interstate disputes.<sup>4</sup>

Today's constitutional courts, from the German Bundesverfassungsgericht to the Supreme Court of the United States, are not in precisely the same position as the courts of medieval Iceland or the *alcalde* of Mexican California. Their situation is, instead, even more precarious. The problem that they face is not merely that they lack the power of either the purse or the sword.<sup>5</sup> It is, rather, that they place themselves in direct opposition to powerful actors who do wield the purse and the sword.<sup>6</sup> Constitutional courts that engage in judicial review make it their business to rule against the very institutions of government with

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that the role of private judges in transmitting information about past behavior gave traders an incentive to obey their judgments).

3. See GREIF, *supra* note 2, at 213–16 (noting that “the state did not enforce commercial contracts,” and arguing that the judgments of the *alcalde* nevertheless generated contractual compliance and social order by providing the information necessary for a “multilateral reputation mechanism” to operate); DAVID J. LANGUM, LAW AND COMMUNITY ON THE MEXICAN CALIFORNIA FRONTIER: ANGLO-AMERICAN EXPATRIATES AND THE CLASH OF LEGAL TRADITIONS, 1821–1846, at 146–47, 185–86, 273 (1987) (describing the sorry inability of the local Mexican courts to enforce agreements or debts); Karen Clay, *Trade, Institutions, and Credit*, 34 EXPLORATIONS ECON. HIST. 495, 503–09 (1997) (hypothesizing that the judgments of the *alcalde* in civil cases, though not subject to government enforcement, nevertheless influenced behavior by spreading information, publicizing errant behavior, and “linking past behavior and future interaction”).

4. See Ginsburg & McAdams, *supra* note 1, at 1233–34, 1310–11 (observing that the International Court of Justice lacks enforcement power yet renders judgments that are obeyed approximately seventy percent of the time); Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1103 & n.196 (surveying the literature on the extent to which national governments comply with the rulings of international tribunals).

5. See, e.g., *Baker v. Carr*, 369 U.S. 186, 267 (Frankfurter, J., dissenting) (“The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”); THE FEDERALIST No. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”); MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 13 (1981) (“Courts, we are repeatedly and rightly told, have neither the purse nor the sword.”).

6. See Dieter Grimm, *Judges in Contemporary Democracy: An International Conversation*, in JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 17, 26 (Robert Badinter & Stephen Breyer eds., 2004) (“It is the specific weakness of constitutional courts that the power is in the hands of those who are affected by their decisions.”); McAdams, *supra* note 4, at 1104 (identifying constitutional review—and, indeed, all litigation against the government—as an example of “sanctionless adjudication” that raises the “intriguing positive question” of how “courts succeed in getting other branches to comply with their decisions”); *id.* at 1119 n.241 (observing that “domestic courts engaged in constitutional review” face the challenge of securing the compliance of the very branches of government on which they are dependent, and suggesting that they generate this compliance by avoiding decisions that the other branches might ignore); Matthew C. Stephenson, “*When the Devil Turns . . .*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 60 (2003) (asking why the branches of government that control “the money and guns” would ever choose to obey the branch that controls neither).

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the power to enforce judicial rulings. To put the question bluntly: “Why would people with money and guns ever submit to people armed only with gavels?”<sup>7</sup>

The second question—that of the supposed antagonism between judicial review and popular rule—is all too familiar to scholars of American constitutional theory. The view that the two are mutually incompatible, though dominant today, has not always prevailed: as a historical matter, it was once common to encounter majoritarian arguments *in favor of* judicial review. From the late eighteenth century through the mid-nineteenth century, state courts often characterized judicial review not as an obstacle to the popular will, but rather as a means of protecting the people from abuses of power by their own government.<sup>8</sup> Delegates to state constitutional conventions, meanwhile, offered similar reasoning in support of energetic judicial review by popularly elected judges.<sup>9</sup>

Since then, however, the view that judicial review protects popular majorities from government abuse has fallen on hard times. In its place, the notion that judicial review poses a “counter-majoritarian difficulty,” in Alexander Bickel’s words,<sup>10</sup> has become the foundation upon which contemporary American constitutional theory rests.<sup>11</sup> In striking down the acts of elected officials, Bickel argued, the Supreme Court “exercises control, not in behalf of the prevailing majority, but against it.”<sup>12</sup> Constitutional theory has since been dominated by the questions of whether and when it is appropriate for judges to overrule the will of a governing majority, and “how . . . the other branches of government and individuals regulated by the Court [are] to keep the justices in their

7. Stephenson, *supra* note 6, at 60.

8. See Jed Shugerman, *The People’s Courts: The Rise of Judicial Elections and Judicial Power in America* (Sept. 9, 2008) (unpublished Ph.D. dissertation, Yale University) (on file with author).

9. See *id.* (describing the arguments offered by state constitutional delegates in New York, Illinois, Kentucky, Virginia, Ohio, and Maryland in favor of electing state judges and enhancing the independence of state courts from governors and legislators alike).

10. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986).

11. See, e.g., 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3–6, at 302–11 (3d ed. 2000) (observing that, for decades, “many of the most prominent, and most skillful, constitutional theorists [have] treated the question of the legitimacy of judicial review as itself the central problem of constitutional law,” and citing many examples); Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153, 155, 162–63 (2002) [hereinafter Friedman, *Academic Obsession*] (noting that “the central obsession of constitutional theory” has been, and remains, “the inconsistency between judicial review and democracy”); Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 *NW U. L. REV.* 933, 935–42 (2001) [hereinafter Friedman, *Counter-Majoritarian Problem*] (decrying the fixation of constitutional scholarship with the supposed problem of judicial countermajoritarianism as a “pathology”); David M. Golove, *Democratic Constitutionalism: The Bickel-Ackerman Dialectic*, in *THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY* 71, 71 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005) (observing that the questions “famously captured” by Bickel constitute the “enduring challenges” of constitutional theory and “have provoked a generation of theorists to offer a bewildering array of answers”).

12. BICKEL, *supra* note 10, at 17.

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place.”<sup>13</sup>

The factual premise that judicial review is countermajoritarian has come under sustained empirical attack from multiple directions.<sup>14</sup> There are two senses in which judicial review might be described as countermajoritarian. First, it might be countermajoritarian in the sense that the majority lacks control over the courts. Second, it might be countermajoritarian in the sense that the courts fail in practice to side with the views of the majority.<sup>15</sup> At least with respect to the practice of judicial review in the United States, both propositions are questionable. As a threshold matter, it is facially implausible to argue that political majorities lack control over the countless state judges who are elected or subject to popular recall. As for the federal courts, it is impossible to deny that the composition of the Supreme Court, and increasingly of the lower federal courts as well, is the product of pitched struggle among political actors who pay very close attention to the substantive views of judicial nominees.<sup>16</sup> Political scientists have long argued that the nature of the federal judicial appointment process ensures, in Robert Dahl’s words, that “the policy views

13. HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* 47 (1990).

14. See, e.g., Mark A. Graber, *Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power*, 65 MD. L. REV. 1, 5–10 (2006) [hereinafter Graber, *Foreword*] (reviewing the reasons for which scholars from different disciplines have arrived at an “emerging consensus” that judges “gain and increase their power to declare laws unconstitutional and make public policy when and only when at least some members of the existing governing coalition wish [them] to exercise such power”); Terri Peretti, *An Empirical Analysis of Alexander Bickel’s The Least Dangerous Branch*, in *THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY*, *supra* note 11, at 123, 123–41 (surveying empirical research by political scientists that casts doubt on the notion that judicial invalidation of legislation tends to defy majority wishes or to frustrate majoritarian tendencies of other government actors); *infra* notes 16–20 and accompanying text (describing various ways in which political scientists have undermined the empirical premises underlying the countermajoritarian dilemma).

15. This understanding of why judicial review is countermajoritarian appears to be Bickel’s own understanding. On his account, there is nothing countermajoritarian about judicial review unless one equates the acts of elected officials with the wishes of a majority. See BICKEL, *supra* note 10, at 16–17 (arguing that, when the Court strikes down legislative or executive action on constitutional grounds, “it exercises control, not in behalf of the prevailing majority, but against it”).

16. For the progenitor of this body of literature, see Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). Political scientists and law professors alike have taken up the argument. See, e.g., Neal Devins, *The D’Oh! of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1347–50 (2007) (arguing that the appointment and confirmation process has produced “a Court whose preferences generally track the median voter”); Friedman, *Counter-Majoritarian Problem*, *supra* note 11, at 935–42; David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 739–42 (2005) [hereinafter Law, *Generic Constitutional Law*] (arguing that the courts are in fact accountable and responsive to the views of a durable governing majority); David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner’s Dilemma*, 26 CARDOZO L. REV. 479, 498–500 (2005) (documenting the extent and regularity of popular control over the ideological composition and direction of the federal bench); Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2792 (2003) (observing that, under any system of judicial review, judicial decisions can always be “displaced” by political decisions—the only question being whether such displacement can occur “in the short run or only in the long run”).

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dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.”<sup>17</sup>

Many have also pointed out that the relationship between the elected policy-makers who supposedly speak for popular majorities, and the unelected judges who supposedly thwart them, is often cooperative and mutually beneficial rather than adversarial. There exists an “emerging consensus” among scholars working at the intersection of law and political science that elected officials often have self-serving, strategic reasons not merely to acquiesce in, but even to encourage the resolution of important policy questions by powerful and independent courts.<sup>18</sup>

Nor is there much evidence to support the proposition that courts defy the actual wishes of the majority, as far as American constitutional adjudication has been concerned. As a historical matter, the Supreme Court’s decisions have been, whether by coincidence or design, largely in sync with public opinion.<sup>19</sup>

17. Dahl, *supra* note 16, at 285. Nor are political scientists the only ones to embrace the fact that the power to appoint justices is the power to steer the policy direction of the Court. See WILLIAM H. REHNQUIST, *THE SUPREME COURT 209–10* (rev. ed. 2001) (deeming it “both normal and desirable” that “public opinion has some say in who shall become judges of the Supreme Court” and “thereby indirectly about its decisions” as well).

18. Graber, *Foreword, supra* note 14, at 6; see, e.g., TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 21–33* (2003) (arguing that, in situations of political deadlock in which no party can be assured of gaining or retaining power, “all parties will prefer to limit the majority and therefore will value minoritarian institutions such as judicial review” as a form of “insurance” against subsequent radical and unfavorable shifts in policy); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM passim* (2004) (arguing that political elites who fear loss of power deliberately engage in “hegemonic preservation” by entrenching like-minded policymakers on the bench and deliberately empowering them to constrain subsequent regimes); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY passim* (2006) (arguing that judicial review cannot thrive in practice unless there are “political reasons for powerful political actors to support [it],” and that, as a matter of actual American history, “presidents have found it in their interest to defer to the Court and to encourage it to take an active role in defining the Constitution and resolving constitutional controversies”); Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425, 427 (2005) (reviewing five recent books by political scientists, all of which argue that “[j]udicial review is established and maintained by elected officials”); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36–37 (1993) (observing that politicians benefit from diverting to the judiciary policy issues that provide little opportunity for political gain or have the potential to divide existing political coalitions); J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges So Conservative in Politically Charged Cases?*, 95 AM. POL. SCI. REV. 331, 332 (2001) (identifying three reasons why “U.S. federal politicians would want to keep judges independent”—namely, to make credible promises to lobbyists for the purpose of extracting rents, to “keep bureaucrats in line,” and to “mitigate their losses from losing elections”); Gordon Silverstein, *Sequencing the DNA of Comparative Constitutionalism: A Thought Experiment*, 65 MD. L. REV. 49, 53–57, 62–65 (2006) (discussing economic and political reasons for political actors to tolerate and even encourage strong courts and judicial review); Stephenson, *supra* note 6, at 60–61, 64–86 (arguing, on the basis of formal modeling and empirical testing, that governments have an incentive to encourage strong courts because “an independent judiciary can facilitate tacit bargains between political competitors to exercise mutual moderation”).

19. See, e.g., Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606–07 (2003) (observing that “in the main the results of Supreme Court decisionmaking comport with the preferences of a majority or at least a strong plurality, something that many political scientists

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Indeed, empirical studies suggest that the Court's actions are *at least* as consistent with public opinion as those of the *elected* branches.<sup>20</sup> Accordingly, it is entirely possible that judicial invalidation of legislative or executive action actually *advances* the wishes of the majority on the whole.

This Article takes aim not at the empirical foundation of the countermajoritarian dilemma—as so many have already done, and so capably—but rather at its theoretical foundation. Judicial review has, I argue, been misconceptualized by constitutional scholars as countermajoritarian and antidemocratic when, in fact, it underpins and reinforces the power of the people over their government. This Article employs insights from political science and game theory to illuminate the fundamentally democratic character of judicial review. It argues that judicial review, far from posing a threat to popular rule, instead performs functions that are crucial to the maintenance of popular sovereignty. Constitutional courts with the power of judicial review perform monitoring, signaling, and coordination functions that facilitate the exercise of popular control over the government. The relationship between judicial power and popular rule is not antagonistic, but symbiotic. On the one hand, by conveying relevant information about government misconduct in a highly public fashion, the courts enable the people to control their government in an informed and coordinated manner. On the other hand, by backing judicial review with the threat of popular action, the people give the government reason to obey the courts.

Judicial review supports popular sovereignty by mitigating the principal-

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now take as a given"); Friedman, *Academic Obsession*, *supra* note 11, at 166 (noting that "legislative enactments often do not enjoy majority support," whereas "judicial decisions often do"); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1750 (2001) ("On only a relative handful of occasions has the Court interpreted the Constitution in ways opposed by a clear majority of the nation."); Jeffrey J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POLITICS 1114, 1120 (1997); Antonin Scalia, *Federal Constitutional Guarantees of Individual Rights in the United States of America*, in HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 53, 90–91 (David M. Beatty ed., 1994) (arguing that "constitutional decisionmaking unsupported by clear text and tradition has been more effective in extending federal majoritarian rule over dissenting States than in preserving minority rights from national majorities").

20. See, e.g., THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 78–81 (1989) (reporting that, over the fifty-year period spanning the Hughes Court through the Burger Court, the Court's decisions on constitutional issues were in sync with public opinion over sixty percent of the time); Thomas R. Marshall, *Public Opinion, Representation, and the Modern Supreme Court*, 16 AM. POL. Q. 296, 300 (1988) (same); Thomas R. Marshall & Joseph Ignagni, *Supreme Court and Public Support for Rights Claims*, 78 JUDICATURE 146, 148–49 (1994) (reporting that the Court is much more likely to rule in favor of constitutional claims that enjoy public support than those that do not enjoy such support); *id.* at 149 & tbl.2 (reporting that the extent to which the Court's support for rights claims has "exceeded public opinion support" has "eroded over time," and finding the largest gap in percentage terms between the Court and the public in the area of "political and religious dissent," a category that includes school prayer); Alan D. Monroe, *Public Opinion and Public Policy, 1980–1993*, 62 PUB. OPINION Q. 6 (1998) (reporting that overall federal policy is consistent with majority preference only about fifty-five percent of the time); Peretti, *supra* note 14, at 140 (observing that "the Court's decisions match majority opinion more often than not and about as often as the other branches").

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agent problem that lies at the heart of democratic government.<sup>21</sup> In a system of constitutional government premised upon popular sovereignty, the people collectively institute and delegate power to a government, including most notably a monopoly on the legitimate use of force. The terms and conditions of this delegation of sovereign power make up a country's constitution.<sup>22</sup> The government, as agent of the people, is supposed to exercise its power consistent with these terms and conditions, and in the best interests of the people. But the interests of principal and agent may diverge. Those entrusted with public power may violate the terms of the delegation in a number of ways: they may seize more power than has been entrusted to them, for example, or turn the power that they have been given against the people.<sup>23</sup>

The people, as collective principal, thus face the challenge of asserting effective control over a potentially treacherous government. A constitution ordinarily sets forth mechanisms by which the people may exercise such control peacefully, such as competitive elections and a process for amendment of the constitution itself, but these are not immune to sabotage or failure. In extreme cases of constitutional failure, the people may band together to overthrow a government that has blocked the ordinary mechanisms of popular control: no government can withstand a concerted uprising by the whole citizenry. There are, however, significant potential obstacles to any effective exercise of popular power over the government. One is an information problem: the people cannot respond to bad behavior by the government if they remain unaware of that behavior. Another is a problem of collective action, or coordination: even if the people acting together are capable of toppling the government, such action may require widespread coordination that can be difficult to achieve.

Constitutional courts offer a solution to both problems. First, they provide reliable, low-cost information about the constitutionality of government conduct. A court engaged in judicial review performs the function of a whistleblower or fire alarm: it warns the people if their government has overstepped the

21. Per Martin Shapiro's formulation of the problem: "The constitution is a contract between the demos and government. The demos as constitution-maker faces the classic principal-agent problem when it establishes government by contract. How is the contract to be enforced on the agent?" Martin Shapiro, *The Success of Judicial Review and Democracy*, in MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 149, 182 (2002); see Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203, 205–06 (2005) (defining the "canonical principal-agent model" as developed by economists); *infra* section II.A (discussing the problems inherent in the principal-agent relationship between the people as principal and the government as agent).

22. See Martin Shapiro, *The European Court of Justice*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 273, 274 (Peter H. Russell & David M. O'Brien eds., 2001) (describing a "democratic constitution" as a "contract between the demos and a government acting as its agent" that "seeks to place limits on the political authority delegated" to the agent).

23. See D. RODERICK KIEWIET & MATHEW D. McCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS 26 (1991) (noting Madison's fear that "a government powerful enough to govern effectively would necessarily be powerful enough to oppress [the people]," and deeming it "the essence of the problem . . . that resources or authority granted to an agent for the purpose of advancing the interests of the principal can be turned against the principal").

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bounds of its delegated power. Second, courts can coordinate popular action against usurping governments by generating common beliefs and common knowledge about both the constitutionality of government conduct and the ways in which other citizens will react. People are unlikely to act openly against a government unless they believe that others will act as well: it is folly to engage in solitary rebellion against a despotic regime. What they need is a signal that it is time to act. A court can provide such a signal by ruling publicly against the government. The substantive content of the ruling operates on our beliefs about whether there is reason to act against the government. The fact that the ruling is public, however, operates on our beliefs about how others are likely to think and act. Courts make possible coordinated action against the government by shaping both types of beliefs at once.

It is thus inaccurate—if not backward—to argue that judicial review of government action undermines popular rule. Rather, judicial review can be understood as an institutional mechanism that facilitates popular control over government by conveying information and shaping beliefs about how the government behaves and how the people are likely to respond.<sup>24</sup> The fact that courts perform these monitoring and coordinating functions helps, in turn, to solve the puzzle of why powerful government actors obey seemingly powerless courts. The ability of the courts to mobilize the public against the government means that government disobedience of the courts carries potentially severe consequences.

Part I of this Article sets forth the principal-agent problem that lies at the heart of any government premised upon the notion of popular sovereignty. It illustrates the problem by positing a hypothetical state of nature in which people have much reason to institute a government, but also have reason to fear that any government to which they delegate power may betray them. In this scenario, the introduction of a judicial body reduces the risk of such betrayal and reinforces popular control over the government.

Parts II and III argue that constitutional courts with the power of judicial review perform monitoring and coordinating functions that both ameliorate the principal-agent problem and create incentives for the government to comply with judicial decisions. Part II explains how constitutional courts perform a monitoring function on behalf of the people. By acting as a fire-alarm mechanism that litigants can activate in cases of unconstitutional conduct, judicial review provides an economical source of reliable information about government behavior that facilitates popular control over the government. The threat that the judiciary will sound the alarm, in turn, gives the government an incentive both to obey constitutional limits in the first place, and to comply with adverse

24. See Forrest Maltzman et al., *Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 43, 47 (Cornell W. Clayton & Howard Gillman eds., 1999) (“Institutions . . . influence strategic decision makers through two principal mechanisms—by providing information about expected behavior and by signaling sanctions for noncompliance.”).

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judicial rulings after the fact.

Part III offers a coordination-based explanation of judicial power and explicates the role of the courts, in their capacity as coordinators, in upholding popular rule. It suggests that the designation of a judicial official or court to decide upon the legality of government conduct can help the people to overcome collective action problems that might otherwise prevent them from acting against a lawless government. By generating widespread beliefs about the acceptability of government conduct, courts can coordinate popular opposition to the government. This fact, in turn, gives governments a reason to obey seemingly powerless courts.

Sections III.A and III.B argue that obedience to governments and courts alike is a product of strategic behavior, and that courts influence strategic behavior by shaping the expectations that people hold about how others will behave. The influence that courts have over the strategic beliefs that people hold enables them to create strategic incentives for litigants to comply with their rulings—and for citizens to obey or resist their government—even when the courts lack anything that could accurately be described as enforcement power. Section III.C explains how tyranny and revolution are both forms of large-scale coordination, and why a tyrannical government can be overthrown only if widely held beliefs about how other citizens will behave can be reshaped. Section III.D argues that the act of judicial review can shape beliefs and coordinate behavior in such a way that the public can effectively discipline a tyrannical or usurping government. It does so by way of a seemingly unlikely analogy between the role that an everyday traffic light plays in regulating an ordinary intersection, and the role that constitutional courts play in a democracy. Section III.E suggests various practices and goals that courts can adopt to increase the likelihood that they will succeed at effectively coordinating public opposition to bad governments.

Part IV of this Article discusses a counterintuitive implication of a coordination-based account of judicial power. Conventional wisdom suggests that courts secure compliance with their decisions by drawing upon their store of legitimacy, which is undermined by decisions that are unpopular, controversial, or lack intellectual integrity.<sup>25</sup> Part IV argues that precisely the opposite is true: an unpopular or unpersuasive decision can, in fact, enhance a court's power in future cases, as long as it is obeyed. Widespread compliance with a decision that is controversial, unpopular, or unpersuasive serves only to strengthen the widely held expectation that others comply with judicial decisions. This expectation, in turn, is self-fulfilling: those who expect others to comply with a court's decisions will find it strategically prudent to comply themselves, and the aggregate result will, in fact, be widespread compliance. Part IV illustrates these strategic insights—and the Supreme Court's apparent grasp of them—by contrasting

25. See *infra* notes 174–80 and accompanying text.

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*Bush v. Gore*<sup>26</sup> with *Brown v. Board of Education*<sup>27</sup> and *Cooper v. Aaron*.<sup>28</sup>

Part V explores the practical implications of the theory for judicial independence and the extent of popular support for the courts. It does so by modeling judicial review by an independent court as a game of strategy played by the government, the court, and the people. This analysis yields three predictions. First, if the theory is correct that constitutional courts facilitate popular control over the government by performing monitoring and coordinating functions, would-be tyrants have an incentive to undermine their independence, for the same reasons that a would-be arsonist might seek to disable a fire alarm. Second, because people know that would-be tyrants have an incentive to undermine judicial independence, they will support the independence of the courts from the government, and they will further construe an attack upon the courts as a warning sign of potential usurpation. Third, to the extent that judicial review performs monitoring and coordinating functions that bolster popular control of the government, the people have a rational incentive to support judicial independence, even if the courts do not always adopt policies that are preferred by the majority.

The Article concludes with a few words of practical advice for those in government, and a call for reform of constitutional theory itself. For those on the bench, the Conclusion offers suggestions as to how courts can best protect and expand their own power. For those who dream of becoming despots, there is advice on how best to design a toothless judiciary without being too obvious about it. For those faced with the task of framing working constitutional arrangements for a liberal democracy, the Conclusion identifies structural choices that are conducive to the success of judicial review, and it also makes a modest case for popular participation in the selection of judges. Last but not least, the Article closes by urging a new research agenda for constitutional scholarship—one that moves beyond the countermajoritarian dilemma to questions deserving of greater attention.

## I. THE GUNMAN AND THE JUDGE: THE EMERGENCE OF GOVERNMENT AND THE PROBLEM OF AGENCY

### A. THE STATE OF NATURE

The Hobbesian state of nature is a famously unpleasant place. Thomas Hobbes defined the state of nature as the hypothetical condition in which people would find themselves in the absence of government.<sup>29</sup> It is a chaotic state in which people employ violence upon one another without any kind of organized

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26. *Bush v. Gore*, 531 U.S. 98 (2000).

27. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

28. *Cooper v. Aaron*, 358 U.S. 1 (1958).

29. THOMAS HOBBS, *LEVIATHAN* 183–90 (C.B. Macpherson ed., Penguin 1968) (1651).

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external restraint, in a perpetual war of all against all.<sup>30</sup> Life in the state of nature is, as a consequence, “solitary, poore, nasty, brutish, and short.”<sup>31</sup> Rational people in this state of nature, Hobbes argued, would choose to confer a monopoly over the legitimate use of force upon a sovereign—even an absolute monarch—provided that the sovereign could, in exchange, put an end to this “condition of Warre of every man against every man.”<sup>32</sup>

The state of nature is a useful concept because it highlights not only the reasons for which people might choose to institute a government, but also the inevitable dilemma that stems from the creation of organized government. What Hobbes sought to illustrate is that people have eminently good reasons to institute a sovereign, and to give their sovereign a monopoly on the legitimate use of force. Hobbes worried little, however, over the problem of how sovereigns might abuse this power.<sup>33</sup> It is this problem—the threat of tyranny, of government run amok—that has long preoccupied liberal thinkers with a practical interest in the design of government institutions. On the one hand, a community of people can hope to accomplish many important goals only by pooling its resources and entrusting them, together with the power of coercion, to a limited number of actors who together constitute a government. On the other hand, there arises a very real danger that those in government may turn their powers against society for their own selfish benefit. This concern is manifest throughout the Constitution: no sooner does the Constitution create a new government than it sets forth substantive limits upon the powers of that government, combined with institutional mechanisms designed to ensure that the government stays within those limits and remains subject to popular control. Judicial review by independent courts has long been understood as one mechanism for keeping the government within the limits of its power. What has been overlooked, however, is the manner in which judicial review enables the people themselves to exercise effective control over their government.

The Hobbesian framework can be employed to illustrate not only (1) the reasons for which people institute governments and (2) the danger that governments pose to their citizens, but also (3) the roles that judicial review plays in ensuring that the government remains subject to popular control and that the

30. *Id.* at 185–88, 196 (“[D]uring the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man.”).

31. *Id.* at 186.

32. *Id.* at 196. For Hobbes, it sufficed that life under a sovereign, even a despotic one, would still be preferable to the dreaded alternative—namely, a state of “perpetuall war.” *Id.* at 266 (arguing that “masterlesse men” enjoy “full and absolute Libertie” at the cost of living in a state of “perpetuall war”); *see also id.* at 264–65 (arguing that “nothing the Sovereign Representative can doe to a Subject, on what pretence soever, can properly be called Injustice, or Injury”); Russell Hardin, *Hobbesian Political Order*, 19 *POL. THEORY* 156, 157, 171–72 (1991) (observing that Hobbes’s “overriding actual concern” was to maintain “sovereign government in the face of revolutionary fervor and turmoil,” and thus to avoid the destruction and chaos that accompanies revolution).

33. *See supra* note 32.

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relationship between government and citizen operates as intended by the people. We might call this extension of the Hobbesian framework *the lone gunman scenario*, for reasons that should soon become apparent.

Imagine a small community that lacks any organized government, and in which the inhabitants all carry guns. Let us call it Hobbestown. Life in this community is not necessarily anarchic. The people of Hobbestown may in fact share some common expectations regarding the use of force: they may, for example, profess a norm that anyone who resorts to gunplay without provocation is subject to retaliation. To the extent that such norms governing the use of force do exist, however, the norms are prone both to interpretive disagreement and outright disobedience.<sup>34</sup>

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For the people of Hobbestown, life without government poses significant drawbacks. Because the community lacks any institutional mechanism or actor with both the power and the responsibility to interpret, revise, or enforce these norms, there is no decisive way of ascertaining what constitutes provocation, for example, or of ensuring that norm violation meets with specified consequences. Under these conditions, costly violence may occur with uncomfortable frequency. The frequency with which revenge killings and blood feuds occurred in premodern Eskimo and Icelandic societies, for example, suggests that such concerns are well founded.<sup>35</sup> The absence of any designated specialist in norm enforcement means furthermore that all members of the community must spend time and effort deterring and punishing transgressors—time and effort that, in many cases, could be spent more productively on wealth-creating activities. Moreover, to the extent that the community must rely for its defense on uncoordinated action by individuals who are not experts in the use of force, Hobbestown might be particularly vulnerable to external threats.

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For such reasons, the people might wish to delegate the use of force to a specialist—a lone gunman—who is capable of protecting them from one another and from external threats. Such delegation would entail the handover of all weapons to the lone gunman. The people, having surrendered their own weapons, would pose less of a threat to one another in the first place. And the lone gunman, as a designated specialist in the use of force with the community's entire arsenal at his disposal, would be better armed and more adept at the use

34. See, e.g., Larry Alexander, *Judicial Review and Moral Rights*, 33 *QUEEN'S L.J.* 1, 5 (2007) (“Even in the most ideal circumstances, in a community all of whose members subscribe to the same general moral theory, there will be controversy over how the general moral prescriptions apply in concrete situations.”).

35. See E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* 87–89 (1954) (observing that the Eskimo obligation to commit “blood revenge” passes from generation to generation until fulfilled, and noting that even an “executioner” acting as an “agent of the community” must take advance precautions to ensure that he does not incur “blood revenge” upon himself); MILLER, *supra* note 1, at 182–84 (characterizing the Icelandic “bloodfeud” as an ongoing, possibly interminable, relationship of reciprocal killing, and describing the Icelandic practice of “vengeance” as a group activity governed by imprecise norms and notions of “balance” and “equivalence”).

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of force than any ordinary member of the population could hope to become. He would be well equipped both to punish those who violate the norms of the community, and to repel attacks upon the community. The lone gunman embodies, in short, a rudimentary form of government.

#### B. THE PROBLEM OF THE TREACHEROUS GUNMAN

There are important reasons, however, why the people might be loath to give the lone gunman a monopoly on the use of force. Although they wish to suppress internal conflict and remain safe from external predators, they would not necessarily want to do so at the cost of delivering themselves into servitude at the hands of the lone gunman. Rather, the people would presumably seek to ensure that their one-man proto-government can be relied upon to act in their best interests and will not turn against them. The goal of the people, in other words, will be to establish a successful principal-agent relationship, in which the people collectively are the principal and the gunman is an agent who serves their best interests.<sup>36</sup> But in attempting to establish such a relationship, the people would promptly encounter the problem that “a government powerful enough to govern effectively would necessarily be powerful enough to oppress them.”<sup>37</sup>

Professors Kiewiet and McCubbins dub this problem “Madison’s dilemma,” for it was Madison who, in *Federalist No. 51*, articulated the two prongs of this dilemma—the necessity of some form of government, on the one hand, and the threat of government oppression, on the other.<sup>38</sup> “The essence of the problem,” observe Kiewiet and McCubbins, “is that resources or authority granted to an agent for the purpose of advancing the interests of the principal can be turned against the principal.”<sup>39</sup> Thus, in the example at hand, the people of Hobbes-town solve the initial problem of “enabl[ing] the government to control the governed”<sup>40</sup> by surrendering their weapons to the lone gunman, only to confront the challenge of ensuring that the gunman acts in their best interests—or, at the very least, does not betray and oppress them.

Broadly speaking, there are two mutually compatible ways in which the

36. See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1133 (1991) (observing that, in a republican government, “the people (the ‘principals’) delegate power to run day-to-day affairs to a small set of specialized government officials (the ‘agents’)”); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 325 (2005) (“Principal-agent theory posits the rulers as servants of the ruled.”); Shapiro, *supra* note 21, at 182 (characterizing the relationship between the “demos” and the government as one of principal and agent).

37. KIEWIET & MCCUBBINS, *supra* note 23, at 26.

38. *Id.*; see THE FEDERALIST NO. 51 (James Madison), *supra* note 5, at 322 (“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”).

39. KIEWIET & MCCUBBINS, *supra* note 23, at 26; see also, e.g., Amar, *supra* note 36, at 1133, 1206 (noting the problem that government officials, as “agents” of the people, “may try to rule in their own self-interest, contrary to the interests and expressed wishes of the people”).

40. THE FEDERALIST NO. 51 (James Madison), *supra* note 5, at 322.

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people might attempt to address the threat of treachery by the gunman. The first approach is to design institutions that thwart efforts by the gunman to usurp or exercise absolute power. This was the approach advocated by Madison, who explicitly sought to design a government that would be “oblige[d] . . . to control itself.”<sup>41</sup> To that end, he and his fellow Framers proposed in the Constitution a system of checks and balances, in which rivalry among different branches of government, and between the state and federal governments, would prevent overreaching by the government as a whole. In the same vein, there are various institutional solutions that the people of Hobbestown might devise, albeit at some potential cost in complexity and inefficiency. They might, for example, surrender their weapons to one person but give their ammunition to another, in a rudimentary version of the separation of powers: one actor would thus wield the executive power, but another actor would possess the resources needed to make that power effective. They might also attempt to designate multiple gunmen with overlapping jurisdictions and responsibilities, in the hope that competing gunmen would end up checking one another without lapsing into a bloody feud of their own.<sup>42</sup>

The second way in which the people might keep the gunman on his best behavior would be for them to retain the ability to amend or terminate the agency relationship, such as by revoking the agent’s powers or selecting a new agent. Thus, for example, the people of Hobbestown might agree to select a new gunman at fixed intervals, perhaps via regularly scheduled competitive elections. They might also attempt to bolster their control over the gunman by setting forth in writing the terms and conditions under which they have delegated power to the gunman, in the form of rules of conduct for the gunman and explicit limits upon the gunman’s power. This writing might also set forth procedures for the modification or revocation of the gunman’s powers. Such a document would be, in effect if not also in name, a constitution.

The parallels between the situation faced by the people of Hobbestown and the Framers of the Constitution should again be evident. As Akhil Amar has argued, the limits upon governmental power found in the Constitution exist as much to facilitate popular control over the government as to protect individuals from tyrannous majorities.<sup>43</sup> Amar characterizes the Bill of Rights as an effort by the Framers to solve an agency problem—namely, the possibility that the government, instituted to serve the interests of the people, might instead turn against the people.<sup>44</sup> Much like federalism

41. *Id.*

42. See Shapiro, *supra* note 22, at 275 (noting that a “division of powers” among competing government actors, each anxious to repel encroachment upon its own authority, is “a “standard self-enforcement device” for policing the constitutional limits of the power delegated by the people to their government).

43. Amar, *supra* note 36, at 1146–1210 (arguing that various features of the Bill of Rights, ranging from the rights of assembly and petition and the militia clause of the Second Amendment to the centrality of the jury, were motivated in substantial part by “populist” concerns and intended to further popular participation in, and control over, the newly created federal government).

44. *Id.* at 1133, 1145–46, 1152, 1177, 1179, 1182, 1206 (explicitly defining the problem faced by the Framers as an “agency” problem).

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and the separation of powers, constitutional features such as the right to assemble and the right to bear arms were intended both to prevent the concentration of absolute power and to protect popular sovereignty.<sup>45</sup>

C. THE PROBLEMS OF BARGAINING, INCOMPLETE INFORMATION, AND  
COLLECTIVE ACTION

Efforts by the people to exercise effective control over the gunman are likely, however, to encounter three significant obstacles. The first is a bargaining problem: the people must agree upon both the terms of the delegation and a strategy for dealing with violations. Their efforts to agree will occur behind what Rawls famously dubbed a “veil of ignorance”<sup>46</sup>: the people do not know at the outset how the gunman will behave, for example, or whether the gunman’s behavior will favor some at the expense of others. All they know for certain is that they must agree upon a strategy for controlling him, and that a treacherous gunman will attempt to disrupt any strategy that they devise. One approach that the gunman may take, in particular, is to play divide-and-conquer: a gunman who requires the support of only part of the population in order to stay in power may secure that support by transgressing against the rest of the population and sharing his plunder with those whose support he needs.<sup>47</sup> That is, the gunman may usurp power by pitting one group against another.

The prospect of such behavior gives the people a powerful reason to commit themselves in advance to a comprehensive strategy for identifying and responding to abuses by the gunman. Such a strategy might take the form of a written constitution that would amount in substance to a mutual defense pact. The people will find it impossible, however, to address with precision all situations that might arise. Any constitution that they draft is bound to contain ambiguities and lacunae that will become apparent only with the benefit of experience.<sup>48</sup>

45. See *id.* at 1152–57 (discussing the rights of assembly and petition); *id.* at 1162–73 (characterizing the Second Amendment as both a barrier against centralized tyranny and a mechanism for maintaining civilian control of the military).

46. JOHN RAWLS, *A THEORY OF JUSTICE* 118–23 (rev. ed. 1999) (explaining how, in the “original position,” people reason from behind a “veil of ignorance” toward the substantive requirements of justice).

47. See Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 *AM. POL. SCI. REV.* 245, 247–48, 261 (1997) (“Maintaining limits on the state requires that citizens oppose a violation even if they potentially benefit from it.”).

48. See, e.g., Randall Calvert & James Johnson, *Interpretation and Coordination in Constitutional Politics*, in *LESSONS IN DEMOCRACY* 99, 112–17, 130–32 (Ewa Hauser & Jacek Wasilewski eds., 1999) (arguing that constitutions cannot solve problems of political coordination once and for all because disagreement inevitably surrounds the application of constitutional requirements in actual situations); Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests, and Institutions: Constructing the European Community’s Internal Market*, in *IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE* 173, 180 (Judith Goldstein & Robert O. Keohane eds., 1993) (noting that it is always “very costly, . . . if not impossible,” for people to devise “an exhaustive set of rules to govern all their future interactions,” and consequently that people “invariably make incomplete contracts that do not specify how participants should behave under all possible circumstances, but rather only sketch general codes of conduct”); Daniel Sutter, *Enforcing Constitutional Constraints*, 8 *CONST. POL. ECON.* 139, 139 (1997)

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Moreover, even if the people were somehow capable of anticipating every contingency, the degree of effort and consensus needed to adopt a comprehensive constitution might nevertheless be prohibitive.<sup>49</sup>

The second important obstacle to effective popular control over the gunman is a problem of incomplete information. Neither elections nor constitutional amendments will be of any use in controlling the gunman, for example, if the people lack the information to know whether the gunman ought to be replaced or how the constitution needs to be amended. In order to make informed decisions about the gunman, the people must have some way of knowing whether the gunman has discharged his responsibilities and respected the limits upon his power. It will be necessary for them to know, for instance, whether the gunman has used lethal force, against whom, and for what reason. In addition, they must be able to assess whether the gunman's conduct has been consistent with their wishes. A constitution that sets forth their goals and prescribes rules for the gunman's conduct provides the most obvious standard against which to make this assessment. Assessment of the gunman's compliance with the constitution may, however, require a significant degree of judgment and expertise.<sup>50</sup> Meanwhile, if the gunman believes that the people cannot detect misconduct—or, equally, that the people cannot agree upon what constitutes misconduct that demands a response<sup>51</sup>—that belief will only embolden him to misbehave.<sup>52</sup>

The third problem that the people face is the strategic challenge of coordinat-

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(describing constitutions as “necessarily incomplete contracts” that can neither anticipate all contingencies that might “arise after the constitutional founding” nor preclude disagreement over “the application of the rules in a specific case”).

49. Cf. Peter C. Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137, 147–49, 157–58 (1992) (arguing that “constitutions that try to ‘nail down’ every detail and negotiate every contemporary political conflict” are prone to failure because they are “unlikely to secure much allegiance in public debate and cannot coordinate political action for very long,” and that a constitution is more likely to endure if it aims merely to set forth procedures for the resolution of substantive disagreement than if it actually attempts to resolve such disagreement in the first place). It is also worth noting that, even if the people do manage to reach agreement behind the veil of ignorance upon a comprehensive strategy for dealing with the gunman, a serious difficulty may subsequently emerge over time: some citizens may wish to repudiate the strategy if they discover that it unduly burdens or fails to protect them in practice, while others may refuse to revisit the strategy precisely because it coddles them. That is, once history reveals that a particular constitutional regime favors one group over another, it will be difficult for the people either to enforce the existing constitution against the gunman, or to agree upon a new constitution. As Daniel Sutter warns:

People may approve limits on government before knowing their position in society; once the uncertainty is resolved some may want to renege on the rules. Political philosophers can argue that agreement creates a moral obligation to abide by the rules, . . . [but a]s a practical matter at least some individuals will fail to live up to this obligation.

Sutter, *supra* note 48, at 139–40.

50. See Sutter, *supra* note 48, at 140 (“Issues of constitutional law are rarely simple. Most people lack either the mental capabilities or the time and inclination to master the subject. A typical citizen judging whether government has overstepped its constitutional limits might do no better than random guessing.”).

51. See *id.* at 146 (identifying several reasons why people may disagree “whether the available evidence warrants action” against the government, and noting that the result may be a “coordination failure” on the part of the people); Weingast, *supra* note 47, at 251 (noting that, because “violations of the rights of some may

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ing the collective action required to depose a treacherous gunman. Even if the people can agree upon the conditions for ousting the gunman, there exists a real risk that the gunman, once in power, may crush any effort to dislodge him. Constitutional restrictions upon the power of the gunman may amount to little more than “parchment barriers”<sup>53</sup> unless the people can credibly threaten to enforce them. Successful enforcement by the people, in turn, requires collective action on a large scale in the face of lethal force, which may be easier said than done.<sup>54</sup> Acting in concert, the people of Hobbestown have the ability to overpower a lone gunman with few or no casualties. The scope of the uprising will influence not only the gunman’s ability to suppress the uprising, but also his willingness even to try. A sufficiently large uprising will persuade the gunman that resistance is futile and may, indeed, instill in him a fear of retribution for any casualties that he inflicts in the course of futile resistance. If the gunman believes that he will inevitably be toppled, his best strategy may be to refrain from resisting at all in order to avoid retribution. If, however, the people attack the gunman individually or seriatim, each person who acts is bound to die at the hands of the gunman.<sup>55</sup>

Thus arises an acute strategic problem of coordination and collective action. All would prefer to depose an abusive gunman, yet who will dare to act knowing that, if others do not join at the same time, he or she will meet with certain death? Only coordinated action against the gunman is likely to prove

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benefit others,” citizens are likely to disagree over “what actions constitute a transgression” by the government, and coordination against the government will accordingly be difficult).

52. See Garrett & Weingast, *supra* note 48, at 179 (“If individuals do not always know when a defection has taken place, then defection will not always be punished, and thus the incentives to defect will increase.”); Sutter, *supra* note 48, at 140–41 (observing that constitutional constraints on the government cannot be enforced unless the people possess the means to detect constitutional violations).

53. THE FEDERALIST NO. 48 (James Madison), *supra* note 5, at 308.

54. See, e.g., Russell Hardin, *Constitutionalism*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 289, 291 (Barry R. Weingast & Donald A. Wittman eds., 2006) (noting that collective action problems plague any effort to maintain a constitutional order); Barry R. Weingast, *The Political Foundations of Limited Government: Parliament and Sovereign Debt in 17th- and 18th-Century England*, in THE FRONTIERS OF THE NEW INSTITUTIONAL ECONOMICS 213, 237 (John N. Drobak & John V.C. Nye eds., 1997) (observing that citizens face a “massive coordination problem that hinders their ability to police limits on sovereign behavior” to the extent that a sovereign can abuse some citizens without causing all other citizens to conclude that the limits have been broken).

55. Thomas Schelling’s discussion of non-zero-sum games employs a comparable scenario involving a single robber who holds up a large number of people. From a strategic perspective, the robber’s situation is fundamentally similar to that of Hobbestown’s lone gunman because, in both cases, an individual’s ability to dominate and oppress rests upon the inability of his victims to behave in a coordinated fashion:

[T]wenty men held up for robbery or ransom by a single man who has a gun and six bullets[] . . . can defeat him without loss if they can visibly commit themselves to a threat to do so . . . [But they cannot] make a threat unless they agree on it themselves; so if he can threaten to shoot any two who talk together, he can deter agreement . . . [I]f he can announce a formula for shooting, such as that those who move first get shot first, he can deter them unless they find a way to move together without a “first.”

THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 120–21 (7th prtg. 1980).

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effective, but such action cannot occur unless several conditions are met. First, the people must know that they have reason to act against the gunman: if the gunman's misconduct remains unknown, no uprising will occur. Second, they must know when to act: even if everyone wants to overthrow the gunman, uprising can succeed only if they act together. Third, they must believe that others will act. This third requirement is a crucial one. In order to act, each person needs not only a reason to seek the gunman's overthrow, but also reason to believe that others have reason to seek the gunman's overthrow as well. Believing that others will act, each person becomes more willing to act. The belief that a successful uprising will occur thus becomes a self-fulfilling prophecy.<sup>56</sup> Yet the opposite holds true as well: if no one believes that others have reason to act, no one will act, and a revolt will never occur, even if everyone does, in fact, have reason to act.<sup>57</sup>

What the people need in order for a revolt against the gunman to succeed, therefore, is "some signal for their coordination"—one that is "so unmistakably comprehensible and so potent in its suggestion for action that everyone can be sure that everyone else reads the same signal with enough confidence to act on it, thus providing one another with the immunity that goes with action in large numbers."<sup>58</sup> In the language of game theory, the basis for acting against the gunman must be *common knowledge*: everyone must know not only that the gunman has misbehaved, but also that everyone knows, and that everyone knows that everyone knows.<sup>59</sup> In order to rebel at a certain point, not only must I have reason to rebel at that point, but I must also know that you have reason to rebel at the same point, and that you know that I know that you have reason to rebel at that point, and so on.

These information and coordination problems may prove difficult for the people of Hobbestown to solve without the help of an appropriate institution,

56. See, e.g., MICHAEL SUK-YOUNG CHWE, RATIONAL RITUAL: CULTURE, COORDINATION, AND COMMON KNOWLEDGE 3, 10 (2001) (characterizing rebellion against a government as a "coordination problem" in which "each person is more willing to show up at a demonstration if many others do, perhaps because success is more likely and getting arrested is less likely"); ROGER V. GOULD, INSURGENT IDENTITIES: CLASS, COMMUNITY, AND PROTEST IN PARIS FROM 1848 TO THE COMMUNE 18 (1995) (observing that "[p]otential recruits to a social movement will only participate if they see themselves as a part of a collectivity that is sufficient large and solidary to assure some chance of success through mobilization").

57. See Sutter, *supra* note 48, at 146 ("Each person may think a protest is warranted but that nobody else believes this, in which case no one initiates a protest. Universal nonparticipation may always be an equilibrium." (footnote omitted)).

58. SCHELLING, *supra* note 55, at 74 (discussing how popular revolt against a fragile regime can succeed); see also *id.* at 90 ("[T]he mob's problem is to act in unison without overt leadership, to find some common signal that makes everyone confident that, if he acts on it, he will not be acting alone.").

59. See CHWE, *supra* note 56, at 3 (defining "common knowledge" as "knowledge of others' knowledge, knowledge of others' knowledge of others' knowledge, and so on"); Peter Vanderschraaf & Giacomo Sillari, *Common Knowledge*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), <http://plato.stanford.edu/archives/fall2008/> (distinguishing "mutual knowledge," which is knowledge that everyone possesses without necessarily knowing that others also possess it, from "common knowledge," which encompasses "nested knowledge" about the knowledge of others).

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such as a court that performs judicial review. Direct popular oversight of the gunman would require the people not only to find a way to monitor the gunman's conduct, but also to familiarize themselves with the content and application of the constitutional law that defines the gunman's authority and responsibilities. Legal information is not easy for ordinary people to obtain and absorb.<sup>60</sup> Thus, assuming that Hobbestown's constitutional law achieves even minimal complexity, only a small fraction of the population could be expected to acquire and exercise the necessary expertise.<sup>61</sup> Who, then, could fill the informational vacuum? The legal academy? The media? Law professors might possess the necessary expertise, but they would surely lack the necessary resources to monitor government activity. The media, conversely, possess greater investigative resources, but generally lack the requisite legal expertise.

The community's failure to designate a specific actor with responsibility for ruling authoritatively upon the constitutionality of the gunman's conduct would also hamper efforts to coordinate against the gunman. Among those capable of holding informed views as to the constitutionality of the gunman's conduct, disagreement would likely be a common occurrence. Faced with complex and conflicting information about the constitutionality of the gunman's conduct, on what basis would legally unsophisticated members of the general public decide whether to act against the gunman? On whose signal would they coordinate? To combat the potential tyranny of the gunman, they need a "trigger strategy": they must agree on not only what actions by the gunman should trigger an attempt to depose him, but also how to determine whether those actions have occurred.<sup>62</sup>

To tackle these problems, the people of Hobbestown might designate someone to monitor the gunman's behavior, clarify the limits upon the gunman's powers, and declare publicly whether and when the gunman has violated those limits.<sup>63</sup> They might choose to call this official a monitor, a reporter, a referee, or perhaps even a judge. This judge would lack any weapons of her own with which to restrain the gunman. Thus, it would be inaccurate to say that the judge has the power to enforce the terms of the delegation to the gunman or to strike

60. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 281 (1991) (observing that, "[i]n a world of costly information, . . . one cannot assume" widespread knowledge of the law, and arguing that people may rely upon social norms and informal systems of social control, rather than law and legal enforcement, in part because legal expertise is rare and costly to obtain); *id.* at 252 (noting that people may "choose against law . . . in order to avoid the administrative costs of finding the law or learning its technicalities").

61. See *supra* note 50 and accompanying text (noting that "[m]ost people lack either the mental capabilities or the time and inclination" to master constitutional law).

62. Weingast, *supra* note 54, at 253 (discussing how, in order to prevent a recurrence of tyranny, English Whigs and Tories sought to agree on "trigger strategies" that "should trigger a joint response by both groups[]" against the king); see Sutter, *supra* note 48, at 146 (noting that "[p]eople can disagree for several reasons whether the available evidence warrants action" against the government, and that "[a] divergence of opinion creates potential for coordination failure").

63. See Sutter, *supra* note 48, at 140 (observing that the difficulty ordinary citizens face in "judging whether government has overstepped its constitutional limits . . . warrants employment of an expert to make the determination").

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down or invalidate the gunman's actions. Nevertheless, the judge's role would still be judicial in nature and, indeed, has ample precedent in the real world. A judicial declaration that the gunman has exceeded his powers would be analogous, for example, to the nonbinding declarations of incompatibility that British courts issue when confronted with violations of the European Convention on Human Rights.<sup>64</sup>

How might the introduction of an unarmed judge help to solve the problems inherent in the principal-agent relationship between the people and the gunman? The judge can perform two functions that will help the people to exercise effective control over the gunman. The first is a *monitoring* function. Without adequate knowledge of the gunman's behavior, the people stand little chance of preventing or responding to usurpation or treachery.<sup>65</sup> The judge can provide much needed information about the gunman's compliance with whatever limits the people have imposed upon him in advance. Not only can she report upon the facts of the gunman's behavior, but she can also resolve the questions that will inevitably arise over what constitutes a violation of the rules governing his behavior.

The second function that the judge can perform is that of *coordination*. It may be impossible for the people, acting individually, to assert control over a tyrannical gunman. Yet it may also be difficult for them to take collective action against the government absent some signal that rallies them to action. A ruling by the judge that the gunman has turned against the people is such a signal: it leads people to believe that resistance to the gunman is not only necessary, but also likely to occur. By shaping widespread beliefs of this kind, the judge can make popular reassertion of control over the gunman a self-fulfilling prophecy. The judge's ability to inform and coordinate the public, in turn, gives the gunman reason to comply with her rulings, notwithstanding the fact that he is armed and she is not.

In performing judicial review, constitutional courts perform the same functions as our hypothetical judge: they monitor government compliance with restrictions upon its power, and they do so in a way that facilitates coordinated public opposition to the government. Their performance of these functions both enhances popular sovereignty and helps to explain government compliance with judicial decisions. Part II of this Article explains why the institutional characteristics of courts render them well suited for the role of monitoring the government. Part III discusses how courts can coordinate behavior on a large scale by shaping the beliefs that we hold about how others are likely to behave. The ability of the courts to coordinate public opposition against the government, in particular, both facilitates the exercise of popular control over the government and creates incentives for the government to respect judicially articulated limits upon its power.

64. See PAUL P. CRAIG, *ADMINISTRATIVE LAW* 562–608 (5th ed. 2003) (discussing judicial application of the Convention in Britain via the Human Rights Act, 1998).

65. See *supra* notes 50–52 and accompanying text.

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## II. COURTS AS MONITORS

### A. HOW PRINCIPALS MONITOR AGENTS

*Scientia potentia est.*<sup>66</sup> It is in the nature of adjudication for courts to gather and report information about the behavior of the parties that come before them. Does this knowledge give them power over the parties? Social scientists have suggested that the answer is yes: merely by collecting and distributing information about how people behave, courts can induce people to refrain from bad behavior.<sup>67</sup> A well-known example concerns the emergence of commercial law in the early Middle Ages. European merchants of that period developed a private legal code, the *lex mercatoria*, that was administered by judges who were themselves drawn from the merchant ranks.<sup>68</sup> These private judges could not call upon the state for assistance and had little power to enforce their judgments against those who violated the merchant code.<sup>69</sup> What they could do, however, was to make information available about the past conduct of other merchants: for a fee, these judges would disclose whether a particular merchant had refused to honor a judgment against him.<sup>70</sup> The availability of this information, in turn, enabled merchants who otherwise lacked knowledge of one another's reputations to shun potential trading partners with a blemished record.<sup>71</sup> The prospect of being blacklisted in this manner ensured a healthy degree of compliance with the decisions of the private judges.

The inherent tendency of courts to collect and disseminate information in the course of adjudicating disputes assumes special significance in the context of the agency relationship between the people and their government. Whether the relationship is one of shareholders and corporate managers, or citizens and public officials, the issue of imperfect information lies at the heart of all agency problems. Agents can misbehave in a variety of ways: they can shirk their duties; they can conceal information about their behavior from their principals; they can even turn the principal's own resources and authority against the principal.<sup>72</sup> In such situations, what the principal needs in order to prevent shirking and even treachery by the agent is reliable information about the agent's behavior.

To be more specific, agency problems of this ilk cannot be overcome unless

66. Translated from the Latin: "Knowledge is itself power." SIR FRANCIS BACON, *Meditationes Sacrae*, in *EXEMPLUM TRACTATUS DE FONTIBUS JURIS* AND OTHER LATIN PIECES OF LORD BACON 170, 191 (James Glassford trans., Waugh & Innes 1823) (1597).

67. See *supra* notes 2–3 and accompanying text (discussing how the *alcalde* of Mexican California and the private merchant judges of medieval Europe secured compliance with their judgments, even in the absence of enforcement power, by conveying information to third parties that enabled reputational mechanisms to function effectively).

68. See Milgrom et al., *supra* note 2, at 2, 4.

69. See *id.* at 2, 5.

70. See *id.* at 2–5.

71. See *id.*

72. See *supra* note 39 and accompanying text.

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two conditions are satisfied. The first, observe Professors Lupia and McCubbins, is a knowledge condition: the principal must possess enough information to judge whether the agent's actions benefit the principal.<sup>73</sup> The second is an incentive condition: the agent must have some incentive to act in the principal's best interests.<sup>74</sup> Yet it is difficult for the principal to provide the proper incentives if the principal lacks information about the agent's behavior. For example, the citizens of a democracy may wish to employ the threat of electoral defeat to deter misconduct by the government. That threat will only be effective, however, if voters are capable of assessing the government's behavior when it comes time to vote.

There are, as Lupia and McCubbins note, three ways for a principal to learn about an agent's actions. Not all of them are well suited to the task of gathering information about government conduct. First, the principal may rely upon the agent's self-reporting.<sup>75</sup> Second, the principal may engage in direct monitoring of the agent's actions.<sup>76</sup> Third, the principal may rely upon information provided by a third party.<sup>77</sup> In selecting among these possibilities, a sensible principal will be guided by considerations of cost and reliability. Thus, for example, the people of any given country would be unwise to rely upon self-reporting by the government, for the simple reason that the government has an incentive to conceal bad behavior and will be an unreliable source of information about its own misconduct.

Direct monitoring of the government by the people is also far from ideal, not because it is inherently unreliable, but rather because it is likely to be quite costly.<sup>78</sup> As an initial matter, the information that the people need to monitor their government's compliance with constitutional restrictions will be costly to collect: in a country of even modest size and complexity, it would require an extraordinary expenditure of effort for ordinary citizens to effectively patrol their entire government for acts of malfeasance, particularly if the government is bent upon concealing such conduct. It will also be costly to digest whatever information is collected: ordinary people have limited resources of time and attention that they can devote to the task of following and understanding their government's behavior.<sup>79</sup> Too much information is as much an obstacle to popular control of the government as too little information. To bombard the people with voluminous quantities of raw data about every aspect of govern-

73. Arthur Lupia & Mathew D. McCubbins, *Representation or Abdication? How Citizens Use Institutions To Help Delegation Succeed*, 37 EUR. J. POL. RES. 291, 298–99 (2000) (identifying the conditions that must be satisfied in order for a principal to delegate successfully to an agent).

74. *Id.* at 300.

75. ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 81 (1998).

76. *Id.*

77. *Id.*

78. *Id.* at 80–81 (observing that direct monitoring is “prohibitively costly”).

79. *See id.* at 25–26 (introducing the concepts of “cognitive opportunity cost” and “cognitive transaction costs” to explain why deliberate inattention to information can be rational).

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ment behavior is to ensure that they will struggle to absorb any of it, much less to form an opinion about whether the government is respecting the limits of its authority. Finally, even if people are capable of both collecting and absorbing large quantities of information about the actual behavior of their government, they will find it costly to develop that raw data into useful assessments of the government's compliance with constitutional restrictions<sup>80</sup>: such assessments are likely to require a degree of legal expertise not possessed by most people.<sup>81</sup>

B. WHY COURTS MAKE EFFICIENT AND EFFECTIVE MONITORS OF GOVERNMENT CONDUCT

The last way in which the people might obtain information about the behavior of their government—namely, reliance upon the reports of a third party—is also the most promising one. In the lone gunman scenario, the third party was hypothesized to be an unarmed judge with the task of declaring publicly whether the gunman is acting within the terms of the delegation. The unarmed judge of Hobbestown is analogous in the real world to a judiciary that adjudicates the legality of government action but lacks any means of enforcing its judgments against the government. A judiciary of this type can mitigate the costs of collecting and developing the necessary information, if not also the costs that people must incur in digesting it.

First, courts can collect information about government misconduct more efficiently than a system of direct monitoring by the people. Their advantages lie in the fact that they do not attempt to patrol the halls of government for acts of misconduct, but instead respond to complaints brought to them by the people who are directly affected by government misconduct. Courts behave, in the terminology of Professors McCubbins and Schwartz, more akin to a “fire-alarm” system of oversight than a “police-patrol” system of oversight.<sup>82</sup> Whereas a “police-patrol” system requires the ongoing expenditure of effort to unearth government misconduct, a “fire-alarm” system relies upon those who already know of such misconduct to sound the alarm.<sup>83</sup> The police-patrol approach is inherently resource-intensive, if not wasteful: it detects the odd incident of wrongdoing only by monitoring vast quantities of mostly uneventful and lawful behavior.<sup>84</sup> By contrast, the fire-alarm approach focuses scarce oversight resources on likely problem areas by exploiting the fact that victims of miscon-

80. *See id.* at 26 (describing “the energy needed to process a stimulus into a useful inference” as a “cognitive transaction cost”).

81. *See supra* note 60 and accompanying text (noting that it is costly for ordinary people to obtain legal knowledge).

82. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166, 168, 171–76 (1984).

83. *See id.* at 166, 168.

84. *See id.*

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duct have both the knowledge and the incentive needed to bring suit.<sup>85</sup> As Professors Garrett and Weingast observe, “[t]he creation of a legal system in which it is in the interests of a party that believes it has not been treated [lawfully] to seek recourse to the courts is an effective means for dealing with [the] problem” of limited monitoring resources.<sup>86</sup>

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Second, courts have obvious and significant, if not insurmountable, advantages over ordinary people when it comes to developing raw data about government conduct into an assessment of whether the government has complied with applicable legal restrictions upon its power. Ordinary citizens are not known for their legal skills.<sup>87</sup> Courts are, by contrast, specialists and experts in the interpretation and application of law. That expertise is essential to the task of determining whether the government is acting within constitutional limits. The precise content and meaning of constitutional restrictions upon government power are necessarily the product of interpretation and application<sup>88</sup>; it is logically impossible to say, for example, whether a statute violates a constitutional rule until the meaning of that particular rule has been settled in the context of that particular statute. Accordingly, one can determine whether the government has behaved legally only by identifying, elucidating, reconciling, and applying the relevant legal rules in light of the facts of a given case. In a legal environment of even modest complexity, these are not tasks that members of the general public are likely to perform competently.

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Third, courts help to reduce and simplify the flow of information that people must digest in order to determine whether their government is respecting its constitutional limits. There are several inherent characteristics of judicial review that make it easier for the public to identify and focus upon those cases that are likely to be of greatest concern. One such characteristic is the gatekeeping function that courts perform in the ordinary course of adjudication. Courts do not sound the alarm every time a lawsuit is filed against the government; instead, they exercise judgment and reject suits that lack merit, thereby relieving the people of any need to follow every allegation of government misconduct.

Another helpful characteristic of judicial review, from an information-management perspective, is the manner in which judiciaries are structured. The existence of specialized courts and appellate hierarchies enables people to focus their attention on a single source of information. In countries that concentrate the exercise of judicial review in a specialized constitutional court, as in much of Europe and Latin America, it is obvious where to turn for information about

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85. See *id.* at 173–74 (noting that one way in which Congress has implemented “fire-alarm” oversight is by enacting laws that “have substantially increased the number of groups with legal standing” to challenge agency action in court).

86. Garrett & Weingast, *supra* note 48, at 198.

87. See *supra* note 60 and accompanying text.

88. See, e.g., Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1142 (2008) (“The Constitution necessarily draws its meaning from the interpretive practice or practices in which it is situated.”).

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the constitutionality of government action.<sup>89</sup> In countries with a decentralized system of judicial review, such as the United States or Canada, the hierarchical structure of the judiciary and the docket-management tools available to appellate courts tend to filter out cases of limited importance or salience before they reach the highest court.<sup>90</sup> The result, again, is to limit the universe of information that people must navigate, and to focus attention upon the work of a single court.

The manner in which courts report their decisions can also have a beneficial impact on the ability of ordinary citizens to learn about government conduct. Let us imagine, for example, that the people of Hobbestown have charged their unarmed judge with responsibility for determining the gunman's compliance with the restrictions they have imposed, and for informing them of her findings. The people would want the judge's determinations to be both informative and accessible. To that end, the judicial determinations would ideally have certain characteristics. First, they would be *widely available* at little or no cost to members of the public. Second, they would be substantively accessible, or *comprehensible* to the public. Third, they would be *sufficiently thorough* to enable people to judge for themselves whether there is cause for alarm.

In the real world, the reporting of judicial decisions strongly exhibits the first of these characteristics: high court decisions about the constitutionality of government conduct, in particular, tend to be widely available at little or no cost, whatever the country. It is more difficult to generalize, however, about the comprehensibility and thoroughness of such decisions. On the one hand, judicial decisions possess one particular quality that helps make them accessible to a general audience: they tell stories.<sup>91</sup> Adjudication encases questions of law and fact in compelling narratives. Cases are dramatic stories of specific harms to specific persons. It is all too evident from popular culture how well morality tales of the courtroom variety capture the public imagination. Constitutional adjudication, by its nature, shares this appeal to a broader audience. Nearly all constitutional courts decide cases in lieu of, or in addition to, abstract legal

89. See Mark Tushnet, *Comparative Constitutional Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1225, 1255 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (describing the "purist Kelsenian system" of judicial review, in which ordinary courts are prohibited from ruling on constitutional questions, but noting also the difficulty of coordinating the constitutional court's interpretations with the actions of the ordinary courts).

90. Cf. Tamir Moustafa, *Law and Resistance in Authoritarian States: The Judicialization of Politics in Egypt*, in RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 132, 146 (Tom Ginsburg & Tamir Moustafa eds., 2008) (noting that the structure of administrative court systems facilitates identification of the most significant cases of misconduct by government officials by filtering a large number of citizen complaints "through a coherent system of procedural rules, standing criteria, and the like").

91. See generally, e.g., CONSTITUTIONAL LAW STORIES (Michael C. Dorf ed., 2004) (demonstrating that constitutional cases tell stories); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2426–29 (1989) (characterizing a judicial order dismissing a complaint as a story that "officially devalue[s]" the complainant's own story). I am grateful to Martin Shapiro for suggesting this point.

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questions.<sup>92</sup> The fact that they engage in this form of storytelling gives them a particularly effective way of communicating to the public.

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On the other hand, the comprehensibility of judicial decisions to a broad audience tends to suffer because judges do not write opinions primarily with a general audience in mind, with the occasional exception of cases that they believe will or should be of unusual interest to the public.<sup>93</sup> To some extent, there may also exist an inevitable tradeoff between comprehensibility and thoroughness: thorough opinions are likely to be characterized by a degree of detail and complexity that makes them more difficult for laymen to digest, whereas shorter opinions may be easier to read but will also tend to provide less information about the case.<sup>94</sup>

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Different courts do, in fact, make this tradeoff in different ways. Decisions of the European Court of Justice, for example, are easier to read insofar as they are relatively concise and always free of dissenting or concurring opinions, but the reader does not benefit from the expression of competing viewpoints that may highlight potentially salient information missing from the court's opinion or weaknesses in the court's reasoning.<sup>95</sup> Decisions of the British House of Lords, by contrast, are relatively lengthy and always include a separate opinion by each member of the court; moreover, because there is no officially designated opinion of the court, the reader must peruse all of the opinions in order to ascertain to what extent, and on what issues, a controlling rationale exists.<sup>96</sup> The United States Supreme Court, with its practice of rendering clearly labeled majority, concurring, and dissenting opinions, falls between these two ex-

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92. France poses the conspicuous exception: the Conseil Constitutionnel can only review legislation that has been adopted by parliament but not yet promulgated. It can neither address controversies arising from actual operation of a law nor entertain complaints from ordinary citizens. See JOHN BELL, FRENCH CONSTITUTIONAL LAW 32–33 (1992); ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 8, 57–59 (1992).

93. See, e.g., RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN v. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 678–99 (1975) (discussing Chief Justice Warren's strategic goals in drafting the Court's opinion in *Brown v. Board of Education*, including that of presenting a unanimous face to potentially hostile segments of the public).

94. See Ray Forrester, *Supreme Court Opinions—Style and Substance: An Appeal for Reform*, 47 HASTINGS L.J. 167, 177 (1995) (arguing that longer opinions are less likely to be read by ordinary people and thus escape “the scrutiny of the governed”); Ryan C. Black & James F. Spriggs II, An Empirical Analysis of the Trends, Determinants, and Effects of the Length of Majority Opinions of the U.S. Supreme Court (2008) (unpublished manuscript), available at [http://works.bepress.com/james\\_spriggs/2](http://works.bepress.com/james_spriggs/2) (observing that “lengthy opinions make even more difficult the public's task of decoding the Court's decisions” and thereby shift the burden of “explaining the Court's work to the half dozen or so reporters who cover the Court”).

95. A typical European Court of Justice decision is just three to four pages in length, of which no more than half is legal analysis. See MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 104–06 (2004). Facts are treated “brusquely,” and “no indication whatsoever” is given as to how each judge voted. *Id.* at 105.

96. See, e.g., *Anisminic Ltd. v. Foreign Comp. Comm'n*, [1969] 2 A.C. 147, 167–223 (H.L.) (appeal taken from Eng.) (reporting five separate opinions totalling forty-six pages, and listing the opinions in order of seniority without any label indicating the extent to which any particular opinion commands majority support).

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amples. Most of the time, it is easy for even a casual reader to ascertain how severely the Court is divided, and on what issues.<sup>97</sup>

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### C. THE RELATIONSHIP BETWEEN COURTS AND OTHER MONITORING INSTITUTIONS

The tradeoff between accessibility and thoroughness is not, however, as intractable as it might first appear. The actual impact of judicial monitoring on public awareness of government misconduct is not simply the product of how courts choose to write their opinions. Rather, courts rely to a significant extent upon other actors, such as the media and the legal academy, both to publicize their rulings and to render the substance of their decisions more intelligible to a general audience.<sup>98</sup> The existence of such institutions means, among other things, that the extent to which judicial review facilitates the exercise of popular sovereignty is unlikely to hinge upon the relative brevity or verbosity of judicial opinions. As long as there exist sophisticated intermediaries in the media and the legal academy capable of helping members of the general public to identify salient cases and understand what has been said by the courts, it does little harm for courts to err on the side of thoroughness at the possible expense of comprehensibility.

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The role of intermediaries in making the work of the courts accessible to a broader audience highlights a more general point: the task of monitoring the government is not one that courts perform in isolation and without assistance. It is instead a task that calls for courts and other institutions to cooperate with one another in order to perform effectively. In any well-functioning democratic order, courts operate alongside a range of other actors that not only assist the courts in detecting and publicizing government misconduct, but also operate in their own right as fire-alarm mechanisms. These include not only the media and the academy, but also opposition parties, interest groups, and the bar.<sup>99</sup> Within the government itself, auditors, ombudsmen, and independent commissions all

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97. There are conspicuous exceptions to this general rule, but they are conspicuous in part because they are relatively rare. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 553 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (“join[ing] with the plurality in ordering remand on terms closest to those I would impose” in order to “give practical effect to the conclusions of eight members of the Court”); *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 583–604 (1949) (plurality opinion of Jackson, J.) (announcing the judgment of the court, but relying upon a view of Article III expressly rejected by six members of the Court in three separate opinions).

98. *See* Jeffrey K. Staton, *Constitutional Review and the Selective Promotion of Case Results*, 50 *AM. J. POL. SCI.* 98, 101–02, 110 (2006) (arguing that courts have a strategic incentive to encourage greater and more accurate media coverage of their decisions because such coverage increases the cost to the government of disobeying judicial decisions).

99. The idea that the media, in particular, play a watchdog role of constitutional dimension is not new; Edmund Burke famously characterized the media as the “Fourth Estate” of the British constitutional order, “more important” than the church, the nobility, or the common people. THOMAS CARLYLE, *ON HEROES, HERO-WORSHIP, & THE HEROIC IN HISTORY* 141 (University of California Press 1993) (1841) (“Burke said there were Three Estates in Parliament; but, in the Reporters’ Gallery yonder, there sat a *Fourth Estate* more important far than they all.”); *see also, e.g.*, 1 F. KNIGHT HUNT, *THE FOURTH ESTATE: CONTRIBUTIONS TOWARDS A HISTORY OF NEWSPAPERS, AND OF THE LIBERTY OF THE PRESS* 7 (David Bogue 1850) (quoting Sir Edward Bulwer Lytton) (“[T]he Newspaper is a daily and sleepless watchman that

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have responsibility for detecting and drawing attention to official misconduct.

The fact that other institutions perform monitoring activities that overlap with those of a constitutional court does not mean that judicial review is superfluous. The relationship between the courts and other institutions with monitoring capabilities is best understood as complementary and symbiotic. Each is made more effective by, and enjoys advantages over, the others. As a result, none is a perfect substitute for any other. To forego judicial review entirely is to compromise both the effectiveness of other monitoring institutions and the overall ability of the people to monitor their government. To give an obvious example, courts provide grist for the media by hearing disputes and rendering decisions that are of potential interest to the public. At the same time, by exposing government noncompliance to public censure, media coverage of the courts encourages the government to obey judicial decisions in the first place.<sup>100</sup>

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Likewise, a constitutional court directly benefits the media by defending and celebrating freedom of speech. In doing so, however, the court helps itself as well. It preserves the ability of the media not only to publicize judicial decisions, but also to detect and report misconduct in the first place. That information, in turn, enables and encourages potential litigants to invoke the scrutiny of the courts. The result is a virtuous circle of adjudication and reporting, reporting and adjudication. To put a new twist on a familiar metaphor, the efforts of the media and the courts combine to offer the best of both police-patrol and fire-alarm oversight: the media act as a police patrol that generates judicial fire alarms.<sup>101</sup>

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Synergies aside, courts also possess a number of advantages over other institutions that offset their weaknesses and render them especially effective at monitoring government compliance with legal restrictions. One such advantage is expertise: judges possess a combination of legal skill and experience that renders them better qualified than the average journalist or politician to assess the lawfulness of government conduct.<sup>102</sup> Another advantage is credibility. Here and in other countries, courts tend to enjoy higher levels of public confidence

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reports to you every danger which menaces the institutions of your country, and its interests at home and abroad.”).

100. See Staton, *supra* note 98, at 99, 102–11 & 110 tbl.4 (positing that constitutional courts encourage media coverage of their decisions as a means of increasing the likelihood of government compliance, and finding by way of empirical support that the Mexican Supreme Court is much more likely to seek out media coverage when it strikes down important federal policies than when it upholds policies, or when it strikes down less important policies); Georg Vanberg, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, 45 AM. J. POL. SCI. 346, 347–48 (2001) (arguing that the “threat of public censure” can deter government disobedience of judicial decisions, but only to the extent that the public can monitor how the government responds to the courts).

101. See *supra* notes 82–84 and accompanying text (describing and comparing the “police-patrol” and “fire-alarm” models of government oversight). Credit and thanks are due to Martin Shapiro for this insight.

102. See *supra* notes 50, 60–61 and accompanying text.

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than either the media or the national government.<sup>103</sup> Such confidence is crucial if a given institution is to function effectively as a fire alarm: people are more likely to heed the message if they trust the messenger.

To be sure, judicial review is not superior to other fire-alarm mechanisms in every respect. The pace at which public litigation unfolds, for example, is almost certainly a meaningful drawback of judicial monitoring: journalists can unearth troubling facts and law professors can pontificate upon their legal consequences in a fraction of the time that it ordinarily takes a lawsuit to wind its way through the courts. The fact that other institutions may be faster to react than the courts, however, does not necessarily mean that they do a better job of monitoring the government. In particular, the media and other private monitoring institutions are vulnerable to government manipulation in ways that courts are not. For information about the government, the press must rely to a significant extent upon what the government itself chooses to disclose. The government can be expected to provide the media with a selective and self-serving account of its own activities, to reward sympathetic journalists with preferential access to information, and perhaps even to suppress or censor unfavorable coverage.<sup>104</sup> Courts, by contrast, have at their disposal privileged means of gathering information that are not available to ordinary actors. Judicial fact-finding enjoys the backing of compulsory legal process. The power to issue subpoenas and the threat of punishment for contempt of court—not to mention the possibility of conviction for perjury or obstruction of justice—make it considerably more difficult and dangerous for a government official to deceive a judge than a reporter.

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There is another, and more important, reason why courts are not fungible with other institutions that perform a fire-alarm function. Anyone can proclaim that the government has behaved unlawfully; anyone can sound the alarm. The question is whether people will respond, and on a sufficiently large scale to be effective. In order for the people to maintain control over the government, they

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103. See, e.g., PATRICIA MOY & MICHAEL PFAU, WITH MALICE TOWARD ALL? THE MEDIA AND PUBLIC CONFIDENCE IN DEMOCRATIC INSTITUTIONS 13–24 & 14 fig.1.2 (2000) (discussing trends in public attitudes toward various institutions from the 1960s through the 1990s, and revealing that more people express “a great deal of confidence” in the Supreme Court than in Congress, the Presidency, the press, or the educational system); *id.* at 18 (“The press has long been one of the most reviled of institutions, typically scoring lower confidence ratings than most others.”); John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in LAW IN JAPAN: A TURNING POINT 99, 127 (Daniel H. Foote ed., 2007) (citing newspaper poll findings that, in Japan, the judiciary enjoys much greater levels of public trust than religious institutions, the army, or the national government); Takao Tanase, *The Japanese Attitude Toward Judicial Reform*, 1 KYOTO J.L. & POL. 27, 38 n.7 (2004) (reporting a television poll finding that a “large majority” of the Japanese public thinks that the media has a tendency to infringe upon, rather than protect, people’s rights); *infra* note 219 and accompanying text (noting the high levels of public support enjoyed by constitutional courts in Canada, Germany, India, Japan, and the United States relative to other institutions).

104. See, e.g., DANIEL C. HALLIN, *THE UNCENSORED WAR: THE MEDIA AND VIETNAM passim* (1986) (describing the government’s success at “news management,” and the media’s acceptance and propagation of the government’s perspective, for most of the duration of the war in Vietnam).

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must not only find a way to monitor the government, but also overcome large-scale coordination problems. It is to the need of the people for a coordinating mechanism, and the capacity of constitutional courts to fulfill this need, that we turn next.

### III. COURTS AS COORDINATORS

#### A. THE MANY FACES OF JUDICIAL POWER

It has long been clear that judicial power wears more than one face. Like blind men grasping at different parts of an elephant,<sup>105</sup> scholars have offered sharply discontinuous accounts of the nature of judicial power. Some see in the courts the face of public reason and are inspired to hope that wise jurists may advance our democratic discourse.<sup>106</sup> Others pierce the veil of courtroom ritual and judicial wordplay to discover only the state's unrivaled capacity for organized violence at work, brutally and without end.<sup>107</sup> Neither account seems wholly adequate. Courts cannot always induce people to obey by convincing them that a particular course of action is normatively desirable; nor can courts always threaten coercion. It strains credulity to suggest that President Nixon surrendered the Watergate tapes because the Supreme Court led him to see the light of reason, or because he feared the arrival of federal marshals at the White House door.<sup>108</sup> A view of judicial power as resting simply upon state coercion fails, in particular, to account for the fact that has motivated our search for a more complete account of the reasons for which powerful actors obey seemingly weak courts: across a wide range of situations—both historical and contemporary, domestic and international—state enforcement of judicial decisions is simply absent. In the absence of any plausible threat of state enforcement, what fills the void?

By way of a partial answer, Part II of this Article identified another reason why people obey courts: courts perform a monitoring function, which is to say

105. The story of the blind men who perceived an elephant in entirely different ways, depending upon what part of the elephant each one touched, is one that Buddha is reputed to have told his disciples. See *Udana* 68–69 (“For, quarreling, each to his view they cling. Such folk see only one side of a thing.”); David M. Zlotnick, *The Buddha’s Parable and Legal Scholarship*, 58 WASH. & LEE L. REV. 957, 962–67 (2001) (discussing the origins of the parable and its frequent appearance in legal scholarship).

106. See, e.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE* 69–71 (1985) (arguing that judicial review “forces political debate to include argument over principle,” and that “argument of principle” is a “better” form of argument for a democracy); JOHN RAWLS, *POLITICAL LIBERALISM* 231–40 (1996 ed.) (characterizing courts as exemplars of “public reason”).

107. See, e.g., Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1607 (1986) (observing that the “civil facade” of a criminal trial reflects not the ability of the courts to “talk our prisoners into jail,” but rather “the defendant’s autonomous recognition of the overwhelming array of violence ranged against him, and of the hopelessness of resistance or outcry”).

108. See *United States v. Nixon*, 418 U.S. 683, 713 (1974) (rejecting a claim of executive privilege to withhold audio recordings and papers that had been subpoenaed for use in a federal criminal investigation).

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that they expose and publicize misconduct. Adjudication provides information that enables third parties to identify rule-breakers. Equipped with this knowledge, various actors respond in ways that are not necessarily intended to inflict punishment, but nevertheless impose political, economic, or social costs upon the rule-breaker. European merchants in the Middle Ages who failed to obey the private judges responsible for administering the *lex mercatoria* faced the loss of trading opportunities with fellow merchants.<sup>109</sup> Residents of nineteenth-century Mexican California brought their marital disputes before the *alcalde* “not because the court could do much about them, but to publicize the errant behavior and so exert pressure on the wrongdoer to reform.”<sup>110</sup> Likewise, a misbehaving government faces a loss of political support if its conduct is identified and publicized by a court armed with little more than a reputation for competence and integrity.

In identifying misconduct, however, courts do not merely perform a monitoring function. They also perform a *coordinating* function. In its role as monitor, a court provides information that motivates us to behave a particular way. A resident of Santa Barbara who learns that the *alcalde* has ruled against an errant spouse or cheating trader, for example, is thereby given reason to shun the wrongdoer. In its role as coordinator, however, a court provides public cues that enable large numbers of people to behave the *same* way, at the *same* time, and for the *same* reason. As Avner Greif emphasizes, “the *alcalde* and other communal leaders provided the public signal required to *coordinate* punishments.”<sup>111</sup> The sanctions that the community brings to bear against the wrongdoer are effective because they are coordinated: a ruling by the *alcalde* makes it possible for the community to ostracize an errant spouse, or to boycott a cheating trader. This ability of courts to coordinate behavior en masse provides yet another answer to the question of why people obey courts. And it provides yet another reason why judicial review reinforces, rather than undermines, popular sovereignty.

These different types of judicial power—persuasion, coercion, monitoring, coordination—may seem to share little in common. Yet courts exercise all of these powers in precisely the same way—namely, by formulating and communicating opinions about disputes. The opinions that courts express shape the beliefs that people hold. It is by influencing different types of beliefs that courts exercise different types of power. There are three types of beliefs, and thus three types of judicial power, to be distinguished. First, courts shape normative beliefs, and in so doing, they exercise the power of persuasion. Second, they shape factual beliefs, and in so doing, they engage in monitoring or whistleblowing, which is also a form of power over the behavior of others. Third, they

109. See *supra* notes 68–70 and accompanying text.

110. Clay, *supra* note 3, at 507; see also, e.g., GREIF, *supra* note 2, at 214–15 (noting that the *alcalde* “provided a public signal regarding who was at fault in cases of public dispute”).

111. GREIF, *supra* note 2, at 215 (emphasis added).

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shape predictive beliefs, which is to say that they are capable of coordinating behavior on outcomes that they select.

*1. Normative beliefs.* First, courts can shape our normative beliefs, or our beliefs about how people should behave. We may call this the power of persuasion: it is not the ability to coerce, but rather the ability to make people want to comply by appealing to their sense of what is good, appropriate, or desirable. The persuasiveness of a given assertion may be defined as a function of both the identity of the speaker and the content of the communication. A particular speaker may be persuasive, for example, because he or she possesses credibility, authority, or both. To say that a speaker has credibility is to say that the audience believes the speaker is knowledgeable and unlikely to deceive them.<sup>112</sup> To say that a speaker possesses authority implies, by contrast, that the audience feels a normative obligation to obey the speaker, regardless of whether the speaker is correct or knows better than the audience.<sup>113</sup> A court may be persuasive because it possesses either or both of those qualities: we may be persuaded to behave a particular way because we believe that the court is acting in a truthful manner on the basis of relevant expertise, or because we feel a moral obligation to obey the court.

Just as there are different qualities that can make a court persuasive, there are different ways in which the content of a judicial opinion can persuade us. A court may employ any combination of legal, moral, and practical arguments in its efforts to shape our normative beliefs. It might persuade its audience that racial segregation of public schools should be abolished, for example, on the ground that it is unconstitutional, or that it is immoral, or that it undermines the pursuit of American military and diplomatic goals by painting the United States in an unflattering light vis-à-vis its Cold War rivals.<sup>114</sup>

112. See LUPIA & McCUBBINS, *supra* note 75, at 50–51, 64 (identifying the conditions under which “persuasion” can occur); Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9, 36 (2006) (observing that learning from others cannot occur unless the speaker is perceived to be both “knowledgeable” and “trustworthy”).

113. See Scott J. Shapiro, *Authority*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 382, 383, 394 (Jules Coleman & Scott Shapiro eds., 2002) (noting that it is the defining characteristic of authority to claim the right to be obeyed “regardless of whether [the authority’s] judgments are correct”). Per Joseph Raz’s influential account of the nature of authority, the statement that *A* has authority over *B* means that *B* has reason both to act as *A* commands, and to disregard reasons for acting some other way. See JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 18–27 (1979); see also, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 233–34 (1980). Outside of legal philosophy, it is not unusual for scholars to equate the concept of authority with that of legitimacy, or to define both in circular fashion. See James L. Gibson et al., *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 537 (2003) (observing that “authority” is “often used as a synonym for legitimacy,” yet noting at the same time that “[l]egitimate institutions” are defined as “those with an authoritative mandate to render judgments”).

114. See MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 90–114 (2000) (describing the position taken during the Truman Administration by the Justice Department and Secretary of State Dean Acheson, among others, that the spectacle of racial segregation was having an increasingly negative impact on America’s ability to exercise world leadership).

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A court's power to influence our behavior by persuading us that a particular course of action is illegal, immoral, or imprudent is not to be taken lightly. Finger-wagging can be effective. But it is not the only reason why people obey courts; nor is it necessarily the most important.

2. *Factual beliefs.* Second, courts can shape our factual beliefs, or our beliefs about how people have actually behaved. A judicial opinion can influence beliefs about whether *A* was in fact the driver of the automobile that struck *B*, for example, or whether the government did in fact intern certain citizens in prison camps on the basis of their ethnicity.<sup>115</sup> To the extent that courts credibly describe the behavior of others, they perform a whistleblower or monitoring function. As argued in Part II, the fact that courts perform this function gives people a reason to obey them: the prospect that a court may expose one's misconduct is reason to refrain from misconduct in the first place.

3. *Predictive beliefs.* Third, courts can shape our predictive beliefs, or our expectations about how others will behave. The essence of strategic behavior is to act in ways that anticipate the behavior one expects from others. Our predictions regarding the behavior of others inform our strategic calculations as to the costs and benefits of different courses of action. A judicial decision that changes our expectations about how others will behave thus influences our own behavior as well. In choosing how to behave in light of a judicial decision, a strategic actor must take into account how she expects others to respond to the decision. Her calculations as to how others will react may lead her to comply with the decision, regardless of whether she finds the decision either factually informative or normatively persuasive.

By generating predictive beliefs about the behavior of others, courts can induce rational actors to comply with their decisions. The expectation that others will punish us for defying the courts, for example, has traditionally provided a strong incentive to obey the courts in the first place. Suppose, for example, that *A* sues *B* for intentional infliction of emotional distress and wins a damages award. The judgment may have no effect on *B*'s factual belief that she inflicted no harm on *A*, or on her normative belief that her behavior was wholly justified. The fact that the court has entered a judgment against her, however, leads her to believe that others—including, but not limited to, the court itself—will inflict various costs on her if she refuses to pay *A* as ordered. It is *B*'s predictive beliefs about the consequences of the decision, as opposed to her factual or normative beliefs, that lead her to comply.

#### B. ADJUDICATION AS A SOLUTION TO COORDINATION PROBLEMS

The threat of coercion is not, however, the only consideration capable of motivating strategically minded actors to comply with judicial decisions. In many situations, people have an interest in cooperating with one another, yet

115. See *Korematsu v. United States*, 323 U.S. 214, 216–17 (1944) (acknowledging, obliquely, the government's forcible internment of "persons of Japanese ancestry").

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they cannot cooperate effectively unless they can coordinate their actions. Consider, for example, the sport of competitive rowing. All of the rowers in a boat share the goal of propelling their boat forward as quickly as possible, but to do so, they must coordinate the power and rhythm of their strokes. They follow the directions of the coxswain not because they will be punished for disobedience, but rather because they must coordinate their actions in order to achieve their common goal. The coxswain, in turn, is able to coordinate their actions only because each rower holds certain beliefs about what the other rowers know and believe: each rower knows that every other rower is aware of the coxswain's directions, and each rower expects every other rower to follow those directions. A courtroom setting generates similar beliefs on the part of litigants. Each party knows that the other parties are aware of the court's commands, and each party further expects the other parties to follow those commands. Thus, insofar as the parties stand to benefit from coordinating with one another, they have reason to obey the court's decision.

At first glance, it may seem strange to suggest that people obey judicial decisions because such decisions enable them to cooperate with one another. Casual observation suggests that people resort to courts not because they wish to cooperate, but rather because they are in conflict. Even in litigation, however, the parties ordinarily share at least some goals in common. For example, although each party would prefer the court to resolve the case a particular way, the parties are likely to share in common a preference that the dispute be resolved by adjudication rather than by violence. Whatever the actual outcome turns out to be, the parties would prefer to arrive at that outcome by an order of the court than by a fight to the death. Thus, litigation is not a truly zero-sum game: the parties prefer different outcomes yet derive mutual benefit from resolving their dispute in the courtroom.

Real-life strategic interactions, such as those that take place in courtrooms, are often characterized by a combination of both conflicting and shared interests.<sup>116</sup> These so-called "mixed-motive games" are ubiquitous and include, inter alia, all bargaining situations.<sup>117</sup> Examples range from the mundane daily task of driving through a busy intersection to international border disputes with the potential for nuclear war.<sup>118</sup> In strategic interactions of this variety, there is clearly an element of conflict because each side favors a different outcome for self-interested reasons. Everyone wishes to cross the intersection before everyone else; India and Pakistan both wish to lay claim to Kashmir, each to the exclusion of the other.

Yet there are also obvious and significant gains to cooperation, in that it is

116. See SCHELLING, *supra* note 55, at 83–118 (identifying the characteristics of a mixed game of conflict and cooperation, and discussing the ubiquity of such games).

117. *Id.* at 87, 89, 99–102 (observing that "bargaining situations" are inherently mixed-motive games).

118. See Ginsburg & McAdams, *supra* note 1, at 1317–19 (characterizing international border disputes as mixed-motive games of conflict and cooperation).

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costly for the participants to fail to agree upon the outcome. Everyone wishes to avoid a collision; India and Pakistan prefer, presumably, to avoid nuclear war. If the benefits of cooperation are sufficiently large relative to the expected gains from conflict, then the participants will share a common interest in coordinating on the same outcome, even though they each prefer different outcomes. How, then, can the players in this strategic game coordinate upon the same outcome, and what determines the outcome upon which they will coordinate?

In such situations, a court can do the trick of coordinating behavior on a particular outcome by generating mutually reinforcing, self-fulfilling expectations about how the parties will behave.<sup>119</sup> The example of a border dispute between two hypothetical states, *A* and *B*, illustrates the point. Each state would prefer to yield to the other than to engage in a costly war, which will be the outcome if both attempt to occupy the disputed territory.<sup>120</sup> Suppose that the two states take the step of litigating their dispute before a court that lacks any ability of its own to coerce a state into obeying its rulings. In real-life versions of this scenario, the actual likelihood of compliance is quite high: Professors Ginsburg and McAdams estimate that the International Court of Justice (ICJ) has enjoyed a compliance rate of at least eighty-six percent in border dispute cases, notwithstanding its lack of enforcement power.<sup>121</sup> The explanation for the court's success, they argue, lies in the fact that the parties share a common interest in coordinating their behavior, which the court helps them to achieve.<sup>122</sup>

The court's ability to coordinate competing states upon a peaceful outcome can be explained as a function of its influence over each state's predictive beliefs. The decision of the court—and, indeed, the mere participation of both states in the judicial proceedings—weave a web of strategic expectations that will ultimately ensnare the losing party. If neither state expects to gain anything from winning the case, neither state has any reason to participate in the proceedings: any effort spent is wasted effort. To take the time and effort to participate in the proceedings is to send a costly, and therefore credible, signal that one believes the court's decision will have at least some impact on the

119. Professors Ginsburg and McAdams have drawn explicitly upon concepts from game theory to argue that courts command obedience in part by shaping self-fulfilling expectations on the part of the litigants. *See id.* at 1288–1330 (arguing that international tribunals perform signaling and coordination functions that help to explain how they can obtain obedience in the absence of any enforcement power); McAdams, *supra* note 4, at 1050–97, 1120–21.

120. *See Ginsburg & McAdams, supra* note 1, at 1318–19 (describing a dispute in which two neighboring states both desire border territory, but the territory is insufficiently valuable to justify a costly war).

121. *See id.* at 1315 tbl.2 (estimating conservatively that eighteen of the twenty-one border and maritime delimitation cases decided on the merits by the ICJ since 1947 have met with compliance). The discussion that follows does not mirror their analysis, but uses it instead as a point of departure.

122. *See id.* at 1308, 1316 (arguing that adjudication by the ICJ often solves coordination problems, and that the possibility of successful judicial resolution “increases dramatically” when the dispute involves an element of coordination); *see also* JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 12 (2005) (identifying a shared interest in coordination as one possible explanation for the observance of international borders).

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actual outcome of the dispute. Because both states send and receive the same signal, both states know that they are paying mutual attention to the court. In other words, both states know that the court's ruling will be a focal point of their mutual attention.

The fact that both states know the court's decision is a focal point makes it difficult, in turn, for the losing state to defy the decision without triggering a war. A decision that tells both states that the territory belongs to *A*, for example, encourages *A* to occupy the territory. One way in which it does so is simply by engendering a sense of entitlement on the part of *A*. Another way in which it does so, however, is by generating common knowledge about the likely behavior of both states. As a result of the ruling, not only does *B* believe that *A* will try to seize the land, but *A* knows that *B* holds this belief: in other words, *A* knows that *B* believes that *A* will behave aggressively. If *A* further believes that *B*'s best response to aggression is to yield, then *A* will expect *B* to yield. This belief that *B* will yield will give *A* further encouragement to behave aggressively. At the same time, if *B* knows that *A* holds the beliefs just described, *B* will expect *A* to behave aggressively, and this belief will in fact encourage *B* to yield.

In short, given what *A* expects *B* to do, *A*'s best choice of strategy is to behave aggressively, and given what *B* expects *A* to do, *B*'s best choice of strategy is to yield. The overall result—*A* seizes the land and *B* yields—is an equilibrium: it is a stable and self-enforcing pattern of behavior because neither state can do better by behaving differently, in light of what each expects the other to do.<sup>123</sup> The result is also consistent with the court's decision, not because the court has any power to enforce the decision, but rather because the decision shaped the mutually reinforcing and self-fulfilling beliefs of the parties regarding what to expect from one another.

Another apparent example of a powerless court that has elicited the obedience of governments by coordinating their behavior is the European Court of Justice (ECJ). By the late 1960s, progress within the European Community (EC) toward the creation of a common market had stalled, thanks in part to the so-called "Luxembourg Compromise" that effectively guaranteed the ability of any member state to block legislation aimed at lowering non-tariff trade barriers.<sup>124</sup> Against this backdrop of policy paralysis, the ECJ adopted, in the landmark *Cassis de Dijon* case, a principle of "mutual recognition": goods and

123. "An equilibrium is a situation in which no player believes that it can achieve a better outcome by unilaterally changing strategies, in light of its beliefs as to the strategies of the other players and the probabilities of relevant events." David S. Law, *The Paradox of Omnipotence: Courts, Constitutions, and Commitments*, 40 GA. L. REV. 407, 457 n.191 (2006). Because neither party fares better by unilaterally changing strategies, the overall pattern of behavior is stable. See JAMES D. MORROW, *GAME THEORY FOR POLITICAL SCIENTISTS* 80–98 (1994) (defining a Nash equilibrium).

124. See ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* 121, 144 (2004) (describing the French recalcitrance that produced the Luxembourg Compromise, and noting the failure of the member states "to make progress on market integration, according to the plans they themselves had designed").

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services that are legal for sale in one member state, it ruled, must also be legal for sale in other member states.<sup>125</sup> The member states did not welcome the court's adoption of the mutual recognition principle.<sup>126</sup> Why, then, did they end up following the court's drastic approach?<sup>127</sup>

The answer may lie at least partly in the fact that the member states faced a mixed-motive game characterized by both a need for cooperation and a tendency toward conflict. Their immediate goal in forming what is now the European Union was to establish a common market, yet it was inevitable that they would disagree over how best, and how thoroughly, to accomplish this goal. Geoffrey Garrett and Barry Weingast have suggested that the ECJ prevailed on the question of how market integration would proceed because there was no other path to cooperation that suggested itself.<sup>128</sup> Multiple equilibria were possible, but the member states found themselves unable to coordinate on any equilibrium other than the status quo continuation of non-tariff trade barriers. Especially in light of the Luxembourg Compromise, it would have been costly, if not impossible, for the member states to agree upon a different approach, and the court's solution to the challenge of market integration was probably better than no solution at all.

By articulating a set of expectations as to how integration would proceed, the ECJ's adoption of mutual recognition as an ordering principle for the common market created "a focal point around which EC members could coordinate their bargaining."<sup>129</sup> To the extent that the member states shared an interest in market integration but had been unable to achieve it via ordinary policymaking processes, compliance with the solution imposed—or, perhaps more accurately, *proposed*—by the ECJ was in their self-interest. Because the member states sought to coordinate their behavior, it is perhaps misleading to say that they obeyed, or complied with, the court's decision. The court had neither the ability

125. Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649; see STONE SWEET, *supra* note 124, at 127–29; Garrett & Weingast, *supra* note 48, at 177–78.

126. See STONE SWEET, *supra* note 124, at 145 (noting that "[t]he Member States neither anticipated nor welcomed the Court's jurisprudence on the free movement of goods," and that "academic observers were taken by surprise" by *Cassis de Dijon* and its precursor, the *Dassonville* case).

127. See Garrett & Weingast, *supra* note 48, at 196 ("The critical question is why the sovereign nations of the EC—and particularly national governments and judiciaries—have acquiesced in the ECJ's extraordinary restructuring of the legal system.")

128. See *id.* at 189, 197 (observing that "no natural route toward cooperation existed" in the absence of the ECJ's pronouncement, and deeming it "unlikely that all the member states would have been able to agree on some alternative arrangement"). A similar argument might be made of the Appellate Panel of the World Trade Organization, which has succeeded at fashioning rules to govern international trade in the face of a stalemate among the WTO's member nations. See Judith L. Goldstein & Richard H. Steinberg, *Regulatory Shift: The Rise of Judicial Liberalization at the WTO* 15–33 (UCLA Sch. of Law L. & Econ. Research Paper Series, Research Paper No. 07-15, 2008), available at <http://ssrn.com/abstract=1026039> (likening the role of the Appellate Panel in liberalizing trade among WTO member nations to that of the European Court of Justice in the aftermath of the Luxembourg Compromise); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. (forthcoming 2009).

129. *Id.* at 189.

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nor the need to coerce the member states to reach a cooperative equilibrium that was of benefit to all of them. Coordination, not coercion, is the more apt description of what courts do in mixed games of conflict and cooperation, of which European economic union is a particularly rich example.

The examples of judicial coordination discussed thus far have involved mixed games of conflict and cooperation at the international level, wherein seemingly powerless courts have exercised power by coordinating interaction between different states. But the same logic holds true for domestic adjudication as well. Citizens and rulers frequently possess a mixture of shared and divergent interests. In such situations, judicial decisions can coordinate behavior on a large scale. The fact that a court is engaged in coordination can, in turn, explain compliance with a decision that does not appear to be backed by any threat of enforcement. We need not reach far for an example of judicial coordination of large-scale political behavior at the domestic level. Recent history illustrates how a court can, in the face of intense criticism and widespread opposition, nevertheless coordinate the behavior of the entire nation on nothing less than an actual regime change.

Suppose that a presidential candidate—let us call him George—wins the bare minimum number of states needed for victory in the Electoral College amidst widespread reports of vote-count irregularities in a pivotal state, where the two candidates are separated by a margin of mere hundreds of votes out of millions cast.<sup>130</sup> His opponent Albert, a sitting Vice President who won the nationwide popular vote, promptly challenges the result of the election in that state’s highest court. The state court rules in favor of Albert, but a bare majority of the Supreme Court rules in favor of George and further forbids the state court from taking further action. Suppose, moreover, that every Justice in the majority was appointed by a President of George’s party, and that the majority opinion rests upon novel or uncharacteristic legal reasoning<sup>131</sup> that even academics sympathetic to George’s party find difficult to defend.<sup>132</sup>

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130. See *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam); Hardin, *supra* note 54, at 295–96 (discussing *Bush v. Gore* as an example of coordination).

131. See, e.g., Klarman, *supra* note 19, at 1730 (reporting that the majority’s equal protection rationale “was so novel and far-fetched that Bush’s lawyers came exceedingly close to not even bothering to raise it”); Sanford Levinson, *Bush v. Gore and the French Revolution: A Tentative List of Some Early Lessons*, LAW & CONTEMP. PROBS., Summer 2002, at 7, 15 (quoting Judge Posner’s disbelief that three of the Justices in the majority could genuinely “believe in that equal protection stuff”).

132. See, e.g., Richard L. Hasen, *A Critical Guide to Bush v. Gore Scholarship*, 7 ANN. REV. POL. SCI. 297, 301–03 (2004) (describing both the “swift and harsh” reaction of the “admittedly liberal legal academy” to the majority opinion, and the misgivings expressed even by “scholars with some sympathy for the Court’s equal protection holding” as to the remedy ordered by the Court); Klarman, *supra* note 19, at 1725, 1726 & n.23 (deeming it “telling” that “even Republican commentators defending *Bush* generally have refrained from arguing” that “the conservative Justices would have reached the same result” had “the situation of the two presidential candidates been reversed”); Mark Tushnet, *The Conservatism in Bush v. Gore*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 163, 165 (Bruce Ackerman ed., 2002) (“I have not yet seen a decent legal defense of the majority’s decision to preclude Florida authorities from conducting a recount that would be consistent with constitutional require-

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From a strategic perspective, there are three aspects of the decision that bode poorly for the prospect of widespread compliance. First, the decision faces substantial opposition. Both the sitting Administration and a slight majority of the voting public would prefer to see Albert take office. Second, the decision is unenforceable. There is no government or third party upon which the Court can call to ensure that George assumes the Presidency. If both the White House and those who voted for Albert were to refuse to recognize George as President, it is unclear what, if anything, the Court could do to overcome their opposition. It is already inherently awkward, both as a logical and a practical matter, to require the government, or any other party, to enforce a decision against itself.<sup>133</sup> This problem is compounded by the fact that the incumbent Administration is hostile to the outcome ordered by the Court: the President, who commands whatever force might be used to enforce the decision, is presumably not eager to hand over power to the opposing party. Third, the decision is unpersuasive. The failure of even George's supporters to defend the Court's legal arguments leaves the popular majority that supported Albert free to believe that the decision is highly suspect as a matter of constitutional law, a brazen act of political partisanship, or both.<sup>134</sup>

What bodes well for the Court, however, is that the situation presents a classic mixed-motive game of both shared and divergent interests, in which the shared interests, though often overlooked, happen to be relatively strong. The two candidates and their supporters are clearly in direct conflict as to who should assume the Presidency. Yet presumably, both sides would place even greater importance upon avoiding a situation in which there is no President at all and the prospect of political chaos, if not de facto civil war, looms large. Both sides may prefer, in particular, to have the Court decide who will be President, than to have some other institution such as Congress decide, or to have no President at all.<sup>135</sup>

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ments.”). *But see, e.g.*, Peter Berkowitz & Benjamin Wittes, *The Lawfulness of the Election Decision: A Reply to Professor Tribe*, 49 VILL. L. REV. 429, 432 (2004); Charles Fried, *An Unreasonable Reaction to a Reasonable Decision*, in *BUSH v. GORE: THE QUESTION OF LEGITIMACY*, *supra*, at 3; Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219 (2002).

133. *See, e.g.*, Law, *supra* note 123, at 426 (noting the practical and legal problems raised by situations calling for the enforcement of judgments against the sovereign).

134. *See* Gibson et al., *supra* note 113, at 539 (noting a survey finding that fifty-three percent of respondents believed that the Court's decision in *Bush v. Gore* was based “mostly on politics,” as opposed to only thirty-four percent who believed that it was based “mostly on the law”). *But see id.* at 546 (concluding, on the basis of different survey evidence, that over sixty-two percent of the public “believe[s] that the Court based its decision on the legal merits of the case, not on the justices’ desire to see Bush become president”).

135. According to a poll taken shortly before the Court's decision in *Bush v. Gore*, a majority of both Bush and Gore voters preferred to have the election decided by the Court than by other political institutions such as Congress, the Florida legislature, or the Florida Supreme Court. Jeffrey L. Yates & Andrew B. Whitford, *The Presidency and the Supreme Court After Bush v. Gore: Implications for Institutional Legitimacy and Effectiveness*, 13 STAN. L. & POL'Y REV. 101, 109 (2002). A majority of both groups of voters also indicated that they would accept the Court's ruling as “legitimate” regardless of the outcome. *Id.*

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Under such circumstances, the Court may be able to coordinate the behavior of all citizens on the outcome of its choosing, regardless of whether its decision is persuasive or popular. To be more precise, it can guarantee that George will assume the Presidency without resistance if three conditions are met. First, everyone must believe that everyone else is aware that the Court has ruled in favor of George. A Supreme Court decision that purports to resolve a close presidential election is likely to satisfy this condition, for all practical intents and purposes. Second, everyone must believe that everyone else obeys the Court's decisions. A consistent history of widespread obedience to the Court would encourage such a belief; so, too, would a public concession by Albert, in this particular case. Third, everyone must believe that resistance to a decision that everyone else is obeying is both costly and futile. If the first two conditions are satisfied, the third is easily satisfied as well. For someone to refuse to recognize George as President, after everyone else has acquiesced, is quixotic and ineffectual; for someone to attempt to overthrow George as a usurper, and to seek the installation of Albert as rightful President, merely invites punishment for treason.

If everyone does in fact hold these beliefs about the Court's influence on the knowledge and behavior of others, then a ruling in favor of George will lead everyone to expect George to assume the Presidency, with the acquiescence of Albert and his supporters. Because everyone expects everyone else to comply, and because the best strategic response to compliance by everyone else is to comply, the expectation that people will comply is self-fulfilling. It is not obvious, moreover, how Albert or his supporters can hope to escape the web of self-fulfilling and mutually reinforcing beliefs and expectations woven by the Court's decision. The expectation that they will acquiesce is common knowledge: not only do Albert's supporters know that others expect them to accept George as President in light of the decision, but Albert's supporters also *know that others know that they know* that they are supposed to accept George as President. Although Albert's supporters are numerous enough to prevent George from taking office, action of that type against George would require them to coordinate on a large scale against George. It will be impossible for them to coordinate in this manner, in turn, if each of them expects mass compliance with the Court's ruling.

#### C. TYRANNY AND REVOLUTION AS COORDINATION PROBLEMS

The power of courts to coordinate behavior en masse is of considerable relevance to the agency relationship between the people and their government. The goal of the people, as collective principal, is to create a government of limited powers that will act as their agent, and the challenge that they face is to ensure that those limits are in fact respected by an agent endowed with the means to oppress them. There are various institutional mechanisms, such as federalism and separation of powers, by which the people may attempt, in

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Madison's words, to "oblige [the government] to control itself."<sup>136</sup> But no such mechanism is foolproof. If the ordinary institutional restraints and controls of constitutional democracy do not exist or have been subverted, the people may have no other means of dealing with tyranny than to reclaim their power by overthrowing the regime.<sup>137</sup> Conversely, if the government believes that the people are incapable of removing it from power, that knowledge can only encourage the government to act with impunity.

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The most basic form of control that a principal enjoys over an agent is the ability to end the agency relationship and revoke the agent's powers. The same is true of the principal-agent relationship between the people and their government. In the last analysis, there may be no better way for the people to prevent government tyranny and abuse than to threaten a tyrannical and abusive government with loss of power. The threat of removal and punishment by the people is a powerful incentive for the agent of the people to remain faithful in the first place. The question underlying any popular delegation of sovereign power to an organized government, therefore, is whether, and under what conditions, the people can in practice reclaim their power from a government that has betrayed them.

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Collective action problems pose a substantial obstacle to the assertion of popular control over a usurping government.<sup>138</sup> As a collective principal, the people do not naturally speak with one voice or act with one mind. The barriers to effective collective action against the government can be characterized in a variety of ways. One problem that the people face is that of coordination: if they are to act against the government in an effective way, they must coordinate upon how and when they are to act. It takes a large number of people to mount a successful revolt, yet people will not be inclined to revolt unless they believe that others will revolt as well.<sup>139</sup> Nor, indeed, is it only full-scale revolution that requires mass coordination: citizens cannot discipline their government via ordinary electoral means unless they behave in a particular way (vote against the government) at a particular time (election day) and place (polling station). Another obstacle to collective action is the free rider problem: each individual

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136. THE FEDERALIST NO. 51 (James Madison), *supra* note 5, at 322.

137. See Sutter, *supra* note 48, at 145 ("In the case where government is united and elections subverted, revolution is the citizens' only option.")

138. See, e.g., KIEWIET & McCUBBINS, *supra* note 23, at 26–27 (observing that "the very same collective action problems that delegation is intended to overcome—prisoners' dilemmas, lack of coordination, and social choice instability—can reemerge to afflict either the collective agent or a collective principal"); Hardin, *supra* note 54, at 291 (observing that, even though "it is to our mutual advantage" to preserve a constitutional order, there may be "collective action problems in preserving it, so that its serving mutual advantage does not guarantee its survival"); *supra* section I.C.

139. See Timur Kuran, *Now Out of Never: The Element of Surprise in the East European Revolution of 1989*, 44 WORLD POL. 7, 16–25 (1991) (discussing the phenomenon of "revolutionary bandwagons," wherein the greater the number of citizens who already support a revolution, the less costly it becomes for additional citizens to support the revolution as well); *supra* text accompanying notes 54–55 (discussing why overthrow of the "lone gunman" requires collective action, and why such action is difficult to achieve).

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faces the temptation to shirk his or her part, and to reap the benefit of sacrifices made by others.<sup>140</sup> The situation also has some of the characteristics of a prisoner's dilemma.<sup>141</sup> Everyone would prefer to overthrow a despotic regime, yet rebellion is a suicidal strategy if others do not join in the rebellion. If everyone expects everyone else to remain passive, then everyone will, in fact, remain passive.

However one chooses to characterize the collective action problem that the people face, the crux of the problem—and the nature of the solution—remain the same. The survival or downfall of any regime depends ultimately upon the beliefs and expectations that people hold about how other people will behave. There is no government or ruler whose power does not rest upon a mutually reinforcing set of beliefs and expectations. In order for the people of Hobbes-town to overpower an oppressive gunman, or for the people of a country to overthrow an oppressive government, the beliefs and expectations underpinning the oppressor's power must change.

Imagine, for example, a king so tyrannical that even his soldiers are inclined to mutiny. Suppose further, however, that every soldier is under orders to kill anyone—citizen or fellow soldier—who opposes the king. There are three ways in which the king can be toppled: by a mutiny of the king's soldiers, as in the form of a military coup; by a popular rebellion that the soldiers are unable to quash; or by some combination of the two, as in the form of a popular rebellion that the soldiers tolerate or even assist. Each possibility poses a strategic dilemma for the would-be participants.

Let us first consider the possibility of mutiny by the soldiers. It is common knowledge to all of the soldiers that they are all under orders to kill anyone who opposes the king. Yet it is also common knowledge that the king, as a lone individual, is powerless to execute mutineers on his own. Knowing these facts, each soldier will decide whether to mutiny on the basis of his or her beliefs about how other soldiers will behave. The structure of beliefs and expectations

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140. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 5–65, 132–34 (2d prtg. 1971) (explaining why it can be more difficult for large groups than for small groups to achieve shared political objectives, and emphasizing the problem that those who do not share in the cost of achieving the objective can nevertheless share in the benefits); Kuran, *supra* note 139, at 14 (observing that “revolution constitutes a ‘collective good’ that each person “can enjoy whether or not he has contributed to its realization,” and that it is therefore “generally in a person’s self-interest to let others make the sacrifices required to secure the regime’s downfall”); Sutter, *supra* note 48, at 145 (explaining that, because “[c]onstitutional rules benefit all citizens whether or not they participate in enforcement,” efforts to pay for “experts to detect violations,” “prevent capture or shirking” on the part of those experts, and “punish[] observed violations” are all prone to problems of free riding).

141. The prisoner's dilemma is a game of strategy in which both players stand to benefit from cooperating with one another, but each player has reason to fear that the other player will behave noncooperatively. Unless they are able to arrive at a different set of expectations, both players will select noncooperative strategies that ultimately leave both of them worse off. See David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 *CARDOZO L. REV.* 479, 502–04 (2005) (defining and illustrating the classic prisoner's dilemma).

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that sustains obedience to the king is thus deeply reflexive: in Thomas Schelling's words, "obedience depends on the expectation that others will be obedient in punishing disobedience."<sup>142</sup> If each soldier believes (correctly, it so happens) that his comrades would join him in a mutiny, then the king is doomed. But there is, of course, no guarantee, that any soldier will ever realize how his comrades actually feel about the king.<sup>143</sup> Rather, the soldiers may find themselves trapped in a self-perpetuating state of ignorance and obedience. If each soldier believes that other soldiers will obey their orders, no soldier will dare to speak or act against the king. Instead, each soldier, living in fear of how other soldiers will behave, will continue to remain silent and to obey the orders of the universally despised king.<sup>144</sup> This is a plausible scenario: given that the soldiers are under orders to kill anyone who advocates mutiny, they may have no way of knowing the true preferences of their comrades.

It is thus possible for a king with no genuine support among any of the soldiers to nevertheless maintain control over the entire army. As Avner Greif observes, a "king's strength comes not from his army but from the beliefs held by each member of the army that everyone else will obey the king's orders and that the best response is also to obey."<sup>145</sup> In the language of game theory, obedience to the king is an equilibrium of mutually reinforcing expectations, in which the players have coordinated on a suboptimal outcome: even though all soldiers would prefer to overthrow the king, none will dare to take the necessary action in light of how they expect others to respond.<sup>146</sup> Those who obey the king are, in short, trapped in a form of prisoner's dilemma.<sup>147</sup> And in order for them to escape this dilemma, their expectations about how their fellow soldiers will behave must somehow be revised.

142. SCHELLING, *supra* note 55, at 74 (explaining "the legendary power of an old gang leader" who is able "to bring order into the underworld" because his reputation triggers beliefs in each gang member about how other gang members will behave); *see also, e.g.*, MICHAEL POLANYI, *PERSONAL KNOWLEDGE: TOWARD A POST-CRITICAL PHILOSOPHY* 224 (1958) ("If in a group of men each believes that all the others will obey the commands of a person claiming to be their common superior, all will obey this person as their superior . . . . [A]ll are forced to obey by the mere supposition of the others' continued obedience.").

143. *See* Kuran, *supra* note 139, at 20 (using the sociological term "pluralistic ignorance" to describe situations in which "a society can come to the brink of a revolution without anyone knowing this" because neither "private preferences" nor the corresponding willingness of individuals to support revolution is "common knowledge").

144. *See id.* at 18 (observing that a government's supporters may be "privately sympathetic to the opposition" yet nevertheless "participate in the persecution of the government's opponents," in order to establish their own "pro-government credentials" and thus avoid persecution at the hands of other government supporters—who may themselves, in turn, be "privately sympathetic" to the opposition).

145. GREIF, *supra* note 2, at 136; *see also, e.g.*, McAdams, *supra* note 4, at 1108 (posing the question of why law enforcement officials go to the trouble of sanctioning those who break the rules, and suggesting that they do so because they expect others to sanction them for breaking the rules that require them to sanction those who break the rules).

146. *See supra* note 123 (defining an "equilibrium," in the context of game theory, as a situation in which no player can hope to fare better by changing strategies unilaterally, given the player's beliefs about the strategies chosen by others).

147. *See supra* note 141 (defining the "prisoner's dilemma" made famous by game theory).

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Likewise, the possibility of a successful popular rebellion depends upon the beliefs and expectations that people hold about one another. No regime is wholly impervious to mass uprising. Just as coordinated action by the people of Hobbestown can overpower the otherwise deadly gunman, widespread and concerted action stands an excellent chance of overthrowing any government. For such action to occur, however, people must not only be prepared to act. They must also believe either that the army will acquiesce, or that enough people will join the rebellion that the army will be overwhelmed. Let us assume, for now, that the people believe that the soldiers will follow orders and attempt to suppress any rebellion. If so, the only way in which the people can launch a successful uprising is if they can coordinate their actions. In the face of resistance by the army, failure to coordinate ensures them the same fate as the villainous henchmen in a stereotypical martial arts film: invariably, the henchmen attack the hero one by one, and the hero defeats them because they insist upon attacking one by one, rather than as an unstoppable horde. To be assured of success, the people must rise up at once as an unstoppable horde. Like the soldiers, however, the people are caught in an equilibrium of paralysis in the face of oppression, and to escape this strategic trap, they require some way of knowing when and how others will act, and of convincing others that they too will act.

The third possibility, involving some combination of military mutiny and popular uprising, introduces the element of strategic interaction between the people and the army. This new layer of interaction greatly increases the number of strategic permutations and choices to be considered. What remains the same, however, is that the outcome of the game will still be determined by the beliefs that people hold about how other people will behave. Suppose, for example, that the people can credibly signal to the soldiers that they will engage in an uprising too large to be successfully put down by force, with the likely result that soldiers who insist upon remaining loyal to the king will be wiped out. If every soldier believes not only that the uprising will succeed, but also that *all other soldiers believe* that the uprising will succeed, then it becomes an optimal strategy for each soldier to stand down. Moreover, *if the people believe that the soldiers believe* that the uprising will succeed, this belief will embolden the people to rise up in the first place. And *if the soldiers believe that the people believe that the soldiers believe* that the uprising will succeed, then the soldiers will have even more reason to stand down. And so on. Once again, mutually reinforcing expectations push all the players in the game toward a particular outcome. Whether they reach the outcome that they would all prefer—namely, overthrow of the king—depends, however, upon the specific expectations that they hold.

The power to change people's beliefs about how others will behave is, in short, the power to topple governments. Both submission to authority and repudiation of authority are large-scale acts of coordination made possible by the fact that people hold shared beliefs about what others believe and how

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others will behave.<sup>148</sup> In other words, the viability of a regime is a function of the beliefs that people hold about the beliefs of others. Widely held expectations about the survival of the regime are self-fulfilling because the survival of the regime is a function of widely held expectations.<sup>149</sup>

The threat of mass uprising is not the only means by which people exercise control over governments. Revolution is a blunt and costly instrument of popular control. Democratic constitutions are characterized by a variety of institutional mechanisms designed to achieve popular control over government without any need for coordinated action. Public officials serve for limited terms and are subject to varying degrees of popular control via election, recall, and impeachment. By design, power may be fragmented among competing actors—state and federal, for example, or legislative, executive, and judicial—that restrain and compete with one another. In their capacity as monitors of government conduct, courts enhance the effectiveness of these institutions and mechanisms. By reporting upon government compliance with constitutional limitations, they can provide the impetus needed for peaceful change at the ballot box.

In a context of well-functioning democratic institutions, the people need not threaten coordinated violence in order to exercise control over their government. It is difficult to imagine the President or Congress, for example, rejecting the Constitution to the point that they cannot be replaced peacefully via electoral means. More drastic forms of action requiring mass coordination remain necessary, however, against a government that has subverted or rejected democracy altogether. The mechanisms and institutions of democracy can be subverted and broken, whether suddenly, as in the case of a military coup, or more gradually, as in the descent of Weimar Germany into fascism. In the face of a government that has gone truly bad for whatever reason, the people may have no alternative but to resort to collective action against the government.

The ability of the people to rise up against a tyrannical government depends, in turn, upon whether the people are capable of arriving at the same set of beliefs about how the government has behaved and how other people are likely to respond. There are, in particular, three beliefs that people must hold. First, they must believe that the government has behaved unacceptably. Second, they must believe that others believe that the government has behaved unacceptably.

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148. See, e.g., CHWE, *supra* note 56, at 19 (“[S]ubmitting to a social or political authority is a coordination problem: each person is more willing to support an authority the more others support it.”); RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 140 (1999) (“Establishing a constitution is a massive act of coordination that creates a convention that depends for its maintenance on its self-generating incentives and expectations.”); RUSSELL HARDIN, ONE FOR ALL: THE LOGIC OF GROUP CONFLICT 30 (1995) (observing that the survival of the state “depends on coordination at the level of government and on lack of coordination at the level of any potential popular opposition,” and that the state “need merely make it in virtually everyone’s clear interest *individually* to comply with the law even though collectively it might be their interest to oppose the law” (emphasis in original)).

149. See, e.g., Yates & Whitford, *supra* note 135, at 110 (“For a social institution to have force, it must have support among members of a population. In that population, each person’s support partly depends on their expectation and understanding that others will support the institution.”).

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We might call this belief a *first-order metabelief*: it is a belief about beliefs. Third, they must believe that others believe that others believe that the government has behaved unacceptably. We might call this belief a *second-order metabelief*: it is a belief about beliefs about beliefs. The power to shape these beliefs and metabeliefs is the power to bring a government to its knees. Therefore, if the goal of the people is to ensure that they can police the government by means of collective action, they must arrange to share an appropriate set of beliefs, and to coordinate upon a shared response, in the face of government misbehavior. In short, the people must find some means of generating common knowledge about the proper occasion to act against their government.

Institutions and mechanisms that generate shared beliefs and coordinate behavior are not rare. There are many real-life examples from which to draw inspiration and understanding. To better appreciate how we might coordinate upon a task as formidable as popular uprising, we might begin by considering the operation of a simple device that most of us encounter every day, in three different colors: red, yellow, and green.

#### D. HOW COURTS ARE LIKE TRAFFIC LIGHTS

The subjects of our hypothetical king—like the people of Hobbestown, and the citizens of actual democracies—share much in common. For the most part, their interests are not in conflict: they wish to exercise control over their respective governments. They also face similar collective action problems that make it difficult for them to realize their common interests. What they need is some way of coordinating upon the same plan of action—some common signal which they all treat as a basis for acting against the government, and which they all know that others will treat as a basis for acting against the government.

What the people need, in other words, is the equivalent of a traffic light. Consider the strategic situation facing cars and pedestrians at an intersection. They all share the same goal: each of them wishes to cross the intersection safely and efficiently. To do so, they must all share the same expectations about who will cross the intersection at any given time. A traffic light can coordinate expectations and behavior in precisely this manner, if certain conditions are met. First, everyone must be able to see the light. Second, there must exist a shared understanding of what the different colors mean. Third, this shared awareness and understanding of the light must be common knowledge: everyone must know that everyone else sees the light and understands what the colors mean, and the fact that everyone possesses this knowledge about the knowledge of others must itself be widely known.

Assuming that these conditions are met, the traffic light will shape expectations in a way that gives everyone a strong incentive to obey the light, regardless of whether the light is formally enforced. For example, a driver faced with a red light might prefer to drive through the intersection without enduring any delay. The fact that she sees a red light leads her to believe, however, that

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other people do not expect her to be in the intersection, and that her chances of being hit by some other driver are therefore high. Given this belief, her best strategy is to wait until the light turns green, at which time she will expect others to stop (in part because she believes that others will expect her to go). The expectations of drivers who see red lights and drivers who see green lights become both mutually reinforcing and self-enforcing. Moreover, this equilibrium can sustain itself on the strength of these expectations alone, regardless of whether the police enforce it by means of traffic citations.

A traffic light is what game theorists call a focal point. To say that a particular point (or message, or outcome) is focal is to say that it suggests itself to all the players in a game of coordination as the right way to play the game. Thus, for example, people asked to guess a place and time at which to meet a stranger in New York City tend to pick the information booth at Grand Central Station at noon.<sup>150</sup> In this game, people choose Grand Central Station at noon not because it is convenient for them, or because they like train stations, but because they believe that other people will also choose Grand Central Station at noon.<sup>151</sup> As Thomas Schelling first defined the term, a focal point has two essential characteristics. First, it must be prominent or conspicuous.<sup>152</sup> This requires not only that everyone is aware of the light, but also that everyone believes that *everyone else* is aware of the light. Second, it must be unique.<sup>153</sup> For the light to succeed as a focal point for crossing behavior, it cannot be competing for attention with other traffic lights in the same intersection, or with a uniformed police officer who is blowing a whistle and employing hand signals. The fact that a traffic light combines these characteristics gives everyone reason to believe that the traffic light will become the focus of attention for everyone else in deciding whether and when to cross the intersection. It is the belief that everyone else is obeying the traffic light that leads each individual to obey the light as well. As Tom Ginsburg and Richard McAdams explain:

What makes an outcome focal is not merely that it stands out to each individual, but that each individual believes that it stands out to others, that each individual believes that each individual believes that it stands out to others, and so forth. Except by accident, coordination requires something approaching common knowledge that others will perceive one equilibrium as unique.<sup>154</sup>

150. See SCHELLING, *supra* note 55, at 55 n.1, 56.

151. See *id.*

152. See *id.* at 57; see also Ginsburg & McAdams, *supra* note 1, at 1268 (noting that, in order for a third party to create the common knowledge necessary for coordination, its message must be “believed to be sufficiently visible to everyone so that each player was likely to assume that the other[s] perceived it”).

153. See SCHELLING, *supra* note 55, at 58; see also Ginsburg & McAdams, *supra* note 1, at 1268 (noting that, in order for a third party to create the common knowledge necessary for coordination to occur, there must be “no other competing message”).

154. Ginsburg & McAdams, *supra* note 1, at 1268.

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In order to police their government effectively, the people require some means of coordinating their behavior, much as a traffic light regulates the behavior of drivers and pedestrians at an intersection. Political scientists have identified an institutional solution to this problem of mass political coordination: a relatively recent body of scholarship in the rational choice vein argues that constitutions are best understood as coordination devices.<sup>155</sup> As Barry Weingast observes: “Constitutions, a charismatic leader, a galvanizing event such as a major riot, or a pact can serve to coordinate citizens’ reactions so that citizens can police the state.”<sup>156</sup> The Constitution of the United States, for example, has instilled in Americans strong and probably self-enforcing expectations about the time, place, and manner in which presidents are to be chosen. Even the most popular of presidents would find it impossible to seek reelection for a third time;<sup>157</sup> likewise, an otherwise popular incumbent’s refusal to hold a presidential election at the required four-year interval would likely capsize the administration.<sup>158</sup>

It does not seem wholly appropriate to say that either constitutional requirement would be *enforced* against the incumbent. In all likelihood, the use or even threat of force against the incumbent would prove unnecessary; chances are that matters would not deteriorate into a gunfight on the White House lawn between presidential loyalists and constitutional patriots. It seems more accurate to say, instead, that the incumbent would be denied the continued exercise of the powers of the Presidency by a constitutionally coordinated shift in the beliefs and expectations of everyone around him. The Presidency of the United States is not a natural phenomenon, like a rock or a waterfall, but rather the product of

155. See, e.g., HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY, *supra* note 148, at 86 (arguing that a constitution “establishes conventions . . . that make it easier for us to cooperate and to coordinate in particular moments”); Calvert & Johnson, *supra* note 48, at 104–23, 130–35 (tracing the development of the literature on constitutions as coordination devices, and arguing that a successful constitution provides the basis for the ongoing solution of continually evolving coordination problems that can never be wholly and permanently settled); John M. Carey, *Parchment, Equilibria, and Institutions*, 33 COMP. POL. STUD. 735, 735–38, 749–50, 753–54 (2000) (discussing how constitutions generate stable, self-enforcing patterns of political behavior by coordinating expectations); Russell Hardin, *Why a Constitution?*, in THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 100, 100–19 (Bernard Grofman & Donald Wittman eds., 1989) (taking issue with the conventional view that constitutions are social contracts, and arguing instead that they are coordination devices); Ordeshook, *supra* note 49, at 147–51 (characterizing an “effective” constitution as one that “coordinates action” by “establish[ing] a set of stable and self-generating expectations about peoples’ actions that overcomes alternative expectations”); David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 YALE L.J. 1717, 1733–34 (2003) (drawing upon the rational choice literature in political science to argue that the text of the Constitution acts a “focal point” that makes possible mass coordination on the manner in which political disputes are to be resolved); Weingast, *supra* note 47, at 246, 251 (arguing that “[d]emocratic stability occurs when citizens and elites . . . resolve[] their coordination dilemmas about limits on the state,” and that constitutions in particular “can serve to coordinate citizens’ reactions so that citizens can police the state”).

156. Weingast, *supra* note 47, at 251.

157. See U.S. CONST. amend. XXII (providing that no person may be elected more than twice to the Presidency).

158. See, e.g., *id.* art. II, § 1, cl. 1 (prescribing presidential elections at four-year intervals).

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large-scale coordinated human action: countless people must behave in specific ways in order for any given person to exercise the powers of the office. That behavior, in turn, will not be forthcoming if it is contrary to the expectations generated by the Constitution. Rather, both the internal and external constraints that secure obedience to the President will unravel.<sup>159</sup> Soldiers, officials, and citizens alike will not feel obligated to obey someone who occupies the Oval Office in clear violation of the Constitution. No less important, however, is the impact of a constitutional violation on the strategic expectations that people hold of one another: they will not expect others to expect them to obey, and they will not expect others to obey either. The Constitution thus acts as a double-edged sword: the same coordination mechanism that endows a person with the powers of the Presidency can just as easily disempower him as well.

Yet there are several reasons why a constitution, by itself, may not serve as an adequate focal point for coordinated action against a tyrannical government. First, government compliance with a constitution is often difficult for ordinary people to assess. Constitutions do not interpret themselves, and people face the inevitable problem of determining whether the constitution has been violated. Except perhaps in the most egregious and visible cases of government misconduct, that determination will often require monitoring resources and expertise that ordinary people cannot easily muster.<sup>160</sup> Second, even if ordinary citizens could somehow judge constitutional violations on their own, it is likely that they would often disagree with one another, much as the most experienced judges do. Coordinated action will be difficult for them to muster unless they can first agree upon how to proceed in the face of disagreement over whether a constitutional violation has occurred.<sup>161</sup> Third, even if ordinary citizens could judge constitutional violations—and do so in a consistent way—they may still have no way of knowing what their fellow citizens have concluded. In order for coordinated action to occur, it is not good enough for individual citizens to conclude, in isolation from one another, that the government has exceeded its constitutional bounds. Rather, their shared conclusion must be common knowledge: each person must believe that everyone believes that everyone has concluded that the government has exceeded its constitutional bounds. For

159. Cf. RICHARD A. POSNER, *HOW JUDGES THINK* 125–57, 174–203 (2008) (distinguishing between “internal constraints” on judging that arise from the content and character of legal rules, and “external constraints” on judging that reflect the rewards and penalties that judges expect to face from others); Richard H. Fallon, Jr., *Constitutional Constraints* (forthcoming 2009) (manuscript on file with the author) (arguing that the Constitution imposes both “internal,” or normative, and “external,” or material, constraints on judicial and nonjudicial actors alike).

160. See *supra* text accompanying note 60.

161. Cf. Garrett & Weingast, *supra* note 48, at 175 (observing that efforts by decentralized actors to cooperate can be frustrated by the difficulty of defining and verifying cooperative behavior); *id.* at 176 (noting that “ambiguity” about what constitutes unacceptable behavior leads to “potential breakdowns in cooperation,” and that the problem can be mitigated by an institution capable of providing “critical information about when an actor has defected”); Sutter, *supra* note 48, at 146 (identifying several reasons why people may disagree “whether the available evidence warrants action” against the government, and observing that the result of such disagreement may be “coordination failure”).

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example, an incumbent President who refuses to relinquish office after losing an election might raise legal objections to the validity of the election or the result. If such objections succeed in generating uncertainty about both how one ought to behave and how others will, in fact, behave, the result may be a failure of coordination against the incumbent.

Judicial review can remedy these problems and supply the necessary focal point for popular policing of the state.<sup>162</sup> As discussed in Part II, courts have the necessary expertise to report upon the constitutionality of government conduct, and can do so with relative efficiency as compared to a system of direct popular oversight. They convert the raw material of a constitution and the information supplied by litigants into clear signals about the constitutionality of government conduct. Courts with final responsibility for deciding constitutional disputes happen to enjoy the qualities that a focal point must have: they are both prominent and unique. There can be little doubt that the signals conveyed by a body officially designated the “Supreme Court” about the constitutionality of government conduct stand out from all other signals about the constitutionality of government conduct. Prominence is ensured by the judiciary’s official status as an organ of the state and the widespread reporting and availability of judicial decisions. It is further reinforced by the designation of either a specialized, high-profile constitutional court, or the nation’s highest court of regular jurisdiction, to resolve constitutional disputes.<sup>163</sup> This public prominence enables such a court to generate common knowledge: anyone who hears of an important Supreme Court decision can be reasonably confident that many other people have also heard of the decision, precisely because awareness of the court is widespread.

The signals that courts send are also unique. It is rare for a court at the top of the judicial hierarchy to contend in any serious way with competing signals as to the constitutionality of government conduct.<sup>164</sup> To be sure, in a healthy democracy, there can be a cacophony of competing voices as to the constitutionality of government conduct. Opposition politicians, the press, and interest groups may all send competing signals that criticize or disagree what the courts have decided. As an organ of government with various trappings of authority and formal responsibility for interpretation of the constitution, however, a

162. See Sutter, *supra* note 48, at 147 (arguing that “[t]he verdict in a Supreme Court case serves as a focal point, minimizing coordination problems” that citizens would otherwise face in deciding whether to act against the government); cf. Calvert & Johnson, *supra* note 48, at 112–17, 130–35 (arguing that interpretation, deliberation, political argument, and appeal to precedent are all indispensable characteristics of successful coordination under a constitution).

163. See *supra* notes 89–90 and accompanying text (contrasting the Kelsenian model of constitutional review popular in Europe and Latin America, which makes use of a specialized constitutional court, with the decentralized model found in common law jurisdictions such as the United States and Canada).

164. Cf. WHITTINGTON, *supra* note 18, at 1–27, 82–160, 230–96 (describing how the Supreme Court has, over time, acquired “constitutional leadership” and displaced the role of the Executive branch in interpreting the Constitution, often with the acquiescence or cooperation of the Executive itself).

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constitutional court is a natural focal point on questions of governmental legality in a way that even prominent political leaders and media outlets are not. People may disagree over whether a case was *correctly* decided, but rarely is there much question as to what the court has in fact decided; nor is there much doubt that the court's decision will be viewed as dispositive. By way of analogy, imagine an intersection with no traffic light but instead a bunch of people standing in the path of the traffic and making hand signals to different drivers. Only one of those people, however, is wearing a dark blue uniform and a badge that reads "traffic enforcement." When it comes to constitutional questions, a court that is officially designated as having final interpretive authority over the constitution is, by definition, the bearer of an official badge that reads "constitutional interpreter."

In most countries with judicial review, it is trivially easy to identify who wears the badge. There is only one Supreme Court of the United States, or Canada, or India, or Japan. The fact that there exists one clearly labeled court at the apex of each national judiciary reinforces both the prominence and uniqueness of these bodies. It is equally straightforward to have a specialized court for constitutional matters. There is only one Bundesverfassungsgericht in Germany, and that is the Bundesverfassungsgericht. In some countries—such as France, South Korea, and Russia—the picture is complicated by the existence of parallel courts with overlapping jurisdiction over constitutional matters.<sup>165</sup> This situation can result in competition for, and uneasy sharing of, the mantle of final interpretive authority over the constitution.<sup>166</sup> The fact that interpretive authority over the constitution happens to be shared between two courts, however, is not necessary fatal to either court's ability to serve as a focal point. If the two courts happen to agree, or if one court speaks to an issue while the other does not, the signal to the people remains clear. Even in the rare case of actual disagreement between the two courts, the people may still be able to settle upon

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165. France's three highest judicial bodies—the Conseil d'État, the Cour de Cassation, and the Conseil Constitutionnel—can neither reverse nor hear appeals from one another and have been known to take opposing positions on the same legal questions. See Law, *supra* note 16, at 722–23 & n.273 (discussing the disagreement between the Conseil d'État and Cour de Cassation over the validity of French legislation that conflicts with E.U. law); Doris Marie Provine, *Courts in the Political Process in France*, in HERBERT JACOB ET AL., *COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE* 177, 177–96 (1996) (describing the jurisdictions of, and relationship among, the three courts). The combination of overlapping jurisdiction and a nonunitary judiciary has produced a power struggle in Korea, where the task of judicial review is awkwardly divided between the Constitutional Court, which has the power to invalidate legislation but cannot review the judgments of the ordinary courts, and the Supreme Court, which has the power to declare administrative regulations unconstitutional and to reverse ordinary court decisions but cannot strike down statutes. See GINSBURG, *supra* note 18, at 239–42. Conflict of a similar nature has occurred between the Russian Constitutional Court, which has jurisdiction over the constitutionality of statutes, and the Supreme Court of the Russian Federation, which has jurisdiction over administrative cases. See William Burnham & Alexei Trochev, *Russia's War Between the Courts: The Struggle Over the Jurisdictional Boundary Between the Constitutional Court and Regular Courts*, 55 AM. J. COMP. L. 381, 392–96 (2007).

166. See Tushnet, *supra* note 89, at 1245–46 (discussing the recurring problem of conflict between specialized constitutional courts and ordinary courts over questions of constitutional meaning).

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a common response. Indeed, a strategy of responding only when both courts agree, and not when the courts send contradictory signals, might itself be focal and is a likely equilibrium. If no one knows how others will respond to a mixed signal, no one will dare to act in response to a mixed signal. Moreover, because this uncertainty is itself common knowledge—everyone knows that everyone is uncertain—everyone will expect everyone else to do nothing in response to a mixed signal. Given this expectation, the best response is to do nothing.

#### E. HOW COURTS ARE NOT LIKE TRAFFIC LIGHTS

Unfortunately, the relationship between judicial review and popular action is not nearly as straightforward as the relationship between traffic lights and driving behavior. To a much greater extent than the signals that a traffic light sends, the signals that a court sends are themselves open to interpretation and disagreement. Imagine, for example, that everyone accepts that traffic lights govern behavior at intersections, but no one can agree on whether a given light is red or green, or what to do when the light is yellow. In such a situation, the traffic light may fail to coordinate behavior, even if everyone is trying to obey the light.

Similarly, even if the people recognize a particular court as their focal point in deciding whether to act against the government, there may be no clear-cut rule or understanding that tells them how to respond when the court rules that the government has behaved unconstitutionally. The mere fact that the government loses a constitutional case will not necessarily cost the government any political support. Nor should it. In many cases, the most sensible thing for the public to do will be nothing at all. The fact that a court rules against the government does not mean that the government is willfully ignoring constitutional limits. *Ex ante*, it may be highly unclear whether a particular course of action by the government will pass constitutional muster in the eyes of a reviewing court. Indeed, close cases are the stock and trade of constitutional courts of last resort: constitutional litigation makes its way to the Supreme Court precisely because the answers to the questions posed are not obvious.

Judicial review provides the people with information about government conduct. Before they can react, however, the people must not only absorb that information, but also decide whether it is cause for alarm. The intensity of public reaction will presumably be influenced by such factors as the perceived importance of the constitutional rule or restriction, and the extent to which the violation suggests deliberate usurpation or lawlessness. On the one hand, people are unlikely to be greatly disturbed by abuse or violation of the President's right to demand written opinions from Cabinet members.<sup>167</sup> On the other hand,

167. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 10–11 (1999) (offering the President's right to demand written opinions from Cabinet members, U.S. CONST. art. II, § 2, cl. 1, as an example of a constitutional provision that does not "generate impassioned declarations" about the protection of essential liberties).

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people might show more concern if the Court were to draw attention to an effort by the President to detain his political opponents.

On the question of whether it is necessary for the people to take action against the government in any given case, the courts may provide only limited guidance. It is easy for a court to signal whether a given action by the government is constitutional: however complicated the rationale, the ultimate outcome takes the form of a simple yes or no. It is more difficult for a court to signal the extent to which people should be alarmed by a given constitutional violation. In practice, the public relies upon intermediaries in the press, the academy, and the political arena to know what to make of a court's decisions.<sup>168</sup> This reliance upon intermediaries to interpret and assess the import of judicial rulings, however, merely resurrects the coordination problem that the public's use of the court as a focal point had supposedly solved. By exposing themselves to conflicting views as to the significance of a particular constitutional violation, the people substitute a Babel of voices for the single voice of the court, which leaves them once again without a signal upon which to coordinate. Instead of struggling to coordinate upon a response to government misconduct, they must now instead struggle to coordinate upon a response to an array of potentially vague and inconsistent signals about government misconduct.

The problem of interpretive ambiguity, or lack of specificity, suggests that the traditional definition of a focal point calls for amendment. As noted previously, Schelling and others identify the two necessary characteristics of a focal point: first, prominence or conspicuousness; and second, uniqueness, in the sense that there are no competing signals. Yet *specificity* and *lack of ambiguity* would appear to be necessary characteristics as well. Grand Central Station may be both prominent and unique, but it is not terribly specific. Two people might both consider Grand Central Station at noon to be focal yet still fail to meet unless they both have the information booth specifically in mind. Likewise, constitutional courts may fail in practice to send signals that are sufficiently clear and unambiguous to unleash *coordinated* public action against the government.

The fact that judicial opinions are often inaccessible or equivocal does not mean, however, that courts are incapable of coordinating the public. It is well within a court's power to send clear and unambiguous signals about government conduct if it so chooses. Even if the Supreme Court does not typically decide cases unanimously and in language that the public can easily understand, it is capable of doing so when the need arises.<sup>169</sup> Consider, for example, the brevity of the Court's opinion in *Brown v. Board of Education*,<sup>170</sup> the straightforward

168. See *supra* section II.C (discussing the interaction between the courts and other institutions that also engage in monitoring of government behavior).

169. See, e.g., MARSHALL, *supra* note 20, at 148 (noting “[c]onsiderable evidence” that “Supreme Court justices strive for unanimity when they set major precedents or when they expect serious opposition to their decisions”).

170. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954). Not counting footnotes, the text of Chief Justice Warren's opinion for the Court totals 1,835 words.

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language that it used,<sup>171</sup> and the care that was taken to ensure a unanimous decision.<sup>172</sup> Unanimity, brevity, and lucidity may not be qualities that characterize every Supreme Court decision, but they are certainly within judicial reach. Indeed, some courts make a rule of them: the European Court of Justice and the French Cour de Cassation, among others, issue very short rulings that include neither dissenting nor concurring opinions.<sup>173</sup>

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Another way in which courts can improve their ability to inform and coordinate the public is to distinguish as clearly as possible between innocent mistakes and good-faith disagreement on the part of well-meaning officials, and deliberate constitutional violations that smack of usurpation. Because reasonable minds are bound to disagree over the scope of relevant constitutional restrictions, even the most well-meaning of governments is likely to run afoul of judicial review from time to time. Ideally, courts would help the people to identify constitutional violations that demand their attention by stating expressly whether there exists cause for popular alarm. This threshold might be met if, for instance, the government were to violate constitutional restrictions in a blatant or willful manner, or if its actions were to jeopardize the ability of the people to assert control over the government by peaceful means.

#### IV. IMPLICATIONS OF THE THEORY FOR LEGITIMACY-BASED ACCOUNTS OF JUDICIAL POWER

The argument that compliance with judicial decisions can be explained, in many situations, as the product of judicial coordination poses a strong challenge to conventional wisdom about the nature of judicial power. A common way of explaining why people obey courts, especially in unpopular or controversial cases, is to invoke the ill-defined concept of judicial legitimacy.<sup>174</sup> It is often

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171. See, e.g., *id.* at 495 (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”); KLUGER, *supra* note 93, at 696 (quoting Chief Justice Warren’s desire, stated in a memo to his fellow justices, that the opinion be “short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory”).

172. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 301–08 (2004); KLUGER, *supra* note 93, at 694, 698 (describing Chief Justice Warren’s successful efforts to avoid separate opinions in *Brown*); *id.* at 696 (noting Justice Frankfurter’s similar desire for a unified Court in *Brown*).

173. See LASSER, *supra* note 95, at 30–31 (reporting that decisions of the Cour de Cassation “tend to run to less than a single typed page”); *id.* at 104–06 (noting that the typical ECJ decision is three to four pages in length, of which only “40 to 50 per cent” is legal analysis).

174. See, e.g., MARSHALL, *supra* note 20, at 131 (defining “legitimacy” as a “political system’s ability to win broad, voluntary approval and acceptance for its decisions”); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–1801 (2005) (distinguishing among “legal,” “sociological,” and “moral” conceptions of “legitimacy”); Seymour Martin Lipset, *Social Conflict, Legitimacy, and Democracy*, in LEGITIMACY AND THE STATE 88, 88 (William Connolly ed., 1984) (“Legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for society.”); John H. Schaar, *Legitimacy in the Modern State*, in LEGITIMACY AND THE STATE, *supra*, at 104, 108 (contrasting “traditional and lexical” definitions of legitimacy, under which “a claim to political power is legitimate only when the claimant

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suggested that the Supreme Court enjoys a finite store of some intangible resource known as legitimacy, which can be cultivated over time but also depleted in a variety of ways.<sup>175</sup> Legitimacy may be depleted, for example, by decisions that antagonize a significant portion of the population,<sup>176</sup> smack of blatant partisanship or unprincipled vacillation,<sup>177</sup> or otherwise blur the distinction between legal decisionmaking and ordinary political decisionmaking upon which courts stake their claim to obedience.<sup>178</sup> From this perspective, a decision such as *Bush v. Gore*<sup>179</sup> constitutes a substantial withdrawal from a hard-earned store of legitimacy, of a kind that the Court cannot afford to make on a regular

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can invoke some source of authority beyond or above himself,” with “current scientific” definitions, which “all dissolve legitimacy into belief or opinion”). See generally William Connolly, *Introduction: Legitimacy and Modernity*, in LEGITIMACY AND THE STATE, *supra*, at 1, 9–18 (reviewing various influential conceptions of legitimacy).

175. See, e.g., *Bush v. Gore*, 531 U.S. 98, 157 (2000) (Breyer, J., dissenting) (describing “the public’s confidence in the Court” as “a public treasure” “built slowly over many years”); *Planned Parenthood v. Casey*, 505 U.S. 833, 864–69 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.) (deeming it “imperative to adhere to the essence” of *Roe v. Wade*, 410 U.S. 113 (1973), for fear of otherwise inflicting “profound and unnecessary damage to the Court’s legitimacy”); *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (arguing that the Court should abstain from “injecting itself into the clash of political forces” lest it endanger its “authority,” which rests upon “sustained public confidence in its moral sanction”); James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New-Style” Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 61 (2008) (observing that courts are “weak institutions,” explaining obedience to courts as the result of “political capital,” and equating their “political capital” with their “institutional legitimacy”); Gibson et al., *supra* note 113, at 537 (observing that scholars use the terms “legitimacy” and “diffuse support” to refer to “a reservoir of favourable attitudes or good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants” (quoting DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 273 (1965))); Klarman, *supra* note 19, at 1759 (opining that the Court risks its legitimacy by rendering “unpopular or controversial decisions in bunches”); Law, *Generic Constitutional Law*, *supra* note 16, at 679–80 & n.103 (observing that “judicial legitimacy” is “discussed obsessively” by judges “as if it were a precious commodity to be hoarded”); Yates & Whitford, *supra* note 135, at 118 (“[T]he Court’s decisions in many cases over a very long time are what the public focuses on in assessing the Court’s legitimacy.”).

176. See, e.g., Anke Grosskopf & Jeffery J. Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court*, 51 POL. RES. Q. 633, 634 (1998) (equating the Court’s “legitimacy” with a “reservoir of goodwill” that can be sapped by decisions that lack popular support); Klarman, *supra* note 19, at 1748 (adopting the “basic premise . . . that the Court’s institutional standing ultimately depends on producing decisions that garner the long-term approval of the American public,” and that the opposition of “relatively powerful interest groups” is likely to have an adverse effect on the Court’s “long-term legitimacy”).

177. See, e.g., *Casey*, 505 U.S. at 864–66 (“[T]he Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation . . . . The legitimacy of the Court would fade with the frequency of its vacillation.”).

178. See, e.g., Dahl, *supra* note 16, at 280 (“[M]uch of the legitimacy of the Court’s decisions rests upon the fiction that it is not a political institution but exclusively a legal one . . . .”); Fallon, *supra* note 174, at 1819 (“[A] claim of judicial legitimacy characteristically suggests that a court . . . rested its decision only on considerations that it had lawful power to take into account or that it could reasonably believe that it had lawful power to weigh . . . .”).

179. 531 U.S. 98 (2000).

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basis without jeopardizing future compliance with its decisions.<sup>180</sup> This conventional view of legitimacy as a form of judicial currency yields two predictions. First, a court should be able to secure compliance with an unpopular or controversial decision as long as it possesses sufficient legitimacy to pay for that compliance. Second, every unpopular decision that a court renders should weaken its capacity to secure compliance with later decisions.

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To conceive of judicial power as the power to coordinate behavior, however, leads to the opposite conclusion: one need not be popular in order to be powerful. A court's ability to coordinate need not decrease simply because it renders unpopular (or unpersuasive, or unenforceable) decisions. To the contrary, the more often that a court renders unpopular (or unpersuasive, or unenforceable) decisions that are nevertheless obeyed, the *greater* the court's power to coordinate may become. In the hypothetical case of *George v. Albert*,<sup>181</sup> for example, a controversial or unpersuasive decision in favor of George does not necessarily undermine the Court's power to secure voluntary obedience to future decisions. Rather, if George successfully assumes the Presidency without overt resistance, the Court's decision has instead reinforced the Court's power. Mass compliance with the decision in favor of George is a brute demonstration of the Court's ability to coordinate behavior on the outcomes that it announces.

The effectiveness of this demonstration is only *enhanced* if the Court's decision is unpersuasive on the merits, unenforceable as a practical matter, or opposed by a large segment of the population. Coordination upon a given focal point—be it a traffic light or a judicial ruling—depends entirely upon the existence of a widespread belief that others are coordinating upon that focal point. To observe countless people obeying a decision that they dislike, and that cannot easily be enforced, instills precisely this belief; it leads us to believe that people coordinate upon the Court's rulings, and the existence of this belief, in turn, ensures that people will in fact coordinate upon the Court's rulings. There are various ways to explain why people might obey such a decision: it might be normatively persuasive; it might be backed by a meaningful threat of enforcement; or it might simply ordain the outcome that people prefer. If we are forced to rule out these explanations, however, it becomes harder to resist the conclu-

180. See, e.g., *BUSH v. GORE: THE QUESTION OF LEGITIMACY*, *supra* note 132; Gibson et al., *supra* note 113, at 535 (concluding that “legitimacy did indeed seem to provide a reservoir of good will that allowed the Court to weather the storm created by its involvement in Florida’s presidential election”); Klarman, *supra* note 19, at 1759 (suggesting that the Court’s legitimacy is “most at risk when it renders unpopular or controversial decisions in bunches”); Yates & Whitford, *supra* note 135, at 106 (reasoning that “the Court relies on its reservoir of institutional legitimacy for obtaining its institutional goals and maintaining its position as one of three coequal and separated powers”); *id.* at 116–17 (“[L]ong-term public perceptions of Court legitimacy depend upon sequences or strings of counter-majoritarian decisionmaking . . . . [T]he public’s support for the Court erodes when the Court consistently makes decisions deviating from majority preferences.” (footnote omitted)).

181. See *supra* text accompanying notes 130–32 (describing a hypothetical dispute between two presidential candidates based upon the facts of *Bush v. Gore*, 531 U.S. 98 (2000)).

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sion that people are coordinating upon the Court's rulings. And once we conclude that others are coordinating upon a given focal point, our own best response is to coordinate upon the same focal point: it is costly to be the only person who rebels against the government, or ignores the traffic light, or defies the Court.

To say that a decision the likes of *George v. Albert* only increases a court's capacity to coordinate behavior upon the outcomes it chooses is not to say, however, that courts are incapable of self-inflicted injury. It is very simple for a court to undermine its own ability to coordinate: it need only render decisions that are visibly the object of disobedience. If courts secure obedience by cultivating and sustaining a certain set of expectations about how others will behave, then the worst thing that can happen to a court is to allow events to prove that those expectations are wrong. A court cannot afford to allow people to observe behavior that is off the equilibrium path—namely, defiance of the court that meets with no adverse consequences. Just as a traffic light ceases to coordinate behavior if it becomes known that everyone ignores the traffic light, the court's ability to coordinate behavior collapses if people learn that their beliefs about how others react to judicial decisions are wrong. Once the belief spreads that there are no consequences to disobeying the court, the court will find it difficult to command obedience again.

Imagine, by way of analogy, the plight of an aspiring socialite who wishes to cement her status by hosting parties that are well attended by the cream of society. The fickle glitterati whom the socialite needs most to attract share an interest in attending successful parties and avoiding unsuccessful ones, where a successful party may be defined as one that is well attended by their rarefied peers. From their perspective, failure to attend a successful party is costly: they lose an opportunity to see and to be seen, to accrue further social status, and perhaps even to enjoy themselves. But attendance at an unsuccessful party is also costly: not only have they wasted their time, but they also risk appearing desperate and suffer the ignominy of association with a failed event. Thus, whether elite guests attend her parties depends upon whether they believe that other elite guests will attend her parties. To host a successful party is, in other words, to coordinate the behavior of potential guests.

The socialite's challenge, therefore, is to promote a widespread belief that her parties are successful ones. If each of her potential guests believes that other elite guests will attend her parties, then everyone will, in fact, attend her parties. There are various strategies by which the socialite can cultivate this belief. She may signal that friendly paparazzi will be present; she may obtain commitments from elite guests and then publicize these commitments; she may publicize her lavish catering and entertainment arrangements. To a substantial extent, however, the beliefs that people hold about a given host's parties are likely to depend upon the host's record of success or failure. If the socialite hosts a party that fails miserably, people will update their beliefs about her parties for the worse. And if these doubts about attendance at her parties are allowed to grow,

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they will ultimately be self-fulfilling: people who doubt the attendance of others will cease to attend, which will only give people even greater cause to doubt the attendance of others. The result will be coordination upon a new equilibrium—namely, non-attendance at her parties.

The ability of a court to coordinate behavior is a form of judicial power, while the ability of a host to coordinate behavior is a form of social popularity (although it might fairly be called a form of power as well). But both capacities for coordination are won, and lost, in similar fashion. To the extent that social popularity is a function of one's ability to coordinate the behavior of others, a popular host is one who preserves the appearance and reputation of being popular. Likewise, to the extent that judicial power inheres in the ability to coordinate the behavior of others, a powerful court is one that preserves the appearance and reputation of being powerful. Conversely, a court jeopardizes its power by allowing people to observe that it is not obeyed.<sup>182</sup> Public demonstration of a court's inability to coordinate behavior encourages a belief that the court will be unable to coordinate behavior in future cases, and this belief, if allowed to grow unchecked, will become self-fulfilling. A court that seeks to preserve its capacity to coordinate behavior must therefore avoid such demonstrations of impotency.

In sum, to the extent that courts derive their power from their ability to coordinate behavior, the impact of a given decision on the power of a court will be a function not of the decision's popularity or persuasiveness, but rather of the extent to which people comply with it. Thus, for example, although *Bush v. Gore* may not have endeared itself to many people,<sup>183</sup> it marked an increase of judicial power and was, in this sense, a victory for the Court: in the face of intense criticism and wide opposition, the Court coordinated a peaceful regime change and, in so doing, generated a widespread belief that it could do so again in the future. In intuitive terms, it is not difficult to grasp how the decision actually increased the power of the Court. Prior to *Bush v. Gore*, one might reasonably have doubted the ability of the Supreme Court to settle the result of a presidential election against the preferences of a majority of the nation's voters. After *Bush v. Gore*, such doubts are harder to sustain. In the same manner that a successful party increases the likelihood that the socialite's next

182. See Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness: Delegation, Defiance, and Judicial Opinions*, 52 AM. J. POL. SCI. 504, 507 (2008) (arguing that obvious government defiance of judicial decisions tends to "induce more and more noncompliance" by "undermin[ing] the general perception that court decisions must be respected" and thus rendering disobedience "a 'normal' part of politics" to which "citizens and political elites become less likely to react").

183. Nor, however, does it appear to have had a significantly negative impact on public approval of the Court. See Gibson et al., *supra* note 113, at 553 (concluding, after controlling for such variables as support for the rule of law, that "the Court may well have diminished its legitimacy by its ruling in *Bush v. Gore*, but only by a trivial amount"); Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32, 35 & tbl.1 (2001) (finding the decrease in public approval of the Court following *Bush v. Gore* so small as to lack statistical significance).

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party will be successful as well, *Bush v. Gore* fosters a widely held belief that everyone will comply with a similar decision in a similar case and thus enhances the actual likelihood of compliance with such a decision. This belief is only strengthened by the fact that the Court achieved compliance with its ruling in the face of both political opposition and intellectual obstacles.<sup>184</sup> If the Court were to be called upon to determine the result of another presidential election, the likelihood of widespread compliance is higher as a result of the Court's earlier *realpolitik* victory in *Bush v. Gore*. And if it were indeed to manage the same feat a second time, it would only increase its power to do so a third time. And so forth.

By contrast, the Court's first decision in *Brown v. Board of Education*<sup>185</sup> may have enhanced the moral stature of the Court like no other decision before or since, but it also risked severe injury to the power of the Court itself. In the immediate aftermath of the Court's decision in *Brown I*, it became clear that the Court had every reason to fear massive resistance.<sup>186</sup> The Court's strategic response in *Brown II*<sup>187</sup> was twofold: it shunted enormous responsibility and discretion to the lower courts,<sup>188</sup> and it adopted infamously "loose phraseology" that "could neither constrain evasion nor bolster compliance."<sup>189</sup> As Michael Klarman observes, "precision enabled defiance, which the justices desperately wished to avoid."<sup>190</sup>

In light of the prolonged defiance that nevertheless followed, Klarman characterizes *Brown II* as "a mistake from the Court's perspective."<sup>191</sup> Insofar as the Court's overriding goal was to preserve its own power, however, it is far from clear whether *Brown II* was, in fact, a strategic mistake. By rendering a decision on the question of implementation that was too permissive to be flaunted in an obvious way, and by substituting the handiwork of the lower courts for its own, the Court hindered the formation of a popular belief that it could not command obedience.<sup>192</sup> For an institution that must rely upon the power of coordination to secure large-scale obedience, a popular belief that one lacks power is a self-

184. See *supra* notes 131–32 (noting the degree of skepticism and criticism that the decision encountered).

185. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

186. See KLARMAN, *supra* note 172, at 314–15 (documenting a variety of signs, all obvious to the Court, that massive and potentially violent resistance to school desegregation was brewing).

187. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

188. See KLARMAN, *supra* note 172, at 317–19 (discussing Justice Jackson's opposition to the approach of shifting responsibility for implementation of *Brown* to the district courts).

189. *Id.* at 318. In the words of *Brown II*, the lower courts were directed to ensure "a prompt and reasonable start," 349 U.S. at 300, toward "good faith implementation" of the initial decision, *id.* at 299, "with all deliberate speed," *id.* at 301.

190. KLARMAN, *supra* note 172, at 317.

191. *Id.* at 320.

192. See Staton & Vanberg, *supra* note 182, at 507, 513 (arguing that noncompliance weakens judicial power by undermining the belief that judicial rulings will be obeyed, and that judges therefore have a strategic reason to "use vague language" that "mask[s] noncompliance" in cases where they "expect defiance").

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fulfilling belief. Thus, insofar as they sought to preserve their own power,<sup>193</sup> the Justices may have adopted exactly the right strategy: in the face of the violent resistance to school desegregation that ultimately followed, *Brown II* enabled the Court to cushion the blow to its reputation for commanding obedience.

Measured against the goal of preserving the appearance—and thus the reality—of its own power, the Court’s next moves also made strategic sense. First, it chose to await a case in which it could issue a decision without appearing utterly ineffectual.<sup>194</sup> Second, having found such a case, it then issued a decision that insisted unambiguously and emphatically upon complete obedience.<sup>195</sup> For several years after *Brown*, the nation had every reason to doubt whether the federal government would make any effort to enforce school desegregation decisions against recalcitrant state officials.<sup>196</sup> Only after President Eisenhower deployed the 101st Airborne Division to Little Rock<sup>197</sup> was it once again safe for the Court to reassert itself without highlighting its impotence. This application of brute force gave the Court an opportunity not merely to salvage, but to burnish, its reputation for issuing decisions that elicit compliance.

That opportunity arrived in the form of *Cooper v. Aaron*, and the result, not surprisingly, was a paean to federal judicial supremacy.<sup>198</sup> In the face of massive noncompliance, the Court’s best hope for appearing powerful was to encourage the perception that its decisions were backed by the full force of the federal government. What better way for the Court to encourage such an

193. Justice Black, for example, advised his colleagues that white southerners were “going to fight this” regardless of whether the Court pursued a gradualist approach, but he explicitly endorsed gradualism for fear of otherwise issuing a futile order. Remarks of Justice Black (Conference of April 16, 1955), in *THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS* 665 (Del Dickson ed., 2001) (“The less we say, the better off we are . . . [because t]here will be a deliberate effort to circumvent the decree.”).

194. See KLARMAN, *supra* note 172, at 324 (“The justices . . . avoided further confrontation over school desegregation by denying full review in every case that was appealed until 1963, with the sole exception of the Little Rock case, *Cooper v. Aaron* (1958) . . . They had apparently decided to say no more on the subject until they had received some signal of support from the political branches.”).

195. See *Cooper v. Aaron*, 358 U.S. 1, 4 (1958) (rejecting the argument that state officials were not bound by the Court’s decision in *Brown*).

196. See KLARMAN, *supra* note 172, at 326 (describing the use of state troopers in Texas to block enforcement of a school desegregation order, and the non sequitur of Eisenhower’s response that “the federal government could not intervene in ordinary instances of rioting”). Indeed, shortly before Governor Orval Faubus directed the Arkansas National Guard to block the racial integration of Central High School, President Eisenhower had openly reiterated his unwillingness to “send federal troops . . . into any area to enforce the orders of a federal court.” *Id.* Thus, as Klarman notes, “Faubus was justifiably surprised when the 101st Airborne appeared in Little Rock” a couple of months later. *Id.*

197. See *id.*

198. See *Cooper*, 358 U.S. at 18 (asserting that “the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system”); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997) (“The accepted wisdom is that *Cooper*’s statement of judicial supremacy was an overstatement . . .”).

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impression than to issue a clear and firm order after federal force had already been brought to bear? It is obvious, given the sequence of events, that the Court's aggressive assertion of power in *Cooper* could not have caused the President's use of force. Rather, if there is any relationship of cause and effect to be drawn between the two events, it was the President's use of force that led the Court to assert itself in *Cooper*.

John Hart Ely once observed that "one of the surest ways to acquire power is to assert it."<sup>199</sup> The words ring true, but they must be qualified: the surest way to acquire power is to assert it *when there is no risk of disobedience*. The tactic is a time-honored one. Cowed by political peril, the Marshall Court did nothing to help William Marbury secure a judicial commission that in its view was rightfully his,<sup>200</sup> and it capitulated to a constitutionally dubious purge of Federalist judges from the circuit courts.<sup>201</sup> Yet in hindsight, we do not remember *Marbury v. Madison* as a sad chapter in the story of the Judiciary's abject surrender to the Jeffersonians. We remember it, instead, as the cornerstone of judicial power in this country because the Court had the strategic sense to assert itself in a ruling that was at no risk of being disobeyed in any obvious way. *Cooper v. Aaron* is thus heir to the same tradition as *Marbury* in more ways than one: both are not merely assertions of judicial power, but rather *opportunistic* assertions of judicial power made under conditions of assured compliance. Having learned the weakness of its position by the time of *Brown II*, the Court squeaked like a mouse; after federal troops had cleared the way in Arkansas, it roared like a lion. *Cooper* stands as a monument to judicial power if we remember not the squeak, but the roar. And that is, perhaps, what we tend to remember. With the passage of time, the illusion of power has become the reality.

199. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 48 (1980).

200. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–80 (1803) (holding unconstitutional a statutory grant to the Supreme Court of original jurisdiction over petitions for writs of mandamus, and thereby denying William Marbury's request to compel the new Jefferson administration to deliver his judicial commission); PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 121 (5th ed. 2006) (observing that the Court's decision in *Marbury*, while asserting the power of the Court to invalidate congressional statutes, also upheld the "practical ability of Thomas Jefferson to avoid giving Marbury the commission that was, ostensibly, rightfully his").

201. See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 307–08 (1803) (upholding the transfer of a pending case to a reconstituted circuit court that had been pared by the Jeffersonians of judges appointed by the earlier Federalist administration of John Adams); BREST ET AL., *supra* note 200, at 105 (observing that, in deciding *Stuart*, the Court "in effect upheld the constitutionality" of "the Jeffersonian purge of the Federalist circuit judges" and "complete[ly] capitulat[ed] . . . to the new political reality of Republican hegemony"); Sanford Levinson & Jack M. Balkin, *What Are the Facts of Marbury v. Madison?*, 20 CONST. COMMENT. 255, 261 (2003) (describing the Court's decision in *Stuart* as a "full capitulation" to "Jeffersonian hegemony" that "de facto" upheld the purge of Federalist judges). The perilous circumstances surrounding the Court's capitulation in *Stuart* included, inter alia, the politically motivated impeachment of Justice Samuel Chase, an ardent Federalist, and the outright elimination of the Court's 1802 Term. See *id.* at 259, 262.

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V. IMPLICATIONS OF THE THEORY FOR JUDICIAL INDEPENDENCE AND THE  
POPULARITY OF THE COURTS

It is common to conceive of judicial independence as serving a countermajoritarian function: judicial independence is necessary, the conventional story goes, if courts are to protect individuals and minorities from government persecution and tyrannous majorities alike.<sup>202</sup> On this view, popular majorities ought to have little reason to support judicial independence: to the extent that courts do what they are supposed to do, they antagonize the majority, which might therefore be expected to resent judicial independence.<sup>203</sup>

This Article has urged a different perspective on the relationship between judicial independence and popular rule. Courts perform monitoring and coordinating functions that safeguard popular sovereignty by enabling the people to exercise effective control over their government. They cannot perform these functions, however, unless they enjoy independence from the government that they are supposed to monitor. The people of Hobbestown, for example, will place little value upon the judge's reports if they happen to know that the gunman is holding a gun to the judge's head or has taken the judge's family hostage. Because only independent courts can be relied upon to provide credible information about the government's behavior, the citizenry have a compelling reason to support judicial independence.<sup>204</sup>

202. See, e.g., ELY, *supra* note 199, at 135–83 (identifying the protection of minorities as a “representation-reinforcing” reason for which courts engaged in judicial review should defy the wishes of a popular majority, and observing pithily that “constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can”); John Ferejohn & Larry D. Kramer, *Judicial Independence in a Democracy: Institutionalizing Judicial Restraint*, in *NORMS AND THE LAW* 161, 164 (John N. Drobak ed., 2006) (citing Madison’s “profound insight” that “majoritarian pressures are especially threatening to judicial independence in a republic”); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 *REV. POL.* 369, 370 (1992) (noting the widely held view that judicial independence “allows courts to avoid the prejudice and shortsightedness to which elected officials sometimes succumb,” and to “preserve rights under attack”).

203. See, e.g., Stephenson, *supra* note 6, at 63 (arguing that “the public often strongly supports policy changes favored by the government and opposed by the courts,” and that this fact undermines the argument that a fear of “public backlash” induces governments to respect judicial independence); Matthew C. Stephenson, *Court of Public Opinion: Government Accountability and Judicial Independence*, 20 *J.L. ECON. & ORG.* 379, 380 (2004) (stating that “in many cases the elected branches are more likely than courts to have preferences similar to those of the relevant public constituencies,” and deeming it “especially problematic” for this reason to assume that “voters defend the courts by imposing political costs on defiant elected officials”) [hereinafter, Stephenson, *Court of Public Opinion*].

204. To be precise, judicial independence is one of two conditions that must be satisfied if the courts are to provide the people with credible information about the government's behavior. As a general matter, a third party will be a persuasive and credible source of information if two conditions are met. The first condition relates to the *expertise* of the third party: the audience must believe that the speaker possesses relevant knowledge or expertise that the audience does not itself possess. See Lupia & McCubbins, *supra* note 75, at 50–51; McCubbins & Rodriguez, *supra* note 112, at 36. The second condition relates to the *intentions* of the third party: the audience must believe that the speaker faces no net incentive to engage in deception. See Lupia & McCubbins, *supra* note 75, at 50–51; McCubbins & Rodriguez, *supra* note 112, at 36. Ordinarily, it will be easy for a court to satisfy the first condition:

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At the same time, judicial independence is not without its drawbacks. To introduce judicial review by an independent court is, in effect, to trade one set of agency costs for another. Recall that the relationship between the people and the government can be understood as a principal-agent relationship fraught with risk: the government is an agent of the people that, if left to its own devices, may usurp power and threaten their ultimate sovereignty.<sup>205</sup> Judicial review by an independent court is one means by which the people may seek to address these potentially severe agency costs. Having set forth the terms on which they have delegated power to the government in the form of a constitution, they may institute an independent court for the purpose of monitoring the government's compliance with these constitutional limits and, if necessary, coordinating an effective popular response to any violations that occur.<sup>206</sup> In doing so, however, the people create yet another agency relationship with costs of its own: no less than the government that it is supposed to monitor, the court itself is an agent that may attempt to advance its own goals at the expense of its principal.<sup>207</sup>

How might the people weigh the costs and benefits of judicial independence? One way to see how they might do so is to model judicial review and judicial independence as elements of a game of strategy involving the government, the people, and a constitutional court. In this game, the people choose whether to insulate the court from government influence. The government then chooses to act in a manner that is either constitutional or unconstitutional. Finally, the court responds to the government's action by ruling for or against the government. By opting for judicial independence, the people increase the probability that the court will rule against the government.

What makes this game particularly instructive is to assume—much as this Article has argued—that the people lack the ability to determine for themselves whether the government has acted constitutionally.<sup>208</sup> To be specific, we assume that the people lack either the factual information or the legal ability to assess the constitutionality of government behavior. The government and the court, by contrast, are assumed to possess perfect information about both the factual and legal character of the government's conduct.

The assumption that the people possess woefully imperfect information has

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courts possess atypical expertise when it comes to ascertaining the lawfulness of government conduct. In order for a court to satisfy the second condition, however, the people must believe that the court has no incentive to deceive them. This condition cannot be satisfied if it appears that the court acts as a mouthpiece for the government that it is supposed to monitor.

205. See *supra* sections I.A & I.B.

206. See *supra* section I.C.

207. See, e.g., Tom Ginsburg, *Administrative Law and the Judicial Control of Agents in Authoritarian Regimes*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES*, *supra* note 90, at 58, 67 (noting that a government that chooses to use courts to monitor the behavior of its bureaucrats faces the problem of “agency costs in the monitors,” meaning that the courts themselves may impose costs upon the government by acting in ways contrary to its wishes).

208. See *supra* section II.B and text accompanying notes 50–52 (discussing the inadequacy of the information that people possess about the constitutionality of government conduct, and the difficulty and cost of gathering such information).

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important practical consequences. Although the people must rely on the court for information about how the government has behaved, they cannot tell whether the information that the court provides is in fact accurate: they lack the ability to distinguish false judicial signals about constitutionality from true signals. As a result, the people are incapable of holding the court accountable for false signals. Even if they happen to possess the raw power to discipline the court for sending false signals, they have no way of knowing when to exercise that power. Consequently, the court is free to rule as it wishes without fear of punishment by the people. In this sense, the court can be said to enjoy independence from the public, regardless of whether it also happens to enjoy independence from the government. Finally, the fact that the people may lack both factual knowledge and legal understanding of the government's behavior means that it is possible for the them to express support for unconstitutional government actions out of ignorance rather than antipathy to the constitution.

As the table below illustrates, the interaction between the government and the court has four possible outcomes. In the first scenario, the court sends what might be called a *true negative* signal: it rules correctly that no constitutional violation has occurred. In the second scenario, the court sends a *false negative* signal: again, it indicates that no constitutional violation has occurred, but in this case, the signal is false. In the third scenario, the court sends a *false positive* signal: it rules falsely that a constitutional violation has occurred. Finally, in the fourth scenario, the court sends a *true positive* signal: it rules that a constitutional violation has occurred, and the ruling is true.

**Table 1. Possible Outcomes of Interaction Between the Government and the Court**

	<b>Government acts constitutionally</b>	<b>Government acts unconstitutionally</b>
Court rules in favor of government	(1) True negative signal	(2) False negative signal
Court rules against government	(3) False positive signal	(4) True positive signal

It is obvious that the people would prefer to receive only true signals. That is, in an ideal world, neither scenario (2) nor scenario (3) would ever occur. Given their inability to distinguish between true and false signals, however, there is little that the people can do to discourage false signals. They can influence the court's behavior by supporting judicial independence, but doing so will not achieve the exact result that they desire. Rather than raising the likelihood of *true* as opposed to *false* signals, judicial independence raises the likelihood of *positive* as opposed to *negative* signals: that is, it increases the incidence of

scenarios (3) and (4) relative to scenarios (1) and (2). If the public opts for judicial independence, the incidence of false negatives will fall, but the incidence of false positives will rise. Conversely, if the court is left at the mercy of the government, the risk of false positives will fall, but the risk of false negatives will rise.

Thus, in deciding whether to support or forgo judicial review by an independent court, the people must decide which is the lesser of two evils: an increased risk of false positives or an increased risk of false negatives. False positives are undesirable for more reasons than one. To the extent that government policies enjoy popular support, judicial review is open to the familiar charge of counter-majoritarianism.<sup>209</sup> More troubling, however, is the potentially debilitating effect of excessive judicial review on the government itself. For the court to restrict state action more stringently than the constitution requires is to disable the government from exercising the powers that it was intended to possess, and to undermine its effectiveness as an agent of the people.<sup>210</sup> At the extreme, a government that is thwarted at every turn may become incapable of acting upon the very problems that it was created to address.

Yet false negatives may be cause for even greater concern. Judicial review can, again, be likened to a fire-alarm mechanism.<sup>211</sup> In real life, people routinely tolerate false alarms, and for good reason. Given the choice between a fire alarm that sometimes goes off during routine dinner preparations (that is, an alarm prone to false positives) and one that does not sound even when the kitchen is in flames (that is, an alarm prone to false negatives), most people with even a moderate aversion to risk would probably choose to endure the occasional false alarm, notwithstanding the nuisance involved. Unless false alarms are frequent and disruptive to the point of preventing ordinary activity—and the likelihood of actual catastrophe is exceedingly remote—there is too much at stake in the event of an actual fire to justify disabling the alarm entirely.

The same reasoning can be applied to the choice between a court that occasionally blocks constitutionally innocuous laws, and a court that fails to sound the alarm when the government attempts to usurp power. The people simply cannot afford to remain ignorant of government encroachment upon their sovereignty and freedom: to do so is to run the risk of a descent into tyranny. The costs inflicted by an overactive court are, by comparison, more easily endured. Unlike the government, a constitutional court has no obvious

209. As previously noted, however, it is unsafe to assume that the actions of elected officials will in fact reflect public sentiment more closely than those of unelected judges. *See supra* notes 19–20 and accompanying text (noting that the positions taken by Congress and the President have not tracked public opinion more closely than those taken by the Supreme Court).

210. *Lochner v. New York*, 198 U.S. 45 (1905), offers an obvious and infamous example of how judicially imposed constraints on state action can impair the government's ability to address basic social and economic challenges.

211. *See supra* notes 82–85 and accompanying text.

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means of oppressing the people on its own.<sup>212</sup> Moreover, even if the court happens to place unwanted constraints upon the government, the people will surely find it easier to loosen such constraints than to rein in a tyrannical government.

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There are obvious limitations to this analysis. The game described above is simply not intended to capture the strategic and political dynamics of judicial independence and judicial review in all their complexity. For example, the setup of the game deliberately ignores the fact that government actions often fall in a grey area of uncertain constitutionality, and that courts cannot merely apply the constitution but must instead make law in order to decide such disputes.<sup>213</sup> Likewise, it does not allow for the possibility that the people have access to other sources of information that would enable them to monitor the behavior of both the government and the court. What the game does provide, instead, is an analytical framework for exploring how rational actors might behave given a particular set of assumptions about their goals and abilities. The key premise of the game is that the people are averse to the risk of tyranny but must rely on the court for information about the extent to which government action is consistent with constitutional limitations.

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Given this premise, the players have strategic incentives to behave in the following ways. First, because the people rely upon judicial review by an independent court to warn them of government usurpation and to coordinate their response, a government that is in fact intent upon usurping power will be keen to undermine judicial independence. A second prediction, which follows directly from the first, is that government attacks upon the court’s independence ought to trigger strong public opposition. Third, the people can be expected to support judicial independence even when the court strikes down policies that enjoy popular support. It is rational for them to tolerate such behavior if they believe either that the court knows more than they do about the constitutionality of the government’s actions, or that a certain amount of unwanted judicial lawmaking is the price they must pay for judicial monitoring of government compliance with the constitution.<sup>214</sup>

The first two of these predictions are plausible, if not consistent with experience. Consider, for example, recent events in Pakistan. Faced with the likeli-

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212. See THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 5, at 433–34 (deeming the Judiciary the “weakest” and “least dangerous” branch of government, and arguing that “liberty can have nothing to fear from the judiciary alone,” because it has “no influence over either the sword or the purse”).

213. See, e.g., SHAPIRO, *supra* note 5, at 17 (noting that the “conflict resolution, social control, and lawmaking functions of courts” are “mutually interdependent” and thus inseparable in practice); Shapiro, *supra* note 22, at 274 (“[C]ourts make law . . . as an integral and inescapable aspect of their fundamental social logic as conflict resolvers.”).

214. Cf. Shapiro, *supra* note 22, at 275–76 (observing that, just as anyone who employs a “junkyard dog” for security “must expect to sometimes be bitten,” any demos that institutes a “higher-law judicial review court” to police government compliance with the constitution must expect to pay a price in the form of unwanted judicial lawmaking).

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hood that the Supreme Court of Pakistan would overturn his reelection on constitutional grounds, President (and General) Musharraf sought to remove the independent-minded Chief Justice Iftikhar Chaudhry from office.<sup>215</sup> Chaudhry's removal became, quite literally, a focal point for intense public and political opposition to the Musharraf regime: in a single day of violent clashes prompted by Chaudhry's arrival in Karachi, thirty-nine people died.<sup>216</sup> Following the court's reinstatement of Chaudhry as its chief justice,<sup>217</sup> Musharraf took more drastic action against the judiciary. Declaring a state of emergency, he suspended the constitution entirely and placed numerous judges, including Chaudhry, under house arrest.<sup>218</sup> The severity of the measures taken against a seemingly powerless court illustrates the depth of a tyrant's fear of that seemingly powerless court. What is more important for present purposes, however, is the fact that his fears were well founded. On the one hand, the willingness of the judges both to rule against Musharraf on the constitutionality of his reelection and to reinstate Chaudhry demonstrates the role of the courts in monitoring and publicizing efforts to usurp power. On the other hand, the intensity of public opposition to Musharraf's attacks upon judicial independence illustrates vividly the role that courts can play in coordinating popular action against government usurpation.

The third prediction—namely, that attacks upon judicial independence should prove deeply unpopular, even when the courts happen to defy the wishes of a majority—also resonates with experience. In this country and elsewhere, courts known for striking down supposedly majoritarian legislation have nevertheless enjoyed high levels of public support that put other government institutions to shame.<sup>219</sup> Support has remained strong, moreover, even when the public has

215. See Salman Masood, *Violence Puts More Pressure on Musharraf*, N.Y. TIMES, May 14, 2007, at A3; David Rohde & Jane Perlez, *Ousted Justice and Opposition Leader Urge Pakistanis to Continue Protests*, N.Y. TIMES, Nov. 7, 2007, at A10.

216. See Masood, *supra* note 215, at A3.

217. See Somini Sengupta, *Musharraf Loses Fight over Suspension of Judge*, N.Y. TIMES, July 21, 2007, at A1.

218. See Rohde & Perlez, *supra* note 215, at A10.

219. See, e.g., VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS 13 (2003) (noting that overall levels of support for the Supreme Court are both “consistently higher” and “more stable” than levels of support for Congress and the Executive); DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 56–57 (2d ed. 1997) (observing that, according to multiple public opinion polls, Germany's constitutional court “enjoys substantially more public trust than any other major political or social institution, including parliament, the military establishment, the regular judiciary, the television industry, and even churches and universities”); Joseph F. Fletcher & Paul Howe, *Canadian Attitudes Toward the Charter and the Courts in Comparative Perspective*, 6 CHOICES 4, 12, 13 tbls.8–9, 16 tbl.11, 25 (2000) (reporting that over three-quarters of Canadians are “somewhat” or “very satisfied” with the Supreme Court of Canada, and that, by a two-to-one margin, Canadians prefer their courts to have “the final say” over their legislatures in the event that the courts hold a law unconstitutional); James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 349 tbl.3 (1998) (revealing that seventy percent of Americans are “somewhat” or “very” satisfied with the performance of the Supreme Court, while nearly seventy-five percent of Germans in what was formerly West Germany express similarly high levels of satisfaction with the performance of their own constitutional court, the Bundesverfassungsgericht); Law, *Generic Constitu-*

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disapproved of particular decisions.<sup>220</sup>

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The most dramatic clash of the last century over judicial independence in the United States illustrates the point. Public reaction to Franklin Roosevelt's proposal to pack the Court with New Deal supporters was highly negative.<sup>221</sup>

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Yet opposition to the Court-packing plan cannot be explained as a product of opposition to the New Deal or to Roosevelt himself, given his landslide reelection and the strong popular and political support that he enjoyed.<sup>222</sup> Popular rejection of the plan more likely reflected the public's desire to preserve the integrity of an institutional fire-alarm mechanism for warning them of government usurpation. The Court's initial response to the New Deal displeased many people. Yet it is plausible that those same people might prefer an alarm that is too easily triggered to one that has been disabled.

The relationship posited here between the courts and the people is one of mutual dependency or symbiosis. On the one hand, the existence of independent courts wards off threats to popular rule. The fact that the courts are independent helps the people to learn of, and respond effectively to, efforts by the government to usurp power. On the other hand, judicial independence cannot survive without popular support. If a usurping government can undermine the indepen-

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*tional Law*, *supra* note 16, at 679–80 & n.105 (discussing the high levels of public confidence enjoyed by the Indian judiciary relative to other government institutions); Tanase, *supra* note 103, at 29 & tbl.1 (reporting higher levels of trust among the Japanese in the judiciary than in lawyers, the police, or politicians); *see also supra* note 98.

220. *See, e.g.*, HOEKSTRA, *supra* note 219, at 12–13 (observing that most empirical research to date has found that “agreement with specific Court decisions does not typically factor into overall support for the institution,” and that overall support for the Court has been consistently high over time); Fletcher & Howe, *supra* note 219, at 17 (reporting that only thirty-six percent of Canadians would support elimination of the Supreme Court of Canada if its decisions were consistently to contradict public opinion); Joseph F. Fletcher & Paul Howe, *Supreme Court Cases and Court Support: The State of Canadian Public Opinion*, 6 CHOICES 30, 31, 49–52 (2000) (finding that public disagreement with the Canadian Supreme Court on specific policy issues has not translated into negative public opinion toward the court itself, and that “[e]ven consistent opponents of Supreme Court rulings are modestly favourable in their assessments of Canada’s judicial institutions”); Stephenson, *supra* note 6, at 63 (“While there is evidence that courts do shift position in response to sustained public opposition, it does not seem to be the case that judicial independence is respected only when public and judicial preferences are aligned.” (internal citations omitted)). *But cf.* Lori Hausegger & Troy Riddell, *The Changing Nature of Public Support for the Supreme Court of Canada*, 37 CAN. J. POL. SCI. 23, 38–44 (2004) (offering tentative evidence that public support for the Canadian Supreme Court is becoming more responsive to public opinion on specific policy issues).

221. *See, e.g.*, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971, 987, 1037–45 (2000) (describing the concerns that fueled public opposition to the Court-packing plan).

222. *See id.* at 987, 1028–31 (observing that “significant segments of the public during the New Deal” opposed both the Court’s rejection of the New Deal and Roosevelt’s efforts in response to bring the Court to heel). In the 1936 election, Roosevelt won over sixty percent of the vote, carried every state except Maine and Vermont, and secured a whopping three-quarters Democratic majority in Congress. *See* David E. Kyvig, *The Road Not Taken: FDR, the Supreme Court, and Constitutional Amendment*, 104 POL. SCI. Q. 463, 465 (1989); *see also* WHITTINGTON, *supra* note 18, at 268 (“Even a popular president, fresh from a landslide electoral victory, backed by overwhelming partisan majorities in Congress, and faced with stern judicial resistance to his policy program in the midst of economic crisis, could not win passage of even a relatively tempered proposal to meddle with the Court.”).

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dence of the courts without fear of popular retaliation, it will do so. It is only the existence of an implicit working partnership between the people and the courts that enables the courts to act as a check upon the rest of the government. Deprived of popular support, and bereft of the power of either purse or the sword, a constitutional court has little hope of maintaining its independence, much less of thwarting a regime that harbors tyrannical designs. In their dealings with the government, the courts need the support of the people if they are to command compliance. Yet it is equally true that, in their dealings with the government, the people benefit from the assistance of the courts. In the face of a lone gunman with both a capacity for violence and a thirst for power, it is in the best interests of the disorganized, uninformed people and the unarmed, vulnerable judge to stand together.

#### CONCLUSION

Constitutional scholarship has long acknowledged that government obedience to the least dangerous branch cannot be taken for granted. It has not, however, addressed the problem in a coherent or satisfying way. For the most part, the relevant literature has simply assumed that courts possess some poorly defined quality known as legitimacy that, when mustered in sufficient quantity, leads government officials to comply.<sup>223</sup> And having thus muddled the threshold question of why governments obey courts, it has tied itself in knots over the supposed dilemma that courts, armed with the awesome power of their own legitimacy, are in a position to foist upon the polity choices that lack majority support.<sup>224</sup>

This theoretical paradigm is deeply unsatisfying. It rests upon dubious empirical premises about the extent to which judicial review is actually countermajoritarian.<sup>225</sup> It obscures the crucial underlying question of human motivation—namely, the extent to which government officials obey courts out of a sense of normative obligation, or instead for reasons of self-interest. And it is oddly circular: legitimacy enables courts to act in a countermajoritarian fashion, we are told, yet countermajoritarian behavior threatens the legitimacy of courts. Constitutional theory has consequently been preoccupied with finding ways of escape from a trap of its own making: how can courts perform judicial review without losing their legitimacy? How, in other words, can they have their cake and eat it too?

If we are to move beyond this paradigm, we must avoid its peculiar assumptions and learn to address ourselves to a different and perhaps more interesting set of questions about the relationship between judicial power and judicial review. This Article has sought to do precisely that. Using as its starting point a hypothetical state of nature in which neither governments nor courts exist, it has

223. See *supra* notes 174–80 and accompanying text.

224. See *supra* notes 10–13 and accompanying text.

225. See *supra* notes 14–20 and accompanying text.

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constructed a theoretical account of what constitutional courts do, why people would choose to adopt such institutions, and why government officials would choose to obey them. Courts perform two crucial but largely overlooked functions—namely, monitoring and coordination—that enable them to elicit compliance even when they lack enforcement power of their own. In the context of judicial review, the performance of these functions by a constitutional court ameliorates the information and collective action problems that plague the principal-agent relationship between the people and their government. The ability of the court to inform and mobilize gives the people reason to embrace judicial review and judicial independence alike. The threat of action by an informed and mobilized public, in turn, gives the government reason to obey the court.

The theory set forth here, if correct, holds different lessons for different audiences. There are obvious practical implications for four groups in particular: courts, tyrants, constitutional designers, and constitutional theorists. Each shall be addressed in turn.

*1. Lessons for courts.* Courts, for their part, can do themselves no harm, and possibly much good, by highlighting their role and value as instruments of popular sovereignty, rather than fretting over their decidedly irregular tendencies toward countermajoritarianism.<sup>226</sup> They can perform their monitoring and coordinating functions more effectively by making it easy for ordinary readers to grasp the import of their decisions, and by indicating as clearly as possible the willfulness and severity of the constitutional violations that they encounter. If they are to keep the public informed as fully as possible, however, courts should also refrain from cultivating justiciability doctrines that shield broad swathes of government activity from judicial scrutiny.<sup>227</sup> A court may needlessly disable itself from sounding the alarm by adopting a restrictive approach to standing that bars the adjudication of “generalized grievances,”<sup>228</sup> for example, or by treating certain sensitive constitutional questions as inherently “political” or “governmental” and therefore nonjusticiable.<sup>229</sup> It is perhaps

226. See *supra* note 8 and accompanying text (noting that it was once common for judges to justify judicial review in majoritarian terms).

227. See generally BICKEL, *supra* note 10, at 111–83, 200 (extolling the “passive virtues” of the various ways the Court has found to avoid ruling on the merits of constitutional claims).

228. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–76 (1992).

229. See, e.g., AUGUST REINISCH, INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 96–99 (2000) (discussing how French, Italian, British, and German courts have invoked “*acte de gouvernement*” or “act of state” doctrines to declare nonjusticiable various forms of government conduct in the area of foreign affairs); Pierre Avril, *Political Questions in France*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 169, 171–72 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007) (describing the decline and resuscitation in France of the *acte du gouvernement* doctrine, pursuant to which the Conseil d’État refrains from reviewing certain governmental acts); Rachel E. Barkow, *The Rise and Fall of the Political Question Doctrine*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES*, *supra*, at 23, 33, 42–45 (criticizing as unprincipled the Supreme Court’s periodic avoidance of “political questions” on “prudential” grounds); Law, *Generic Constitutional Law*, *supra* note 16, at 705 (noting that American and Japanese courts

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ironic that restrictions of this sort have sometimes been justified on the ground that they manifest proper respect for the democratic process,<sup>230</sup> when in fact they have the potential to undermine democratic control by depriving the public of valuable information about the conduct of those who govern them.

There is, to be sure, an important strategic reason why a court might wish to limit the cases that it can hear. Self-limitation may be motivated by self-preservation. Lacking as they do the ability to enforce their decisions against unwilling governments, constitutional courts possess feet of clay: their power is dependent upon the beliefs that others hold about the consequences of disobedience.<sup>231</sup> If the government seems likely not only to disobey judicial rulings on a particular question, but to do so at little or no cost to itself, a decision on the merits runs the risk of exposing—and thereby aggravating—the powerlessness of the court. Under conditions of uncertain government compliance, judicial self-censorship may seem prudent as a strategic matter.<sup>232</sup> It is questionable,

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alike have adopted “political question” doctrines that effectively shield from judicial review entire categories of constitutional questions about the extent of government power); Shigenori Matsui, *A Comment Upon the Role of the Judiciary in Japan*, 35 OSAKA U. L. REV. 17, 18–19 (1988) (observing that the Japanese Supreme Court has used both standing doctrine and the “political question” doctrine to avoid ruling upon constitutional questions to such an extent that it has been accused by commentators of “abdication” the responsibility of judicial review).

230. See, e.g., *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 23 (1998) (noting that “the Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance”); *Allen v. Wright*, 468 U.S. 737, 760 (1984) (deeming it beyond the “proper role of the federal courts” to rule on “general complaints about the way in which government goes about its business”).

231. See *supra* sections III.B–III.C.

232. See, e.g., Jesse H. Choper, *Introduction to THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES*, *supra* note 229, at 1, 20–21 (expressing unease over the extent to which the Court’s application of the political question doctrine may be influenced “by its judgment of whether a particular result will bring criticism, hostility, or disobedience”). There is evidence to suggest, for example, that Japanese courts have adopted a restrictive approach to justiciability in part because they do not wish to appear ineffectual in the face of government resistance. See, e.g., Hidenori Tomatsu, *Judicial Review in Japan: An Overview of Efforts to Introduce U.S. Theories*, in *FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY* 251, 269–71 (Yoichi Higuchi ed., 2001) (describing both the rarity with which the Japanese Supreme Court attempts to strike down legislation, and the Japanese government’s indifferent and even defiant reactions on those rare occasions); Colin P.A. Jones, *Judiciary’s ‘Snake Legs’ Exposed*, JAPAN TIMES ONLINE, Apr. 29, 2008, <http://search.japantimes.co.jp/cgi-bin/fl20080429zg.html> (arguing that one technique the Japanese judiciary has developed “for appearing relevant despite its lack of power” is to opine on the merits of a constitutional argument in dictum while nevertheless denying relief on nonsubstantive grounds). The Japanese judiciary’s experience with litigation under article 9 of the Japanese constitution would appear to be illustrative. Litigants have repeatedly sought to challenge the constitutionality of Japan’s “Self-Defense Forces” and various security arrangements with the United States under article 9, the text of which categorically prohibits either “the threat or use of force as a means of setting international disputes” or the maintenance of any kind of “war potential.” KENPŌ [Constitution], art. 9 (Japan). The Japanese Supreme Court has held that such challenges are not justiciable absent a truly flagrant constitutional violation. See, e.g., John O. Haley, *Waging War: Japan’s Constitutional Constraints*, 14 CONST. FORUM 18, 23–28 (2005) (discussing at length the court’s article 9 jurisprudence); Matsui, *supra* note 229, at 19; Tomatsu, *supra*, at 258–59. More recently, the Nagoya High Court expressed the view that the deployment of aircraft to Iraq violated the restrictions of article 9 but held that the plaintiffs lacked standing and were thus ineligible for relief. See Craig Martin, *The Nagoya High Court Decision on Japanese Forces in Iraq* (Apr. 24,

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however, whether restrictions on justiciability constitute an especially useful means of judicial self-preservation. Justiciability doctrines are simply not designed for the purpose of identifying disputes that have the potential to undermine the appearance of judicial efficacy if resolved on the merits. Rules pertaining to the nature of the injury that a plaintiff must allege, for example, or the supposedly political character of the underlying legal issue, are poor proxies for the likelihood of government noncompliance that will embarrass and undermine the court in question.

Indeed, the reflexive avoidance of politically divisive or controversial cases—via the political question doctrine, the *acte de gouvernement* doctrine, and the like<sup>233</sup>—might actually prove a counterproductive choice of strategy for a court keen to consolidate its power. This Article has argued that, contrary to conventional wisdom, controversial decisions have a tendency to enhance, rather than diminish, a court's power, as long as they are obeyed.<sup>234</sup> Accordingly, a court that already commands obedience and expects more of the same, such as the United States Supreme Court or the German Bundesverfassungsgericht, has little to fear and perhaps even something to gain from embracing controversy. By contrast, a court that lacks a similarly developed track record, such as a newly established constitutional court in an emerging democracy, faces greater risk that its decisions will be disobeyed and its reputation for obedience stillborn. Should it succeed in deciding such a case, however, it will engender expectations of future obedience that boost its power in subsequent cases. If those gains seem more than commensurate with the risks involved, adjudication becomes a prudent gamble. A truly strategic court, as opposed to a merely timid one, will recognize that its political environment is characterized not merely by risks, but also by rewards: nothing ventured, nothing gained.

2. *Lessons for tyrants.* Scholarship, like many things, can be put to unintended uses. Thus, an aspiring tyrant might find that the theory proposed in this Article offers useful insights into both the nature of the threat that judicial review poses, and the range of solutions available for dealing with this threat. Conventional wisdom might lead the would-be despot to take an active, and malign, interest in the independence of the courts. Such a strategy, however, has the potential to backfire. Precisely because the motivations behind such behavior are so transparent, a frontal attack on judicial independence may trigger the very sort of popular uproar that it is intended to forestall.

A more subtle approach for the would-be dictator to adopt, and therefore one less likely to arouse public alarm, would be to strike not at the independence of the courts, but instead at their capacity to monitor and coordinate effectively. One strategy, for example, would be to create multiple courts with overlapping

2008), <http://craigxmartin.com/2008/04/the-nagoya-high-court-decision-on-japanese-forces-in-iraq>. The government responded by vowing to ignore the substance of the decision. See Jones, *supra*.

233. See *supra* note 229 and accompanying text.

234. See *supra* Part IV.

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jurisdictions.<sup>235</sup> A regime that wishes to thwart effective judicial monitoring and popular policing of its actions has an incentive to sow confusion by deliberately setting up competing courts that send conflicting messages about the legality of government conduct. This trick of institutional design not only undermines the focal potential of any specific court's rulings, but also increases the likelihood that at least one court will side with the regime, thus further diminishing the ability of the courts to coordinate action against the regime. The would-be tyrant should also strive to ensure that judicial decisions are difficult to obtain and understand, so as to diminish the effectiveness of the courts as a monitoring mechanism. To that end, he or she would be well advised to situate the courts in a distant and inconvenient locale, ensure that they are understaffed and short of resources, limit the availability of their decisions,<sup>236</sup> and select jurists who will be abstruse, long-winded, and prone to open disagreement with their colleagues. The last of these goals, in particular, should not be difficult to accomplish, in light of the formidable talent that the legal academy has to offer.

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3. *Lessons for constitutional designers.* Needless to say, the goal of this Article is not to offer practical advice to tyrants. To describe the institutional arrangements that a would-be despot ought to choose is an ironic way of describing the institutional arrangements that constitutional designers ought to avoid. To the extent that the authors of a constitution are interested in minimizing the likelihood of despotism and bolstering popular rule, they should simply do the opposite of what a dictator would do. The informational and collective action problems that the people confront in attempting to exercise control over their government generate a need for institutional mechanisms capable of monitoring government conduct, and of coordinating public action against a government that goes awry. Judicial review is precisely such a mechanism, and it is likely to prove most effective when performed by a unique and highly visible constitutional court that sends clear, comprehensible, freely available signals about the incidence and severity of government noncompliance with constitutional restrictions. A constitutional court is, of course, not the only institution capable of publicizing government misconduct and mobilizing public opposition. Opposition parties, interest groups, the bar, and the media all perform monitoring and coordinating functions and thus play roles of constitutional dimension in a well-functioning democratic order. These other institutions should not, however, be viewed as perfect substitutes for a constitutional

235. Cf. Tamir Moustafa & Tom Ginsburg, *Introduction: The Functions of Courts in Authoritarian Politics*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES*, *supra* note 90, at 1, 17 (observing that one way in which authoritarian regimes "contain judicial activism" is "by engineering fragmented judicial systems in place of unified hierarchies").

236. Cf. *Big, Expensive, and Weirdly Spineless*, *ECONOMIST*, Feb. 16, 2008, at 44, 44 (noting critically that Mexico has exempted its National Human Rights Commission from its freedom of information laws, and that the Commission charges \$7.40 per page for those documents that it chooses to release to the public).

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court with the power of judicial review.<sup>237</sup>

The notion that the people need the judiciary to perform monitoring and coordinating functions has practical implications for the design of judicial selection processes that may not be immediately evident. If courts are indeed to perform monitoring and coordinating functions on behalf of the people against the government, there is a case to be made in favor of requiring the people to elect their judges, rather than assigning the task of judicial selection to those whom the judges are supposed to oversee. Allowing government officials to appoint the judges who will watch over them is arguably akin to allowing the foxes to appoint those who will guard the henhouse. Any system that allows the government to choose the judges necessarily gives the government an opportunity to select judges that will be sympathetic to its own goals and interests, as opposed to those of the people.<sup>238</sup>

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To be sure, direct popular election of judges is not the only means of safeguarding the integrity of the courts as a government oversight mechanism. Other mechanisms, such as protection against diminution in salary or removal from office, can help to ensure a measure of judicial independence from the government. Yet there is no reason why such protections cannot be combined with a system of popular election for judges. There is nothing inherently implausible, for example, about a system in which judges are elected to tenured positions or nonrenewable fixed terms with guaranteed salaries.<sup>239</sup> Such a system might help not only to silence the perpetual criticism that judicial review is antidemocratic, but also to ensure that the courts are beyond the influence of the government that they are called upon to monitor. No method of appointing judges is without its drawbacks, but the practice of electing judges may deserve more sympathetic consideration than it has received.<sup>240</sup>

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Such a system might help not only to silence the perpetual criticism that judicial review is antidemocratic, but also to ensure that the courts are beyond the influence of the government that they are called upon to monitor. No method of appointing judges is without its drawbacks, but the practice of electing judges may deserve more sympathetic consideration than it has received.<sup>240</sup>

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237. See *supra* section II.C.

238. It is hardly fanciful to think, for example, that presidents may prefer to appoint judges who advance a broad view of presidential power. See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L. ECON. & ORG. 132, 170–75 & 175 fig.3 (1999) (documenting empirically the tendency of the Supreme Court to favor claims of executive power, and to side with the President in interbranch disputes with Congress); see also Shugerman, *supra* note 8 (describing how state constitutional delegates viewed judicial elections as a means of re-establishing the independence of the judiciary, both from governors who had used judicial appointments to advance their own interests, and from legislators whose abuses had gone unchallenged by judges).

239. See, e.g., WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* 266 (2007) (entertaining the possibility of popular election of constitutional court judges “for a single lengthy term,” with nomination of candidates by the political parties so as to render them accountable for the selection of “bad” judges); J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* 149 (2003) (observing that judges need not lack independence simply because they are elected, and that an “effective way” to insulate them from “outside influence” would be to adopt judicial term limits that preclude them from being reelected).

240. Suspicions about the practice of electing judges run deep, at least in legal and academic circles. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 792 (2002) (O’Connor, J., concurring) (blaming the state’s “problem with judicial impartiality” on “the practice of popularly electing judges”); Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected*

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An especially difficult challenge facing constitutional designers involves the initial establishment of a constitutional court that will in fact coordinate expectations and behavior. Success at coordination breeds success at coordination: once people believe that others will coordinate upon a court's rulings, that belief becomes self-fulfilling. The question is, then, how can one generate the belief in the coordinating capacity of the court in the first place? The initial challenge of establishing a court that will act as a coordination mechanism resembles the initial hurdle to riding a bicycle: once in motion, both devices can be kept in motion with relative ease, but it is not necessarily obvious how one sets the device in motion in the first place. The task is no doubt made easier by the fact that people expect courts to resolve legal questions. Simply to designate a given body of legal experts a "constitutional court" or "supreme court," and to call its members "judges" or "justices," is to trigger a set of expectations about how others will respond to that body's pronouncements on questions of law. Success in one place may also tend to breed success in other places. A long and successful record of judicial review in the United States, for example, may foster beliefs about the role and viability of constitutional courts that contribute to the success of judicial review in other countries. And each additional success, in turn, should only reinforce the beliefs that enable judicial review to flourish.

Although there is no obvious or foolproof way of generating a widespread, self-fulfilling belief in the efficacy of a constitutional court, there exist constitutional design options that may increase the likelihood of success. In particular, a division of powers among governmental actors, as in the form of federalism or a separation of legislative and executive functions, creates opportunities for constitutional courts to exercise power over other government actors and thus to generate self-fulfilling beliefs about their efficacy in a wider range of cases.<sup>241</sup> In an interbranch dispute between the executive and the legislature, for example, any ruling on the merits necessarily favors one branch over the other. The result is a two-on-one dynamic, in which the constitutional court aligns itself with a powerful political actor that has both the incentive and the means to demand compliance from the other branch. Likewise, a constitutional court that is in the business of deciding federalism disputes can reasonably expect federal

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*Rather than Appointed Judiciary* 1 (John M. Olin L. & Econ. Working Paper No. 357, 2007), available at <https://www.law.uchicago.edu/files/357.pdf> (noting "the conventional wisdom among lawyers and scholars that judges should be appointed by elected officials or independent commissions, and should not be elected"); Joanna Shepherd, *The Influence of Retention Politics on Judges' Voting* 3 (Pub. Law & Legal Theory Research Paper Series No. 07-24, 2007), available at <http://ssrn.com/abstract=997491> (finding empirically that voting behavior of state supreme court judges is "strongly associated" with the ideological preferences of those who choose whether they remain in office).

241. See Shapiro, *supra* note 21, at 273–77 (suggesting that federalism and, to a lesser degree, separation-of-powers schemes are conducive to the success of judicial review because they create opportunities for courts to render decisions that are favored by powerful political actors); Shapiro, *supra* note 21, at 159–60, 176–77 (arguing that constitutional courts acquire the power to decide rights cases against the government by first deciding "boundary conflicts between parts of government" with the approval of "economic and political elites," before straying into the territory of deciding rights cases).

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support, and thus compliance with its decisions, when it rules in favor of the federal government. The more that government actors comply with the court because compliance happens to be in their self-interest, however, the greater the opportunity for the court to consolidate a reputation for securing compliance, and the harder it may therefore become to defy the court. A constitutional court may be able to parlay a reputation for compliance earned in the context of federalism and separation-of-powers disputes into a generalized belief in its own efficacy in cases involving the government.

4. *Lessons for constitutional theorists.* This Article is not alone in challenging the “academic obsession” with the countermajoritarian dilemma.<sup>242</sup> Until this obsession loses its peculiar grip, however, there will remain entire realms of inquiry that deserve greater attention from constitutional scholars. Some—but not all—have been broached by this Article. To wit: why do people obey courts? What functions do courts perform, and to whose benefit? Why do government actors comply with the decisions of constitutional courts? What, if anything, can such courts do to augment their power? To name but a handful more: for what reasons might citizens and governments alike not merely tolerate, but even encourage, the growth of judicial power?<sup>243</sup> Under what conditions can constitutional courts and judicial review actually succeed at setting limits upon the state, or at protecting rights from infringement?<sup>244</sup> To what extent, if any, does constitutional adjudication facilitate the expression and resolution of social and political conflict?<sup>245</sup>

There is no good reason why constitutional scholarship should give short shrift to such fundamental questions of “who gets what, how, and why.”<sup>246</sup> Perhaps it is optimistic to imagine how the field of constitutional theory might

242. Friedman, *Academic Obsession*, *supra* note 11, at 159; *see supra* notes 14–20 and accompanying text.

243. *See supra* note 18 and accompanying text.

244. *See, e.g.*, ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 189–91 (1989) (questioning whether courts are capable of protecting fundamental rights against a durable political majority, and using the history of judicial review in the United States as an example); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* *passim* (1991) (arguing that courts cannot successfully vindicate rights in a manner that entails significant social change unless various institutional and political conditions are satisfied); Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027, 1037–69 (1992) (disputing Rosenberg’s thesis); Stephenson, *Court of Public Opinion*, *supra* note 203, at 381–91 (identifying conditions under which rational voters would force the government to yield to the courts).

245. *See, e.g.*, HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY*, *supra* note 148, at 139–40, 276–77, 320 (arguing that successful constitutions capable of both protecting individual liberties and fostering economic growth are plausible “only in societies in which there is already a high degree of coordination on some individual values and little coordination on exclusionary group values”); LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* *passim* (2001) (arguing that liberal constitutionalism should aim to produce “unsettlement” rather than settlement of political conflict).

246. Martin Shapiro, *Public Law and Judicial Politics*, in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE II*, at 365, 374 (Ada W. Finifter ed., 1993) (contrasting the “standard positivist task of political science” with the “massive and deliberate confusion of is and ought” that characterizes “most of the legal scholarship produced in law schools” in the area of public law).

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look if it were to outgrow its preoccupation with the supposedly countermajoritarian character of judicial review. But it is time for the wheel to turn. The tired tropes of the countermajoritarian dilemma have occupied too much attention for too long.

Constitutional theory is dead; long live constitutional theory.

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