PART III

THE STABILITY AND EFFECTIVENESS OF JUDICIAL REVIEW

10. Judicial review as a self-stabilizing constitutional mechanism

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A. INTRODUCTION

Most constitutions fail in less than two decades (Elkins, Ginsburg, and Melton 2009, 129) yet the US Constitution has lasted for over 200 years—despite constitutional crises and the Civil War. The US Constitution is unusual not only in its duration, but also in the popular support it commands despite the size and diversity of the federation that it governs.[1] In previous work, we have argued that the Constitution has endured because it is "self-stabilizing" (Jacobi, Mittal, and Weingast 2015; Weingast 2016; Mittal and Weingast 2013; Mittal, Rakove, and Weingast 2011, 25; Mittal and Weingast 2010; Mittal 2010)—that is, it structures incentives at a given time such that: (i) those in power honor the constitutional rules for protecting the rights of citizens and for transferring power when they have lost elections; and (ii) those out of power have incentives to support the constitutional system rather than attempt extra-constitutional action such as coups (Jacobi, Mittal, and Weingast 2015, 609; Przeworski 1991, 36–7).

Constitutional systems face three fundamental difficulties that lead to constitutional failure; paralleling each potential problem is a corresponding solution that promotes constitutional stability (Mittal and Weingast 2013, 279–80). First, citizens rationally fear regimes that pose a threat to their lives, assets, or well-being (de Figueiredo Jr. and Weingast 1999, 261–302). When an incumbent regime threatens them, citizens often willingly support extra-constitutional action, such as coups, to protect themselves. Self-stabilizing constitutions address this problem by lowering the stakes of politics—that is, by limiting the realm of legitimate governmental action. When the stakes in politics are lower, citizens have less need to resort to extra-constitutional action because they have less to fear from the government. We call this the "limit condition."

Second, an important mechanism through which citizens ensure constitutional compliance is the ability to coordinate against political officials who attempt constitutional transgressions (Weingast 1997, 251–2; Myerson 2006, 5; Ordeshook 1992;

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[1] For instance, in the August 2012 AP-National Constitution Center Poll 69% of respondents reported that the statement "The United States Constitution is an enduring document that remains relevant today" came closer to their view than the statement "The United States Constitution is an outdated document that needs to be modernized." The AP-National Constitution Center Poll, *available at* http://constitutioncenter.org/media/files/data_GfK_APNCC_Poll_August_GfK_2012_Topline_FINAL_1st_release.pdf.

Hardin 2007; Hadfield and Weingast 2014, 23). Citizens face a variety of difficulties in coordinating against a government that transgresses their rights. For instance, citizens typically disagree about the types of actions or policies that constitute a transgression. Self-stabilizing constitutions are therefore more likely to survive because they create focal points that help solve these coordination dilemmas. These focal points create consensus about citizen rights and constitutional procedures by guiding citizen coordination concerning constitutional transgressions. We call this the "consensus condition."

Third, environmental changes—including economic, technological, and social changes—continually present new problems and crises. These changes often reduce the short-run benefits of cooperation and render existing institutions unstable. Self-stabilizing constitutions confront environmental volatility by creating institutions that allow citizens and political officials to adjust to changing circumstances and solve their dilemmas and crises (Hayek 1960, 22–38; North 2005, 166–70; Mittal 2010, 1–8). We call this the "adaptation condition." We discuss each of these problems and their solutions in Section B.

In this chapter, we explore the complex role of the US Supreme Court in fostering constitutional stability by supporting these three conditions. In doing so, we recognize—but separate our work from—normative studies of judicial review and the countermajoritarian difficulty (Bickel 1962; Friedman 2009; Thayer 1893). These studies explore tensions created by judicial review of actions taken by popularly elected legislatures and executives (Bickel 1962; Friedman 2009; Tushnet 1995; Somin 2004; Adler 1997). Some normative scholars of judicial review conclude that the countermajoritarian difficulty is not as pernicious as it appears because the Court is generally incentivized to stay within the bounds of public opinion (Friedman 2009, 14–16). Others counter that courts do not (and should not) simply reflect public opinion; rather judges must sometimes take unpopular positions, especially when it comes to the protection of minority rights.[2]

Largely missing from this normative debate is the role that judges play in creating constitutional stability, which is surprising given the Constitution's unusual endurance.[3] Constitutional law scholars often take American constitutional stability for granted. But such stability does not simply arise by writing a constitution, as James Madison observed (Madison 1788c). Rather, stability must be actively constructed and maintained. We argue that the Supreme Court has played an increasingly important—if largely unrecognized—role in preserving constitutional stability over the course of American history.

As Sections C–E describe, several features of the Constitution relating to judicial review enable the Court to promote the three conditions for constitutional stability. Although the design of the federal judiciary occupied relatively little of the Constitutional Convention's time in 1787, the framers hoped—at a minimum—that it would promote constitutional stability. The Constitution vested broad, undefined judicial

[2] United States v. Carolene Products, 304 U.S. 144, 152 n.4; Urofsky 2015, 100; Ely 1980; Horowitz 1993, 10.

[3] *See* Alberts, Warshaw, and Weingast 2012.

power in "one supreme Court."[4] By so empowering the Supreme Court, the Constitution enabled it to act as a potential check on the powerful (or at least anticipated to be powerful) Congress (Rakove 2002, 1513–14). Over the course of American history, the Court has asserted and consolidated powers of judicial review and adopted various institutional practices that have enhanced its capacity to support constitutional stability by lowering the stakes in politics, providing coordination mechanisms, and enabling adaptation.

Section C specifically considers the Court's role in preserving the limit condition. As Friedman and others have argued (Friedman 2009, 375; Ferejohn and Kramer 2002, 976–94), the Court rarely strays from the bounds of public opinion because it fears credible threats of punishment by the elected branches—including jurisdiction-stripping, court-packing, or failure to enforce its orders. This induced behavioral feature of the Court helps preserve the limit condition by providing members of the Court with incentives to avoid unpopular decisions (Mittal and Weingast 2010, 343). This, in turn, lowers the stakes in politics for ordinary citizens (Mittal and Weingast 2010, 345). However, justices are not always motivated by stability or able to predict if a given decision will raise the stakes. Many of the Court's most controversial decisions—such as *McCulloch* v. *Maryland* and *Dred Scott*—have been destabilizing precisely because they unexpectedly and significantly raised the stakes for large groups of citizens (Urofsky 2015, 32; Friedman 2009, 9).

Over time, the Court consolidated its powers of judicial review (Kramer 2004, 95). In doing so, we argue in Section D that the Court has increasingly acted as the "coordinator-in-chief" by articulating core values and provisions of the Constitution. Practically speaking, the Court has discretion in how it decides cases. It can often resolve cases on one of several possible grounds, and it can define the nature of the interests at stake in a given case. In our language, the Court has discretion in choosing constitutional focal points. For instance, as Baird and Jacobi demonstrate, the Court has repeatedly chosen to frame cases around federalism rather than focusing on the substantive issue at the heart of a case (Baird and Jacobi 2009a, 189–97). In Section D, we describe how, using this discretion, the Court has crafted focal points that lower the stakes in politics and thus aid constitutional stability by supporting the consensus condition.

Finally, in Section E, we show how the Court's consolidation of judicial review also forms the basis of its role in maintaining the adaptation condition (Urofsky 2015, 45, 76). The Marshall Court laid the groundwork for interpreting federal powers with unanticipated future threats and crises in mind.[5] But the sheer breadth of the Court's interpretive power on display in those cases also illustrates how difficult it is to satisfy the three conditions—limit, consensus, and adaptation—at once. Lasting constitutional stability involves constant tradeoffs among the conditions. In this section, we also show how the Court has at times privileged certain conditions at the expense of others. For example, although *McCulloch* might have been decided with adaptation in mind, it certainly strained the limit condition by raising the stakes for proponents of states' rights.

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[4] U.S. CONST. art. III, § 1.

[5] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

In assessing the role of the Supreme Court in advancing constitutional stability, we demonstrate that our framework for self-stabilizing constitutions provides a new, practical perspective on the Court's day-to-day work. We eschew the rhetoric of normative studies of judicial review concerned primarily with the countermajoritarian difficulty. In focusing on the three conditions, we argue that the Court's opinions do not merely explain the meaning of various constitutional and statutory provisions; rather, they encapsulate and stimulate meaningful debates across the branches and among citizens about the adequacy of constitutional limits in a given area, and provide the foundations for ongoing constitutional stability (see Kramer 2004).[6] In doing so, we also shed new light on various Supreme Court practices and doctrines, including the use of dissenting opinions and *stare decisis*.

B. CONDITIONS OF CONSTITUTIONAL STABILITY

Citizens rationally fear incumbent regimes that pose a threat to their assets, family, or well-being (de Figueiredo and Weingast 1999). Consequently, they may be willing to support extra-constitutional action, such as coups, to protect themselves. Support for extra-constitutional action can occur even when the government is acting legally and legitimately if it is sufficiently threatening. Self-stabilizing constitutions address this problem by lowering the stakes of politics by limiting the realm of governmental action. By taking certain governmental actions off the table, constitutions can lower stakes, giving citizens less need to resort to extra-constitutional action. We call this the *limit* condition.

In order to ensure constitutional compliance by elected officials, citizens must be able to coordinate against officials who attempt to violate constitutional limits—often through various forms of resistance (Myerson 2006, 4–5; Mittal and Weingast 2013, 288). Citizens face a variety of difficulties in coordinating against a transgressing government. Because citizens' situations and experiences differ considerably, their views of the constitution also differ. In particular, citizens typically disagree about the content of rights and government procedures. These differences imply that citizens will often disagree about whether a constitutional transgression has occurred. These disagreements perennially inhibit coordination against governmental transgressions.

The solution to this problem lies in the creation of constitutional focal points that help solve these coordination dilemmas. Constitutional focal points create consensus about citizen rights and constitutional procedures. We call this the *consensus* condition. Because complex coordination games typically involve multiple solutions, the choice of a particular focal point matters and it is often the source of considerable political debate. For this reason, it is particularly important to have an unambiguous, common knowledge procedure for choosing focal points (Hadfield and Weingast 2012; Dixon, 4).[7] In the nineteenth century, Congress created new focal points in the form of four compromises addressing various sectional crises in 1820, 1833, 1850, and 1877 (Mittal

[6] Larry Kramer has written extensively on this aspect of "popular constitutionalism."

[7] Hadfield and Weingast call such a mechanism a "legal steward" (Hadfield and Weingast 2012).

and Weingast 2013, 292–8). The Supreme Court has taken an increasingly important role since the Civil War, typically in interaction with the political branches (Kramer 2004, 213).

Finally, environmental changes continually present new problems and crises. An economic depression may occur, a new foreign threat suddenly emerges, or one region grows while another shrinks. These changes often reduce the short-run benefits of cooperation and render political institutions unstable. For instance, existing institutions may preclude a potential compromise given the way they allocate veto rights. Self-stabilizing constitutions address this problem of change by creating conditions for adaptive efficiency: That is, they create political institutions that allow citizens and political officials to adjust to changing circumstances and solve their dilemmas and crises. We call this the *adaptive efficiency* condition.

Our research shows that constitutional clauses often serve a purpose that is not generally recognized in either the standard literature on democracy or the normative literature on constitutions: They facilitate the three conditions of constitutional stability. In this chapter, we illustrate how judicial review has become an increasingly important—though incomplete and imperfect—means of maintaining constitutional stability.

C. THE LIMIT CONDITION: THE ROLE OF JUDICIAL REVIEW IN SHAPING CONSTITUTIONAL LIMITS

1. Constitutional Text and Structure and the Limit Condition

The framers' overriding concern with constitutional stability is infused in each Article of the Constitution as well as unwritten elements of our constitutional tradition. As we have written elsewhere, the limiting effect of the text of the Constitution is both more widespread and more complex than is generally appreciated (Jacobi, Mittal, and Weingast 2015, 605). Most obviously, many Amendments—such as the Fifth Amendment's prohibition on taking property without just compensation[8] and the First Amendment's prohibition on laws abridging the freedom of speech[9]—establish limits on governmental action. Other examples of the limiting power of the Constitution include the separation of powers system that creates multiple vetoes over legislation; the direct taxation clause;[10] and the enumeration of Congress's powers.[11]

The framers spent relatively little time during the Constitutional Convention discussing the federal judiciary (McCloskey 2005, 3; Kramer 2006, 705, 738–40), and many scholars suggest that they did not intend to establish judicial review as we understand it today (Farrand 1967, 156–7; Friedman 2009, 36–7; Kramer 2004, 73–92; McCloskey 2005, 4; Rakove 1997, 1047). But, at a minimum, the framers did suggest that the judicial power together with other features of the Constitution would serve as a limiting

[8] U.S. CONST. amend. V.
[9] U.S. CONST. amend. I.
[10] U.S. CONST. art. I, § 2, cl. 3.
[11] U.S. CONST. art. I, § 8.

force in the new republic (Kramer 2006, 73–8). For Hamilton, it was the courts "whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing" (Hamilton 1788). For Madison, whose distrust of legislative power extended to the state legislatures, the Court could play at least a modest role in resolving disputes between the federal government and the states (Rakove 2002, 1515; Friedman 2009, 34; Rakove 1996, 173–7). In his view, "some … tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact" (Madison 1788b).

Although most of the framers did not conceive of the judiciary in Hamilton's or Madison's terms (Kramer 2004, 73), there appears to have been substantial agreement that the Court would serve as a guardian of rights and that judges would require "independence" from the political branches to discharge that role (Kramer 2006, 739–40; Amar 2005, 220). Consequently, Article III incorporates provisions for life tenure and protections against the diminishment of judicial salaries.[12] According to Hamilton, "permanency" of judicial office was a critical element of judicial independence (Hamilton 1788).[13]

Yet the Constitution also renders the federal judiciary dependent on the political branches in important ways (Amar 2005, 212–13). For instance, the size and structure of the judiciary—and in some cases its jurisdiction—falls under congressional control (Amar 2005, 212–13). As Ferejohn and Kramer argue, "the balance between independence and accountability in the federal system is maintained through a system that protects individual judges from direct outside interference while making the institution in which they work vulnerable to control by the political branches of government" (Ferejohn and Kramer 2002, 964). In our view, this balance between judicial independence and dependence on the political branches created by the Constitution serves a purpose generally unrecognized in the normative literature: It creates incentives for the Court to preserve the limit condition. By adjudicating cases in a way that lowers the stakes in politics, the Court is less likely to provoke confrontations with the political branches—thereby making it easier to preserve its independence.

2. The Court as Guardian of the Limit Condition

Has the consolidation of the Supreme Court's power of judicial review contributed to or threatened constitutional stability? Arguably, it has done both. Many of the Court's decisions have fostered stability—or at least they have not generated substantial popular backlash (Friedman 2009, 4; Post and Siegel 2007, 376). For instance, some have argued that in *Bush* v. *Gore*,[14] the Court fostered stability at perhaps the most critical time in a democracy by bringing its settlement power to the result of a disputed presidential election (Friedman 2009, 16, 32).

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[12] U.S. CONST. art. III, § 1.

[13] These prescriptions had been a mainstay of constitutional theory throughout the eighteenth century, including in the theories of Montesquieu and Adam Smith.

[14] 531 U.S. 98 (2000).

But the Court's decisions have also threatened constitutional stability at times. For example, the nationalizing decisions of the Marshall Court exacerbated the conflict over the topic that the framers most feared could lead to disunion—slavery—and eventually led some states down the path of nullification and civil war (Friedman 2009, 83–104; McCloskey 2005, 416–52; Whittington 1999, 76). As a result, simply surveying the Court's landmark decisions leaves a muddled and incomplete impression of the Court's role in creating constitutional stability, and more importantly, exactly *how* it fosters stability.

To understand the Court's role in preserving constitutional limits, it is important to shift focus away from the landmark majority opinions that often form the basis of many traditional studies of judicial review and consider the surprising extent to which *all* of the Court's opinions—majority, concurring, and dissenting—have stimulated debate about the limit condition and whether it has been satisfied in a given instance. As the potentially destabilizing decisions of the Marshall Court suggest, justices are not always motivated first and foremost by short-run stability. But the Court's practice of publishing multiple opinions has generated debate across the branches and among ordinary citizens about the existence and adequacy of constitutional limits at a given time (Kramer 2004; Post and Siegel 2009, 27; Post and Siegel 2007, 376; Sunstein 1993, 23).

Credible threats of punishment, such as jurisdiction-stripping, court-packing, or non-compliance, provide the Court with incentives not to stray too far from public opinion (Mittal and Weingast 2010, 343). In this framework, successful popular deterrence of the Court contributes to constitutional stability by preserving the limit condition and lowering the stakes for ordinary citizens. When the Court has been unwilling or unable to defer to public opinion, the public has chosen to retaliate in a variety of ways that have the potential to threaten constitutional stability at the system-wide level (Mittal and Weingast 2010, 348).

Indeed, many of the Court's most controversial decisions have unexpectedly and significantly raised the stakes for large groups of citizens (Friedman 2009, 9). This dynamic is most clearly understood within the context of the development of federalism and the Court's decisions from 1789 to the Civil War, particularly those consolidating judicial review of congressional and state legislation. Important aspects of the development of judicial review took shape in the context of federalism (Rakove, 1997: 1031). During this period, the allocation of power between the federal government and the states was a perennial source of conflict (McCloskey 2005, 17; Whittington 1999, 76), and in decision after decision—from *Cohens* v. *Virginia*[15] to *Gibbons* v. *Ogden*[16]—the Marshall Court took positions that enhanced the power of the Court and threatened states' rights advocates (Whittington 1999, 76–7). *McCulloch*,[17] which adopted an expansive interpretation of the Necessary and Proper Clause, stressed the limit condition more than any other decision of the time (Friedman 2009, 80). Although Marshall's opinion in the case follows prior decisions in arguing that

[15] 19 U.S. (6 Wheat.) 264 (1821); *see* McCloskey 2005, 28.
[16] 22 U.S. (9 Wheat.) 1 (1824); *see* McCloskey 2005, 51.
[17] 17 U.S. (4 Wheat.) 316 (1819).

constitutional stability in a rapidly expanding nation required broader federal powers,[18] states' rights advocates saw in that argument a profound threat to their lives, liberty, and property (Friedman 2009, 83–9; Tushnet 2008, 17–29).

Yet the nationalizing decisions of the Marshall Court are also notable in that they stimulated widespread debate across the branches and among citizens about constitutional limits within the context of federalism (Kramer 2004, 174). That tradition of catalyzing and channeling debate continues today, and also occurs within the Court itself through the publication of multiple opinions in a case. Because constitutional stability is often taken for granted, it is easy to overlook the considerable extent to which all of the Court's opinions—particularly dissents—concern themselves with the limit condition.[19]

Today, the Court itself generates and reflects debate about the limit condition and whether it has been satisfied in a given context. Dissenting justices routinely appeal to the limit condition by highlighting how the majority's ruling raises the stakes for certain groups of citizens. For instance, Justice Sotomayor's well-publicized[20] dissent in *Utah* v. *Strieff*[21]—a Fourth Amendment case holding that evidence found during an unlawful police stop was nonetheless admissible since officers subsequently discovered a valid outstanding arrest warrant—could not have been clearer in alleging a violation of the limit condition. While the majority largely failed to engage the subject of constitutional limits, Justice Sotomayor's dissent focused squarely on how the Court's opinion threatened ordinary citizens:

> [T]his case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.[22]

In doing so, it appeals to the limit condition and brings the stakes in politics to life in brutal terms.

Dissents have also alleged violations of the limit condition in other prominent cases involving race relations,[23] military discretion,[24] gay rights,[25] the right to die,[26] and

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[18] *Id.* at 421.

[19] The literature on the use of so-called "slippery slope" arguments in Supreme Court opinions offers one window into the Court's consideration of constitutional limits. *See* Sternglantz 2005; Volokh 2003.

[20] *See* Matt Ford, *Justice Sotomayor's Ringing Dissent*, THE ATLANTIC (June 20, 2016), *available at* http://www.theatlantic.com/politics/archive/2016/06/utah-streiff-sotomayor/487922/; Robert Barnes, *Sotomayor's Fierce Dissent Slams High Court's Ruling on Evidence From Illegal Stops*, THE WASH. POST. (June 20, 2016), *available at* https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-5-3-that-mistakes-by-officer-don't-undermine-conviction/2016/06/20/f1f7d0d2-36f9-11e6-8f7c-d4c723a2becb_story.html.

[21] 136 S. Ct. 2056 (2016).

[22] *Id.* at 2070–1 (Sotomayor, J., dissenting).

[23] Plessy v. Ferguson, 163 U.S. 537, 557–8 (1896).

[24] Korematsu v. United States, 323 U.S. 214, 234 (1944).

[25] Lawrence v. Texas, 539 U.S. 558, 590 (2003).

[26] Washington v. Glucksberg, 521 U.S. 702, 784–5 (1997).

contraception use.[27] For example, in *Obergefell* v. *Hodges*[28]—a case holding that same-sex couples can exercise the fundamental right to marry—Justice Scalia's dissent argued that the Court itself was threatening constitutional stability:

> I write separately to call attention to this Court's threat to American democracy … Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.[29]

In attacking the Court, Justice Scalia's dissent focused on how the Court's reasoning or interpretation of the Constitution raised the stakes. He further argued that the Court's use of judicial review in this and other cases potentially threatened all citizens.[30]

In conclusion, while the Court's use of judicial review can lower the stakes, at times the Court has issued opinions that have threatened various groups of citizens. In that event, the Court's practice of publishing concurring and dissenting opinions can provide the foundations for future constitutional focal points that lower the stakes over the long run. The next section shows how the Court uses its capacity to create focal points and guide citizen coordination in ways that might strain the limit condition in the short run while promoting stability over the long run by defining constitutional values and rights as new circumstances arise.

D. THE SUPREME COURT AS A SOLUTION TO THE COORDINATION DILEMMA

1. Constitutional Text and Structure and the Coordination Condition

Several features of the Constitution enable the Court to take a central role in promoting citizen coordination against government transgressions. Most notably, the "vesting clause" of Article III says: "the judicial power of the United States shall be vested in one supreme Court."[31] Article III, Section 2, defines the jurisdiction of this "supreme" Court broadly—extending the judicial power to "all Cases" under the Constitution and

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[27] Tushnet 2008, 183.

[28] 135 S. Ct. 2584 (2015).

[29] *Id.* at 2626–7 (Scalia, J., dissenting).

[30] *Id.*; Tushnet 2008, xxiv–xxvi.

[31] U.S. CONST. art. III, § 1. Amar suggests that the word "Supreme" referred to the Court's position within the hierarchy of the federal judiciary, rather than its position vis-à-vis the other branches. However, as he argues, the Constitution gave the Supreme Court relatively few tools to impose control over lower courts, and an early draft of the Constitution proposed creating "*one or more supreme* tribunals" (Amar 2005, 209–10).

federal law, among other things.[32] Accordingly, once a case reaches the Supreme Court, no further appeal can be taken. In addition, the Constitution provides life tenure and protection of judicial compensation.[33] Taken together, these features of the Constitution partially insulate the justices from external pressure from the other branches or groups of citizens and enable the Court to guide citizen coordination by articulating constitutional values and the meaning of constitutional provisions. Most importantly, from the perspective of our framework, they provide the institutional foundations for the justices to guide citizen coordination against an overreaching legislature or executive.

Coordination was a virtue well understood in 1787, as reflected in *The Federalist No. 22*:

> Laws are a dead letter without courts to expound and define their true meaning and operation … To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice (Hamilton 1787).

Although it would take generations for the meaning of "supreme" and "the judicial power" to develop, Article III's establishment of the Supreme Court laid the foundations for a Court capable of taking a leading role in coordinating expectations of when constitutional transgressions have occurred.

By interpreting the Constitution over time—and in particular by defining rights and other limits on legitimate government action—the Court has become one of the central coordinating mechanisms of the constitutional system. However, sometimes the Court interprets the Constitution in a way that strains the limit condition, as was the case with the most controversial Marshall Court cases, discussed above.[34] Those cases arguably stressed the limit condition in the short run but at the same time promoted stability over the long run by clarifying the contours of America's developing federal system and promoting adaptation. Similarly, we have seen that sometimes the Court itself is perceived by some as presenting a threat to the community, and it is often the justices themselves who identify those threats—as Justice Scalia did in *Obergefell*, quoted above. Those dissenting opinions help clarify, and thus coordinate, opposition to judicial overreaching.

2. The Supreme Court as Coordinator-in-Chief

Traditional constitutional scholars have overlooked the Court's powerful role in coordinating expectations concerning constitutional transgressions. The Court has increasingly acted as the "coordinator-in-chief" when it comes to the meaning of the Constitution by extending existing focal points and creating new ones where warranted.

Coordination is a perennial problem for constitutional stability because a single individual who objects to the actions of the government often has little power to stop that action, even if the government is acting illegally. Although the government is

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[32] U.S. CONST. art. III, § 2.
[33] U.S. CONST. art. III, § 1.
[34] *See supra* Section C.2.

necessarily stronger than any individual, if most individuals object to the government's action, the government risks losing its legitimacy and support. As a consolidated group, the public can potentially force the government to back down from unconstitutional action. Constitutions facilitate this joining of forces. However, over time it is difficult to create and maintain agreement as to what constitutes a transgression. Citizens—and even judges—disagree.

A constitution promotes stability when it creates focal points to help solve coordination dilemmas arising from citizen disagreement. For instance, in the context of takings of individual private property, the US Constitution provides that "just compensation" must be provided when a government takes private property for public use.[35] By clarifying what a constitutional violation is—such as an uncompensated taking—and what procedures follow when such acts occur—such as when compensation must be provided—the Constitution promotes the consensus condition (Jacobi, Mittal, and Weingast 2015).

The framers intended for the federal judiciary to provide one source of input as to whether a constitutional transgression has occurred (Hamilton 1788). But the Court's current role matured out of its assertion of judicial review. As Marshall famously wrote in *Marbury* v. *Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[36] Indeed, Riker argues that the Marshall Court's opinions holding state laws unconstitutional helped habituate Americans to the idea of the Supreme Court as an arbiter of constitutional meaning more broadly, thereby making it easier for the Court to announce and enforce constitutional constraints on the national government (Riker 1965, 246).

As the American economy became more integrated and as the national government took a greater role in regulating the economy, the Supreme Court exercised a more prominent role in reviewing federal laws. The change in Supreme Court behavior on this dimension is dramatic. The Court ruled unconstitutional: three federal laws in the 70 years between 1790 and 1859; 22 laws in the 40 years from 1860 to 1899; and 50 laws in the 40 years from 1900 to 1940.[37]

The Supreme Court's increased scrutiny of federal legislation during the second half of the nineteenth century and throughout the twentieth century laid the foundations for its growing role in coordinating expectations of when a constitutional transgression has occurred. But choosing constitutional focal points is not easy, in part because multiple plausible options exist. As Hamilton emphasized in *The Federalist No. 22* quoted above, judges often disagree on how to resolve cases. And sometimes they even disagree on the issues at play in a given case.

Frequently, the Court has considerable power to frame the issue or issues upon which it decides. It often resolves cases on one of several possible grounds, and in doing so defines the nature of the interests at stake in a given case. Many constitutionally recognized interests cut across one another in some circumstances, and this gives the Court choice over which constitutional right to emphasize in its opinion of the Court.

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[35] U.S. CONST. amend. V.

[36] 5 U.S. (1 Cranch) 137, 177 (1803).

[37] *See* Riker 1965, 240–1; W.C. Gilbert, PROVISIONS OF FEDERAL LAW HELD UNCONSTITUTIONAL BY THE SUPREME COURT OF THE UNITED STATES, GOVERNMENT PRINTING OFFICE.

For instance, in *Evans* v. *Newton*[38]—a case concerning the desegregation of a park in Macon, Georgia—the Court pitted the Fourteenth Amendment's Equal Protection Clause against freedom of association and respect for states' rights:

> There are two complementary principles to be reconciled in this case. One is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses. The other is the constitutional ban in the Equal Protection Clause of the Fourteenth Amendment against state-sponsored racial inequality, which of course bars a city from acting as trustee under a private will that serves the racial segregation cause[39] (Baird and Jacobi 2009a, 189–96).

In our language, the choice of how to frame the case affords the Court the opportunity to choose among multiple constitutional focal points. By having the power to choose—and most importantly by choosing—the Court supports constitutional stability by facilitating coordination against government transgressions. And in doing so, it is sometimes able deflect criticism that controversial decisions garner by framing a given decision not as a repudiation of one right but as a validation of another, thereby supporting the limit condition.

Prior empirical work has shown that the Court has considerable discretion over how to frame issues, and that it regularly makes use of that choice in maximizing its support when facing controversial issues. For instance, Spiller and Tiller have illustrated that the Court often can choose to decide cases on substantive law grounds or, alternatively, on legal methodology, such as textualism or originalism (Spiller and Tiller 1996, 504). Fischman and Jacobi show that this is a real option in a large range of cases, from statutory interpretation to constitutional criminal procedure (Fischman and Jacobi 2016). Baird and Jacobi show that the Court often chooses to frame cases in terms of federalism, rather than emphasizing substantive issues (Baird and Jacobi 2009a, 183; Baird and Jacobi 2009b). And in the context of the First Amendment, Epstein and Segal show that—even among substantive issues—the Court can strategically emphasize or deemphasize free speech, press, assembly, and association on one hand, and anti-discrimination principles, equality, and privacy on the other (Epstein and Segal 2006). Together these studies show: (1) that the Court has discretion in deciding cases because of secondary crosscutting issues raised in cases; (2) that the Court uses those crosscutting issues to consider different focal points for each potential, opposing outcome; and (3) that justices decide issues in a way to promote new coalitions and mitigate criticism by framing decisions as the extension of one principle rather than the repudiation of another.

For the purposes of constitutional stability, however, it often matters less which outcome the Supreme Court chooses—for instance, whether it decides in favor of religious liberty or free speech—than it does that the Court make a decision. Regardless of the ultimate result, the Supreme Court is acting as coordinator-in-chief simply by choosing. And in choosing, the Court is articulating the realm of legitimate

[38] 382 U.S. 296 (1966).
[39] *Id.* at 298–9.

governmental action and when a transgression has occurred.[40] The Court's justification of its choices in its opinions provides focal points that guide citizen coordination against the state. The next section shows how other institutional practices, including bedrock principles such as *stare decisis*, lower the stakes and facilitate coordination over time by promoting consistency and predictability in judicial decision-making.

E. THE SUPREME COURT AND THE ADAPTATION CONDITION: PROMOTING STABILITY OVER TIME

1. Constitutional Text and Structure and the Adaptation Condition

The problem of change is fundamental to our concept of a self-stabilizing constitution. A constitution must have the ability to adapt on an ongoing basis in the face of the many economic, political, and social changes that inevitably confront every nation. But successful adaptation is difficult, and it involves much more than the cumbersome amendment process outlined in the US Constitution's Article V.

Constitutional features and laws designed to preserve limits or facilitate coordination at one time often fail as circumstances change. Take, for instance, the ultimate failure of the many constitutional features designed to lower the stakes for slaveholders, most notably, the three-fifths clause and equal representation in the Senate (Rakove 1996, 58, 68–9; Weingast 1998, 148). Despite the framers' recognition of the serious threat that slavery posed to lasting constitutional stability (Rakove 1996, 73), those features (and others) ultimately proved insufficient to preserve the limit condition in the face of rapid demographic and territorial change, and the United States fell into civil war as a result (Mittal and Weingast 2013, 292–7).

While normative scholars of judicial review have generated vibrant debates concerning the Court's role in constitutional interpretation (Dworkin 1986; Ely 1980; Breyer 2005; Scalia 1997; Strauss 2010), our consideration of the Court in this section focuses on its role in satisfying the adaptation condition by lowering the stakes in politics and facilitating coordination over time in response to changing circumstances. The dilemma is that, once again, the three conditions can be at odds with one another: Enabling change to respond to new challenges frequently involves flexibility, which is often antithetical to clearly defined limits and coordination mechanisms.

Many framers appreciated that the judiciary would have some role in resolving inevitable ambiguities in constitutional text, or—in Madison's language in *Federalist 37*—of "liquidating" the meaning of the law over time (Madison 1788a; Urofsky 2015; Rakove 2002, 1546). This "liquidating" conception of judicial review is central to understanding how constitutional adaptation has occurred in the United States.

[40] Dixon and Ginsburg consider the ways in which the Court—acting as an updater of constitutional focal points—accrues error costs by imposing constitutional rules that are no longer optimal, and recommend heightened judicial deference to legislation designed to mitigate such error costs (Dixon 2009; Dixon and Ginsburg, 2011).

2. The Supreme Court's Growing Role in Maintaining the Adaptation Condition

Taken together, the Marshall Court's decisions developed the Court's interpretive powers by presenting the Court as the final, focal judge of what the Constitution means.[41] As Marshall famously noted in *Marbury*, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[42] By developing the power of judicial review in *Marbury* and its progeny (McCloskey 2005, 44), the Marshall Court asserted its role in coordinating expectations of what the Constitution meant (Urofsky 2015, 48–9). And its opinions, particularly *McCulloch*,[43] illustrate the Court's role in adaptation by interpreting constitutional provisions—such as the Necessary and Proper Clause—in a way to accommodate various economic, political, and social changes.

In addition to interpreting constitutional provisions with future exigencies in mind, the Court's increasingly common practice of publishing multiple opinions in a given case provides another powerful source of adaptation. As described in Section C, in order to preserve the limit condition, justices must assess likely reactions to their opinions. But sometimes the Court's actions unexpectedly raise the stakes, straining the limit condition. The simultaneous publication of majority, dissenting, and concurring opinions generates animated debate across the branches and among ordinary citizens about whether the limit condition has been satisfied in a given instance—a debate that can end in legislative or executive action against the Court, or even with the Court overruling its own precedent (Urofsky 2015, 48–9).

Kelo v. *City of New London*,[44] which relaxed the "public use" limitation of the Takings Clause, illustrates the role that dissents play in stimulating adaptation. From the outset, Suzette Kelo and the other petitioners argued that weakening the public use limitation constituted a violation of the limit condition that raised the stakes for ordinary citizens by subjecting their homes and personal property to taking for economic development purposes.[45] Although the Court ultimately ruled that the City of New London's economic development plan constituted a valid public use, Justice O'Connor's dissent alleged that the majority's opinion raised the stakes for ordinary citizens, and therefore violated the limit condition:

> Today nearly all real property is susceptible to condemnation on the Court's theory. In the prescient words of a dissenter from the infamous decision in *Poletown*, "[n]ow that we have authorized local legislative bodies to decide that a different commercial or industrial use of property will produce greater public benefits than its present use, no homeowner's, merchant's or manufacturer's property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a 'higher' use."

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41 *Marbury* v. *Madison*, 5 U.S (1 Cranch) 137, 177 (1803); Urofsky 2015, 76.
42 *Marbury*, 5 U.S. at 177.
43 17 U.S. (4 Wheat.) 316, 421 (1819).
44 545 U.S. 459 (2005).
45 *Id.* at 494.

> … This is why economic development takings "seriously jeopardiz[e] the security of all private property ownership."[46]

Consistent with a violation of the limit condition, *Kelo* created a popular backlash in favor of reinvigorating the public use limitation on takings, and that backlash has been felt both at the federal and state levels (Merrill and Smith 2012, 1240). Outraged at the taking of Suzette Kelo's "little pink house" and fearful for the security of their own property, many citizens and their representatives demanded action (Benedict 2009). After *Kelo*, federal legislation was introduced in both houses of Congress to discourage the use of eminent domain for economic development purposes (Merrill and Smith 2012, 1240).

Arguably, the strongest reactions against *Kelo* came from the states themselves. According to one study, 43 states passed constitutional amendments or statutes that restrict the government's ability to use eminent domain for public purposes (Somin 2009, 2102). In addition, many state supreme courts held that economic development was no longer a public use (Merrill and Smith 2012, 1240).

While the strength of the response to *Kelo* certainly varied from state to state (Somin 2009, 2105), the backlash indisputably reached the Supreme Court. Justice Scalia—a proponent of using dissents to identify the Court's "mistakes" (Urofsky 2015, 4)—suggested in a public appearance that *Kelo* would be overruled.[47] Under our self-stabilizing approach, *Kelo* ultimately reflects the Court's role in catalyzing and entrenching public discussion of important issues. Through the iterative process of judicial decision and popular and political response, the Court prompts the public to debate issues of fundamental interest and to find solutions and compromises that preserve the limit condition as circumstances change (Friedman 2009, 381). Intended or not, this process is an important function of the Court's rulings and helps explain how it assists in maintaining the limit and consensus conditions over time (Friedman 2009).

In fact, when the Court decides a case in a way that it anticipates will raise the stakes, the majority opinion may even explicitly invite state and congressional action to preserve the limit condition, as was the case in *Kelo*.[48] For instance, Spiller and Tiller identify instances in which the Court has explicitly invited Congress to override its own decisions (Spiller and Tiller 1996, 503).[49]

In some instances, this process of deliberation and debate across the branches and within the states results in new Court precedent. For instance, Justice Harlan's dissents in the *Civil Rights Cases*[50] and *Plessy* v. *Ferguson*[51]—if not their specific reasoning—

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[46] *Id.* at 405–6 (O'Connor, J., dissenting).

[47] Ilya Somin, *Scalia Predicts that* Kelo *will be Overruled*, The Volokh Conspiracy (Oct. 19, 2011), *available at* http://www.volokh.com/2011/10/19/scalia-predicts-that-kelo-will-be-overruled/.

[48] 545 U.S. at 489–90.

[49] Courts also sometimes mandate legislative action, which incorporates the legislature in the process of adaptation and thus can lend legitimacy to judicial action, such as the development of the right to same-sex marriage (Jacobi 2006) and civil unions (Jacobi 2002).

[50] 109 U.S. 3 (1883).

[51] 163 U.S. 537 (1896).

were ultimately vindicated in *Brown* v. *Board of Education*[52] (Tushnet 2008: xxiv; Urofsky 2015, 25). Similarly, Jacobi and Baird have shown that dissenting opinions in another segregation case, *Evans* v. *Newton*[53] (discussed above), resulted in new judicial precedent, and that dissents regularly create alternative focal points (Baird and Jacobi 2009a, 189–97).

In addition, the Court has developed various mechanisms for controlling the pace of adaptation. Judicial decisions are not simply up or down votes. In their detailed opinions, the justices can set out not only why a case was decided in a particular way, but the likely extent to which future cases will come out in the same way (e.g., *Payne* v. *Tennessee*[54]). In doing so, the Court can shape both its own future agenda and the behavior of other actors. *Stare decisis* is perhaps the most important means of limiting change, as are various justiciability doctrines, such as standing. But the Court has various other ways of controlling the pace of change. For instance, the Court can articulate a strict rule or a flexible standard, thus rendering some areas of law largely determined, and others more open to case-by-case determination (Jacobi and Tiller 2007; Cohen and Spitzer 1994); it can suggest whether and why future cases might come out differently under different circumstances, thus signaling its interest in a particular type of case (Jacobi 2008); and it can also distinguish previous cases, indicating a new direction that the Court is developing. These are recognized tactics of the Court that signal the precedential value that a particular case is likely to have.

The Court's use of judicial review to maintain the adaptation condition illustrates how difficult it is to satisfy our three conditions—limit, consensus, and adaptation—at the same time. While the Court's broader reading of the Necessary and Proper Clause in *McCulloch* and the Takings Clause in *Kelo* facilitated adaptation, they strained the limit condition and raised the stakes for key groups of citizens. Further, although the Court's publication of multiple opinions facilitates adaptation by providing multiple potential focal points, the proliferation of opinions inevitably undermines the coordinating power of the Court (Tushnet 2008, xiii). Justices from Chief Justice Marshall to Chief Justice Roberts have wrestled with this tradeoff between fostering unanimity and facilitating adaptation (Tushnet 2008, xi). As Urofsky notes, the nationalizing decisions of the Marshall Court were certainly more powerful coming from a unanimous Court (Urofsky 2015, 46). Ultimately, each Court has balanced our three conditions in its own way as it has confronted the economic, political, social, and other environmental changes of the time.

F. CONCLUSION

Constitutional survival for multiple generations is all too rare. In order to survive, constitutions must be self-stabilizing. We argue that constitutions provide for their own survival by satisfying three conditions: the limit condition, the consensus condition, and the adaptation condition.

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[52] 347 U.S. 483 (1954).
[53] 382 U.S. 296 (1966).
[54] 501 U.S. 808, 827–8 (1991).

Above all, we hope to demonstrate that our three conditions for self-stabilizing constitutions are not merely theoretical. In the United States, as we have shown, the three conditions concern the Supreme Court in practical ways, as cases from *McCulloch* to *Kelo* demonstrate. In our view, important aspects of the Court's day-to-day work can be understood as navigating the tradeoffs inherent in the three conditions and attempting to project constitutional stability forward in time. Moreover, failure to meet these conditions has at times jeopardized the nation's—and the Supreme Court's—future, as the negative reactions to *Dred Scott* illustrate.

Our framework eschews the rhetoric of normative studies of judicial review concerned primarily with the countermajoritarian difficulty. We focus instead on how the Court has both succeeded and failed in lowering stakes, facilitating coordination, and enabling adaptation over the course of American history. The Court's opinions do not merely explain the meaning of various constitutional and statutory provisions. Rather, they encapsulate and generate meaningful debates across the branches and among citizens about the adequacy of constitutional limits in a given area and should be read with their implications for constitutional stability in mind.

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