DUCKING DRED SCOTT: A RESPONSE TO ALEXANDER AND SCHAUER

Emily Sherwin[*]

In their article entitled "On Extrajudicial Constitutional Interpretation,"[1] Larry Alexander and Frederick Schauer promise to provide an "unqualified" defense of the rule of judicial supremacy announced in *Cooper v. Aaron*.[2] According to that rule, government officials must obey the Constitution as it has been interpreted by the Supreme Court, even when they disagree with the Court's interpretation.[3] They are not free to follow their own judgment of what the Constitution requires. The Court has lately reaffirmed the rule of obedience, holding in *City of Boerne v. Flores*[4] that Congress may not work substantive changes in constitutional interpretation through Section 5 of the Fourteenth Amendment. I do not propose to quarrel with the Court, or with Alexander's and Schauer's endorsement of *Cooper v. Aaron*. My point is that Alexander and Schauer have not gone far enough to accomplish what they would like to accomplish. In fact, their argument is qualified in a very important way.

Alexander and Schauer base their defense of the rule of obedience to Supreme Court decisions on the "settlement function" of law. The primary object of law, in their view, is "to settle authoritatively what is to be done" in contested situations, which in turn will promote social stability and enable individuals to coordinate their actions in mutually beneficial ways.[5] The potential benefits of settled law provide a "content-independent" reason why individuals should obey the law even when they

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* Professor of Law, University of San Diego. Thanks to Larry Alexander for comments.

1. Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359 (1997) ("Alexander and Schauer").
2. 358 U.S. 1 (1958).
3. Alexander and Schauer at 1359-63 (cited in note 1).
4. 117 S. Ct. 2157 (1997).
5. Alexander and Schauer at 1371 (cited in note 1).

disagree with its commands.[6] The authority of Supreme Court decisions interpreting the Constitution stands on the same ground: "[t]he reasons for having laws and a constitution that is treated as law are . . . also reasons for establishing one interpreter's interpretation as authoritative."[7]

I find this argument at least potentially persuasive. Settlement, stability, and coordination are important goods that can only be had through a general practice of obedience to rules. They are not the only goods a society might pursue, and few would maintain that they are entitled to lexical priority. Moreover, obedience to decisions of the Supreme Court is certain to result in errors: sometimes the President or Congress will be right and the Court will be wrong. Yet if we expect that the benefits of obedience to Supreme Court decisions are greater than the harm obedience will cause through error, a rule of obedience is justified. I am willing to assume, with Alexander and Schauer, that this is the case, even though the Court will make mistakes and may never correct them.

The weak spot in Alexander's and Schauer's argument emerges when they come to *Dred Scott*.[8] Having set out their case for a rule of obedience to Supreme Court decisions, they now anticipate an objection: surely Lincoln was right to threaten disobedience to parts of the Court's holding in *Dred Scott*. To avoid this difficulty, they explain that the obligation they have been defending is in fact only one "overrideable" reason that ought to play a part in official judgment. All things considered—including the obligation to obey—Lincoln was right to disobey the Court. Alexander and Schauer insist that this concession does not undermine their argument:

> It just means that [the wrong of disobedience] was outweighed by the greater wrong that would have occurred had the war been lost. Once we see that overrideable obligations are still obligations, we need not say that Lincoln should have followed *Dred Scott*.[9]

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6. Id. On the capacity of laws that solve coordination problems to create reasons for action, see Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. Legal Stud. 165, 172-86 (1982); Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. Cal. L. Rev. 995, 1006-18, 1028-31 (1989); Joseph Raz, *The Morality of Freedom* 49-50 (Oxford U. Press, 1986).

7. Alexander and Schauer at 1377 (cited in note 1).

8. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). See Alexander and Schauer at 1382-83 (cited in note 1).

9. Alexander and Schauer at 1382. In a footnote, Alexander and Schauer mention the possibility that a "Legal Realist" might be skeptical about the effectiveness of

Thus, the rule of obedience that Alexander and Schauer propose is not a *serious* rule—a rule to be followed in every case to which it applies. It is simply a consideration, of some undetermined weight, in favor of official obedience in most cases. For reasons I will explain, this apparently subtle distinction between a serious rule of obedience and a reason to obey introduces a crucial qualification to Alexander's and Schauer's defense of *Cooper v. Aaron*. From the perspective of personal morality, it is surely true that officials sometimes ought to disobey a decision of the Supreme Court.[10] But from the systemic perspective Alexander and Schauer are taking, *Cooper v. Aaron* is of little value unless it means that Lincoln should have abided by *Dred Scott*.

As Alexander and Schauer say, the justification for a rule of obedience to Supreme Court decisions lies in the benefits of authoritative settlement: stability, reliability, and coordination.[11] While these goods may sometimes be outweighed by other ends or values, it does not follow that the rule of official obedience should be something less than a serious rule. The problem, as Alexander and Schauer recognize, is that in judging the relative weight of settlement values and other goods, officials are likely to err; and if they err more often than not, a serious rule ensures the best results overall.[12]

Settlement values are particularly vulnerable to several sorts of error. The first is a cognitive bias in favor of data that are specially salient and therefore readily "available" to the decision-maker.[13] For example, studies show that in assessing risks, people are strongly influenced by vivid accounts of particular events: the disasters we judge to be most frequent are those that receive the most dramatic coverage in the news.[14] This bias in

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presumptive or overrideable obligations, but maintain their own conviction that an overrideable obligation is capable of constraint. Id. at 1382-83 n.93. I intend to take up the skeptical position, though without endorsing the tenets of Legal Realism.

10. On the irrationality of obedience to rules with which one disagrees, see Heidi M. Hurd, *Challenging Authority*, 100 Yale L.J. 1611, 1625-28 (1991).

11. Serious rules, demanding obedience, are sometimes justified by the superior information or epistemic reliability of the rule-maker, but this is a difficult claim to make on behalf of the Supreme Court in relation to other branches of government.

12. Alexander and Schauer at 1375 (cited in note 1) (discussing error).

13. Cognitive biases in favor of available data are discussed in Amos Tversky and Daniel Kahneman, *Availability: A Heuristic For Judging Frequency and Probability* in Daniel Kahneman, et al., eds., *Judgment Under Uncertainty: Heuristics and Biases* 163-78 (Cambridge U. Press, 1982).

14. See Paul Lovic, et al., *Facts Versus Fears: Understanding Perceived Risk* in *Judgment Under Uncertainty: Heuristics and Biases* at 463, 464-72 (cited in note 13). See also Amos Tversky and Daniel Kahneman, *Evidential Impact of Base Rates* in *Judgment*

favor of available information is likely to work against settlement values when they compete with goods such as equality. Issues of equality are salient because they refer to relatively concrete facts and are associated with the immediate fate of human beings. Settlement values, in contrast, are more remote and abstract. Therefore, the demands of equality are likely to be more prominent in the decision-maker's calculations, while the need for settlement recedes.

A second, related reason why settlement values may be undervalued is a problem of coordination among officials. From the perspective of an official considering whether to obey a decision of the Supreme Court, a single instance of disobedience will not appear as a serious threat to the stability, reliability, and coordinating effects of constitutional law as a whole.[15] Settlement values, in other words, are cumulative values—values that make sense only in terms of their overall effect when pursued in a large number of cases. A value such as equality carries its full weight in each case in which it arises. Stability, on the other hand, is not important in any particular case, viewed apart from all other cases. This makes it easy for an official decision-maker facing a single decision to conclude that the effects of disobedience on stability are vanishingly small, while equality (or some other value) looms large.

As long as errors of this kind occur, and as long as their cumulative effect is greater than the sum of errors that would follow from obedience, there is reason, from a systemic perspective, to insist that all officials must obey the decisions of the Court, in all cases.[16] Yet once Alexander and Schauer concede that Lincoln was not bound to obey the rulings of the Supreme Court, the rule of obedience is bound to unravel. Every official who concludes that settlement values are outweighed by other

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Under Uncertainty: Heuristics and Biases at 153-60 (cited in note 13) (specific information favored over base rate information); Richard E. Nisbett, et al., *Popular Induction: Information Is Not Necessarily Informative* in *Judgment Under Uncertainty: Heuristics and Biases* at 101-16 (cited in note 13) (personalized information favored over generalized "consensus" information or abstract information).

15. See Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 Mich. L. Rev. 2203, 2277-78 (1992) (discussing potential judicial errors in deciding whether to enforce legislative rules).

16. Alexander himself has made this point on several occasions. See Larry Alexander, *The Gap*, 14 Harv. J.L. & Pub. Pol. 695 (1991); Larry Alexander and Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. Pa. L. Rev. 1191, 1197-98 (1994). Schauer, too, has recognized the "asymmetry" between a governing authority and those it governs, which makes it rational for the authority to enact and enforce rules. Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 130-33 (Oxford U. Press, 1991).

values in a given case will see himself as another Lincoln, and at least some of these officials will be wrong. If it turns out that the benefits of pluralist interpretation outweigh the loss of settlement values, then we do not need a rule of obedience but only an occasional reminder that officials ought to bear in mind the benefits of authoritative settlement. But if the harm to settlement values is likely to be greater over the run of cases than the errors that follow from obedience, the solution must be a serious rule, applicable even to Lincoln. Settlement values may in fact be morally tradeable against other values, but a rule designed to protect them against miscalculation in particular cases cannot admit that they are tradeable.

At this point, Alexander and Schauer might respond that the rule of obedience need not be a serious rule as long as it has an appropriate dimension of weight.[17] Rather than a requirement of obedience in every case, there should be a presumption in favor of obedience, which can only be dispelled by a very strong competing good. In this way, Lincoln is excused; *Dred Scott* is ducked.

Appealing as this suggestion may be, it simply will not work in a reliable way. Consider what the actual content of a rule of presumptive obedience might be. It might hold, for example, that officials must obey the Supreme Court's interpretations of the Constitution unless the harm to other values will be at least as great as the harm that disobedience will cause to settlement values. Or it might hold that officials contemplating disobedience must give settlement values at least three times their natural weight in deciding what to do.

One difficulty with these solutions is that they leave it to the official decision-maker to determine the natural weight of settlement values. If the decision-maker gives little or no weight to goods such as stability, three times that weight is still negligible. If, as is more likely, decision-makers normally do recognize the importance of authoritative settlement, they nevertheless will vary considerably in their quantitative conclusions. Would-

17. Schauer has proposed a method of decision-making he calls "presumptive positivism," in which rules have a "strong but overrideable priority." Schauer, *Playing By the Rules* at 204 (cited in note 16); Frederick Schauer, *Rules and the Rule of Law*, 14 Harv. J. L. & Pub. Pol. 645, 665-679 (1991). Ronald Dworkin has argued that law is made up not only of rules but also of legal "principles" that are not absolute but have a "dimension of weight." Ronald Dworkin, *The Model of Rules I* in *Taking Rights Seriously* 14, 25-27 (Harvard U. Press, 1977). See also Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 Oxford J. Legal Stud. 215, 239-43 (discussing the weight to be given to judicial precedents).

be Lincolns will continue to err, and their errors may still exceed the errors associated with a serious rule of obedience. In any event, there will be no authoritative settlement of the question when to disobey.

A further difficulty is that a weighted presumption is no less arbitrary from the decision-maker's point of view than a serious rule. It is not rational for a decision-maker to follow a serious rule when, after giving due consideration to the epistemic pedigree of the rule and the settlement values that support a serious rule, the decision-maker disagrees with its result. But it is no more rational for the decision-maker to give settlement values three times their natural weight when, with due regard for the benefits of a threefold presumption, he disagrees with its results.[18] In either case, nothing can make obedience rational except a credible threat of sanctions against those who disobey.

This raises a further question, whether sanctions could ever be applied to enforce a weighted presumption. A serious rule has the advantage of determinate application: there may be disagreement about the meaning of a Supreme Court decision, but once its meaning is ascertained, any disobedience is a violation of the rule. Determining whether a decision-maker deserves to be sanctioned for violation of a weighted presumption is a far more complex task. Whoever judges the decision-maker must first quantify the value of settlement and other goods in the context of the disputed decision and then decide whether the decision-maker's own valuations were culpably amiss. It follows that a weighted presumption is practically, if not conceptually, meaningless.

Thus, if we assume, as Alexander and Schauer assume, that over the long run the sum of errors by officials, including their underestimation of settlement values, will exceed the errors brought about by obedience to decisions of the Court, then the best way to protect settlement values is to impose a serious rule of obedience on officials. Hard cases, including Lincoln's, must be included. Anything less leaves the Constitution less effective than it might be as a source of law.

At the same time, the practical effect of a rule of obedience, however serious, is dependent on the sanctions that attach to disobedience. The fact that a serious rule of obedience may be

18. Gerald Postema has made this point. Gerald J. Postema, *Positivism, I Presume? . . . Comments on Schauer's "Rules and the Rule of Law"*, 14 Harv. J. L. & Pub. Pol. 797, 813-17 (1991).

justified from a systemic perspective does not make it rational for an official to obey when he believes it is right to disobey, all things considered. The only way to reconcile these two points of view is by imposing sanctions that alter the balance of reasons for action in the mind of the official. While a serious rule is much easier to enforce than a weighted presumption, sanctions against government officials for violating a rule of constitutional interpretation will always be far from perfect. There is no mechanism for punishment, and *Bivens*-like sanctions are limited.[19] A clear statement by the Supreme Court that officials are bound to obey its decisions may increase political penalties for disobedience, simply because it marks alternative interpretations as direct challenges to the Court and the stability of constitutional law. But the ultimate duty to obey will never be greater than the combined effect of formal and informal sanctions. To some extent, therefore, constitutional interpretation falls outside the reach of the rule of law. Lincoln must obey, but this does not ensure that he will obey.

19. *Bivens v. Six Unknown Agents Federal Bur. Narcotics*, 403 U.S. 388 (1971).