ENABLING RESISTANCE: HOW COURTS FACILITATE DEPARTURES FROM THE LAW, AND WHY THIS MAY NOT BE A BAD THING

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The conventional view of constitutional adjudication depicts courts as institutions entrusted with safeguarding the rule of law. This view, however, is at odds with the reality of constitutional doctrine, in which courts in fact incentivize some departures from the law. This Article argues that alongside their familiar role as law enforcers, courts design, maintain, and legitimize an incentive structure that enables public officials to resist the law. Through disparate judicial doctrines, such as standing, political question, sovereign immunity, state secrets, and contempt of court, courts grant public officials discretion to depart from laws that they are otherwise bound to obey.

Notwithstanding important reservations, I argue that considerations of efficiency, democratic experimentation, justice, and, paradoxically, judicial legitimacy, lend qualified support to courts enabling such departures from the law. Focusing on those considerations not only sheds new light on seemingly familiar doctrines, but also provides a much needed corrective to constitutional law's preoccupation with courts. By shifting attention from judges to the officials who interpret and implement constitutional law, this Article aims to contribute to the conversation on the consequences of constitutional doctrine for the work of public officials.

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INTRODUCTION

May 16, 2011, was the day the United States reached its legal debt limit of $14.3 trillion. On August 2, unless the ceiling was raised, the country would have defaulted on its debt and the government shut down. In the preceding months, weeks, and days, tremendous political energy was expended to reach a deal. President Obama urged Congress to give him a bill that he could sign, but Republicans were reluctant to increase the ceiling without a concomitant promise to cut government spending. Amidst this controversy, a novel proposal emerged, calling on the President to invoke Section Four of the Fourteenth Amendment, otherwise known as the Public Debt Clause, which provides that "[t]he validity of the public debt of the United States, authorized by law, . . . shall not be questioned."[1] Some took this to mean that the President can (and should) ignore the statutory debt ceiling.[2] Others argued that, regardless of the constitutional provision, the President should raise the ceiling unilaterally, basing their

1. U.S. CONST. amend. XIV, § 4.

2. *See* Katrina vanden Heuvel, *Invoke the 14th – and End the Debt Standoff*, WASH. POST, July 5, 2011, http://www.washingtonpost.com/opinions/invoke-the-14th—and-end-the-debt-standoff/2011/07/01/gHQAUif8yH_story.html.

argument on necessity and on "the president's role as the ultimate guardian of the constitutional order."[3] Others, however, argued that such a move would be unconstitutional.[4]

In the end, President Obama resisted this course, deciding not to rely on the Public Debt Clause.[5] Days before the deadline, a deal was struck and the crisis was averted. And yet, if the President were to invoke Section Four or his power under Article II, and if those actions were deemed unconstitutional, would there be any repercussions? Some have suggested that this was an issue for the courts, yet almost everyone agreed that the courts would refuse to rule on the matter, since no one would have standing.[6]

Assuming this is a correct interpretation of standing doctrine, what does it mean if public officials can act unconstitutionally without having courts available to check their behavior? Isn't it the job of the judiciary to enforce the Constitution on the political branches? Indeed, the Court has practically said as much:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.[7]

Similarly, in *Olmstead v. United States*, Justice Brandeis cautioned: "If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[8]

While these statements are emblematic of the idea of the rule of law, they are difficult to square with the widespread perception that courts would refuse to rule on the constitutionality of the President's decision to ignore the debt ceiling statute.

The debt ceiling case is merely one among many where our professed commitment to the rule of law is at odds with the reality of

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3. *See* Eric A. Posner & Adrian Vermeule, Op-Ed., *Obama Should Raise the Debt Ceiling on His Own*, N.Y. TIMES, July 22, 2011, http://www.nytimes.com/2011/07/22/opinion/22posner.html?_r=1&.

4. *See* Laurence H. Tribe, Op-Ed., *A Ceiling We Can't Wish Away*, N.Y. TIMES, July 7, 2011, http://www.nytimes.com/2011/07/08/opinion/08tribe.html (describing the argument, but rejecting it).

5. *See* Jackie Calmes & Jennifer Steinhauer, *Rejecting the 14th Amendment, Again*, N.Y. TIMES THE CAUCUS BLOG (July 29, 2011, 5:04 PM), http://thecaucus.blogs.nytimes.com/2011/07/29/rejecting-the-14th-amendment-again/.

6. *See* Jeffrey Rosen, *How Would the Supreme Court Rule on Obama Raising the Debt Ceiling Himself?*, NEW REPUBLIC, July 29, 2011, http://www.tnr.com/article/politics/92884/supreme-court-obama-debt-ceiling.

7. United States v. Lee, 106 U.S. 196, 220 (1882).

8. 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

constitutional doctrine. Although we usually think of courts as enforcing law, courts also design and maintain an incentive structure that removes the possibility of judicial oversight from the actions of public officials. The removal of such oversight opens the door to interpretations and actions that may deviate from those of the courts to the point of violating the law.

Officials have an incentive structure with several elements pushing them toward compliance with the law: the possibility of a coercive judicial order against them, public opinion, political pressures, their inherent desire to act legally, and more. But, in spite of this incentive structure, sometimes officials have incentives going the other way that lead them to disregard what they or courts understand to be "the law."[9] This means that resistance is possible even when the courts are ready to issue coercive orders, for example, if the action is extremely popular such that the officials can "get away" with resistance politically.

Additionally, there are areas where courts, otherwise steadfast guarantors of the rule of law, remove one item from the officials' incentive structure—the possibility of a coercive judicial order—and thereby increase the likelihood that the incentives pointing toward resistance will outweigh those pointing toward compliance. Of course, "increase the likelihood" does not mean "guarantee." Quite often, the other incentives for compliance will prevail even in the absence of the possibility of a coercive judicial order.

Courts, then, vacillate between two opposite poles. On one end, as the orthodoxy tells us, is ensuring compliance and legality. At this pole, we find high-minded talk about the rule of law, certainty, stability, and obedience more generally. But there is another, less-discussed pole. At this pole, courts alter officials' incentive structure by removing the possibility of a coercive judicial order against them. When this happens, public officials will have an easier time resisting what they take to be law's demands or what courts deem the law to be. In these spaces, compliance with the law is to be achieved through non-judicial means, i.e., politics or administration, or not achieved at all. To be clear, I am not arguing that courts consciously want public officials to become lawbreakers. Nor do I believe that courts are especially interested in officials deviating from their preferred interpretations. Nevertheless, I argue that the *consequences* of particular doctrines render

9. I define "the law" as what the official takes the law to mean after doing the necessary interpretive work. If courts have not opined on the particular question, officials might perform the interpretive work independently, or defer to what they consider to be an authoritative source within their institution.

such outcomes possible, and that this practice is at odds with the role courts have assumed in the area of judicially enforced constitutional rights.

Not only do courts create areas where public officials can more easily resist law's demands,[10] they do so in a way that cannot be described as anything other than pervasive. That is to say, the creation of such areas occurs through different doctrines and at different stages of the litigation so that it ends up encompassing the world of judicial activity. Accordingly, part of my task will be to describe how these doctrines enable—though not guarantee—official departures from the law. I do so by focusing on five doctrines that are usually conceptualized separately: standing, political question, state sovereign immunity, state secrets privilege, and contempt of court. Collectively, these doctrines allow courts to design public officials' incentive structure for compliance. By removing the threat of judicial sanction, these doctrines expand the scope of officials' discretion as they contemplate whether or not to comply with the law.[11]

Of course, courts (usually the Supreme Court) have a choice between enabling resistance and incentivizing compliance. They can choose to strengthen the judicial enforcement of the law (or what they believe the law to be), or they can opt for increasing the scope of official discretion by removing the threat of a coercive judicial order. Yet courts rarely rationalize their decisions as a conflict between these two poles. The Supreme Court seldom acknowledges (except in dissenting opinions[12]) that a decision gives public officials more discretion to depart from the law.[13] This, however, is immaterial. Whether the Court is conscious of this conflict, or whether it decides to give it voice in its decisions, are questions that are distinct from the fact that

10. By "resisting law's demands" I mean violations of the law and deviations from what courts believe the law to be.

11. There are more than five doctrines that can be analyzed under my framework. However, I chose doctrines that are salient, that come into play at different stages of the litigation, and that uniquely pertain to public officials. The fact that more doctrines can be examined to the same effect merely supports my argument.

12. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 813 n.43 (1999) (Souter, J., dissenting).

13. Except for one instance, I found no evidence of any justice who has professed a desire for public officials to act illegally. In an article, then-Judge Scalia argued that it is desirable for "important legislative purposes" to be "lost or misdirected in the vast hallways of the federal bureaucracy." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983) (internal quotation marks omitted). For discussion, see *infra* text accompanying notes 233–235.

such space exists and that it can be contracted or expanded through doctrine.

Establishing that the Court is engaged in the creation and the shaping of such a space is an important part of my descriptive project. But are any important social and constitutional goals served by the facilitation and preservation of pockets of resistance within a larger legalistic framework? While a definitive answer is probably impossible—partly because of empirical difficulties, partly because of substantive disagreements over first principles—I nevertheless discuss some of the costs and benefits that are generated by the creation and maintenance of such a space and their possible implications.

Part I briefly describes the standard picture, both in the courts and among commentators, which views courts as institutions charged with guaranteeing the rule of law. Part II complicates this picture by considering five doctrines that remove the threat of judicial sanction and hence provide a net reduction in officials' incentives to comply with the law. Although some of the analysis will be familiar, the underlying claim is that we should shift our court-centered focus to one that examines how these doctrines affect the work of public officials. To do that, however, we must first realize that these effects exist. Part III evaluates this practice. I argue that the removal of the threat of coercive judicial orders may advance several politically attractive goals, and that, while increasing the scope of official discretion to resist judicial interpretations may be costly, some of the concerns may be overstated. I then turn to examine some of the implications generated by my analysis.

I.
COURTS AS GUARANTORS OF THE RULE OF LAW

The standard picture of courts is as institutions whose main task is to guarantee the rule of law by, among other things, enforcing the Constitution against governmental violations. This picture has served as the prevailing model of adjudication since *Marbury v. Madison*.[14] Where there is a legal right, Chief Justice Marshall famously declared, there will also be a remedy.[15] Crucially, that remedy will be delivered by the courts since "[i]t is emphatically the province and duty of the judicial department to say what the law is."[16]

14. 5 U.S. (1 Cranch) 137 (1803).

15. *Id.* at 163 ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

16. *Id.* at 177.

This conception of the judiciary's role is now so commonplace that some have questioned the possibility of imagining any other sort of constitutionalism.[17] Indeed, most of the standard works in constitutional theory do not call this conception into question. Rather, they seek to elaborate on how the Court should best go about performing its duties of judicial review and constitutional interpretation. The bulk of constitutional scholarship does not doubt the Court's role in enforcing constitutional rights; it is primarily concerned with specifying how the Court can do so in a principled and coherent way.

The concern with coherence is closely related to a different concern associated with the rule of law, that of uniformity.[18] On this view, the task of constitutional interpretation should be vested in the judiciary, and specifically the Supreme Court, because it is important that there be an institution that definitively settles the law and imposes it on all branches.[19] This view is motivated by considerations of coordination, predictability, certainty, and stability.[20] The fear of non-uniformity, and hence incoherence, pervades constitutional scholarship.[21]

At the rhetorical level, the Court has embraced this picture of its role, insisting that it functions as a Supreme Court of a nation dedicated to the rule of law,[22] and that it has historically been committed to the rule of law[23] and to its enforcement.[24] Further, the Court has reiterated the view that the rule of law both favors and depends on stability.[25] Although the law might change, the rule of law is linked to

17. *See* Steven D. Smith, *Nonestablishment, Standing, and the Soft Constitution*, 85 ST. JOHN'S L. REV. 407, 409 (2011).

18. *See* JEROME FRANK, LAW AND THE MODERN MIND 165 (1963); William Lucy, *Abstraction and the Rule of Law*, 29 OXFORD J. LEGAL STUD. 481 (2009) (discussing uniformity in the law).

19. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377 (1997).

20. *See id.* at 1372–81.

21. *See, e.g.*, Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1250–53 (1978) (discussing non-uniformity as an objection to allowing state courts to expand the application of federally underenforced constitutional norms).

22. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 865 (1992).

23. *See* Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 384 (2004) (quoting United States v. Nixon, 418 U.S. 683, 708–09 (1974)).

24. *See* Republican Party of Minn. v. White, 536 U.S. 765, 803 (2002) (Stevens, J., dissenting) (quoting Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 387 (2002)); *see also* Medellin v. Texas, 552 U.S. 491, 566 (2008) (Breyer, J., dissenting).

25. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1826 (2009) (Stevens, J., dissenting); CBOCS West, Inc. v. Humphries, 553 U.S. 442, 457 (2008).

the idea that the law "will not merely change erratically, but will develop in a principled and intelligible fashion."[26]

What emerges is a picture of the Court at the apex of a hierarchical framework charged with authoritative constitutional interpretation.[27] It is the Court that is entrusted with maintaining America's commitment to the rule of law, which, among other things, entails developing the law in a principled and intelligible fashion.[28] A deviation from the rule of law should result in the Court's opprobrium and, more importantly, intervention. A violation of a constitutional provision violates the rule of law that the Court has taken to uphold.

To be sure, this account is more of an ideal type than a precise description of the Court's conduct in practice. Still, this is the standard picture. It is the one that the Court professes its commitment to and strives to maintain. The remainder of this Article complicates this picture. But rather than argue that the Court's decisions do not live up to its professed ideals, i.e., that they are incoherent, unprincipled, or any similar charge—something which is the mainstay of constitutional scholarship—I argue that the Court itself creates areas where public officials are implicitly allowed to deviate from law's demands. This picture stands at the opposite end of the "Court as guarantor of the rule of law" spectrum that the Court fosters. Understanding how this happens should contribute both to our understanding of judicial practice in general, and to a better understanding of these specific doctrines.

II.
How Courts Enable Resistance

This Part investigates how the courts create areas where public officials operate outside the purview of judicial scrutiny. In this sphere of activity, public officials may indeed comply with the law. However, they also have the option not to comply, and no judicial sanction will be forthcoming. Of course, just because courts will not examine these areas does not mean that officials will necessarily act illegally. For example, a familiar assertion is that legislators have an independent

26. Vasquez v. Hillery, 474 U.S. 254, 265 (1986); *see also* Alexander M. Bickel, The Supreme Court and the Idea of Progress 96 (1978) (arguing that "[t]he process of the coherent, analytically warranted, principled declaration of general norms alone justifies the Court's function").

27. *Cf.* City of Boerne v. Flores, 521 U.S. 507, 545–46 (1997) (discussing the judiciary's role in constitutional interpretation); Cooper v. Aaron, 358 U.S. 1, 18 (1958) (same).

28. For a similar description of the orthodoxy, though repudiating it, see Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 184–89, 207–09, 219–26, 233–41 (2004).

obligation to evaluate the constitutionality of the bills they are voting on.[29] A burgeoning literature in constitutional law seeks to demonstrate that constitutional interpretation and enforcement exist outside the judicial branch.[30] Nevertheless, even if this literature is correct,[31] at most it stands for the claim that *some* constitutional enforcement takes place outside the judiciary. That, however, does not guarantee that officials will indeed act according to law or according to judicial understandings of the law. When the Court takes itself out of the picture, officials are not subject to its constraints. One element in the compliance incentive structure has been removed. And though officials may comply with the law, they nevertheless are presented with a choice whether to do so, a choice more real because they know that courts will not review their decisions.

The subsequent analysis sketches five areas where the absence of judicial review means, in effect, granting officials discretion to resist either law's demands or judicial interpretations of the law. To be clear, I do not claim that the adherence/departure, compliance/resistance tension is driving courts' decisions in any of these areas. The doctrines I examine have emerged for reasons that have little to do with permitting governmental resistance. Such considerations, if they exist, are only present at the margins, and are usually submerged in a sea of other justifications. And yet, if this is the actual effect of these doctrines, judicial attention should be retooled to focus, justify, and take such effects into account.

I describe these doctrines by tracking the progression of ordinary constitutional litigation, from justiciability requirements, through federalism and admissibility of evidence, to the remedial post-judgment stage. I have chosen these doctrines for several reasons. First, most of them represent salient and controversial areas in constitutional law. Thus, they are important, non-negligible doctrines that collectively paint a picture of the process of constitutional litigation. Second, most

29. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135–36 (1893); Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587–88 (1974).

30. *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); KRAMER, *supra* note 28; Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, 50 DUKE L.J. 1395 (2001); Mark Tushnet, *Non-Judicial Review*, 40 HARV. J. ON LEGIS. 453 (2003); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 780–86 (2002).

31. *Cf.* Cornelia T. L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005) (criticizing constitutional interpretation by the Department of Justice's Solicitor General and Office of Legal Counsel).

of the doctrines are usually treated separately, either doctrinally or conceptually. The purpose of examining these doctrines together is to bolster the argument that there is a common (though overlooked) thread that connects them. Recasting these doctrines in this way sheds new light on their actual operation and the functions they serve.

A. Justiciability Requirements

The idea undergirding the concept of justiciability is that the judicial branch has a limited role to play in the constitutional framework. Those limitations are both of a constitutional and prudential nature and are concerned with the "proper—and properly limited—role of the courts in a democratic society."[32] But it is one thing to say that courts have a limited role to play in a democratic society and quite another to define what that role is.[33] There are those who believe that courts should resolve particular disputes, staying away from elaborating general constitutional norms; others believe that courts should seek to maintain the rule of law more generally, even, for example, in the absence of an injury.[34] Still others understand justiciability as a way to filter out cases where remedies would be too intrusive, costly, or ineffectual.[35]

The doctrines of standing and political question, examined below, play out these and other positions. These two justiciability doctrines create, in effect, an exemption from judicial review and thus signal to officials that they are not subject to legal sanctions. Put differently, these doctrines enable the Court to decide how much leeway public officials should have in resisting the law.

1. Standing

Standing is grounded in Article III, which provides that the Court's power extends to "cases" or "controversies."[36] Because there is no agreed upon definition of what constitutes a case or contro-

32. Warth v. Seldin, 422 U.S. 490, 498 (1975); *see also* Allen v. Wright, 468 U.S. 737, 750 (1984); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 221–27 (1974).

33. *See* Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 78–79 (2007) (arguing that although constitutional constraints on government usually have a discernible purpose, justiciability doctrines are unique in that their purposes are contested).

34. *See id.* at 77–78 (contrasting the private rights and public rights view).

35. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and their Connections to Substantive Rights*, 92 VA. L. REV. 633, 648–52 (2006).

36. U.S. CONST. art. III, § 2.

versy,[37] the Court has discretion in shaping its standing requirements.[38] In *Lujan v. Defenders of Wildlife*, the Court suggested that while standing rested on "prudential considerations that are part of judicial self-government," it is mainly grounded in the "essential and unchanging part of the case-or-controversy requirement of Article III," that is as a device to determine whether plaintiffs have a cause of action, to maintain the separation of powers, and to let the Executive, not citizens, take care that the laws be faithfully executed.[39] Commentators, however, have differed sharply over the purposes served by standing doctrine. Some believe that standing ensures an adversarial presentation of the issue.[40] Others argue that standing guarantees that only persons with the requisite personal stake will be able to sue.[41] Others, most famously Alexander Bickel, have suggested that standing (and indeed all justiciability doctrines) is a way for the Court to exercise prudential judgment, allowing it to avoid making difficult ideological decisions.[42]

The problem is that these considerations give rise to different and potentially conflicting requirements, which explains why standing doctrine has been almost universally criticized. It has been called "erratic";[43] "lack[ing] a rational conceptual framework";[44] "confused" and "serv[ing] no useful purpose";[45] and "permeated with sophis-

37. *See* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 229 (1990) (discussing the Court's failure to define the case requirement).

38. *See* LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 96–97 (1988) (discussing how "[c]ourts raise and lower the standing barrier depending on circumstances").

39. 504 U.S. 555, 560–62, 574–77 (1992); *see also* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 461–63 (2008) (explaining separation of powers concerns).

40. *See* Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 563–88 (2006). *But see* Eugene Kontorovich, *What Standing is Good For*, 93 VA. L. REV. 1663, 1672 (2007) (arguing that few find this justification persuasive).

41. *See* Richard Murphy, *Abandoning Standing: Trading a Rule of Access for a Rule of Deference*, 60 ADMIN. L. REV. 943, 947 (2008).

42. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 115–27 (1962) (discussing the passive virtues).

43. Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 635 (1984).

44. Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977).

45. Mark V. Tushnet, Comment, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698, 1705 (1980).

try."[46] The Court itself has admitted as much, stating that "[g]eneralizations about standing to sue are largely worthless as such,"[47] and that standing doctrine "has not been defined with complete consistency."[48] Justice Harlan has called it "a word game played by secret rules."[49] And virtually all agree that standing is inextricably tied to the merits.[50]

Although this criticism is important, it is not my focus here. Even assuming it is correct, we should not overlook the true nature of standing. Any concept of standing must answer the question of how much resistance can be tolerated within a legal system. While standing determines who may file a claim and thus gain access to the courts, it also determines who and what will not be heard by the courts. When there is no standing, the government can continue its conduct knowing that it will be immune from judicial review.

To demonstrate my claim, I will focus on the development of the "injury in fact" requirement of the standing doctrine and how it applies to citizen and taxpayer suits. To obtain standing the Court relies on a tripartite test. First, the plaintiff must demonstrate an "injury in fact," which needs to be "concrete and particularized" and "actual or imminent."[51] If the injury complained of will take place in the future, the threatened injury must be "certainly impending."[52] Other allegations of future injury, even if there is an objectively reasonable likelihood that they will occur, are insufficient.[53] Second, there needs to be a "causal connection between the injury and the conduct complained of."[54] Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[55]

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46. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) (quoting 4 KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE § 24:35 (2d ed. 1983)) (internal quotation marks omitted).

47. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 151 (1970).

48. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982).

49. Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

50. *See, e.g.*, Fallon, *supra* note 35, at 639–41; Tushnet, *supra* note 44, at 663.

51. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations and internal quotation marks omitted).

52. Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (citation and internal quotation marks omitted).

53. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146–55 (2013) (rejecting, on standing grounds, petition of non-U.S. persons concerned of future surveillance under FISA amendments allowing government monitoring as long as the person is reasonably believed to be located outside the United States).

54. *Lujan*, 504 U.S. at 560.

55. *Id.* at 561 (1992) (citation and internal quotation marks omitted); *see also* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).

The demand that the plaintiff demonstrate an injury in fact may seem straightforward, but the Court has yet to define what constitutes an acceptable injury for standing purposes. Although the Court has held that a plaintiff must show an injury that is real, rather than an abstract interest that the government obey the law,[56] the scope of a real injury is unclear, and is nowhere to be found in Article III.[57] Clearly physical injuries would count, but what about aesthetic[58] or stigmatic[59] injuries? Is being denied information an injury?[60] What counts as an injury is, then, inevitably a value-laden, non-neutral judgment.[61]

Today, courts do not allow standing in suits of generalized grievance that only seek to enforce the public's interest that the law be obeyed,[62] but this was not always the case. The injury in fact requirement materialized only in *Data Processing* in 1970.[63] Before then, actions by citizens and strangers were allowed based on whether the legislature or the common law granted a cause of action, independent of an injury.[64] It was only around the New Deal period that more liberal justices started to develop the modern standing doctrine as an attempt to curb the Court's intervention in the operation of the new

56. *See* O'Shea v. Littleton, 414 U.S. 488, 494 (1974); United States v. Richardson, 418 U.S. 166, 176–78 (1974).

57. Bandes, *supra* note 37, at 260; *see also id.* at 283 ("Nothing in article III demands loyalty to the private rights model. The spare 'case or controversy' language by its terms dictates at most that the courts operate within a sphere of expertise distinct from that of the political branches.").

58. *See* Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc., 528 U.S. 167, 183 (2000) (aesthetic injuries sufficient to grant standing).

59. *See* Allen v. Wright, 468 U.S. 737, 755 (1984) ("abstract stigmatic injury" not judicially cognizable).

60. *See* FEC v. Akins, 524 U.S. 11, 21 (1998) (violation of a right to access information considered an injury within Article III).

61. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 167 (1992); Fletcher, *supra* note 46, at 231.

62. *See* Massachusetts v. EPA, 549 U.S. 497, 516–17 (2007); *Akins*, 524 U.S. at 36 (Scalia, J., dissenting); Gilmore v. Utah, 429 U.S. 1012 (1976) (no standing to prevent another's execution). This distinction is not crisp, however, and ultimately depends on the particular circumstances of the case. For example, in *Akins*, whether the generalized grievance results in an "abstract" or "concrete" injury matters. *See* 524 U.S. at 20. Even if a grievance is widely shared, it can manifest differently in different people. *See id.* at 24; *see also Massachusetts v. EPA*, 549 U.S. at 519 ("That Massachusetts does in fact own a great deal of the 'territory alleged to be affected' only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.").

63. *See* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970).

64. *See* Sunstein, *supra* note 61, at 170–71; Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 302 (1961).

administrative state.[65] For example, in *Coleman v. Miller* Justice Frankfurter remarked:

> No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to vindicate, apart from a political concern which belongs to all.[66]

This means that the violation of a public right—one that is shared by all—is not enough to trigger judicial review. Correspondingly, the government's failure to obey the law is not a judicially cognizable ground for standing purposes. This development represents a shift because, in the past, the Court had been willing to entertain generalized grievance suits if Congress granted standing. As Elizabeth Magill explains, the Court permitted such suits under a theory that parties could "bring the government's 'legal errors' to the attention of the federal courts 'on behalf of the public.'"[67] Magill argues that the expansive view had been adopted at a time when plaintiffs were economic competitors who challenged regulated industries.[68] However, in the 1960s–70s, these plaintiffs were replaced by public interest lawyers whose interests diverged from those of market participants.[69] Although the political branches embraced reformist lawyers by enacting statutes that granted standing,[70] the Court was much more equivocal.[71] In Magill's opinion, its reluctance stemmed from a discomfort with litigation as a tool for social reform.[72] This ideological litigation, and the fear that there would be a flood of cases, raised concerns of judicial overreach, non-democratic usurpation, and diverting the judiciary from its traditional role under Article III.[73]

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65. *See* Sunstein, *supra* note 61, at 179–80; F. Andrew Hessick, *Standing*, Injury in Fact, and Private Rights, 93 CORNELL L. REV. 275, 276 (2008); *see also* Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing*, *1921–2006*, 62 STAN. L. REV. 591 (2010) (providing empirical confirmation).

66. Coleman v. Miller, 307 U.S. 433, 464 (1939) (Frankfurter, J., concurring).

67. Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1133 (2009); *see also id.* at 1136. Public suits were allowed to proceed based on provisions in federal statutes that allowed "any aggrieved party" to file suit. *See id.* at 1139–48. The Court read "aggrieved parties" to be those without legal rights, who could only rely on the statute. *Id.* at 1140; *see also* FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476–77 (1940) (the first case to adopt this approach).

68. *See* Magill, *supra* note 67, at 1133.

69. *See id.* at 1134.

70. *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (2013); Clean Air Act of 1963, 42 U.S.C. § 7604 (2013); Clean Water Act of 1972, 33 U.S.C. § 1365 (2013).

71. *See* Magill, *supra* note 67, at 1134–35.

72. *See id.* at 1182–83.

73. *See id.* at 1196–98.

The narrowing of standing was detrimental for generalized grievances suits that sought to have the government obey the law. In *Warth v. Seldin*,[74] petitioners claimed that certain zoning ordinances discriminated against persons of low and moderate income. In response, the Court constitutionalized the injury in fact requirement as derived from Article III,[75] making it difficult for congressional grants of standing to stick if Article III requirements were not met. *Lujan* went a step further: despite a statutory granting of standing in the Endangered Species Act, the Court deemed it insufficient to confer standing on plaintiffs who did not demonstrate an individual injury.[76]

The constitutionalization of the injury requirement limited Congress's ability to confer standing as part of a statutory scheme.[77] It was no longer free, as before, to create legal obligations that could be enforced by public regarding citizens whose interest was that the law be obeyed by government officials. By choosing this path the Court limited its power to supervise executive branch actions. Citizens who do not suffer the type of injury the Court deems acceptable will find it difficult to challenge unlawful activity purely on the basis of its unlawfulness, and, concomitantly, officials will have an easier time resisting legal demands when they know courts will not enforce their deviations.

A second development relates to taxpayer suits, i.e., suits filed by citizens in virtue of being taxpayers to challenge federal allocation of funds. The first case to deal explicitly with this issue was *Frothingham v. Mellon*,[78] which insisted that there be a direct injury, holding that the status of a taxpayer is too tenuous to establish a connection to the asserted constitutional violation.[79] Here, too, the Court required a showing of a particular injury that is not shared by the general public, who suffers in an indefinite way.[80]

While the prohibition on taxpayer suits was partially overruled in *Flast v. Cohen*, where the Court held that citizens can sue as taxpayers if governmental funds are allocated to programs that violate the Establishment Clause,[81] *Flast*'s authority has since been eroded on several

74. 422 U.S. 490 (1975).

75. *See id.* at 501.

76. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 571–78 (1992).

77. *See* Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159 (2011); FISHER, *supra* note 38, at 96.

78. 262 U.S. 447 (1923).

79. *Id.* at 487–88.

80. *Id.* at 488.

81. Flast v. Cohen, 392 U.S. 83, 105–06 (1968).

occasions.[82] Notably, in *Hein v. Freedom from Religion Foundation*,[83] the Court held that taxpayers do not have standing to challenge the constitutionality of executive branch allocation of discretionary funds to the White House Office of Faith-Based and Community Initiatives.[84]

In *Hein*, the Court did not deny that executive allocation of funds to programs that violate the Establishment Clause may be unconstitutional. Instead, Justice Alito said that if a constitutional violation were to occur, Congress was always in the position to step in and remedy the violation.[85] Justice Kennedy, in his concurrence, also emphasized the responsibility of Congress and the executive to act constitutionally and to determine the constitutionality of their actions.[86] Thus, Alito and Kennedy implicitly recognized the space the Court opens for departures from the law, although they assumed that another branch would step in and remedy the violation. However, while one of the Court's virtues is its supposed political isolation, constitutional enforcement by Congress, though possible, would be subject to the congressional political winds, which may or may not be aligned with those of the executive.

The Court's most recent statement on taxpayer suits, *Arizona Christian School Tuition Organization v. Winn*,[87] further narrowed the *Flast* exception. In *Winn*, the Court held that there is no standing for citizens who challenge tax credits that go toward scholarships to students who attend religious schools, and reiterated its policy that challengers must "assert more than just the generalized interest of all citizens in constitutional governance."[88]

The Court's jurisprudence on taxpayer standing generates the same consequences as the line of generalized grievance suits. Taxpayer suits are a way for citizens to guarantee that the government is acting within the confines of the Constitution and the law. But the Court has demonstrated an aversion to such supervision. The inevitable conclusion from the Court's various standing cases is that, no mat-

82. For example, in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), the Court denied standing to taxpayers who challenged the transfer of federal land to a religious school. *Id.* at 179–80. The Court held that the *Flast* exception did not apply to land grants under Congress's Property Clause powers. *Id.* at 180.

83. 551 U.S. 587 (2007) (plurality opinion).

84. *Id.* at 608–09 (plurality opinion).

85. *Id.* at 614 (plurality opinion).

86. *See id.* at 618 (Kennedy, J., concurring).

87. 131 S. Ct. 1436 (2011).

88. *Id.* at 1441–42 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974)) (internal quotation marks omitted).

ter what their stated rationale might be, restrictive standing creates a more generous resistance zone, a larger space for lawbreaking. Consider, in this respect, Chief Justice Burger's opinion for the Court in *United States v. Richardson*:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed . . . to the political process. . . . [T]hat the Constitution does not afford a judicial remedy does not, of course, completely disable the citizen . . . . Lack of standing . . . does not impair the right to assert his views in the political forum or at the polls.[89]

By neutralizing the threat of generalized grievance and taxpayer suits, the Court has given a larger responsibility to Congress and the President to oversee the actions of government officials. This is not necessarily a bad thing, as I will argue below, but it does mean that we must consider the real life implications of these moves for the work of public officials. In particular, when the Court takes itself out of the equation, it effectively removes a major legal constraint that is imposed on government action, while simultaneously minimizing the options available to citizens to ensure legal compliance.

2. *The Political Question Doctrine*

There are two versions of the political question doctrine. The first, traced to Chief Justice Marshall's opinion in *Marbury v. Madison*,[90] is textual. Here courts interpret the constitutional text to see if the issue has been committed to the political branches.[91] The second, like standing, reflects prudential concerns about the exercise of judicial power.[92] This view speaks to a court's institutional capacity in addressing a particular dispute and the impact on the court's legitimacy were it to do so.[93]

Underscoring both versions of the political question doctrine is the idea that certain constitutional questions are better left to the politi-

89. United States v. Richardson, 418 U.S. 166, 179 (1974).

90. 5 U.S. (1 Cranch) 137 (1803).

91. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 232–33 (6th ed. 2009).

92. *See id.* at 233.

93. *See id.* (quoting ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 125–26, 184).

cal branches.[94] Various rationales have been offered as to why that might be. It is possible that the political branches have better resources to investigate certain matters, using their superior institutional capacities.[95] Other issues, such as the decision to go to war and how to conduct foreign affairs, are perceived as issues that should be vested in a politically accountable authority.[96] Scholars have debated these rationales, and the Court, for its part, has devised criteria that purport to assist it in determining whether an issue presents a political question.[97]

But what work is the political question doctrine really doing? According to Louis Henkin, not much.[98] Henkin argued that when the Court identifies what it calls a political question, it simply engages in an ordinary act of constitutional interpretation.[99] If it sees that the issue is committed to another branch, it stays its hand.[100] If the Constitution does not address the issue, it does not impose a limit on the political branches in that case.[101] A true, and rare, political question is one in which the Court acknowledges that the plaintiff has been aggrieved, that the government action violated the Constitution, and yet abstains from reviewing the action.[102] Yet it is hard to recall when the Supreme Court has offered such a rationalization. In the past forty years, only two cases were dismissed by the Court on political question grounds.[103] As Rachel Barkow argues, there is almost no issue that the Court might deem a political question.[104]

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94. *See* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002).

95. *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 268 (2006).

96. *See, e.g.*, Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918).

97. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (mentioning, among other criteria, judicially manageable standards, policy not fit to be made by the judiciary, lack of respect to coordinate branches, and textual commitment to other branches).

98. *See* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 598–99 (1976).

99. *See id.* at 600–01

100. *See id.* at 601.

101. *See id. But see* Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1040 (1985) (arguing that the fact that some clauses mention other branches and yet fail to mention the judiciary does not mean that authority is given to the political branches, since no constitutional provision mentions the courts' power of judicial review).

102. *See* Henkin, *supra* note 98, at 599.

103. *See* Barkow, *supra* note 94, at 267–68; *see also* Nixon v. United States, 506 U.S. 224, 228–38 (1993) (deeming the way in which the Senate impeaches judges to be a political question); Gilligan v. Morgan, 413 U.S. 1, 5–12 (1973) (denying relief to plaintiffs seeking an injunction that the National Guard refrain from infringing constitutional rights).

104. *See* Barkow, *supra* note 94, at 242.

This conclusion may have been premature, however. In 2004, four justices found that political gerrymandering constitutes a political question.[105] Moreover, lower courts and state courts invoke the doctrine on a regular basis.[106] But whether or not the political question is due for a revival, the doctrine, like standing, has not been sufficiently explained with regard to its capacity to grant officials discretion to depart from judicial interpretations of the law.

I begin with Rebecca Brown's observation that "the result of applying the doctrine is the denial to a litigant of the opportunity to enforce a claimed right for reasons external to the nature of the injury."[107] In other words, "giving the political question work to do always means frustrating the work that rights would otherwise do."[108]

Consider, for example, the Court's refusal to hear challenges to the constitutionality of the war in Vietnam. In *Atlee v. Richardson*, the Court summarily affirmed a lower court dismissal of a suit challenging the constitutionality of the United States' activities in Vietnam on political question grounds.[109] In other cases, the Court simply denied certiorari where plaintiffs argued that the war was unconstitutional for not having received congressional authorization. The fact that some plaintiffs could point to a real injury—being ordered to go to Vietnam and possibly lose their lives—did not matter.[110] Lower courts that addressed the issue relied explicitly on the political question doctrine.[111]

Agreeing to hear suits challenging the constitutionality of executive military action—especially the initiation of such an action—might seem to be outside the orbit of judicial activity, but this has not

105. *See* Vieth v. Jubelirer, 541 U.S. 267, 281 (2004) (plurality opinion).

106. *See* Amelia Thorpe, *Tort-Based Climate Change Litigation and the Political Question Doctrine*, 24 J. LAND USE & ENVTL. L., 79, 81–84 (2008) (discussing dismissal on political question grounds of actions seeking relief for the nuisance of greenhouse gas emissions); Christine M. O'Neill, Note, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42 COLUM. J.L. & SOC. PROBS. 545, 560–76 (2008) (discussing use of political question doctrine to reject education claims).

107. Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other* Nixon v. United States, 1993 SUP. CT. REV. 125, 142 (1993).

108. Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 453 (2004); *see also* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1276 (2006) ("[T]he political question doctrine . . . recognizes explicitly that a gap can exist between the meaning of constitutional guarantees, on the one hand, and judicially enforceable rights, on the other.").

109. 411 U.S. 911 (1973) (mem.).

110. *See, e.g.*, Holtzman v. Schlesinger, 414 U.S. 1304 (1973); Massachusetts v. Laird, 400 U.S. 886 (1970); Mora v. McNamara, 389 U.S. 934 (1967).

111. *See* FALLON ET AL., *supra* note 91, at 244 & n.8, 245 (discussing cases).

always been the case. In *Fleming v. Page*,[112] a case that arose from the Mexican-American War, the Court denied Fleming, a United States citizen, recovery of the duties imposed on him by the U.S. Army, since those were imposed at a foreign port. While doing so, the Court held that the President, as Commander-in-Chief, is "authorized to direct the movements of the naval and military forces placed by law at his command . . . . But his conquests do not . . . extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power."[113] Similarly, in *Bas v. Tingy*,[114] the Court did not seem to have any difficulty in defining the 1799 hostilities with France as a "war," even without congressional authorization. War, the Court wrote, can be declared or undeclared, perfect or imperfect.[115] Congress raised an army, dissolved a treaty, and suspended commerce with France.[116] These factors, among others, were sufficient to hold that the country was at war.[117]

My argument is not that the Court was correct, but that it did not consider itself constrained when it came to interpreting Congress's war making powers. True, *Fleming* and *Bas* were private disputes that did not bear upon the constitutionality of the war per se, which may distinguish them from the Vietnam War cases, but they demonstrate that the Court believed it possessed the requisite interpretive tools to adjudicate such disputes. Although this approach to congressionally authorized wars was subsequently abandoned,[118] the point remains: the Court did not shy from substantively adjudicating war power matters. These cases, and others,[119] stand in contrast to today's post-Viet-

112. 50 U.S. (1 How.) 603 (1850).

113. *Id.* at 615.

114. 4 U.S. (1 Dall.) 37 (1800) (opinion of Moore, J.).

115. *See id.* at 40.

116. *See id.* at 41.

117. *See id.* at 41–42.

118. *See* The Prize Cases, 67 U.S. (2 Black) 635 (1863).

119. For discussion of similar cases during that period, see Nada Mourtada-Sabbah & John W. Fox, *Two Centuries of Changing Political Questions in Cultural Context*, *in* THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 89–125 (Nada Mourtada-Sabbah & Bruce E. Cain eds., 2007); *see also* Ribas y Hijo v. United States, 194 U.S. 315, 317 (1904) (overruling, for damages purposes, a presidential declaration as to when the Spanish-American War ended); Weissman v. Metro. Life Ins. Co., 112 F. Supp. 420, 425 (S.D. Cal. 1953) (deciding that, for the purpose of insurance payments, the Korean War is a war, even though there was no congressional authorization). President Truman referred to the Korean War as a "police action." See Louis Fisher, *The Korean War: On What Legal Basis did Truman Act?*, 89 AM. J. INT'L L. 21, 25 (1995).

nam line of war power cases where the courts have been reluctant to opine on the war-making power.[120]

What, then, should we make of the political question doctrine and its relationship to resistance and illegality? On the one hand, when the political question doctrine is merely a label for ordinary constitutional interpretation it is difficult to claim that the Court enables resistance. The more accurate description is that potential room for resistance is entailed in the enforcement of the Constitution. It is the Constitution that assumes that the political branches will either abide by its commands or that they have discretion whether to obey. For example, when the Constitution provides that the "Senate shall have the sole Power to try all Impeachments,"[121] then whether the Senate decides to conduct a full trial or whether it delegates the matter to a committee is an issue that the Senate gets to determine. Therefore, even if having a trial by committee somehow violates the defendant's constitutional rights, the Constitution seems to say that the Court cannot intervene.[122]

By contrast, when courts decide whether an issue is committed to other branches, or whether they should, as a prudential matter, avoid deciding the issue, two additional observations come into play. First, the court is able to portray itself as standing outside the vicissitudes of politics. In this way, the unlawfulness is happening elsewhere, and the court will not be perceived as complicit, despite its facilitation. For example, when the constitutionality of keeping troops in Libya came before a district court, the court refused to intervene.[123] Criticism of President Obama's move—maintaining troops without congressional authorization in violation of the War Powers Act—stuck with him. No one thought that the court was somehow at fault. Second, courts often choose to punt particular issues to the political branches, not necessarily because they lack the judicial tools to resolve them, but because there is a concern that if the court rules in favor of the plaintiffs, the decision will not be obeyed and consequently the court's status will be

120. *See, e.g.*, Campbell v. Clinton, 203 F.3d 19, 24 (D.C. Cir. 2000) (Silberman, J., concurring) (noting the lack of judicially manageable standards in war power cases). A recent exception may be the Guantanamo cases, though it is too soon to tell.

121. U.S. CONST. art. I, § 3, cl. 6.

122. *See* Nixon v. United States, 506 U.S. 224 (1993). Of course, in that case the Court still had to decide on the proper interpretation of that provision. *Id.* at 229.

123. *See* Kucinich v. Obama, 821 F. Supp. 2d 110 (D.D.C. 2011). Although the court dismissed the case on standing grounds, the government had also asserted that the case involved a political question. *Id.* at 114. Though the court was open to the possibility, in light of the standing ruling it did not reach the government's political question argument. *Id.* at 124 n.9.

jeopardized. Thus, the best way to safeguard the court's legitimacy would be by picking its fights.[124] In this way, the court saves face and the alleged illegality can continue.

Some commentators have questioned this explanation. John Hart Ely, for example, acknowledged that in the past courts were reluctant to address issues if they thought they would be disobeyed, but given the place the Court has in today's society, overt defiance is unlikely.[125] Alexander Bickel famously worried "not so much that judicial judgment will be ignored, as that perhaps it should be, but won't."[126]

However, contrary to Bickel and Ely, there are clearly instances—perhaps in high salience cases—where courts are reluctant to use their authority if they suspect that authority will be resisted, disobeyed, or incur severe criticism.[127] This is surely what would have happened in the Vietnam cases had the Court gone the other way. Would the Johnson and Nixon administrations have stopped the war if a lower court (or even the Supreme Court) held it to be unconstitutional?[128] Indeed, one of the things that separates the Vietnam War cases from, for example, *United States v. Nixon*, where the Court denied the President's claim of absolute executive privilege,[129] is that the public and Congress were completely behind the Court's ruling, whereas a substantive decision in the Vietnam cases might have been perceived either as an illegitimate judicial intervention or as an attempt to stop what was, at least initially, a popular campaign.

Ultimately, the political question doctrine is about the latitude the Court gives the political branches, which in turn creates a space that

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124. *See* Redish, *supra* note 101, at 1032; *see also* Fritz Scharpf, *Judicial Review and the Political Questions: A Functional Analysis*, 75 YALE L.J. 517, 566–97 (1966) (arguing that the doctrine acknowledges the limitations of the judicial process).

125. *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 56 (1993).

126. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 75 (1961). For a similar argument, see Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1234 (2002).

127. For a closely related game theoretic model arguing that sometimes the Court drafts vague decisions in order not to be reversed, see Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness: Delegation, Defiance, and Judicial Opinions*, 52 AM. J. POL. SCI. 504 (2008). Similarly, the Court's opinions tend to track public opinion. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

128. The probable answer is that the President would have then gone to Congress and received congressional authorization.

129. 418 U.S. 683, 706–07 (1974).

can be exploited. While it is true that referring the issue to the political branches does not mean that they can exercise absolute discretion free of principled rules,[130] removing the judicial check means taking out a meaningful constraint on official action. By declining to rule on the issue, even in the face of seemingly straightforward provisions such as the Declare War Clause, courts are in effect creating a space where constitutional resistance will have an easier time flourishing.

B. State Sovereign Immunity

State sovereign immunity is the clearest example of a doctrine that enables officials to resist the law or depart from judicial interpretations.[131] The concept of immunity necessarily means non-accountability. Over the years, the Court has expanded the space where public officials can operate without judicial checks on their behavior, while also narrowing the scope of alternative tools, such as Section 1983 suits, that are designed to offset the results of expansive immunity doctrines.[132]

Established in the common law,[133] the scope of state sovereign immunity has fluctuated over time, with the Court playing the major role in its expansion. Seemingly modest, state sovereign immunity was initially derived from the Eleventh Amendment, whose text bars diversity suits between a citizen of one state against the government of another state.[134] Expansion of the doctrine came when the Court started to ground the principle in the general constitutional structure, historical understandings, and the values underlying immunity.[135] Today, the doctrine is justified on the basis of a commitment to democratic decision-making, which is concerned with allowing individuals

130. *See* Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1463 (2005).

131. *Cf.* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466 (1987) (noting tensions with popular sovereignty); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1244 (1988) (noting tensions with the rule of law).

132. *See infra* notes 160–179 and accompanying text.

133. *See* FALLON ET AL., *supra* note 91, at 841–42 (discussing the foundations of sovereign immunity and tracing the doctrine to British custom and colonial practice); *see also* United States v. Lee, 106 U.S. 196, 207 (1882) ("[T]he principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.").

134. U.S. CONST. amend. XI.

135. *See* Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms . . . .").

to satisfy their private claims through state treasuries without express legislative authorization.[136]

The expansion of sovereign immunity began in *Hans v. Louisiana*, which held that Eleventh Amendment immunity prevents a citizen from suing *his own state* in federal court.[137] Interestingly, *Hans* itself was a case of anticipated resistance. The suit was brought by a Louisiana resident against his state for its failure to honor its bonds.[138] The Court, aware that a decision in the petitioner's favor would most likely lead to Louisiana's non-compliance given its post-reconstruction budgetary constraints,[139] found that it was immune from suit in federal court.[140] The cases that followed *Hans* continued this trend by basing immunity on two grounds: honoring state dignity and protecting state treasuries.[141]

The 1990s saw renewed interest in immunity doctrine. In *Seminole Tribe v. Florida*,[142] the Court reversed a case decided seven years earlier, *Pennsylvania v. Union Gas Co.*, which had held that Congress could authorize suits against states in federal courts provided that there was clear statutory authorization.[143] In *Seminole Tribe*, notwithstanding clear statutory authorization, the Court barred such suits on Eleventh Amendment grounds, holding that Congress cannot abrogate state sovereign immunity when exercising its Article I powers, namely the Commerce Clause.[144] Nevertheless, the Court maintained that Congress could still authorize suits against states under the Fourteenth Amendment's Section 5 power.[145] That is, a violation of a fundamental right could be grounds for suing a state in federal court.[146]

Future cases, however, strained this proposition. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court held that Congress could not authorize damages suits against state patent infringements because states did not violate perva-

136. *See* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 521 (2003). For the standard rationales of state sovereign immunity, see Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).
137. 134 U.S. 1, 15–16 (1890).
138. *Id.* at 1.
139. *See* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 444 (2002).
140. *Hans*, 134 U.S. at 15–16.
141. *See* Fallon, *supra* note 139, at 445.
142. 517 U.S. 44, 66 (1996).
143. 491 U.S. 1, 14–19 (1989).
144. 517 U.S. at 47.
145. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).
146. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509 (2004); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

sively violated patent rights.[147] In *Kimel v. Florida Board of Regents*, the Court similarly held that the Age Discrimination in Employment Act could not authorize suits against states that violated the law.[148] There, too, the Court argued that there was no pattern of discrimination by states to justify the abrogation of immunity.[149] Finally, in *University of Alabama v. Garrett*, the Court held that Congress could not authorize suits against states based on Title I of the Americans with Disabilities Act because Congress did not identify sufficient discrimination to merit the stripping of immunity.[150]

These cases rest on the argument that in cases of alleged discrimination in which the discrimination is not subject to heightened scrutiny, Congress can abrogate sovereign immunity only if it finds a pervasive pattern of unconstitutional behavior.[151] Thus, we must conclude that the obverse is true as well: *The Court allows states to violate federal law, as long as that violation lacks a pattern and is not sufficiently pervasive*.

To be sure, eliminating the possibility of damages suits in federal courts did not necessarily mean granting states and officials discretion to resist the law. Suits alleging a violation of federal law could still have been filed in state courts and, sometimes, through other avenues such as administrative tribunals. The Court, however, eliminated these options as well. In *Alden v. Maine*, the Court extended its decision in *Seminole Tribe* to hold that states cannot be sued in their own courts for violating federal law.[152] *Alden* was a suit filed by Maine state employees for overtime back wages owed to them in accordance with the Fair Labor Standards Act.[153] Unable to sue in federal court, plaintiffs moved to the Maine state court system. But the Court held that the rationales that grant states immunity in federal court operate to the same effect in the state's own court.[154] *Alden* represents a dramatic break with the idea that courts have an important role to play in the protection of individual rights and the rule of law. Indeed, the Court's most breathtaking statement came precisely when it grappled with the

147. 527 U.S. 627, 647 (1999).
148. 528 U.S. 62, 91 (2000).
149. *Id.* at 89.
150. 531 U.S. 356, 368 (2001).
151. *See* ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 87 (2008).
152. 527 U.S. 706, 712 (1999).
153. *Id.* at 711–12.
154. *Alden*, 527 U.S. at 745–47. It should be added that the Court extended sovereign immunity to private actions filed in federal administrative agencies in *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743, 747 (2002).

argument that by removing the judicial check states could violate federal law. The Court rejected this notion by arguing that:

> The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes . . . . We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."[155]

Given the circumstances of *Alden*, this is a strange statement. Justice Kennedy assumed that states will comply with the law simply because the Constitution and the laws bind it. The state's good faith, the Court argued, "provides an important assurance" that it will obey the law.[156] But in case the Court failed to notice, the plaintiffs in *Alden* were arguing that the state *failed* to follow the law. Moreover, Maine did not dispute the violation: it simply claimed it enjoyed immunity.

Therefore, it is important to understand what the Court is actually doing. Instead of concerning itself with the rule of law, the Court has delegated its law enforcement power to the potential violator. In its quest to free states from federal control, the Court denies private individuals the possibility to vindicate their federal rights, trusting the political branches to ensure compliance. True, states can still be sued directly by the federal government,[157] but then enforcement becomes more politicized because it places the decision when to initiate proceedings on federal officials who can be lobbied by states, and takes away a remedy that can be placed at the hands of victims.[158] Moreover, a suit by the federal government against the states requires political will that may be lacking. Consider *Alden* itself. The suit that was not allowed to proceed in *Alden* was expressly permitted by the Fair Labor Standards Act, which authorizes the Secretary of Labor to file suit against the states on behalf of employees.[159] But there was no indication that the Secretary was willing, let alone interested, in proceeding against Maine. Expecting the federal government to file suit

155. *Alden*, 527 U.S. at 754–55 (quoting U.S. CONST. art. VI).
156. *Id.*
157. *Id.* at 755.
158. *See* Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 702–03 (2000).
159. *See* 29 U.S.C. § 216(c) (2013).

mistakenly assumes that individuals and the federal government have the same incentives to file a claim. This is unrealistic and ignores the fact that federal action, unlike private action, depends on the current political climate, which may be hostile to enforcement of federal laws.

Responding to these decisions, commentators have been quick to argue that although states cannot be sued directly, a host of other legal tools are available to make government accountable.[160] Significantly, they mention *Ex parte Young*[161] and Section 1983[162] suits as a way to enforce compliance by suing individual state officials. *Ex parte Young* created the fiction that when state officers act unconstitutionally they are not acting on behalf of the state and can thus be sued individually for prospective injunctive relief.[163] Section 1983 suits provide for both damages and injunctive relief against persons acting under state authority (or "color of law") for violating constitutional and federal rights.[164] Commentators promise us that such options take the sting out of the Court's sovereign immunity decisions.[165]

Despite the promise of greater accountability entailed in these tools, the Court has been careful to limit their scope. For example, even though state officers can be sued individually, *Seminole Tribe* deflated such suits by stating that state officials cannot be sued to enforce federal laws that have a detailed remedial scheme.[166] Likewise, if the Court deems the relief to be in actuality against the state government, then the lawsuit against the individual officer will also be barred.[167] Similarly, Section 1983 only provides a remedy for a violation of a federal right, not the violation of federal law.[168] Thus, a Sec-

160. *See, e.g.*, Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213 (2006); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998); Jay Tidmarsh, *A Dialogic Defense of* Alden, 75 NOTRE DAME L. REV. 1161, 1177–79 (2000).

161. 209 U.S. 123 (1908).

162. 42 U.S.C. § 1983 (2013).

163. 209 U.S. at 167–68.

164. 42 U.S.C. § 1983.

165. *See, e.g.*, Jeffries, *supra* note 160, at 49–50.

166. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 74 (1996) ("[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.").

167. *See* Edelman v. Jordan, 415 U.S. 651 (1974); Ford Motor Co. v. Dep't of Treasury of Indiana, 323 U.S. 459, 464 (1945) ("[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.").

168. Blessing v. Freestone, 520 U.S. 329, 340 (1997); *see also* Gonzaga Univ. v. Doe, 536 U.S. 273, 285 (2002).

tion 1983 suit cannot seek enforcement of a federal law.[169] Finally, the focus of these tools on individual officials distracts from larger institutionalized wrongdoing, as rights' violations could be a result of the organizational culture.[170]

The biggest hurdle, however, lies in the conditions the Court imposes for a Section 1983 suit to prevail. Not all public officials enjoy absolute immunity to the same extent as states,[171] but they do generally enjoy qualified immunity, the conditions of which have become progressively easy to satisfy.[172] Once an official meets those conditions, the suit must be dismissed. In the past, officials had to act in good faith and believe that their actions were reasonable.[173] This changed in *Harlow v. Fitzgerald*.[174] Today, officials are entitled to immunity even if a reasonable official would not have believed the conduct to be appropriate, as long as the right violated was not "clearly established."[175] Given that almost every case presents a unique factual pattern, and that each case can be framed as raising a slightly different question, and given that case law proceeds on a highly contextual common-law basis, this requirement effectively shields many officials from liability.[176] Consequently, even malicious or intentional violations of the Constitution are immune whenever the right in question was not clearly established. Further, even if the right was clearly established, but the official nevertheless acted reasonably, or was not aware and should not have known of the right, or did not know and should not have known that his conduct violated the right, immunity will be granted.[177]

State sovereign immunity, more than any other area of law, is explicit about the discretion it grants officials to resist the law. The

169. *See* Hessick, *supra* note 65, at 288.

170. *See* Rizzo v. Goode, 423 U.S. 362, 366–70 (1976) (describing institutional police behavior embedded in organizational life); *see also* Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17 (2000) (discussing the role of unofficial policy and custom in official work).

171. Legislators, prosecutors, judges, and presidents enjoy absolute immunity in the scope of official acts. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731 (1982); Tenney v. Brandhove, 341 U.S. 367, 372 (1951).

172. *See* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989).

173. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 318–22 (1975).

174. 457 U.S. 800 (1982).

175. *Id.* at 818–19.

176. *See* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 82 (1999).

177. *See* Procunier v. Navarette, 434 U.S. 555, 562 (1978).

concept of immunity entails non-accountability, and the Court has sought to expand the space where public officials can operate without judicial checks on their behavior. Strikingly, the Court has also narrowed the scope of alternative tools such as Section 1983 suits that offset the results of expansive immunity doctrines. Even though a Section 1983 suit (or the equivalent federal *Bivens* suit[178]) can be filed against almost any official, its chances for success are slim due to the hurdles propped up by the Court. The end result is that public officials have greater discretion to resist the law. As the Court's statement in *Alden* suggests,[179] the Court expects officials to follow the law even without judicial monitoring. The immunity cases indicate however that this will not always happen, and that officials rely on sovereign and qualified immunity to shield them from liability.

C. State Secrets

The previous sections discussed doctrines of standing, political question, and immunity, all of which bar suits from moving forward independent of their substantive claims. Dismissing suits for reasons extrinsic to their merits sends a powerful message to public officials that they are less constrained—as a matter of fact if not principle—to operate in ways which violate the underlying substantive law. But courts have other tools at their disposal that do not hinge on such "procedural" requirements. The state secrets privilege, which has been invoked with rising frequency,[180] is one of them.

The origins of the privilege are obscure. It is not found in the Constitution or in any federal statute. It was explicitly recognized in 1953, in *United States v. Reynolds*,[181] though it had been used by presidents and executive officers long before then.[182] It is designed to guard against the disclosure of information that would have a deleterious effect on the nation's foreign relations, national security, or intelligence-gathering methods.[183] As Chief Justice Vinson stated in *Reynolds*, the privilege belongs to the government, "[i]t is not to be

178. *See* Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

179. *See supra* text accompanying note 155.

180. *See* Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931, 1938 (2007).

181. *See* 345 U.S. 1, 6–7 (1953). A precursor to *Reynolds*, *Totten v. United States*, did not address the privilege directly, but barred suits based on covert espionage agreements. *See* 92 U.S. 105, 106–07 (1875).

182. *See* William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 92–98 (2005).

183. *See* Gen. Dynamics Corp. v. United States, 131 S. Ct. 1900, 1905 (2011).

lightly invoked," and it is up to the court to "determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."[184]

The privilege operates in such a way that it allows potentially illegal conduct to continue because, if asserted successfully, it bars the admission of evidence—evidence that may speak to illegal government conduct. By excluding such evidence, where that evidence is important, the suit is more likely to be dismissed. Moreover, in cases where the very subject matter of the action is a state secret, a court can dismiss the action based solely on the invocation of the privilege.[185] Further, while courts can examine the evidence in camera, they have increasingly seized on the assertion of the privilege to dismiss suits altogether rather than allow them to proceed with partial evidence.[186]

The propriety of the use of the state secrets privilege has been extensively debated in recent years, with commentators criticizing the privilege,[187] the courts,[188] or both,[189] as a serious subversion of the rule of law and the ability to curtail executive wrongdoing.[190] Courts, on their part, have lamented the difficult position plaintiffs confront when the privilege is invoked, but, as one court noted, "the state secret doctrine finds the greater public good—ultimately the less harsh remedy—to be dismissal."[191]

Curiously, the same courts that bemoan the unfairness that is caused to plaintiffs have generally neglected to consider the long-term effects such decisions have on public officials themselves. Like the

184. 345 U.S. at 7–8.

185. *See* Tenet v. Doe, 544 U.S. 1, 9 (2005).

186. *See* Frost, *supra* note 180, at 1939–40; D.A. Jeremy Telman, *Our Very Privileged Executive: Why the Judiciary Can (and Should) Fix the State Secrets Privilege*, 80 TEMP. L. REV. 499, 500 (2007). *But see* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1306–07 (2007) (arguing that the data do not support this assertion).

187. *See* LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *Reynolds* CASE 253–62 (2006).

188. *See* Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 156–76 (2006).

189. *See* Chesney, *supra* note 186, at 1267 & n.113 (citing academic commentary critical of the privilege).

190. *See* Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse,* 11 LEWIS & CLARK L. REV. 99, 123 (2007); Weaver & Pallitto, *supra* note 182, at 90; Ken Taymor, Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 578–83 (1982) (arguing that courts violate their obligation to enforce legal restraints on executive actions).

191. Bareford v. Gen. Dynamics Corp., 973 F.2d 1138, 1144 (5th Cir. 1992).

other doctrines discussed throughout this Article, the privilege enables the commission of illegal acts by public officials. Its expansion sends officials the message that an increasing number of actions will not receive judicial scrutiny.

Perhaps aware of this effect, two decisions[192] had held that the privilege would not be recognized if it would "sanction official misconduct and perversion of power."[193] In these decisions, the D.C. District Court and the Nevada Supreme Court put forward an "illegality exception," arguing that the privilege cannot be invoked when plaintiffs allege unlawful government conduct.[194] This exception was not followed in subsequent cases, however, and is now all but forgotten.[195] By dismissing the idea that there can be an illegality exception, courts have embraced the notion that government illegality is not only accepted, but also shielded from judicial review. While internal agency considerations might prevent widespread illegality, the reality is that the state secrets privilege is invoked by the head of the executive department, meaning that the alleged illegality is, in fact, a policy rather than an aberration.

As an example, consider the recent case of *El-Masri v. Tenet*, involving the extraordinary rendition of Khaled El-Masri, a German citizen, for interrogation in Afghanistan, where he was subject to harsh conditions and coercive interrogations for four months until his release.[196] El-Masri sued the CIA,[197] but before the suit could proceed the government demanded the case be dismissed since the lawsuit "would require the CIA to admit or deny the existence of a clandestine CIA activity," and would "damage the national security and international relations of the United States."[198] The District Court granted the government's motion to dismiss.[199] Although it cautioned against a blanket approval of the privilege, it went on to say that courts should be mindful of the Executive's "preeminent authority over military and diplomatic matters and its greater expertise relative to the judicial branch in predicting the effect of a particular disclosure on national

192. *See* Black v. Sheraton Corp. of Am., 371 F. Supp. 97 (D.D.C. 1974); Elson v. Bowen, 436 P.2d 12 (Nev. 1967). Both decisions are discussed in Chesney, *supra* note 186, at 1290–95.

193. *Black*, 371 F. Supp. at 100.

194. *See id.*; *Elson*, 436 P.2d at 16.

195. Chesney, *supra* note 186, at 1295.

196. El-Masri v. Tenet, 437 F. Supp. 2d 530, 532–34 (E.D. Va. 2006).

197. *See* Complaint at 2, *El-Masri*, 437 F. Supp. 2d 530 (No. 1:05-cv-1417).

198. *See* Memorandum of Points & Authorities in Support of Motion by the Intervenor United States to Dismiss or, in the Alternative, for Summary Judgment, at 1–2, *El-Masri*, 437 F. Supp. 2d 530 (No. 1:05-cv-1417).

199. *El-Masri*, 437 F. Supp. 2d at 541.

security."[200] Thus, in cases where the executive asserts a "reasonable danger" that the disclosure of the evidence will reveal military matters that in its judgment should not be divulged, the courts should comply.[201]

In *El-Masri*, the court was faced with government illegality in the form of kidnapping, denial of due process, and coercive interrogations. The government never denied those charges. The privilege, however, shielded the government from any legal liability. The state secrets privilege, then, has the same effect as the justiciability doctrines and state sovereign immunity. It shields the government from further judicial scrutiny, thus creating a space that potentially can be used by officials to resist the legal requirements they are otherwise bound to obey.

D. Contempt of Court

Courts can enforce compliance with their orders through the power of contempt, which protects not only the dignity of the court and the judge,[202] but the administration of justice as a whole.[203] It would thus be puzzling if courts were to enable resistance precisely at the moment they seek to enforce their own decrees. However, when it comes to the compliance of public officials with court orders, this is exactly what happens. Although overt defiance of judicial orders by the government is rare, the Supreme Court chose one of the most blatant instances of such defiance to elaborate on its policy regarding contempt.

Spallone v. United States concerned housing discrimination in Yonkers, New York.[204] After long and complicated litigation, the district court found that Yonkers had engaged in intentional racial discrimination in its public and subsidized housing by locating such housing in areas predominantly populated by minority groups.[205] The district court enjoined the city and its officers from promoting residential segregation and ordered the city to take steps so that public hous-

200. *Id.* at 536.

201. *Id.* at 536–37 (quoting United States v. Reynolds, 345 U.S. 1, 10 (1953)).

202. *See* Young v. United States, 481 U.S. 787, 793–802 (1987).

203. *See* C. J. MILLER, CONTEMPT OF COURT 2 (2000).

204. *See* 493 U.S. 265 (1990). For an overview of the background and lower court decisions, see Joseph F. Zimmerman, *Federal Judicial Remedial Power: The Yonkers Case*, 20 PUBLIUS J. FEDERALISM 45 (1990) and PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 231–57 (2003).

205. *See Spallone*, 493 U.S. at 268.

ing would be dispersed throughout the city.[206] The parties subsequently agreed to a consent decree that included the adoption of an "affordable housing ordinance" within 90 days; however, although the decree was approved by the Yonkers city council, the ordinance was not enacted.[207] The district court ordered the city to enact the ordinance, specifying that failure to comply would result in contempt, fines for the city, and fines and imprisonment for individual city council members.[208] The city council again refused to enact the ordinance.[209] A day after that vote, the district court made good on its promise of contempt by imposing fines on the city and on the officials who voted against adopting the ordinance.[210]

On appeal, however, the Supreme Court reversed the contempt as it pertained to the individual officials, holding that the district court abused its discretion because the city's legislative powers are vested in the city council, not in the individual members.[211] Crucially, the Court held that compliance could be secured without exposing the individual council members to liability, and that, by going beyond the city council, the district court's order disrupted the local legislative process, as it forced the legislator to vote for a policy merely to protect his financial situation.[212] This, the Court argued, was a greater perversion of the legislative process than fining the city.[213] The Court cautioned that "federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."[214] Only if contempt against the city proves to be ineffective, can a court hold individual council members in contempt.[215]

The distinction the Court made between the council and the individual officials is perplexing since it was not "the city" that was the source of the impasse, but the individual officials who persisted in

206. *Id*. at 268–69; *see also* United States v. Yonkers Bd. of Educ., 635 F. Supp. 1577, 1577 (S.D.N.Y. 1986).
207. *Spallone*, 493 U.S. at 270–71.
208. *Id.* at 271–72.
209. *Id.* at 272.
210. *Id.*
211. *Id.* at 280. With daily fines approaching $1 million per day, the city eventually enacted the ordinance. *Id.* at 289 (Brennan, J., dissenting). However, as pointed out in Justice Brennan's dissent, in light of continued resistance, the enactment has not guaranteed actual construction of low income housing in white areas. *Id.* at 289 n.3 (Brennan, J., dissenting).
212. *Id.* at 280.
213. *Id.*
214. *Id.* at 276 (citation and internal quotation marks omitted).
215. *Id.* at 280.

their defiance of the court's order.[216] Under the Supreme Court's ruling, the victims of the city's policy would have to pay for the officials' defiance, since the fine would come out of the city's budget, paid for by citizen tax dollars. Indeed, by coupling city and official liability, compliance could have been secured much faster and thus less disruption would have been caused to the legislative process.[217]

The Court in *Spallone*, however, emphasized the importance of local autonomy, which is why it sought to impose the least intrusive remedy,[218] even at the price of noncompliance with the district court's order to rectify a gross constitutional violation. While *Spallone* was a particularly extreme case, the Court's approach has been embraced by lower courts, especially in institutional reform litigation. *Langton v. Johnston*, for example, involved inmates of a state mental health facility who sued the state for violating a consent decree governing conditions at the institution.[219] The court denied relief, arguing based, in part, on *Spallone* that intervening in state and local affairs must be done while respecting "the integrity and function of local government institutions."[220] Likewise, in *New York State Association for Retarded Children v. Carey*, the Second Circuit held that where the legislature refused to allocate funds to improve the unconstitutional conditions at the Willowbrook institution, a state school for children with mental disabilities, in violation of a consent decree, the district court could not hold the Governor and the State Comptroller in contempt in order to achieve compliance.[221] In the words of the Second Circuit, a court cannot "put itself in the difficult position of trying to enforce a direct order . . . to raise and allocate large sums of money."[222]

By refusing to hold the Governor and Comptroller in contempt, the circuit court legitimated the state's noncompliance with the consent decree.[223] Although one could argue that this story simply de-

216. *See id.* at 281 (Brennan, J., dissenting).

217. *Id.* at 293 (Brennan, J., dissenting). Indeed, Justice Brennan worried that the Court's opinion gave public officials too much latitude to resist contempt orders. *See id.* at 306 (Brennan, J., dissenting).

218. *See id.* at 276–80.

219. *See* 928 F.2d 1206, 1208 (1st Cir. 1991).

220. *Id.* at 1221 (quoting Missouri v. Jenkins, 495 U.S. 33, 51 (1990)); *see also* United States v. Metro. Dist. Comm., 930 F.2d 132, 136 (1st Cir. 1991) (discussing arguments based on *Spallone*); Michelle S. Simon, *Suspended Over the Abyss: A City's Quest for Local Autonomy in Institutional Reform Litigation*, 23 FORDHAM URB. L.J. 663, 695 n.253 (1996).

221. *See* 631 F.2d 162, 166 (2d Cir. 1980).

222. *Id.* at 165 (citation and internal quotation marks omitted).

223. *See* Robert A. Schapiro, *The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction*, 99 YALE L.J. 231, 237 (1989) (noting that the court "tacitly blessed a pas de deux in which the Governor claimed that legislative inaction

scribes the limits of the judicial system, that would be a constricted view of institutional reform litigation, an area where courts routinely engage in such matters. It is the doctrinal framework, then, that enables officials to resist law's demands, and *Spallone* stands for the expansion of that space.

With courts removing themselves from scrutinizing official action, public officials have an easier time resisting law's demands. Of course, public officials do not consistently break the law when given an opportunity to do so, nor do courts want public officials to do so. Instead, I have been arguing that with the increase in the scope of official discretion comes an increase in the *likelihood* that officials will resist the law or depart from judicial interpretations of the law. The threat of judicial sanction factors into the decision of whether to comply. Removing this threat means removing this consideration from the official's calculus, thus altering the official's incentive structure. Put differently, the doctrines I have discussed have the unintended consequence that they can lead to more resistance, and indeed, in some of the cases I have described this is in fact what happened.

This unintended consequence, however, is no accident. The granting of discretion to officials is a pervasive feature of constitutional law, and is not confined to one or two areas. The Court has a choice, and often it chooses to expand official discretion. The Court did not have to interpret Article III's case or controversy requirement as excluding taxpayer suits or generalized grievances. It did not have to extend sovereign immunity beyond the text of the Eleventh Amendment. And it did not have to let officials escape liability for violating court orders. The fact that it chose to do so speaks to the Court's power in shaping the space public officials have to engage in action free of judicial scrutiny, which affects the likelihood of their resisting the law's demands. Although one could claim that judges are merely interpreting the law or following precedent, it is clear that in the areas I examined judges are in fact creating the law. The frequent twists and turns that characterize these doctrines militate against a possible argument that the law was imposed on the judges and denied them a choice.

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rendered his compliance impossible, while the legislature had no affirmative obligation to facilitate an agreement to which it was not a formal party").

III.
Should Courts Enable Officials to Resist the Law?

Courts enable officials to resist the law. But should they? While there is no one-size-fits-all answer, this Part argues that when evaluating the particular doctrines discussed above, we must take into account not only the harms to the rule of law entailed in the enabling of resistance, but also the possible values in this practice. If it is valuable—either for its own sake or because it has positive consequences—we should reconsider our view of official resistance as always being problematic, something both courts and commentators simply assume. My conclusion is that various considerations lend support to *some* level of enabling resistance, though it is doubtful the Court has crafted the optimal level. The mere lending of support, however, does not make a practice desirable, and the benefits may be outweighed by the costs.

A. Normative Considerations

Five normative considerations indicate that the Court's role in enabling departures from law may have positive consequences. I argue that considerations of justice and necessity, efficiency, experimentation, non-court-centered constitutional change, and legitimacy complicate the conventional wisdom that surrounds resistance to law's demands.

1. Justice and Necessity

Officials sometimes resist unjust policies that emanate from otherwise constitutional laws. A court's decision not to intervene thus shields the official who decides to resist, upholds a constitutional law, sustains a potentially beneficial action, and legitimizes the official's conduct.

As an illustration, consider the following examples. Suppose the debt ceiling crisis would not have ended in an agreement and default was certain. As a result, millions of people who depend on government programs such as social security, Medicare, Medicaid, and food stamps would have been left unprotected. In order to avert such a crisis the President decides to ignore the debt ceiling statute, claiming either that the Constitution allows him to do so, or that in times of necessity he needs to do all that he can to keep the country functioning. Both these arguments are problematic. It is not clear that the Constitution gives the President the authority to ignore the statute, and the

President's judgment of "necessity" is hardly a legal authorization to violate federal law (though it is a criminal law defense).

If the Court were to intervene and legalize the President's action, it is arguable that more harm would follow, with the Court inevitably putting forward an expansive theory of presidential power. The opposite step—striking down the President's action—seems to be equally problematic given the catastrophic consequences that would ensue from default. Had such a case reached a court, it is unlikely that it would have chosen either of these alternatives. Instead, the court would probably have decided the case on standing or political question grounds, both of which operate to grant the President discretion to ignore the statutory debt ceiling. This third way avoids the pitfalls of explicit authorization or rejection.

The second example involves liability for patent infringements. Imagine that a disease breaks out in one of the states. There is medication available but its price is prohibitive. The state negotiates with the pharmaceutical company to reduce the price, but the latter will not budge. At the same time, another company is offering a generic drug, but its acquisition will constitute a patent infringement. Should the state proceed? Arguably, yes. Will it be violating the law? Yes, but being held hostage by a patent holder while hundreds of people die is not the right moral choice. Again, like the debt ceiling example, a court faced with a lawsuit would have a choice. Accept the lawsuit and many people will die. But, legalize the action and the general protection of patent rights will be seriously undermined beyond the instant case. The solution is state sovereign immunity, which would likely bar a damages suit in such a case.[224]

Although these particular examples may be extreme, it is clear that granting officials discretion in these cases would be an optimal arrangement. On balance, the existing alternatives seem less appealing. One option is to strike down the law being violated. But in cases of clearly constitutional laws, a bad precedent may do more harm than good, and it is unclear on what grounds the law would be struck down. The other alternative is to prohibit the official behavior, but there will be instances where the costs of that move will outweigh the benefits. By relying on the various resistance-enabling doctrines, courts side-

224. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999). Prospective injunctive relief, though permissible, will likely not be appropriate in the case of a fast-breaking epidemic.

step the issue. The validity of the move will be subject to the political process, which may either support or punish officials in due time.[225]

Creating a space where officials can act in ways that might be "illegal" in extreme situations is the constitutional analog of the necessity defense in criminal law. In the end, such actions may be considered lawful because they meet the moral requirements of necessity. The resistance-enabling doctrines suggest that, as a whole, the legal framework may be just precisely because it creates (and legitimates) the necessary space to act in ways that would otherwise be viewed as unlawful, but that are nevertheless necessary in a society that must coordinate between competing values and interests.

2. Efficiency

Courts may grant officials discretion to resist the law because they realize that full compliance has the potential to thwart other important governmental objectives.[226] Legal violations can be efficient where the prescribed legal arrangement leads to sub-optimal results. Consider the following examples, and then consider how courts might approach these issues.

In their study of regulatory compliance, Eugene Bardach and Robert Kagan explain how, in exchange for overlooking certain violations, regulators can achieve more meaningful compliance with administrative policy.[227] They note that regulators often ignore violations that pose no serious risk and refuse to enforce regulatory requirements that are "especially costly or disruptive in relation to the additional degree of protection they would provide."[228] For example, regulators were willing to overlook partial compliance with air pollution regulations when it came to small manufacturers since "it is better to keep these operators in business and to help them achieve a reason-

225. Put differently, the rule of law can be maintained not only through courts, but also through politics. There are times when democracy can function well without invoking the legal process, which in turn can destabilize the political process. For a similar argument in the context of failing to prosecute Bush officials, see Paul Horwitz, *Democracy as the Rule of Law*, *in* WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION 153–77 (Austin Sarat & Nasser Hussain eds., 2010).

226. *See* Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1745–46 (2005); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 114 (2005) (arguing that excessive enforcement can discourage socially beneficial behavior).

227. *See* EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (2002).

228. *Id.* at 134.

able degree of compliance than to hit them with the book and thereby put them under."[229] In addition, regulators often give extensions on deadlines that are statutorily mandated even when they do not have discretion to extend them.[230] They do so in cases where they believe the firm is acting in good faith and taking reasonable steps in its attempt to comply with regulatory standards.[231]

Although regulators may act in ways contrary to the legislation that regulates their activity, they do so because they believe (and empirical evidence supports this[232]) that they can meet regulatory goals by not "going by the book," i.e., by not enforcing every regulatory provision. In this way, regulators can secure cooperation, gain access to information, and establish good working relations with regulated firms, creating, in turn, more efficient enforcement mechanisms.

In what way do courts play a role in facilitating this behavior? Consider standing doctrine, which bars courts from hearing taxpayer suits and generalized grievances. A regulated firm will not have any reason to file suit since the government is actually doing the firm a favor. Persons outside the regulator-firm relationship, however, even if they believe that the regulator should enforce the law to its fullest by issuing citations for each violation, will likely be sufficiently removed so as to not have any stake in the matter. At most, they will be able to claim that the government is failing to comply with the law. But since such a complaint is insufficient to grant standing, the suit will be dismissed. The consequence of a dismissal in this case, as I argued above, is an implicit permission to continue breaking the law. But if the violations contribute to a more efficient regulatory regime and help meet the overall regulatory objectives, one can argue that it is normatively good that they do so, and it is good that the Court implicitly permits them to do so.

A hint of this approach can be found in an article written by then-Judge Scalia before his appointment to the Supreme Court. Responding to Judge Skelly Wright's assertion that it was the court's job to see that "important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy,"[233] Scalia argued the opposite:

229. *Id.* at 137.
230. *Id.* at 138.
231. *Id.*
232. *Id. passim*.
233. Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

> Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in the vast hallways or elsewhere. Yesterday's herald is today's bore . . . . The ability to lose or misdirect laws can be said to be one of the prime engines of social change . . . .[234]

Scalia made this claim as part of a larger functional and theoretical argument about letting democratic processes decide whether a legislative policy should be enforced on the executive.[235] His point was not about efficiency, but the same logic applies. If the administrative process is functioning properly, if regulatory goals are met, and if Congress acquiesces in a practice that violates statutory mandates, the Court will not intervene, *presumably also* because the overall result is efficient.

A similar efficiency-based argument can be made about the state secrets privilege. It is uncontroversial that *some* level of secrecy must be maintained in order to carry out particular government objectives, especially those having to do with national security. In certain cases confidentiality is necessary for the effectiveness and sometimes very existence of governmental activity.[236] The reason the state secrets privilege is controversial is because of its tension with the potential illegality it masks. This does not mean that illegal activity will always receive judicial cover, but because courts rejected an "illegality exception,"[237] it follows that illegality does not mandate disclosure. Yes, courts can review classified material in camera and decide whether a suit should proceed, but the decision to dismiss a suit because of the state secrets privilege ultimately entails a cost-benefit analysis according to which it may be more valuable to maintain secrecy and to preserve a governmental program that may be illegal than to disclose its details to plaintiffs and have the disclosure compromise the program or harm important interests.

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234. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK L. REV. 881, 897 (1983).

235. As critics pointed out, in pressing this argument, Scalia overlooked rule of law concerns grounded in statutory language and in the Executive's Article II obligation to take care that the laws are faithfully executed. *See, e.g.*, Richard J. Lazarus, *Judging Environmental Law*, 18 TUL. ENVTL. L.J. 201, 214 (2004) (calling Justice Scalia a "radical"); Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1, 29–30 (2005) (arguing that Scalia's approach frustrates congressional intent); Murphy, *supra* note 41, at 974 (arguing that Justice Scalia is betraying the rule of law by letting the Executive violate the law). The power of these "rule of law" arguments, however, is likely overstated. *See* discussion *infra* Part III.B.3.

236. Chesney, *supra* note 186, at 1264–65.

237. *See supra* text accompanying notes 192–95.

Both the standing and state secrets examples are vulnerable to the objection from the rule of law. Dismissing suits in the face of government violations undermines our confidence in the accountability of the government, in the role of courts, and in representative democracy generally. Moreover, it denies redress to people whose rights may have been violated. But these concerns, which will be discussed below, prevail only if the rule of law and associated interests are absolute values that always trump competing considerations. If those interests are to be balanced against other considerations, as standing and the state secrets doctrine imply, then despite our initial discomfort courts may be right in enabling some governmental resistance.[238] Of course, it is possible that courts get it wrong; that facilitation of resistance is not efficient. But it is hard to see how this argument can be made into a sweeping generalization. It is possible that courts sometimes miscalculate the costs and benefits. It does not follow, however, that enabling resistance is *always* inefficient.

3. Experimentation and Change

When a court grants public officials discretion, immunizing them from judicial scrutiny, it opens up a space that is not constrained by the judicial process. The action is still informed by political and legal considerations, but those are of a different type, not court-centered, which means that their settlement is "political" rather than purely legal. By facilitating political action that is not subject to judicial scrutiny, room has been opened for experimentation with different alternatives, including those that may challenge existing conceptions of the law. Enabling resistance allows for constitutional change de facto, which can be important where that change would have been struck down by the court had it ruled on the merits. Down the line, it is possible for that change to dialectically engage judicial doctrine, and possibly alter it. The absence of judicial decision on the merits thus keeps the law open for change, conflict, and dialogue.[239]

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238. Another theory—one that is compatible with the arguments made here—is that the Court is hostile to the use of litigation as a mechanism for the regulation of social relations and societal conflict. *See* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1108 (2006). Thus, it would make sense for the Court to stay its hand, trusting other mechanisms to do their work, with the attendant risk of illegality.

239. *Cf.* Archibald Cox, *Direct Action, Civil Disobedience, and the Constitution*, *in* CIVIL RIGHTS, THE CONSTITUTION, AND THE COURTS 3, 22–23 (1967) (arguing that illegality serves the law's need for growth); Fallon, *supra* note 91, at 1151 (arguing that conflict is healthy and desirable).

When courts decide cases on the merits, they are attempting to impose a settlement. Although some see judicial decisions as an invitation for dialogue with other branches,[240] there is little doubt that courts try, even if not always successfully, to settle the issue before them.[241] Of course, sometimes attempts to settle an issue can spark the very resistance that ultimately unravels the settlement itself.[242]

Judicial settlement has two features. First, the issue is "settled" to some degree. That is, a problem has been resolved and put aside. If the settlement is successful, public officials then comply with the decision. But judicial settlement also has an institutional component—the issue has been settled *by the judiciary*. Attempts to modify the settlement will either have to be channeled through the judiciary, or follow the court's guidelines for effectuating the change.[243] Conversely, not deciding on the merits gives political actors and public officials space for experimentation that is not completely constrained by law.

For example, John Jeffries has argued that the limitation imposed by qualified immunity on the recovery of damages for constitutional violations facilitates constitutional change by reducing the cost of innovation.[244] If full remediation were guaranteed, "the costs of compensation would constrict the future of constitutional law."[245] Thus, qualified immunity facilitates constitutional innovation in two ways. First, courts might be reluctant to develop new constitutional norms if the innovation came with a heavy price tag in the form of damages that the government must pay to those whose rights have been infringed upon—damages that are ultimately borne by the taxpayers.[246]

240. *See* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (1992); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 670 & nn.476–77 (1993).

241. *See* LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 92–93 (2001).

242. *See* Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994) (describing how southern resistance to *Brown* mobilized northerners who up until then were relatively untroubled about segregation and led to congressional efforts that culminated in the Civil Rights Act in 1964).

243. In constitutional matters, political actors will have to either amend the Constitution or hope that, over time, the Court's interpretation will have eroded. In statutory interpretation matters, Congress will have to enact a statute.

244. *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999).

245. *Id.* at 98.

246. As John Jeffries explains:

> [L]imiting money damages for constitutional violations fosters the development of constitutional law. . . . [T]he fault-based regime for damages liability biases constitutional remedies in favor of the future. Limitations on damages, together with modem expansions in injunctive relief, shift constitutional adjudication from reparation toward reform. Resources are directed away from cash compensation for past injury and toward the

Second, when officials know they will not be held liable, they are more likely to experiment with different policies, an experiment that can generate policies superior to those developed by courts.

For those who believe in constitutional change, particularly in the need for constitutional law to adapt to changing circumstances, reducing the cost of innovation is important, especially when the formal channels of constitutional change have become ossified. But constitutional change also has a price: the potentially illegal conduct that gave rise to the use of qualified immunity in the first place.

Constitutional innovation and experimentation are thus linked, because the latter is often a precondition of the former. The question, however, is to what extent innovation and experimentation can grow out of illegality. While it is difficult to know exactly when innovation will result, a court may be able to ask whether the challenged action arose in a political climate that is currently being negotiated by the relevant stakeholders; it can view the challenged action in relation to developments in other states and localities to assess the potential of such measures to spark conflict, contestation and dialogue; and it can reflect on the relationship between the challenged action and current doctrine. Perhaps the doctrine is insufficiently clear; perhaps the court would prefer to have matters percolate before imposing a settlement; or perhaps it would like future settlement to be informed by more evidence, suggesting that experiments have to run their course. Finally, a court might stay its hand when doctrine is clear but unsatisfying. Although the court may be able to craft a new rule, it may be reluctant to do so when such a rule imposes uncertain social costs and may have unintended consequences. In these cases, the promises of innovation and experimentation seem more likely than in cases where illegality is isolated, not related to any larger social processes, or is in tension with established societal norms.

Consider, for example, *Arizona v. Winn*,[247] the standing case discussed above.[248] At issue in *Winn* was the constitutionality of an Arizona law that permitted state tax credits for contributions to school tuition organizations (STOs).[249] The STOs, in turn, gave these funds

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> prevention of future harm. The result is a rolling redistribution of wealth from older to younger, as the societal investment in constitutional law is channeled toward future progress and away from backward-looking relief.

Id. at 90.

247. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011).

248. *See supra* text accompanying notes 87–88.

249. *Winn*, 131 S. Ct. at 1440.

as scholarships to support tuition in private schools.[250] However, the Arizona statute allowed the STOs to restrict the funds they offered to include only religious schools.[251] As the plaintiffs in *Winn* argued, that money would have otherwise been received by the state.[252] Instead, they claimed, the money was diverted to religious institutions, in violation of the Establishment Clause.[253] The Ninth Circuit agreed, holding that the plaintiffs demonstrated that the law could pose an Establishment Clause violation and remanded the case to the district court.[254] The Supreme Court, as discussed above,[255] dismissed the case on standing grounds.[256]

Let us assume, along with the Ninth Circuit, that the tax credit that goes to support religious schools is indeed unconstitutional. If no one has standing to sue, this means that states can effectively go ahead and enact similar programs without fear of lawsuits. States can now experiment with a variety of tax-based credits that go, either explicitly or implicitly, to religious schools. Indeed, some states had begun to do so prior to *Winn*, and other states are now planning similar programs.[257] Moreover, because the case was dismissed on standing grounds, and not on the merits, the ruling is even more sweeping in its implications for experimentation and change. After *Winn*, the institutional varieties of a tax credit scheme will not matter, for *Winn* forecloses the entire gamut of Establishment Clause suits that would have followed the enactment of a new school choice program. In other words, *Winn* creates the constitutional space that enables legislators to experiment with different tax-based schemes that end up promoting educational pluralism, without being subject to potential Establishment Clause challenges.[258]

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250. *Id.*

251. Indeed, many of the largest organizations had restricted the funds they offered to religious schools only. *See* Winn v. Ariz. Christian Sch. Tuition Org., 586 F.3d 649, 651 (9th Cir. 2009). This, presumably, made the program different than the one upheld in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which "provided tuition aid on the basis of financial need, without regard to religion, and eligible parents were free to apply the aid toward any private school, religious or secular." *Winn*, 586 F.3d at 651–52.

252. *See* Winn v. Ariz. Christian Sch. Tuition Org., 562 F.3d 1002, 1009 (9th Cir. 2009).

253. *Winn*, 131 S. Ct. at 1441.

254. *Winn*, 562 F.3d at 1023.

255. *See supra* text accompanying notes 87–88.

256. *Winn*, 131 S. Ct. at 1440.

257. *See* Nicole Stelle Garnett, *A* Winn *for Educational Pluralism*, 121 YALE L.J. ONLINE 31, 32 (2011), http://www.yalelawjournal.org/pdf/995_z8hj4yi7.pdf.

258. *See id.* (arguing that this pluralism is a good thing and pointing to statistics demonstrating the success of Catholic schools compared to public schools).

The link between *Winn* and the idea of constitutional change is straightforward. Because these tax schemes cannot be challenged, they constitute a change in constitutional practice. Even though some of these tax schemes may be unconstitutional, they have been constitutionalized in fact. Over time, if the same scheme will be enacted over and over, one could argue that the constitutional rule itself has changed. With the decision in *Winn*, states can safely experiment with various schemes, even those that may be unconstitutional, because the Court has created the space for them to do so.

Thus our understanding of the relationship between church and state is not only shaped by the Court's positive jurisprudence, but is also informed by its abstention from ruling on potentially unconstitutional actions. This can pave the way to new understandings about the proper relationship between church and state. The decision *not* to intervene results in a practice that deviates from the current understanding of the Establishment Clause, which prohibits the allocation of government funds if not done on a non-preferential basis as other similar secular programs. Insofar as experimentation and politically led constitutional change is desirable, judicially enabled resistance can contribute to meeting that goal.

4. Popular Constitutionalism and the Invigoration of Politics

Closely related to the experimentation function is the ability of resistance to invigorate politics. I have argued that removing judicial intervention weakens the incentives for compliance, but sometimes it can have the opposite effect. Removing judicial intervention may be offset by a compensating increase in the other incentives toward compliance. According to an argument made by popular constitutionalists, judicial review—in particular judicial supremacy—inhibits democratic deliberation. If courts have the last say, constitutional discourse in non-judicial forums will be stunted.[259] This phenomenon, termed by Mark Tushnet as the "judicial overhang,"[260] means that if the courts are there to correct legislative mistakes, "legislators have little

259. *See* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 162–69 (2001); *see also* Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J.L. REFORM 971, 976–77 (2010) (describing the critique that judicial review inhibits deliberation in non-judicial forums).

260. *See* Mark Tushnet, *Is Congress Capable of Conscientious, Responsible Constitutional Interpretation?*, 89 B.U. L. REV. 499, 504 (2009).

incentive to expend great effort in enacting only constitutionally permissible statutes."[261]

Senator Arlen Specter's statement prior to the adoption of the Military Commissions Act demonstrates this concern. When asked about the bill, Senator Specter told reporters that it was "patently unconstitutional on its face"[262] and "set back basic rights by some 900 years."[263] He then proceeded to vote for it, saying that he was certain the courts "will clean it up."[264]

With the expansion of judicial review and its intrusion into fields formerly occupied by purely political decision makers, this becomes an even more acute concern. Consider, for example, the argument advanced by Ran Hirschl that we are witnessing the transfer of power from representative institutions to judicial institutions that are isolated from the vicissitudes of political impulses.[265] Although the normative evaluation of such a move is contested, with some viewing it as a necessary step in safeguarding the rule of law and human rights,[266] others, such as Hirschl, challenge this conception, arguing that the move to non-accountable forms of judicial review serves to insulate hegemonic elites.[267]

Similarly, Robert Post and Reva Siegel have lamented the debilitating power judicial supremacy has on public engagement with the Constitution. Their concern is that the people "will cease to maintain a vibrant and energetic engagement with the process of constitutional self-governance," so that "[e]ven if the people retain the last word on the meaning of the Constitution, . . . they may nevertheless no longer feel 'entitled to disagree' with the opinions of the Court and hence lose the vital motivation and will for civic participation."[268]

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261. *Id.*; *see also* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 81 (2008) (arguing that "judicial overhang sometimes promotes legislative disregard of the constitution").

262. Editorial, *Profiles in Cowardice*, WASH. POST, Oct. 1, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/09/30/AR2006093001027.html.

263. Carl Hulse & Kate Zernike, *Legislation Advances on Terrorism Trials*, N.Y. TIMES, Sept. 28, 2006, http://www.nytimes.com/2006/09/28/washington/28detain.html.

264. Editorial, *supra* note 262.

265. *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

266. *See* MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635 (2003).

267. *See* HIRSCHL, *supra* note 265, *passim*.

268. Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1042–43 (2004).

These arguments are inextricably linked to and presuppose the idea that judges are determining substantive constitutional norms. In other words, if courts assert a strong role in a system of governance, then they are dictating the trajectory of constitutional development. If we want to weaken the role of courts, we would have to devise tools to that end. And indeed, some popular constitutionalists have argued for institutional solutions that, at bottom, necessarily assume the link between diminished constitutional discourse and judicial supremacy.[269] For example, Mark Tushnet has called for eliminating judicial review altogether.[270] Larry Kramer endorses the use of constitutional tools such as judicial impeachments, jurisdiction stripping, court packing, slashing the Court's budget, allowing presidents to ignore judicial decisions, and revising court procedures.[271]

But, as I have argued, there is another way to conceive of the judicial function, a way that departs from the narrative of popular constitutionalism but ultimately bolsters its normative agenda. Judges can play a role in the re-invigoration of politics (and, by extension, in constitutional change) without taking away their powers or doing something *to* them, because they already possess the power to facilitate political processes where their role is kept to a minimum.[272] Consider, for example, the remedial debate in structural reform litigation. Much of it concerns the appropriate scope of judicial discretion in devising remedies and the measures courts can take to coerce compliance.[273] The Court has insisted, time and again, that enforcement of structural remedies must respect "the interests of state and local authorities in managing their own affairs."[274] The value of local autonomy has been so dominant that, when giving considerable weight to that value, there is a good chance that noncompliance with court orders will be tolerated. This is what happened, for example, in the Willowbrook case.[275]

The Willowbrook litigation was an attempt to ameliorate the unconstitutional conditions in the Willowbrook institution in New

269. *See, e.g.*, Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 959 (2004) (arguing that in a system characterized by popular constitutionalism, the people assume "active and ongoing control over the interpretation and enforcement of constitutional law").

270. *See* TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, *supra* note 30, at 154–76.

271. *See* KRAMER, *supra* note 28, at 249.

272. Of course, many times it will be up to them to decide when to act on that power.

273. *See, e.g.*, Simon, *supra* note 220, 667–68.

274. Milliken v. Bradley, 433 U.S. 267, 280–81 (1977).

275. *See* N.Y. State Ass'n for Retarded Children v. Carey, 631 F.2d 162 (2d Cir. 1980).

York.[276] New York failed to comply with the district court's order to allocate funding to the independent review board in charge of overseeing the deinstitutionalization of the institution.[277] Declaring itself constrained, the Second Circuit bowed out, leaving intact the state's refusal to fund.[278] But conditions in the institution—and other similarly situated institutions across the country—had triggered such public outcry by citizens and organizations that, even though the lawsuit was only partially successful, public criticism was sufficient to start a national legislative process.[279] The exposure of conditions in the institution, coupled with New York's failure to fully comply with the consent decree, made its resistance visible.[280] The resistance was discussed and debated and ultimately served as a catalyst to the enactment of a federal statute—the Civil Rights of Institutionalized Person Act.[281] The Act gave the Department of Justice the power to file civil actions and intervene in suits challenging unconstitutional conditions.[282] The legislation was one of the reasons for the improvement of mental institutions and the conditions of those under state care.[283]

If the courts' power to facilitate divergent constitutional interpretations has the potential to invigorate politics, then it follows that popular constitutionalism's complaints against judicial review, though not without merit, may be overstated. Courts, insofar as they have the capacity to impose a constitutional settlement, also have the capacity to trigger the process of settlement. This happens when courts refuse to issue a ruling on the merits, leaving space for other actors, and also

276. *See id.* at 163. For a detailed discussion and overview, see DAVID J. ROTHMAN & SHEILA M. ROTHMAN, THE WILLOWBROOK WARS: BRINGING THE MENTALLY DISABLED INTO THE COMMUNITY 299–321 (2005).

277. *See Carey*, 631 F.2d at 163.

278. *See id.* at 166.

279. *See ACLU History: Mental Institutions*, ACLU (Sept. 1, 2010), https://www.aclu.org/organization-news-and-highlights/aclu-history-mental-institutions ("The three-year-long legal battle against Willowbrook culminated in a 1975 consent decree mandating significant reforms; but it took years of tenacious litigation and advocacy to force officials to improve conditions and supply the funds necessary for reform.").

280. *See id.*

281. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. §§ 1997 to 1997j (2013)). In her writings on federalism, Heather Gerken has argued that "division and discord" can mobilize the central power to enact an "integrated policymaking regime" and contribute to a "unified national polity." Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 10, 62 (2010).

282. *See* 42 U.S.C. § 1997(a).

283. *See* Elizabeth Scanlon, *Willowbrook State School*, *in* THE PRAEGER HANDBOOK OF SPECIAL EDUCATION 10–12 (Alberto M. Bursztyn, ed., 2007).

when courts render decisions the political branches refuse to enforce.[284]

By giving the ultimate decisional power to other actors, courts are aligning the power of public officials with their responsibilities to develop, enact, and implement policies in a conscientious manner, even when those may diverge from judicial conceptions of constitutional law. In this way, courts force political actors to internalize the costs of their behavior. This can make courts a partner in the project of popular constitutionalism rather than its enemy.[285] Correlatively, if legislators know that the courts will not correct their mistakes, it may induce them *not* to vote in favor of unconstitutional statutes like the Military Commissions Act for which Senator Specter voted. Legislators' ability to shift blame or responsibility to the courts may be curtailed by the parallel power of courts to shift responsibility back to the political branches.

Paradoxically, then, granting officials discretion to resist the law may strengthen the rule of law. If courts refuse to handle something, then public pressure can be directed at the political branches to make them comply and/or enforce the law. Enabling resistance can contribute to a more active citizenry and a more responsible government. If there is no judicial overhang then the political branches may have a harder time escaping the political fallout.[286] They may internalize the costs of their behavior.

5. Preserving the Courts' Legitimacy

If courts are conventionally understood as institutions that guarantee the rule of law, it might seem paradoxical to claim that their capacity to enable resistance contributes to their legitimacy. I want to argue that it does and, in the process, extend Bickel's idea of passive virtues to the doctrines discussed above. Bickel argued that the Court has the power to avoid adjudication in divisive cases in order to maintain its commitment to principle in most cases.[287] By refraining from

284. This argument bears some similarity to Sunstein's judicial minimalism argument. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). However, on Sunstein's account, courts are settling the law on narrow grounds, *see id.*, whereas on my account courts refuse to enforce the law or tell us what the law is.

285. Admittedly, courts still control the degree of their intervention, which is why popular constitutionalists' concerns are not completely mitigated.

286. John Rawls has made a similar argument regarding refusal by citizens. *See* JOHN RAWLS, A THEORY OF JUSTICE 383 (1971).

287. *See* BICKEL, *supra* note 42, at 70–71. *But see* Gerald Gunther, *The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Re-*

ruling in a substantive manner, the Court positions itself in the tension between principle and expediency without giving in completely to expediency.

In Bickel's view, if the Court were to decide every controversial question it would force more conflicts than it would be able to tolerate, and, in the end, its institutional legitimacy would be compromised, perhaps to the point of noncompliance with its decisions.[288] The passive virtues are committed to principle, which is achieved, paradoxically, by "reducing some of the pressures that might otherwise make it impossible to maintain."[289] The ability to retreat, to enable resistance in one case, protects the courts' ability to uphold the rule of law more generally.[290] Maintaining the nation's "enduring values," which Bickel thought was the Court's job, is possible only if the Court compromised, as a matter of prudence, on some matters of principle in some cases,[291] effectively opening space for potential unconstitutionality and illegality.

Another way to understand this mediation is to consider the term "democratic government under law." As Bickel argued, to have democratic government (understood as privileging majorities), while also being "under law," pulls in two opposite directions.[292] One is safeguarding the rule of law (under law), the other accommodating political will (democratic government). By definition this accommodation is not principled, but rather a type of practical wisdom steeped in institutional tradition that relies on the judge's "trained sensitivity to the ways of the world."[293] Although Bickel did not phrase it as such, the Court has to mediate between legality and the potential for illegality. One way to do so is by utilizing doctrines that, on the one hand, enable illegality but, on the other hand, are sufficiently pliable to allow the Court to retreat in appropriate cases.

It is far from clear that the Court is successful when attempting to mediate between principle and expediency. Mark Tushnet has argued

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view, 64 COLUM. L. REV. 1, 3 (1964) (Gunther's famous critique that one cannot insist 100% on principle 20% of the time).

288. *See* Anthony Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1586 (1985).

289. *Id.*

290. *See* CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 235 (2006) ("By exercising restraint much of the time . . . the courts perpetuate an atmosphere of goodwill that enables them to weather periods of criticism without jeopardy to their long-standing autonomy.").

291. *See* BICKEL, *supra* note 42, at 25–26.

292. *Id.* at 27.

293. Kronman, *supra* note 288, at 1589.

that the mediation can only be successful when there is no rule governing its use.[294] Once a rule is in place, it implicates courts in precisely the type of interaction they seek to avoid; courts can no longer be purely prudential, because doctrines and rules require reasons for their invocation.[295]

But although doctrinal rules diminish the Court's reliance on extra-legal prudential grounds, they do not diminish it to zero.[296] The doctrines discussed above, such as state secrets, contempt of court, or the political question doctrine, are sufficiently elastic to incorporate prudential reasons, even if those are not stated in the decision. When the Court has to decide, for example, whether a controversy is more appropriate for resolution in the political branches, it is relying on rules such as "judicial manageability," which are sufficiently indeterminate to include prudential considerations.

A similar concern with legitimacy can be found in Cass Sunstein's writings on backlash. Sunstein argues that if a decision might undermine the very cause it is intended to promote or make it difficult to secure compliance with other cases, judges might take that under consideration.[297]

Bickel and Sunstein do not contemplate the facilitation of resistance. Bickel cared about excessive entanglement with politics that would cause the Court to forgo its role as guardian of enduring values; Sunstein cares about judicial minimalism.[298] But if we take resistance seriously, then we must account for the role it plays in establishing the courts' legitimacy. When Bickel endorses the use of the passive virtues, or when Sunstein cautions against ignoring consequences, they are overlooking the potential that courts open up by granting officials discretion to resist the law. While both Bickel and Sustein are concerned with maintaining the courts' institutional legitimacy, they do not spell out the implications that follow from their analysis. Namely, that preserving the courts' legitimacy not only entails having courts let other actors make judgments about the law, but that those judgments may deviate from judicial interpretations of the law, and that this can be desirable.

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294. *See* Tushnet, *supra* note 126, at 1204.

295. *See id.*

296. The problem with Tushnet's argument is that he treats it as an analytical matter: once rules are used, you cannot rely on prudence. But if the rules themselves are sufficiently indeterminate, then the use of prudence is still possible.

297. *See* Cass R. Sunstein, *If People Would be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007).

298. Sunstein extols the virtues of judicial modesty more generally and connects it to democratic theory. *See* SUNSTEIN, *supra* note 284.

In sum, there are five main reasons why enabling resistance may be desirable. It can bring about greater justice, result in greater efficiency, encourage experimentation and non court-centered constitutional change, invigorate political discourse, and bestow legitimacy on the Court.

But in what way do the aforementioned doctrines bring about these ends? Obviously, not every use of qualified immunity will enhance constitutional innovation, just like not every invocation of the political question doctrine will promote efficiency. It is unlikely that courts can isolate only those cases that bring about desired outcomes. Courts have a limited ability to foresee the consequences of their decisions, and courts generally operate based on rules, so deciding one way in a case that may bring about a desired end could commit the court to rule in a similar way in a case where that end does not exist.

In the end, the question is one of tradeoffs. Whereas resistance has the potential to advance politically attractive goals, it also threatens important values. I discuss these problems below.

B. Problems with Enabling Resistance

That resistance may be desirable in some cases does not mean that every invocation of these doctrines will result in good outcomes. Many of the doctrines that I have described have been criticized precisely because they do not sufficiently protect the rule of law. To this we can add other problems, such as leaving plaintiffs without redress and the loss of certainty and predictability that may be generated by courts avoiding a ruling on the merits. I want to flag these concerns rather than definitively resolve them. Here I briefly explain them and argue that, although they pose some difficulties, they may be overstated.

1. Loss of Certainty

Law creates certainty by articulating norms that are then enforced in a consistent way. Uncertainty results when otherwise valid norms are opened to the possibility of not being enforced or being disregarded by political actors. Granting officials discretion, especially when that discretion ends up in the form of resistance, can frustrate legitimate expectations. If courts contribute to legal certainty, and if they remove the option of judicial scrutiny, then certainty is undermined.

Certainty is undoubtedly important, but it always exists on a spectrum. Because language is seldom exact, attempting to achieve

absolute certainty is rarely possible and comes at a heavy price. The question, then, is not whether enabling resistance produces some uncertainty over law's interpretation and application, but whether that uncertainty is in some considerable way more detrimental than the one already generated by the legal system.

This question is hard to answer in the abstract because we already live in a world that grants officials discretion to resist the law. But consider that public officials (legislators included) still formulate general policies even when judicial review is not forthcoming. These policies are debated, promulgated, and applied; they are no less certain than authoritative judicial rulings. In fact, a policy that cannot be challenged is in some ways more certain than one subject to judicial review.

Perhaps the concern over certainty masks a different concern over interpretive anarchy. Judicial review means having an institution that performs a settlement function. If courts are excluded from settling some disputes, this means that multiple institutions can generate policies that are not constrained by judicial rulings. Policies can conflict with one another, leaving politics to sort out the winner, a process that can be very messy. Judicial clarity is thus replaced with political ambiguity.

Like the concern about certainty, however, the concern about anarchy is overstated. Firstly, it is widely acknowledged that multiplicity in norm-generating institutions is valuable for democratic, deliberative, and expressive reasons, despite possible worries of redundancy and conflict.[299] Secondly, there is a difference between uncertainty and anarchy. The former is already present in our life, whereas the latter is an extreme unlikely to be realized. As long as the overall political structure is stable, having some areas that will be potentially unsettled does not seem to bother many people. Further, as argued above, the mere granting of discretion does not guarantee resistance. Discursive practices of public officials have their own normalizing effects. Legislators, policymakers, and officials more generally, cannot completely break away from familiar modes of legal argumentation and its peculiar constraints. This serves to temper any concerns about rampant anarchy or excessive loss of certainty.

Consider, for example, *United States v. Richardson*, where the Court dismissed a suit to disclose the CIA budget based on the State-

299. *See* Ori Aronson, *Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization*, 51 VA. J. INT'L L. 231 (2011); Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

ment and Accounts Clause of the Constitution.[300] Prior to Richardson's lawsuit, the budget remained classified preventing public and congressional oversight.[301] With the Court retreating, the picture remained largely the same after the lawsuit.[302] In 1997, under political pressure, the CIA released its budget, though it reclassified it by 1999.[303] After 9/11 the budget received increased scrutiny in light of ballooning security expenditures.[304] Since 2007, Congress has required disclosure of the National Intelligence Program budget at the end of each fiscal year.[305] Three years later, the 2010 Intelligence Authorization Act[306] required the President to disclose to the public the aggregate amount he was requesting be appropriated for the non-military intelligence budget.[307] Although the President can decline its release on national security grounds, he has complied with the Act.[308]

Notwithstanding the possible unconstitutionality of nondisclosure, concerns with uncertainty and anarchy seemed to be nonexistent. Despite some back and forth, the situation remained relatively stable. Other areas of law were not affected by the nondisclosure, and the fact that Congress, the Executive, and civil society had to address the matter did not introduce interpretive anarchy.

2. Loss of Remedies and Deterrence

A second concern with enabling resistance is the expected loss of remedies and reduced deterrence of unlawful actions by government. When the law guarantees remedies to individuals whose rights have been violated, their inability to collect damages not only frustrates their expectations, but also infringes on principles of fairness. If individuals cannot collect, deterrence of unlawful acts is reduced. No-

300. 418 U.S. 166, 167–70 (1974); *see also* U.S. CONST. art. I, § 9, cl. 7.

301. *See* Brian Clampitt, *U.S. Intelligence Budget Request Revealed*, HARV. NAT'L SEC. J. ONLINE CONTENT (Feb. 23, 2011, 3:44PM), http://harvardnsj.com/2011/02/intelligence-budget-request-revealed/ (noting that prior to 2007 "intelligence officials refused to disclose the budget with few exceptions").

302. *See id.*

303. *See id.*

304. *Id.*

305. *Id.*

306. Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111–259, 124 Stat. 2654.

307. *See id.* § 364 (codified as amended at 50 U.S.C. § 415c (2012)); Clampitt, *supra* note 301.

308. *See id.*

where is this more acute than in the sovereign immunity cases discussed above.[309]

The concern with loss of remedies and deterrence is real and serious, but it also sweeps too broadly. The loss of remedies entailed in sovereign immunity means a loss of *judicial* remedies. Alternatives may exist that can bypass the judicial mechanism. In particular, plaintiffs can sometimes obtain the necessary remedies through politics. Two examples from the cases discussed above are illustrative.

In *Seminole Tribe v. Florida*, the Tribe sued Florida over its refusal to negotiate in good faith toward acquiring a gaming license, an obligation required by the Indian Gaming Regulatory Act.[310] With the suit barred on immunity grounds, the Tribe initiated a federal campaign in Congress and with the Secretary of the Interior to secure their licenses.[311] In 1999, the Secretary of the Interior promulgated rules that allowed the Secretary, when states were recalcitrant, to force mediation and accept or reject its results.[312] Granting immunity to Florida actually made it a weaker player in this context, because the Tribe could bypass the state altogether once it asserted immunity.[313] In the end, the two parties entered a federally sanctioned mediation which was approved by the Department of the Interior, allowing the Seminole Tribe to operate the gaming facilities.[314]

A similar thing happened in *Alden v. Maine*.[315] After the decision granting immunity to Maine, the probation officers who were denied overtime and the state employee union lobbied the Maine legislature, which ultimately appropriated funds to cover the employees' claims.[316] A legislative attempt to waive immunity in response to state employee suits implicating several federal statutes did not survive the

309. *See supra* Part II.B. Indeed, commentators have criticized sovereign immunity doctrine, insisting that it is anachronistic, inconsistent with American legal principles, undermines government accountability, and incentivizes government lawbreaking. *See, e.g.*, Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001).

310. 517 U.S. 44, 51–52 (1999); *see also* Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–2721 (2013)).

311. *See* CHRISTOPHER SHORTELL, RIGHTS, REMEDIES, AND THE IMPACT OF STATE SOVEREIGN IMMUNITY 120–21 (2008).

312. *See id.* at 121–22.

313. *See id.* at 122.

314. *See* OFFICE OF THE SEC'Y, U.S. DEP'T OF THE INTERIOR, CLASS III GAMING COMPACT APPROVED FOR SEMINOLE TRIBE OF FLA. (2010), *available at* http://www.bia.gov/cs/groups/public/documents/text/idc009934.pdf.

315. 527 U.S. 706 (1999).

316. *See* SHORTELL, *supra* note 311, at 135.

governor's veto.[317] Following the election of a new governor, however, the legislature succeeded in equalizing the treatment of public and private employees in Maine, and allowed state employees to file suit in state court.[318]

These two stories may be atypical. They describe powerful, well-organized plaintiffs who can mobilize political resources to lobby political institutions and bypass sovereign immunity protections. Politically weak and resource-poor groups have fewer options and are less likely to act politically to secure their remedial rights.[319] Thus, the problem with sovereign immunity decisions is their potential disparate impact. Granting immunity exacerbates the already adverse situation of politically disempowered actors with little capital and political support. The concern about loss of remedies is therefore correct but partial, as it applies differently in different cases.

Consider now a different argument: that immunity incentivizes government illegality because monetary damages would otherwise deter wrongdoing. This argument assumes that government officials respond to financial incentives but, as Daryl Levinson has argued, officials "respond to political incentives, *not* financial incentives."[320] Money paid to plaintiffs does not come from officials' pockets.[321] Even if officials are found liable, they will be indemnified by the government, and they are unlikely to suffer reputational costs if their act is part of routine or accepted government policy.[322] Therefore, "there is no reason to expect that forced financial outflows in the form of compensation payments will change [the government's] behavior in any predictable way."[323] Deterrence of government illegality does not stem from damages or the grant of immunity, but rather from the political power wielded by the citizens who bear the compensation costs compared to that of the victims.[324] This is what determines the scope of government illegality, not immunity.

In sum, it is not clear whether enabling resistance necessarily increases government's proclivity for lawbreaking, at least in the sover-

317. *See id.* at 136.

318. *See id.*

319. This is Christopher Shortell's main thesis, and he demonstrates how weak plaintiffs could not work around immunity. *See id.* at 128–31.

320. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000).

321. *Id.* at 345–61.

322. *Id.* at 353.

323. *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 965 (2005).

324. *Id.* at 966.

eign immunity context. To be sure, there is the potential for that to occur, but there are clearly cases where this will not be the case. If the political structure possesses the power to discipline acts of illegality, then it would seem that the benefits of enablement have a moderating effect on the counter claims of loss of remedies and deterrence. Of course, this still means that different individuals and groups will fare better or worse in the political process compared with the judicial process, and although this is true regardless of whether or not facilitation of resistance is implicated, this concern cannot be glossed over. It is a real cost that is unlikely to be remedied. The question, then, is whether the potential benefits of resistance justify this tradeoff.

3. Undermining the Rule of Law

The resistance-enabling doctrines delegate judicial authority to say what the law is to multiple institutions (legislatures, municipalities, agencies, and individual officials), with the attendant risk of abuse. Granting officials discretion to resist may also pose problems of unequal enforcement, loss of consistency, and even fairness. It would compromise the integrity of the law, which is premised on the notion that all officials are subject to a disciplining authoritative system.

This charge, however, overlooks the fact that the idea of the rule of law is contested both philosophically[325] and in constitutional theory.[326] Arguing that granting discretion to resist the law is tantamount to a violation of the rule of law says very little about what that violation might be.

The array of approaches to the rule of law view it as anything from a set of formal-procedural requirements, such as generality, clarity, and stability,[327] to a more substantive set of values that the rule of law promotes, such as autonomy, fairness, liberty, dignity, and democracy.[328] Others have argued, following Wittgenstein, that since no rule

325. *See* Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137 (2002).

326. *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997).

327. *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW 39, 209–10 (rev. ed. 1969) (detailing the requirements of the internal morality of law). For a strict positivist version, see JOSEPH RAZ, *The Rule of Law and its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210–29 (1979).

328. *See* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 791 (1989) (distinguishing between instrumentalist and substantive theories). *See generally* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004) (discussing the history, politics, and theory surrounding the rule of law).

can determine the scope of its own application, the classical understanding of the rule of law, as rule by law and not by men, is impossible.[329]

If there is no agreed-upon conception of the rule of law, not every government action that one would view as a deviation from the rule of law will be viewed as such by others. Consider the following example. Suppose that, in the post-*Bowers v. Hardwick*[330] pre-*Lawrence v. Texas*[331] days, a state has a homosexual sodomy law on its books. The law is valid and has not been struck down by any court. However, the state's attorney general is on the record saying that her office's official policy is not to initiate any investigations and prosecutions into the commission of the offense because in her view it discriminates on the basis of sexual orientation. There is a clear sense in which the actions of the attorney general violate the rule of law. As a member of the executive, her job is to see that the laws are executed. Barring the usual resource constraints, she has limited discretion to decide which law will be enforced and which will be abandoned. Indeed, if the rule of law is to be understood as rule by law and not by men, her actions violate that principle. But if one views the rule of law as a substantive principle that seeks to further values of dignity, liberty, and fairness, and also implicates human rights norms, it is possible to see the attorney general in a more favorable light, one which takes into account the rule of law values she seeks to advance.

The purpose of this example is not to decide what the rule of law entails, but rather to argue that, without a particular theory of the rule of law, it is difficult to make the claim that facilitation of resistance does violence to the rule of law.

Putting aside the definitional debate, there is a more important point. Sometimes arguments from the rule of law seem to assume that only the political branches can violate the law. Courts, the argument goes, are there to protect us from deviations and abuses by the political branches. These arguments conflate the concept of the rule of law with the institution in charge of its administration. The rule of law is not embedded in any particular institution. If everyone is bound to follow the law, this applies to all institutions, courts included. Whatever the operative definition of the rule of law, critics of judicial facilitation of resistance are likely to ignore violations that are committed by courts, focusing instead on the behavior of public officials.

329. *See* Radin, *supra* note 328, at 800 (arguing that rules are not prior to action, but that action and social practice constitute rules).

330. 478 U.S. 186 (1986) (upholding a law criminalizing sodomy).

331. 539 U.S. 558 (2003) (invalidating a law that criminalized homosexual sodomy).

The source of this confusion, I think, stems from associating courts with institutions entrusted with maintaining the rule of law, which then makes it difficult (though not impossible) to view them as institutions that also partake in its violation. This mistaken conflation can be traced to the much-engrained distinction between law makers and law appliers, which is also based on the division of labor between courts and the political branches. But since everyone concedes that judges make law, we must also evaluate the harms to the rule of law entailed in judicial lawlessness, irrespective of the courts' role in enabling resistance.[332] One need only conjure *Bush v. Gore*[333] to get an idea of the Court's complicated relationship with the rule of law.[334]

The argument that enabling resistance does violence to the rule of law is incomplete. We need a working theory of the rule of law, and we must remember that this facilitation may, on occasion, offset judicial lawlessness.

Finally, even if one is not convinced by the preceding arguments, it is always possible to bite the bullet. In other words, we can admit that judicial facilitation of resistance increases the odds of violating the rule of law, but that there are more important values at stake that may justify the infringement. Jeremy Waldron, for example, has argued that although we think that law should constrain political power, we also disagree on the nature of the danger posed by human power without law.[335] On my interpretation of Waldron, unrestrained human power can be put to good ends; law's moderating effect is not always positive.[336] Granting absolute status to the rule of law has its price. It may sometimes stand in the way of accomplishing desirable ends.

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332. On judicial lawlessness, see Ward Farnsworth, *"To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness*, 86 MINN. L. REV. 227 (2001) and JEFFREY BRAND-BALLARD, LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING (2010).

333. 531 U.S. 98 (2000).

334. *See* Margaret Jane Radin, *Can the Rule of Law Survive* Bush v. Gore*?*, *in* BUSH V. GORE: THE QUESTION OF LEGITIMACY 110–25 (Bruce Ackerman ed., 2002). A related concern has to do with predictability. If predictability is essential for structuring human behavior and the maintenance of the rule of law, can we really say that judicial decisions provide the necessary level of predictability to secure the rule of law?

335. Waldron, *supra* note 325, at 159.

336. Similarly, Morton Horwitz has argued that the rule of law "prevents power's benevolent exercise." Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) (book review).

C. Implications

Doctrines such as standing, political question, state secrets, sovereign immunity, and contempt of court, should be reconceptualized as doctrines that grant officials discretion to resist the law or depart from accepted judicial interpretations. Contrary to conventional thought that finds resistance by public officials perverse or, at the very least, objectionable, these doctrines may be able to advance politically attractive goals. Four implications result from this analysis, which I detail below.

1. The Limits of Law

When we talk about the "limits of law" we sometimes mean that law cannot control everything, or that other normative systems compete with law's demand for supremacy. The literature on backlash in response to court decisions is of this kind. It describes how individuals, social movements, and officials resist court decisions with which they disagree. But the limits of law are also prescribed by legal institutions themselves and not just as a result of competitions that generate contingent boundaries. Courts also determine the limits of law and implicitly allow for unlawful behavior by public officials to not only occur, but to be legitimated.

Whether courts acknowledge the resistance-enabling potential that their doctrines generate, they are a testament to the limits of law. The precise scope of the limits judges carve out is variable, and those limits will change as a matter of circumstances and subject matter. Indeed, no preordained formula can be given, except to say that the existence of the doctrines themselves (as opposed to their precise contours) is something courts find necessary. The crucial point is that law is not limited only by external forces that push against it, but also by the "internal" institutions whose project is to enforce the law. Put differently, courts establish the conditions for the subversion of law, and yet we rarely think of them in this way, precisely because such an understanding undermines their raison d'être.

2. Resistance to Law Is an Integral Part of the Legal System

Nothing that I have described so far is a necessary part of judicial work. We can imagine legal systems that leave very little or no room for resistance. Some countries have expansive justiciability doctrines under which courts are willing to hear almost anything. Some countries may do away with immunity protections. Although it is likely that all countries maintain some form of the state secrets privilege, we

can imagine courts that rarely defer to the political branches. Enabling resistance, then, is an integral part of the legal system not because of conceptual necessity, but as a pragmatic matter.

One reason why courts might remove the possibility of judicial review is because of institutional competence and legitimacy. Courts suffer from information asymmetries and their expertise in the variety of cases that come before them is limited, especially when compared to that of agencies or legislatures with superior fact-finding skills.[337] The uncertainty that surrounds the impact of judicial decisions, especially in issues that are "political" or "widely shared grievances," may lead the court to allow more play in the joints, even at the risk of possible resistance. Of course, courts can minimize the room for acceptable resistance by subjecting every state action to judicial review, but this will involve considerable costs, such as the ossification of other governmental bodies and the removal of flexibility and experimentation, while increasing the likelihood of judicial errors.

Enabling resistance, then, is integral to the judicial system because the alternative of subjecting every official action to judicial review is more than courts can or want to handle. Whether or not courts acknowledge the potential for resistance their decisions entail, there is an intuitive if not fully articulated position that legal controls are important only up to a point.

3. Courts Maintain the Symbolic Importance of the Rule of Law

When courts grant officials discretion to resist the law, they are undermining the general rule that public officials have a duty to obey the law. And yet, courts do not discuss their decisions in these terms. By obscuring the potential for resistance these doctrines engender, courts can maintain the ideal that government has an obligation to obey the law, and at the same time create a space for resistance that does not explicitly undermine that ideal. If the permission to resist were somehow codified, it would no longer be considered resistance, but the codification of an exception might decrease the respect for law that courts want to maintain.

Consider our attitude toward lawbreaking. We acknowledge that laws are occasionally violated by citizens and officials. We would feel very differently, however, if legal violations were governed by an explicit approval.[338] What bothers us is not so much the occasional vio-

337. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1135 (2009).

338. *See* Alon Harel & Assaf Sharon, *'Necessity Knows No Law': On Extreme Cases and Uncodifiable Necessities*, 61 U. TORONTO L.J. 845, 847–48 (2011).

lation, but the principled, systematic, or rule-governed violation. Think about torture. We may concede that in very extreme cases the state may use coercive measures. However, we would reject codifying a necessity exception into our prohibition of torture. Torture is such an affront to human dignity that even recognizing its acceptability in the form of a rule does violence to our categorical rejection of it as legitimate behavior. On this view, subjecting torture to a defense of necessity or duress is not the same as the ex ante authorization to engage in it.[339]

The explicit authorization to resist the law is more damaging to the ideal of the rule of law than a judicial doctrine that grants officials discretion to resist the law. With the latter, the rule of law is preserved in principle, and although officials may violate the law later on, it is they who will be criticized, rather than the system as a whole.

Those who favor judicial candor might take issue with this approach. Not admitting that courts are granting discretion to resist the law suggests that courts do not respect their audience's ability to handle the truth.[340] Yet, this criticism misses the mark. It is not precisely lack of candor, for if courts were to admit that they enable resistance, they would effectively undermine their authority to uphold the rule of law, at least on its formalist definition. It is not lack of respect inasmuch as it is courts' reluctance to undermine their own authority. Consider Justice Scalia's statement celebrating the ways agencies ignore statutory mandates.[341] It is no coincidence that the statement appears in a law review article and not in a judicial decision. If it were part of a decision, this would cast doubt on the court's ability, let alone willingness, to maintain the rule of law.

4. Determining the Scope of Resistance

If we were absolutists about compliance, legality, full remediation, and the rule of law, then these doctrines, as I have recast them, would be anathema. And yet they are not, suggesting that the facilitation of resistance is not only important, but that it is a task the legal system has taken upon itself to manage. Therefore the question that remains is whether courts can identify when resistance should be promoted and when it should be avoided. Can courts evaluate the potential benefits of resistance and factor them into their decisions? Can

339. *See* Alon Harel & Assaf Sharon, *What is Really Wrong with Torture?*, 6 J. INT'L CRIM. JUST. 241, 242–43 (2008).

340. *See* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736–37 (1987).

341. See *supra* text accompanying notes 233–35.

courts balance the potential benefits with the probable costs? And is there even a way to measure such things?

We cannot arrive at a general test that will guide courts on the optimal level of resistance. The doctrines are too different, a test will never be sensitive to the different contexts, and no one test will be able to gauge the consequences of a particular decision. It is impossible to determine, ex ante, how much "play in the joints" courts should enable.

Nevertheless, if enabling resistance is to be successful and context-sensitive, then three considerations should be taken into account. First, courts must acknowledge that the invocation of these doctrines grants officials discretion to resist the law or depart from judicial interpretations of the law. This acknowledgment does not necessarily have to be explicit,[342] but courts should be aware of the potential for resistance their decisions engender. Only if judges are aware of this potential will they be able to think through the benefits and problems posed by the facilitation of resistance.

Second, courts must have as much information as possible about the likely consequences of their decisions. The main difficulty here is not normative, but empirical. Even if courts should consider the consequences of their decisions, it is less clear whether they can foresee and evaluate them. The ability to gauge the outcomes of decisions that facilitate resistance is not apparent, but courts can and should learn from the outcomes of some of the cases discussed above to see whether resistance resulted from the granting of discretion and whether that resistance generated some or all of the aforementioned benefits.

Third, because facilitating resistance is grounded in pragmatic reasons, it is important that the discretion-granting doctrines be as flexible as possible. Indeed, most of the doctrines I described, although formalized to a point, are sufficiently elastic to calibrate based on particular events. The state secrets privilege, for example, provides very little in terms of judicial guidance, other than to leave the decision to the judge who enjoys a great deal of discretion. The tradeoff between transparency and possible harm to national security must be balanced, but there is no instruction how to perform such a balance. Similarly, when it comes to contempt of court, the Court has decided

342. It is possible to think of it as a type of "decision rule." *See* Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 HARV. L. REV. 625, 627 (1984) (distinguishing "conduct rules," which are addressed to the general public and designed to guide its behavior, and "decision rules," which are addressed to officials).

that individual officials can be found in contempt only when lesser restrictive means have been attempted. But it is the court that gets to decide which means are less restrictive, and whether those have been successful. Likewise, when a court considers whether an issue constitutes a political question, the criteria set in *Baker v. Carr* are sufficiently pliable so that the court's discretion is not seriously constrained.[343] Finally, even though state sovereign immunity doctrine provides sweeping protection, courts can adjust it when they decide on the application of qualified immunity. The requirement of "clearly established law" is hardly clear and can serve as a useful engine to develop constitutional law. Therefore, the already established contours of these doctrines give courts leeway when deciding on the scope of resistance in a particular case.

My analysis calls on courts to take stock of their capacity to enable resistance and to factor its implications into their reasoning. Such analysis would turn on the courts' ability to use instrumentalist concerns, something that they may be reluctant to undertake as courts have a preference for principles and line drawing.[344] But courts should internalize the costs of their decisions; they should be aware of the potential for resistance their decisions engender. While it is beyond the scope of this Article to predict how such decisions might look, the point I wish to press is that right now courts do not take this aspect into account at all.

CONCLUSION

We need to rethink our conventional understanding of courts as engaged solely in the task of enforcing the Constitution and the rule of law.[345] A significant part of the literature focuses on whether courts perform these tasks effectively. This Article suggests, however, that courts are also engaged in what may be termed as the opposite of constitutional enforcement: granting public officials discretion to resist the laws that they are otherwise bound to obey.

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343. *See* 369 U.S. 186, 217 (1962).

344. *But see* Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629 (2010) (arguing that the state system allows courts to take consequences into account).

345. *See* Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 81 (1991) (noting that judicial review is understood by many to be the "power of courts to keep legislatures and executives from violating fundamental rights").

How should we make sense of these contradictory functions? Up until now, the preferred way was to give an account of each of the resistance enabling doctrines, usually separately, and explain how they contribute to a particular constitutional understanding. Standing doctrine has been justified based on the judiciary's institutional competence to resolve particularized disputes, not generally shared grievances. Political question doctrine uses the language of institutional competence by suggesting that some controversies should be reserved for the political branches. State sovereign immunity is justified on federalism grounds and protecting state treasuries. Similarly, contempt of court doctrine is justified based on respect for local autonomy and the judicial reluctance to intervene in long-running complicated disputes. Finally, the state secrets privilege is rationalized based on the desire to protect national security.

These justifications have merits, but in separating these doctrines we overlook a common thread. As many have noted, some of these doctrines allow courts to duck issues they do not want to address. This observation, though correct, is court-centered. Less examined are the effects these doctrines have on non-judicial actors. It is only when we think about these doctrines as granting officials discretion to resist the law that we can appreciate this aspect of the courts' work and the implications it has for public officials.

Recognizing this aspect is not tantamount to endorsing it. In a society that cares deeply about the rule of law an argument that there might be some virtues in courts enabling lawbreaking is anomalous. Of course, courts do not *have to* engage in this task. None of the doctrinal developments I described were necessary or preordained. Indeed, courts have ways to minimize this granting of discretion. They can whittle down sovereign and qualified immunity protections, allow taxpayer suits, and narrow the scope of the state secrets privilege. And yet, I have suggested that there are politically attractive ends that may result from this enabling function. The question, of course, is whether we can sensibly develop an approach that isolates desirable resistance. I do not believe such a general, one-size-fits-all approach is possible. The real value, then, is in starting a conversation that discusses these doctrines in the terms I have offered, and in encouraging focused, contextual, and fact-sensitive analyses in specific cases.