NONJUDICIAL CONSTITUTIONAL INTERPRETATION, AUTHORITATIVE SETTLEMENT, AND A NEW AGENDA FOR RESEARCH

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During the past decade,[1] a lively debate has been percolating in an area of legal scholarship that has examined what has been variously described as departmentalism, constitutional Protestantism, coordinate construction, and nonjudicial constitutional interpretation.[2] While exploring

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1. One should note that there is, of course, scholarship on nonjudicial interpretation that predates this period. See, e.g., James B. Thayer, *The Origin and the Scope of the American Doctrine of Constitutional Law,* 7 Harv. L. Rev. 129 (1893); Archibald Cox, *The Role of Congress in Constitutional Determinations,* 40 U. Cin. L. Rev. 199 (1971); Jesse Choper, *Judicial Review and The National Political Process* (U. of Chicago Press, 1980); John Agresto, *The Supreme Court and Constitutional Democracy* (Cornell U. Press, 1984). Regardless, the point remains that a flurry of interest in this topic seems to have developed relatively recently.

Some of the contemporary attention directed at nonjudicial constitutional interpretation seems to have been generated by a 1986 speech delivered by then Attorney General Edwin Meese, in which Meese argued that "constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government." Edwin Meese III, *The Law of the Constitution,* 61 Tul. L. Rev. 979, 985 (1987). Meese's remarks prompted a number of responses from scholars and public officials and helped focus attention on constitutional interpretation by nonjudicial actors. See generally, Symposium, *Perspectives on the Authoritativeness of Supreme Court Decisions,* 61 Tul. L. Rev. 977 (1987).

2. See, e.g., Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter,* 48 Rev. Pol. 401 (1986) (on "departmentalism"); Sanford Levinson, *Constitutional Faith* 27-53 (Princeton U. Press, 1988) (on constitutional "Protestantism"); Choper, *Judicial Review and The National Political Process* (cited in note 1) (on "coordinate construction"); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution,* 24 Hast. Const. L.Q. 359 (1997) (on "nonjudicial constitutional interpretation").

This is certainly not an exhaustive list of the terms that have been used in this area of research. See, e.g., Keith Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution,* 9 Stud. Am. Pol. Dev. 55, 56 (1995) (describing "con-

a wide range of theoretical issues and analyzing disparate circumstances and phenomena, this work is loosely unified by its general skepticism regarding claims that the federal judiciary has exclusive authority in interpreting the Constitution, and its focus on what for many years has been an underdeveloped research topic: constitutional interpretation occurring outside the courts.

The proliferation of this scholarship has produced two unsurprising consequences. First, the suggestion by numerous scholars that we should give greater attention to nonjudicial constitutional interpretation has provoked something of a normative backlash by defenders of judicial supremacy—the doctrine that the Supreme Court has the ultimate say in interpreting the Constitution. Perhaps most prominent in these critiques is the claim that recognizing the interpretive authority of nonjudicial actors would jeopardize the authoritative settlement function of law.[3] Second, while the swell of interest in interpretation outside the courts has generated a growing body of sophisticated scholarship and the evaluation of an increasingly wide ambit of legal and political problems, it has also tended to obscure precisely what is being analyzed, and has led to numerous scholars needlessly talking past one another instead of attempting to build upon and integrate their diverse research projects.

Two recent articles, *On Extrajudicial Constitutional Interpretation* by Larry Alexander and Frederick Schauer[4] and *Ducking* Dred Scott*: A Response to Alexander and Schauer* by Emily Sherwin,[5] reflect these two developments and serve as useful entry points for considering the strengths and weaknesses of the burgeoning body of scholarship examining alternatives to judicial supremacy. On the one hand, several flaws in these authors' analyses can be attributed to their mistaken and undeveloped assump-

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stitutional construction" by Congress). For convenience, I will use the terms "nonjudicial constitutional interpretation" or "nonjudicial interpretation" to refer generally to this diverse body of work.

3. See, e.g., Paul Brest, *Meese, the Lawman, Calls for Anarchy,* New York Times E25 (Nov. 2, 1986); Burt Neuborne, *The Binding Quality of Supreme Court Precedent,* 61 Tul. L. Rev. 991, 1000 (1987).

4. Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation,* 110 Harv. L. Rev. 1359 (1997).

5. Emily Sherwin, *Ducking* Dred Scott*: A Response to Alexander and Schauer,* 15 Const. Comm. 65 (1998).

tions about the meaning and implications of a normative commitment to nonjudicial constitutional interpretation. But a second set of shortcomings in these two essays points not only to problems inherent in these texts, but to difficulties that tend to afflict the entire body of work examining nonjudicial interpretation, whether critical or supportive; thus, some of the weaknesses in Alexander, Schauer, and Sherwin's analyses mirror defects in the relevant legal literature as a whole.

This essay begins by examining the arguments presented in *On Extrajudicial Constitutional Interpretation* and *Ducking* Dred Scott to illustrate a general set of misconceptions that permeate work criticizing calls for a greater diffusion of interpretive responsibility, misconceptions that could be corrected by a closer review of existing scholarship and a greater appreciation for the ways in which scholars sympathetic to nonjudicial interpretation could respond to many of the objections leveled against their research. On the basis of this preliminary analysis, one might well conclude that research generally supportive of constitutional interpretation outside the courts is in a healthy, robust state, and deserves more nuanced treatment in future scholarly exchanges. But in reviewing a second set of defects that run through Alexander, Schauer, and Sherwin's analyses, this essay suggests that much important work remains to be done for both those advocating and those resisting a movement away from an interpretive system dominated by the courts.

I. LEGAL SETTLEMENT, CONSTITUTIONAL INTERPRETATION, AND THE SUPREME COURT

On Extrajudicial Constitutional Interpretation makes a case against the position "that judges should not be the exclusive and authoritative interpreters of the Constitution."[6] According to the authors, the nature and function of law requires authoritative constitutional interpretation by the federal judiciary overseen by the Supreme Court, an arrangement that will best safeguard the values of "settlement and stability."[7] Accordingly, Alexander and Schauer

6. Alexander and Schauer, 110 Harv. L. Rev. at 1359 (cited in note 4).
7. Id. at 1380.

embrace "judicial primacy without qualification,"[8] and urge nonjudicial officials to demonstrate interpretive "deference" in the face of this primacy. Even if an official deems a Supreme Court decision mistaken, he or she should give the Court wide latitude[9] to ensure that the law remains stable and determinate.[10] As the authors put it, "at times good institutional design requires norms that compel decisionmakers to defer to the judgments of others with which they disagree."[11]

Alexander and Schauer's argument rests on three central claims, each of which can be distinguished and criticized on its own terms. First, their analysis suggests that the benefits yielded by authoritative settlement—stability, reliability, and coordination—are preeminent constitutional and legal values. Second, they assert that these values can only be secured through a single authoritative interpreter. Finally, they make a case that this role is best served by the Court.

The first proposition in Alexander and Schauer's overall argument is that "authoritative settlement" is an essential aspect of constitutionalism.[12] The authors defend this settlement function as a critical aspect of all law, and as especially important in a constitutional context, where a constitution's claim to supremacy over other forms of law makes it a particularly suitable basis for coordinating and stabilizing legal decisions.[13] An authoritative constitution (presided over by an authoritative interpreter) settles "what ought to be done" in a pluralistic society by provid-

8. Id. at 1362.

9. "Wide latitude" is not synonymous with absolute deference, of course, and Alexander and Schauer's concession that nonjudicial actors' responsibility to uphold the Court's rulings are "overridable" serves as the basis of Sherwin's critique of their argument. See id. at 1382 (discussing Lincoln's justification in resisting the Court's decision in *Dred Scott v. Sanford*, 60 U.S. 393 (1857) despite his general obligation to support its decisions); see also text accompanying notes 45-49 (describing Sherwin's objection to Alexander and Schauer's analysis).

10. Unless otherwise noted, I will associate this basic position of Alexander and Schauer's with the term "judicial supremacy."

11. Alexander and Schauer, 110 Harv. L. Rev. at 1387 (cited in note 4).

12. Id. at 1371.

13. Alexander Bickel made something of the same argument in suggesting that there is "a strong interest . . . in the uniform construction and application of the Constitution as against inconsistent state law throughout the country." Alexander Bickel, *The Least Dangerous Branch* 13 (The Bobbs-Merrill Co., Inc., 1962). Given this need for uniformity, Bickel concluded that "it is obviously sensible to lodge the [coordinating] function . . . [chiefly] in the federal judiciary." Id.

ing "uniform decisions on issues as to which people have divergent substantive views and personal agendas."[14] Authoritative law, they argue, also helps coordinate atomistic, self-interested actors and promote common interests that might otherwise be hard to achieve.[15] In addition, "settlement for settlement's sake"[16] may be essential in providing a stable environment or medium particularly conducive to certain desirable social objectives—like economic growth.[17] Finally, we might value law's stability to promote a sense of "law abidingness" and reverence for the law amongst politicians and citizens.[18]

Alexander and Schauer conclude that in order to provide the goods associated with legal settlement and stability, we must bolster the Constitution's authority, "and intrinsic to the concept of authority is that it provides content-independent reasons for action."[19] After the courts supply an authoritative resolution to a constitutional issue, other officials should defer to this ruling regardless of whether they support the outcome or its underlying justification, simply because a decision has been made. "[A]n authoritative constitution has normative force even for an agent who believes its directives to be mistaken."[20] In the eyes of Alexander and Schauer, it is more important to get things settled than to get them right, at least with respect to constitutional law and interpretation.[21]

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14. Alexander and Schauer, 110 Harv. L. Rev. at 1376 (cited in note 4).

15. An example of this might be what Mancur Olson identified as "public goods," goods whose attainment is frustrated by individual incentives to avoid contributing to them. See Mancur Olson, Jr., *The Logic of Collective Action* (Harvard U. Press, 1965). While Alexander and Schauer do not mention Olson by name, their analysis here is certainly consistent with his work.

16. Alexander and Schauer, 110 Harv. L. Rev. at 1376 (cited in note 4).

17. For the argument from economics, see the studies collected in George J. Stigler, ed., *Chicago Studies in Political Economy* (U. of Chicago Press, 1988).

18. Alexander and Schauer, 110 Harv. L. Rev. at 1375 (cited in note 4). Cf. Federalist 25 (Hamilton), *The Federalist Papers* 162, 167 (Arlington House, 1966), Federalist 49 (Madison) at 315 (discussing the value of "reverence" for the law); Sanford Levinson, *"Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment,* 21 Tex. Tech L. Rev. 2443, 2452-55 (1990) (discussing legal veneration and constitutional change).

19. Alexander and Schauer, 110 Harv. L. Rev. at 1361 (cited in note 4).

20. Id.

21. Id. at 1363. In this way, Alexander and Schauer's position appears to mirror that adopted by Supreme Court Justice Robert H. Jackson in *Brown v. Allen,* 344 U.S. 443, 540 (1953) (Jackson, J., concurring) in which he stated that "[w]e [members of the Court] are not final because we are infallible, but we are infallible only because we are final." Of course, regardless of whether Jackson's point is desirable as a normative proposition, its empirical validity has certainly been disputed. See, e.g., Gant, 24 Hast.

The difficulty at this initial stage of Alexander and Schauer's argument is not so much their contention as their emphasis. Settlement and stability are indeed critical constitutional values and their promotion should be an important consideration in thinking about who should interpret the Constitution. But the overall tenor of Alexander and Schauer's remarks suggests that instead of being one value in competition with others, legal settlement has a determinative or trumping normative force. To be fair, the authors do note that "[s]tability and coordination are not the only functions that a constitution serves,"[22] and go even further to suggest that "at times [nonjudicial] decisionmakers will, and should, conclude that reaching the morally correct result in the instant case is worth weakening the institution [the Supreme Court] that is expected to produce the morally best array of decisions in the long term."[23]

Notwithstanding these qualifications, however, there remain "good reasons for society to compel . . . officials to follow laws and interpretations that the officials believe to be mistaken."[24] At the end of the day, the settlement and coordination functions of law must weigh heavily in our political calculus and we must not forget that "an important—*perhaps the important*—function of law is its ability to settle authoritatively what is to be done."[25] The overall implication of their argument is that we ought to structure our system of constitutional interpretation to give the values of "stability and coordination" the highest priority.

But emphasizing the connection between constitutional interpretation and legal stability might compromise other constitutional commitments, especially in the absence of any understanding of what institutional and political mechanisms will be used to advance and protect these ends. Consider, in this regard, the remarks of former Attorney General Edwin Meese: "[e]ach of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the

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Const. L.Q. at 399 (cited in note 2) (explaining that judicial decisions are "never truly final").

22. Alexander and Schauer, 110 Harv. L. Rev. at 1376 (cited in note 4).

23. Id. at 1382-83 n.93.

24. Id. at 1375.

25. Id. at 1377 (emphasis added).

performance of its official functions."[26] There are at least three general ways in which the fundamental operations and purposes of the three branches of government might well be compromised if constitutional interpretation were relegated solely to the courts.[27]

First, each department must interpret the Constitution as part of the performance of *enumerated duties.*[28] Absent some independent constitutional interpretation, we might wonder, for example, how Senators would comprehend and apply their "Advice and Consent" responsibilities to the peculiarities of each confirmation case, or how Presidents would know what "extraordinary Occasions" justified their convening either or both houses of Congress.[29] The need for nonjudicial interpretation in understanding and exercising these and other duties seems particularly pressing in a constitutional system like that of the United States, in which federal powers are understood as enumerated and limited. Presidents and Congresses seeking to exercise their constitutional tools and prerogatives need, at a mini-

26. Meese, 61 Tul. L. Rev. at 985-986 (cited in note 1). Cf. James Madison, 4 *Letters and Other Writings of James Madison* 349 (J.B. Lippincott & Co., 1867) (stating that "each [branch of government] must in the exercise of its functions be guided by the text of the Constitution according to its own interpretation of it").

27. One might object that this argument inappropriately conflates judicial supremacy with "judicial exclusivity," the notion that the courts *alone* can determine constitutional meaning. Allowing the courts to offer authoritative constitutional interpretations need not crowd out nonjudicial interpretation that is ultimately respectful of the courts' supreme interpretive position. See, e.g., Gant, 24 Hast. Const. L.Q. at 390 (cited in note 2) (arguing for a system of judicial supremacy that still encourages "the participation of nonjudicial actors in the interpretive process").

While it is true that judicial supremacy *need* not foreclose subordinate nonjudicial interpretation, one might wonder how meaningful, effective, and energetic these interpretations would be in an environment ultimately controlled and supervised by the judiciary, especially in a political system premised on giving vent to ambition through individually rewarding (and publicly beneficial) political actions. Cf. Thayer, 7 Harv. L. Rev. at 155-56 (cited in note 1) (arguing that the rise of judicial supremacy will lead to Congress' increasing reluctance to consider constitutional questions independently). At any rate, Alexander and Schauer insist that nonjudicial agents should, on the whole, refrain from *any* sort of independent interpretation, even where this does not appear to conflict with existing Court decisions. See Alexander and Schauer, 110 Harv. L. Rev. at 1385 (cited in note 4). For Alexander and Schauer, judicial supremacy *does* seem largely synonymous with judicial exclusivity.

28. See generally Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (forthcoming, 1999) (analyzing several different moments of "constitutional construction" by nonjudicial actors and demonstrating how these constructions critically informed the meaning of important constitutional provisions).

29. See U.S. Const., Art. II, § 2, cl. 2 (outlining the Senate's "Advice and Consent" duties) and U.S. Const., Art. II, § 3 (the President "may, on extraordinary Occasions, convene both Houses, or either of them").

mum, to comprehend the basic parameters of these powers.[30]

In addition to invoking understandings of the Constitution as part of the fulfillment of particular duties, each department must rely on interpretation in its cultivation and assertion of a distinctive *institutional role,* that is related to, but not wholly subsumed by, the specific obligations and powers laid out in the constitutional text.[31] Thus, for example, the President's conception of "the executive Power"—and the special responsibilities it gives rise to—should draw upon not just formally delineated Article II activities, but the purposes and aspirations of the Constitution as a whole.

Nonjudicial constitutional interpretation might also play a critical part in helping to fulfill *incidental departmental functions,* that is, special operations or tasks that are performed secondarily, in the course of pursuing enumerated duties and assumed institutional roles. For example, in addition to their particular functions and more general responsibilities to the republic and its citizenry, legislative, executive, and judicial officials contribute (often unwittingly) to an overall institutional scheme in which liberty is preserved through countervailing powers.[32] While consigning interpretive processes to the courts might reduce certain kinds of interinstitutional conflict, the very reduction of this conflict would also work against some of the goals of the constitutional separation of powers.[33]

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30. Concern for the former issue seems to have been the impetus behind the "Enumerated Powers Act," a bill introduced on January 7, 1997, by Rep. John Shadegg, "[t]o require Congress to specify the source of authority under the United States Constitution for the enactment of laws, and for other purposes." The bill's second section specified that "[e]ach Act of Congress shall contain a concise and definite statement of the constitutional authority relied upon for the enactment of each portion of that Act. The failure to comply with this section shall give rise to a point of order in either House of Congress." H.R. 292, 105th Cong., 1st Sess. (Jan. 7, 1997).

31. Cf. Jeffrey K. Tulis, *The Rhetorical Presidency* 41-45 (Princeton U. Press, 1987) (examining the distinctive constitutional roles of each of the federal departments).

32. Federalist 51 (Madison) (cited in note 18) (explaining how the Constitution preserves liberty and avoids tyranny by "divid[ing] and arrang[ing] the several offices in such a manner as that each may be a check on the other").

33. We might recall in this regard Justice Louis Brandeis' dissent in *Myers v. United States,* 272 U.S. 52, 293 (1926) in which he argued that "the doctrine of the separation of powers was adopted [not] to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." But see Louis Fisher, *The Allocation of Powers: The Framers' Intent* in Barbara B. Knight, ed., *Separation of Powers in the American Political*

One should note that none of the independent interpretive activities discussed here need threaten the autonomy or even the ultimate authority of the courts. Instead, they could simply provide helpful legal and political information to nonjudicial and judicial bodies alike, clarifying the different departments' understanding of basic constitutional responsibilities and powers. At any rate, even where legal stability or settlement might be compromised by nonjudicial interpretations, this increase in instability would have to be measured against the accruing benefits.

Setting aside Alexander and Schauer's claims about the primacy of legal settlement and the need for an "authoritative constitution" to achieve this stability, it is still questionable whether the next component of their argument follows—that this stability can only be achieved by a single interpreter. Alexander and Schauer briefly consider the possibility that "each official [would] decide for herself what the Constitution requires" but they dismiss this approach as not sufficiently supporting the settlement function of constitutional law.[34] "To the extent that the law is interpreted differently by different interpreters, an overwhelming probability for many socially important issues [under the multiple-interpreter model], it has failed to perform the settlement function."[35]

Both as an analytic and empirical question, this argument against interpretive pluralism is certainly worthy of debate. Alexander and Schauer's commitment to a strict regime of judicial supremacy in the name of legal stability seems to ignore other creative, flexible, and pragmatic interpretive arrangements that do not obviously foster legal instability. A review of recent scholarship and past American political practices provides substantial evidence that vigorous nonjudicial constitutional interpretation need not produce confusion about constitutional meaning or an obvious degeneration of the settlement function of law.[36] In-

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System (George Mason U. Press, 1989) (arguing that the American separation of powers *was* designed to promote efficient administration).

34. Alexander and Schauer, 110 Harv. L. Rev. at 1377 (cited in note 4).

35. Id.

36. See, e.g., David Currie, *The Constitution in Congress: The Federalist Period 1789-1801* at 296 (U. of Chicago Press, 1997) (illustrating numerous instances of nonjudicial constitutional interpretation in the early years of the republic and noting that "[d]uring a period in which the Supreme Court wrote opinions in only a handful of constitutional cases, Congress and the executive resolved a breathtaking variety of constitu-

deed, several scholars have argued that a greater diffusion of interpretive responsibility might allow for what is ultimately a deeper consensus about constitutional meaning as a variety of political actors engage in and legitimate the interpretive process.[37]

Notwithstanding these observations, one might accept part of Alexander and Schauer's argument—that the courts are essential for promoting legal stability—without adhering to their conclusion that we must therefore embrace them as the authoritative and exclusive interpreters of the Constitution. Alternatively, we could see the courts as part of an interpretive system in which the "structures of each branch [are] differentiated in order to equip each branch to perform different tasks."[38] Thus, protecting legal settlement and stability could be part of the special responsibilities of the courts while the other branches invoke the Constitution in pursuit of their specialized institutional roles and responsibilities.[39]

Even if one accepts the first two components of Alexander and Schauer's argument—that legal settlement is a critical value of constitutionalism, and that it is best pre-

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tional issues great and small"); Choper, *Judicial Review and The National Political Process* at 260-379 (cited in note 1) (outlining a number of occasions in which the legislative and executive branches negotiated issues touching on questions of constitutional meaning without prompting a legal or political impasse); Louis Fisher, *Presidential War Power* (U. Press of Kansas, 1995) (explaining how the parameters of presidential war powers in the 19th century were gradually established through back-and-forth political processes between Congress and the President); Whittington, *Constitutional Construction* (cited in note 28) (portraying moments of nonjudicial constitutional construction including the impeachments of Supreme Court Justice Samuel Chase and President Andrew Johnson, the nullification crisis, and reforms of presidential-congressional relations during the Nixon era); Susan R. Burgess, *Contest for Constitutional Authority: The Abortion and War Powers Debates* 113 (U. Press of Kansas, 1992) (noting that "[t]he practice of departmentalism in [her] abortion case [study] did not create anything as drastic as chaos or anarchy").

37. See Gary Jacobsohn, *Supreme Court and the Decline of Constitutional Aspiration* 10 (Rowman & Littlefield, 1986) (arguing for a model of constitutional interpretation built upon "a collective enterprise involving the inputs of more than one institution" and the public); Burgess, *Contest for Constitutional Authority: The Abortion and War Powers Debates* at 23 (cited in note 36) (suggesting that interpretive pluralism "should broaden constitutional authority and remind disputants of their similarities, even as they strive to clarify grounds for their differences").

38. Tulis, *The Rhetorical Presidency* at 41 (cited in note 31).

39. This conception of constitutional interpretation is hardly alien to American politics. It seems fully consistent with Abraham Lincoln's views in resisting the Court's decision in *Dred Scott*. See Don E. Fehrenbacher, ed., 1 *Abraham Lincoln: Speeches and Writings 1832-1858* at 741 (Library of America, 1989) (explaining that while he will recognize all Court decisions protecting the interests of slave owners, he will nevertheless oppose those decisions "as a political rule").

served by an authoritative interpreter—their analysis still depends upon the additional claim that this authoritative interpreter must be the judiciary directed by the Supreme Court. Put somewhat differently, one might agree with Alexander and Schauer's argument about the necessity of authoritative settlement as a basis for interinstitutional interpretive consistency and coordination while still questioning their choice of means. Scholars have proposed that either the legislative or executive branch might serve as the ultimate interpreter of the Constitution (at least under some conditions).[40] Might not one of these approaches accord with Alexander and Schauer's commitment to finality and stability as cherished constitutional values?

While Alexander and Schauer do not explore this question at length, it is evident throughout their article that they are specifically attached to judicial supremacy as the foundation for a system of constitutional interpretation. In a footnote, they defend the legitimacy of exclusive Court interpretation (as opposed to exclusive interpretation by the legislature or executive) by invoking supposed institutional advantages of the Court, including its ability to resist the "excesses" of "majoritarian forces," its presumed superiority in "determin[ing] the contours of the constraints on its own power" and its adherence to "precedential constraint."[41] While each of these points is debatable on its own,[42] it is also not entirely clear what the relationship is

40. See Murphy, 48 Rev. Pol. at 410-411, 420 n.28 (cited in note 2) (outlining the case for both legislative and executive constitutional interpretation). For commentary supporting the executive branch's interpretive authority see Frank H. Easterbrook, *Presidential Review,* 40 Case W. Res. L. Rev. 905 (1990); Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is* 83 Geo. L.J. 217 (1994). For scholarship generally supportive of congressional power to interpret the Constitution see Cox, 40 U. Cin. L. Rev. 199 (cited in note 1), Louis Fisher, *Constitutional Interpretation by Members of Congress,* 63 N.C. L. Rev. 707 (1985); Eugene W. Hickok, *The Framers' Understanding of Constitutional Deliberations in Congress,* 21 Ga. L. Rev. 217 (1986); Mark Tushnet, *The Constitution Outside the Courts: A Preliminary Inquiry,* 26 Val. U. L. Rev. 437 (1992).

41. Alexander and Schauer, 110 Harv. L. Rev. at 1377 n.80 (cited in note 4).

42. For research raising questions about the Court's ability to resist majoritarian and other political pressures, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,* 6 J. Pub. L. 279 (1957), David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period,* 47 J. Pol. 652 (1985); Robert McCloskey, *The American Supreme Court* (U. of Chicago Press, 1994) among many others. Scholarship skeptical about the Court's capacity to constrain its own powers includes Nathan Glazer, *Toward an Imperial Judiciary,* 41 Pub. Int. 104 (Fall 1975), Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Harvard U. Press, 1977); Jeffrey A. Segal and Harold J.

between the first two contentions—that the Court is able to resist democratic impulses and is a better judge of its own institutional limits—and Alexander and Schauer's analysis of the virtues of authoritative settlement. While a plausible case could be made that these distinctive judicial qualities promote legal settlement, the case does have to be made, and must also be considered against competing arguments for authoritative interpretation by the other branches. One might consider, for example, whether the "unity" of the executive or the potential for strong partisan leadership and organization in Congress would make these more suitable institutions for promoting interpretive stability.[43] Finally, one can also question Alexander and Schauer's argument for judicial supremacy by pointing to scholarship suggesting that "authoritative" Supreme Court decisions may prolong and intensify certain debates.[44]

II. TAKING AUTHORITATIVE SETTLEMENT SERIOUSLY

In *Ducking* Dred Scott*: A Response to Alexander and Schauer,* Emily Sherwin takes issue not with Alexander and Schauer's basic defense of judicial supremacy or the settlement values they esteem so highly, but with their ap-

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Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge U. Press, 1993). On the question of how well the Court follows precedent, see Benjamin Cardozo, *The Nature of the Judicial Process* 142-80 (Yale U. Press, 1921) (suggesting the inconstancy of reliance on precedent); David Kairys, *Legal Reasoning,* in David Kairys, ed., *The Politics of Law, A Progressive Critique* 11-17 (Pantheon Books, 1982); Saul Brenner and Harold J. Spaeth, *Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946-1992* (Cambridge U. Press, 1995).

43. See, e.g., Easterbrook, 40 Case W. Res. L. Rev. at 918 (cited in note 40) ("A unitary Executive always does better at avoiding chaos than does a hydra-headed, uncoordinated judiciary.").

44. See generally Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (U. of Chicago Press, 1991); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 381-83 (1985). In addition to all of these concerns, if one takes Alexander and Schauer's thesis seriously, one would have to consider what institutional arrangements within the judiciary would best promote the goals of authoritative legal settlement. Would it be appropriate, for example, to eliminate concurring opinions in order to maximize judicial clarity and law's settlement function? Should we insist upon a judicial supermajority (perhaps 6-3 or 7-2) to reverse previous Court decisions? These and other institutional changes might seem implicitly supported by Alexander and Schauer's noting that "our argument assumes that Supreme Court decisions provide more clarity than the constitutional text alone. [Judicial supremacy] would hardly be justifiable if decisions of the Court tended to obfuscate and unsettle rather than clarify and settle." Alexander and Schauer, 110 Harv. L. Rev. at 1377 n.79 (cited in note 4).

proach to supporting these ends. According to Sherwin, the authors' argument is dangerously "qualified" in allowing a general commitment to obey the Court's rulings to be overridden in certain circumstances.[45] As Sherwin explains, Alexander and Schauer's "rule of obedience" to Court decisions is not "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."[46] Alexander and Schauer's version of judicial supremacy seems to require political actors to assess the value of legal settlement relative to other goods when deciding whether to obey the decisions of the Court.

The problem with this approach, according to Sherwin, is that it is ultimately fatal to a "rule of obedience" and to the "settlement, stability, and coordination" values this rule is designed to secure.[47] Allowing nonjudicial political actors to exercise any discretion in considering whether to uphold courts' decisions will inevitably produce errors and variety in their judgments, corroding "authoritative settlement."[48] Sherwin proposes that we correct this flaw in Alexander and Schauer's analysis by adopting a "serious" or absolute rule of obedience to the decisions of the Supreme Court. As she explains, "there is reason, from a systemic perspective, to insist that all officials must obey the decisions of the Court, in all cases."[49]

Sherwin concedes that her serious rule of obedience might generate some unfortunate results, including the possibility that interpretive errors by the Court would persist indefinitely.[50] But, "over the long run the sum of errors by [nonjudicial] officials, including their underestimation of

45. Sherwin, 15 Const. Comm. at 65 (cited in note 5).

46. Id. at 67 (emphasis added).

47. Id. at 66. As Sherwin puts it, "[s]ettlement, stability, and coordination are important goods that *can only be had* through a general practice of obedience to rules." Id. at 66 (emphasis added). Sherwin's equation of rules with the values of "settlement, stability, and coordination" is at odds with scholarship pointing out that stable social arrangements, or "spontaneous orders" can emerge from aggregations of unorganized human activity. See, e.g., F. A. Hayek, *Studies in Philosophy, Politics and Economics*, 96-105 (U. of Chicago Press, 1967); N. Barry, *The Tradition of Spontaneous Order*, 5 Literature of Liberty 7-58 (1982).

48. Sherwin, 15 Const. Comm. at 69 (cited in note 5). Leaving assessments of these other values to nonjudicial officials is too risky, Sherwin argues, even if these officials are required to give stability a "presumptive" worth, that is, an assumed priority that could still be overcome when weighed against competing values.

49. Id. at 68.

50. Id. at 66.

settlement values, will exceed the errors brought about by obedience to decisions of the Court," even mistaken decisions.[51] Moreover, even with a strict rule of obedience, Sherwin would allow political figures to criticize the Court's rulings, albeit at the risk of formal and informal sanctions.[52]

To the extent that Sherwin attempts to present a strengthened case for judicial supremacy and the settlement values championed by Alexander and Schauer, her analysis appears to be even more vulnerable to some of the objections raised against *On Extrajudicial Constitutional Interpretation.* Sherwin's steadfast commitment to the benefits of authoritative settlement prompts her to argue against Alexander and Schauer's modest allowance for disagreements with the Court's interpretations in unusual cases such as *Dred Scott v. Sanford,* famously resisted by President Abraham Lincoln. Any deviation from a rule of obedience to Court decisions is deemed subversive to the stabilizing effects of the rule of law. But it is not at all obvious that the stability of a rule generally adhered to ("stop at a red light") will be compromised if it can be overcome in unusual situations requiring individual discretion ("except when it is obviously broken").[53] Moreover, it is not clear that the conceded goods of settlement, stability and coordination should be given priority over all other legal and constitutional values, or that they can only be protected by authoritatively binding interpretations of the Supreme Court.

In addition, Sherwin's efforts to improve Alexander and Schauer's model of judicial supremacy give rise to a problem unique to her argument. How are we to under-

51. Id. at 70.

52. Id. at 71.

53. While state laws often include an exception to the general "stop at a red light" rule for emergency vehicles, they do not necessarily recognize a "broken traffic signal" exception. In Massachusetts, for example, a person driving through a malfunctioning traffic signal is technically in violation of the general rule requiring vehicles to stop at a red light. Interview with Steven Kaplan, Officer, Brookline Police Department, in Brookline, MA (November 1, 1998). See Mass. Gen. L., ch. 89, § 7B (1994) (authorizing emergency vehicles to operate "contrary to any traffic signs or signals regulating traffic" as long as the operator brings the vehicle to a full stop and "proceeds with caution"); Mass. Gen. L., ch. 89, § 9 (1994) (authorizing the designation of locations where traffic must stop); Mass. Regs. Code, tit. 350, § 4.01(7) (1997) (describing the general rule for a stop sign or traffic signal); Mass. Regs. Code, tit. 720, § 9.06(10)(e) (1996) (describing the rule for a red light).

stand the legal status of those who disobey the Court and seek to resist its decisions? For Sherwin, "all officials must obey the decisions of the Court, in all cases." A government official who disobeys a decision of the Court is "violating *a rule* of constitutional interpretation" and challenging the "stability of constitutional law."[54] But how are we to assess this individual's disobedience as a legal and constitutional matter? Is this person a "constitutional renegade," operating outside of the parameters and commitments of constitutional law (and to be evaluated therefore, by the constraints of realpolitik, or perhaps by standards provided by political philosophy)? Or are there other rules of constitutional interpretation, other constitutional values besides stability, such that a person might violate Sherwin's rule of judicial obedience and still retain fidelity to the Constitution? Sherwin gives us incomplete guidance on these questions, making it difficult to know how a responsible constitutional citizen operating under her interpretive system would even begin to assess the actions of a contemporary Lincoln resisting a decision as objectionable as *Dred Scott.*

III. DEFINITIONS AND EMPIRICAL STUDIES

Having suggested a number of ways in which both *On Extrajudicial Constitutional Interpretation* and *Ducking* Dred Scott fail to consider existing scholarship as well as the full implications of their own analyses, I now turn to two additional sorts of problems affecting not only these texts but most of the literature examining nonjudicial interpretation. One might first note that Alexander, Schauer, Sherwin, as well as the bulk of the work they are indirectly criticizing, give insufficient attention to definitional issues, to describing precisely what is being analyzed and proposed (and consequently, what is excluded from consideration). The two articles considered here also suffer from a second set of shortcomings stemming from their exclusive reliance on normative and theoretical approaches to their investigations and their failure to consider empirical studies that might usefully inform, contextualize, and test their claims and conclusions. This limitation also re-

54. Sherwin, 15 Const. Comm. at 71 (cited in note 5) (emphasis added).

flects a tendency within the broader literature examining nonjudicial interpretation, which frequently focuses on either normative or empirical issues, while devoting little attention to how these two sorts of inquiries might fruitfully inform one another. In surfacing these two kinds of "symptomatic" problems in Alexander, Schauer, and Sherwin's arguments, I hope to illustrate their importance and begin an argument (further developed in my conclusion) intended to demonstrate why attending to these issues should comprise part of a new agenda for research on nonjudicial interpretation.

Alexander and Schauer's attention to delineating what they are examining starts off as a strength in their analysis, separating it from other work examining nonjudicial constitutional interpretation, which makes only a minimal effort in this regard. Alexander and Schauer suggest, for example, the utility of distinguishing nonjudicial interpretation occurring in the context of "judicial inaction" from that which takes place where the courts have spoken on an issue, arguing that the former raises no special conflict for nonjudicial officials who interpret the Constitution.[55] But despite these initial attempts, a number of definitional problems emerge in their analysis, problems which ultimately hamper the power and applicability of their thesis.

First, the terms Alexander and Schauer use to describe their object of inquiry are imprecise, leading to confusion about exactly what they are discussing and proposing. In describing the general phenomenon they are arguing *against*—nonjudicial constitutional interpretation rendered in contexts where the courts have already spoken—they invoke a variety of terms including "extrajudicial constitutional interpretation,"[56] "nonjudicial constitutional interpretation,"[57] "judicial non-exclusivity in constitutional

55. Alexander and Schauer, 110 Harv. L. Rev. at 1360 (cited in note 4). In claiming that the question of constitutional deference "is not an issue" when an official or institution agrees with a court decision, Alexander and Schauer ignore the possibility that a nonjudicial official might agree with the outcome of a Court decision while disagreeing with how the decision was arrived at, or what precedent it set. Alexander and Schauer, 110 Harv. L. Rev. at 1363 n.15 (cited in note 4). Additionally, nonjudicial officials might be concerned with how apparent "deference" to a Court's decision at one moment (when it concurred with the Court's policy outcome) might affect its ability to resist Court opinions at a later time.

56. Id. at 1359 (from the title).

57. Id. at 1360.

interpretation,"[58] and "non-deference"[59] by nonjudicial officials. Each of these phrases might plausibly be thought of as describing distinct interpretive activities. "Extrajudicial" constitutional interpretation could include interpretation that occurs "on top of" or as a supplement to the interpretations of the courts.[60] Judicial "non-exclusivity" might refer to circumstances where courts have a powerful (even a decisive) interpretive role, but other institutions still have some incentive to participate in the interpretive process.[61] And "non-deference" to court decisions could describe a range of behaviors, from an assertion of qualified independence from a court's decision[62] to outright rejection of its binding authority.[63] The reader of *On Extrajudicial Constitutional Interpretation* is left a bit uncertain whether these various concepts are used deliberately to describe distinct phenomena, or whether they are simply to be treated as fungible.[64]

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58. Id. at 1361.

59. Id.

60. Arguably, such "extrajudicial" constitutional construction was authorized by the Court in *Katzenbach v. Morgan,* 384 U.S. 641 (1966) (allowing Congress to offer additional constitutional protections under the Fourteenth Amendment beyond those recognized by the Court). But see, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 528 (1997) (indicating that "[t]his is not a necessary interpretation" of *Morgan*).

61. See, e.g., Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?,* 61 N.C. L. Rev. 587, 608, 590 (1983) (arguing that by engaging in independent constitutional interpretation Congress "can screen the easy cases by rejecting unconstitutional bills . . . [and] provide a different viewpoint on the Constitution and become an innovative force" while still suggesting that the "courts should examine to the fullest extent the constitutional implications of every piece of legislation").

62. See, for example, Abraham Lincoln's First Inaugural Address in which he suggested that questions decided by the Supreme Court are "entitled to very high respect and consideration" but that the polity is not otherwise irrevocably bound by Court rulings. Fehrenbacher, ed., 2 *Abraham Lincoln: Speeches and Writings 1859-1865* at 221 (cited in note 39).

63. See, for example, President Andrew Jackson's veto of the bill to recharter the second Bank of the United States in which he declared that "[t]he Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution . . . [t]he opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both." Andrew Jackson, *Veto Message of July 10, 1832* reprinted in Chester James Antieau, *The Executive Veto* App. 111 (Oceana Publications, Inc., 1988).

64. Despite inconsistencies in defining their object of inquiry, the overall focus of Alexander and Schauer's critique seems to be on "non-deference":

> We call the position that we are challenging *non-deference*. Non-deference occurs when a nonjudicial official who disagrees with a judicial decision on a constitutional question does not conform her actions to that decision and perhaps even actively contradicts it. The nonjudicial official thus makes decisions according to her own, rather than the court's, constitutional interpretation. Such an approach . . . rejects judicial supremacy . . . .

Alexander and Schauer, 110 Harv. L. Rev. at 1362 (cited in note 4) (emphasis added).

Among the difficulties that this lack of descriptive precision gives rise to is confusion in categorizing, comprehending, and assessing particular political activities from the perspective of Alexander and Schauer's overall argument. For example, what are we to make of recent public criticisms of salient judicial rulings?[65] Do these attacks—including congressional calls for impeaching particular judges and sustained efforts to block the appointment of federal judges *en masse*—represent examples of "non-deference" to the courts' constitutional authority? In some ways these initiatives, which generally avoid making independent assessments of the constitutional issues frequently at the heart of these disputes, suggest that the courts' interpretive authority remains uncontested. At the same time, however, the courts' authority in these cases seems to be precisely the question at issue. Similarly, what are we to make of recent legislative efforts seeking to compel the judiciary to return to its own previously articulated standards or principles?[66] Do these activities represent the threat and dangers of "judicial non-exclusivity"? One is uncertain how Alexander and Schauer would characterize and evaluate these developments and their impact on authoritative settlement.

The nomenclature Alexander and Schauer use in describing the interpretive dynamics that they *support* is also somewhat confusing and problematic. The doctrine of judicial supremacy that Alexander and Schauer defend is identified as "judicial primacy without qualification,"[67] "the question of deference,"[68] "authoritative interpretation,"[69] and "judicial authoritativeness."[70] These descriptions, too, seem less-than-synonymous.[71] Overall, it is not clear how

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But, as already indicated, this account of "non-deference" lends itself to a range of different interpretive arrangements, not all of which need reject judicial supremacy.

65. See Shannon P. Duffy, *Report: Right Wing to Blame For Empty Federal Bench Seats*, The Legal Intelligencer 1 (Sept. 30, 1997); Joan Biskupic, *Hill Republicans Target 'Judicial Activism'; Conservatives Block Nominees, Threaten Impeachment and Term Limits*, Wash. Post A1 (Sept. 14, 1997); Michael Kramer, *Cheap Shots at Judges*, Time 57 (Apr. 22, 1996). See generally *Hearings of the Commission on Separation of Powers and Judicial Independence*, A.B.A. (October 11, 1996).

66. See, e.g., Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb-2000bb-4 (1994).

67. Alexander and Schauer, 110 Harv. L. Rev. at 1362 (cited in note 4).

68. Id. at 1369.

69. Id. at 1373.

70. Id. at 1380.

71. For example, as already indicated, one can imagine interpretive systems in

Alexander and Schauer would assess interpretive systems consistent with the descriptive language and categories set out in their piece but seemingly in tension with the tenor of some of their other remarks and analyses.

These criticisms should not be dismissed as mere semantic quibbling. The authors' failure to elaborate upon these definitional distinctions combined with their somewhat narrow analytic focus obscures potentially important differences among these terms, and perhaps inadvertently limits our political and legal imagination in thinking about nonjudicial constitutional interpretation.[72] Alexander and Schauer emphasize, for example, that their argument in favor of interpretive "deference" is aimed at "nonjudicial public official[s],"[73] an approach that leaves out an entire class of actors that might very well play an essential role in constitutional interpretation: private citizens.[74] While Alexander and Schauer briefly note that private actors contribute to the evolution of constitutional meaning by agitating for legal change, it is unclear whether these individuals should show the same deference to the Court as that expected of nonjudicial officials and lower court judges.[75]

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which the Court has interpretive "primacy" (in the sense that its rulings are primary or given greatest weight), while the interpretations of other branches still have some authority and sway. Cf. Mikva, 61 N.C. L. Rev. at 590, 608 (cited in note 61).

72. Alexander and Schauer claim, for example, that interpretive pluralism "entails not just parity of interpretive authority among the three branches of the federal government" but parity among the members of "each branch . . . state and local [officials] . . . and . . . among all citizens." Alexander and Schauer, 110 Harv. L. Rev. at 1378, 1379 (cited in note 4). But see Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen,* 83 Geo. L.J. 347, 348 (1994) (outlining a theory not of absolute interpretive parity but of "comparative institutional competence" in which "each institution must interpret the Constitution in order to decide how much deference to give to specific decisions by other institutions"). Note also that it is unclear why a system with some diffusion of interpretive responsibility would require absolute "parity" amongst the officials *within* an institution; nonjudicial interpretive processes could enjoy at least as much structure and hierarchy as that found in ordinary policy and political processes.

73. Alexander and Schauer, 110 Harv. L. Rev. at 1363 (cited in note 4).

74. On the interpretive role of citizens in a constitutional system see Levinson, *Constitutional Faith* (cited in note 2); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics,* 83 Geo. L.J. 373; Bruce Ackerman, *Higher Lawmaking,* in Sanford Levinson, ed., *Responding to Imperfection* (Princeton U. Press, 1995).

75. See Alexander and Schauer, 110 Harv. L. Rev. at 1386 (cited in note 4). It is not clear why Alexander and Schauer's arguments in favor of legal stability wouldn't apply equally well to political actors who do not hold official government posts. Note also that Alexander and Schauer's argument in favor of judicial supremacy would seem to apply to state officials.

Overall, Alexander and Schauer's definitional ambiguities leave one somewhat uncertain how their analysis fits in with the broader constellation of scholarship on nonjudicial constitutional interpretation. There are already well-developed arguments in favor of judicial supremacy that would bolster Alexander and Schauer's thesis, as well as existing analyses defending interpretative pluralism that they should contend with more explicitly. Without a clearer sense of exactly what Alexander and Schauer are objecting to as well as what they are endorsing, it would be difficult to integrate their analysis with this and other related research.

While Alexander and Schauer at least gesture to existing studies of nonjudicial constitutional interpretation, Sherwin's argument about the virtues of authoritative settlement and a "serious rule of obedience" to the Court's rulings largely ignores this larger body of work. Furthermore, Sherwin's inattention to describing what she is objecting to makes it difficult to know how to apply her analysis to existing scholarly discussions. Indeed, Sherwin's argument seems particularly abstract when compared with other work examining interpretation outside of the courts. While one can understand Sherwin's approach as a persuasive application of a theory of rules, it is less obvious how her analysis should be assessed from a more pragmatic or political perspective, a perspective taking into account the needs of our regime and the range and complexity of its diverse constitutional commitments.

Indeed, Alexander, Schauer, and Sherwin's use of language suggests a somewhat cramped understanding of the purposes and potential of constitutional interpretation and its role in our nation's political life. In focusing on the ways in which nonjudicial interpretation destabilizes law's "settlement" function, for example, Alexander and Schauer tend to see constitutional interpretation as necessarily giving rise to institutional conflict and interpretive divergence. But there are many interpretive processes—including those with active nonjudicial participants—that have seemingly little to do with this sort of conflict (and have, therefore, little potential to upset law's settlement and stability functions). Nonjudicial actors might consult the Constitution not to challenge a Court's interpretation but to consider one of the nation's foundational political texts, in order to

determine some of the purposes and aspirations of the republic.[76]

Many of the definitional problems running through the analyses of Alexander, Schauer, and Sherwin pervade the general body of scholarship looking at nonjudicial interpretation. As suggested at the very beginning of this essay, this research suffers from typological diversity that does not always reflect a precise delineation of distinct objects of inquiry; scholars analyzing nonjudicial interpretation have not always been attentive to the ways in which they use their terms and referents and to how their work relates to that of others. This lack of clarity and consistency in describing exactly what is being examined both reflects and contributes to a general absence of *synthesizing* scholarship,[77] that is, work that attempts to integrate systematically the diverse studies of nonjudicial interpretation in order to categorize, compare, and ultimately evaluate this material.

Beyond the problems stemming from these issues, Alexander, Schauer, and Sherwin's analyses are weakened by failing to consider the contributions of existing empirical work examining constitutional interpretation outside of the courts. Alexander and Schauer explicitly identify theirs as

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76. In this way we might understand the Constitution as a fundamentally educative document providing "an explicit set of standards in terms of which a government can be judged and, when necessary, resisted. [Conceived of this way, it] is a book in which people can read the fundamental principles of their political being." Herbert Storing, *The Constitution and the Bill of Rights,* in Robert A. Goldwin and William A. Schambra, eds., *How Does the Constitution Secure Rights*? 15, 30-31 (American Enterprise Institute for Public Policy Research, 1985) (describing the views of Anti-Federalists on the role of the Bill of Rights).

In addition to contracting our understanding of the purposes of constitutional interpretation, Alexander, Schauer, and Sherwin's emphasis on constitutional interpretation as a *legal* activity may help to explain their conclusion that a commitment to constitutionalism requires judicial supremacy. One scholar has suggested that to the extent we focus on the Constitution as law, we might incorrectly endorse judicial supremacy:

> If, following [John] Marshall, we base our understanding and defense of judicial review on the idea that "the Constitution is law," then the primacy of the Court in the American system of governance becomes more set. But if our basic view of the Constitution begins not with what the Constitution is—law—but with what it established—a constitutional democracy of separated powers, checked and balanced—then the activity of judicial review becomes part of an interlocking totality of governance. In other words, the idea of the Constitution as law interpreted by judges and the idea of the Constitution as a framework for limited government may well lead to different results.

Agresto, *The Supreme Court and Constitutional Democracy* at 71 (cited in note 1).

77. Some exceptions to this observation include Burgess, *Contest for Constitutional Authority: The Abortion and War Powers Debates* (cited in note 36) and Gant, 24 Hast. Const. L.Q. at 359 (cited in note 2).

a "normative inquiry" that is "neither empirical nor historical," and Sherwin's analysis suggests a similar orientation.[78] But this commitment to a strictly theoretical approach to the problem of nonjudicial interpretation compromises these authors' resulting assessments and conclusions. In eschewing sustained historical analysis, for example, they fail to appreciate both the diversity of forms that nonjudicial constitutional interpretation can assume as well as the longstanding and dynamic role it has played in our nation's political processes.[79] Alexander and Schauer's ahistoricism also contributes to their somewhat static and insular view of how challenges to judicial supremacy are generally perceived: "[the] argument [that nonjudicial officers should interpret the Constitution independently of the Court] is not only widely accepted today, but it has also enjoyed a remarkable persistence."[80] In fact, nonjudicial officials' understanding that they should independently interpret the Constitution appears to have a historically contingent character, an observation that has already been made by those who have documented historical changes in constitutional interpretation and the evolution of our current system of judicial supremacy.[81]

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78. Alexander and Schauer, 110 Harv. L. Rev. at 1369 (cited in note 4).

79. See, e.g., Currie, *The Constitution in Congress* (cited in note 36); Whittington, *Constitutional Construction* (cited in note 28).

80. Alexander and Schauer, 110 Harv. L. Rev. at 1360 (cited in note 4). Alexander and Schauer insist that "most scholars, most officials, and, we suspect, many ordinary citizens believe that even when the Supreme Court has spoken" nonjudicial officials are not required to follow its interpretation. Id. (references omitted). But there are good reasons to think that to the extent one can accurately describe a scholarly, political, and popular consensus on the question of who has ultimate interpretive authority, the reverse situation is actually at hand. If anything, "most scholars, most officials" and a majority of "ordinary citizens" seem to uphold the view espoused by Alexander and Schauer—the view that nonjudicial officials are duty-bound to follow the Constitution as it is construed by the Supreme Court and not as they see fit. See, e.g., Ruth Marcus, *Constitution Confuses Most Americans; Public Ill-Informed on U.S. Blueprint,* Wash. Post A13 (Feb. 15, 1987) (referring to a national survey in which "Six in 10 of those responding said *correctly* that the Supreme Court is the final authority" on constitutional questions, emphasis added); Gant, 24 Hast. Const. L.Q. at 362 (cited in note 2) (discussing the views of the public and legal scholars on the question of judicial supremacy); Agresto, *The Supreme Court and Constitutional Democracy* at 102 (cited in note 1) ("the common public and academic opinion of judicial power today firmly supports a rather simple doctrine of judicial finality, a notion that the Court is, in brief, the last word in constitutional government").

81. See, e.g., Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine,* 21 Ga. L. Rev. 57 (1986), Fisher, *Presidential War Power* (cited in note 36); Keith Whittington, *Oppositional Presidents and Judicial Negotiations: Judicial Authority in Political Time* (paper presented at the 1998 Annual Meeting of the American Political Science Association, Boston, MA, September 3-6).

Alexander, Schauer, and Sherwin's unwillingness to blend theoretical and empirical research is replicated in the broader scholarship examining nonjudicial interpretation of the Constitution. In large part, existing research in this area consists of *either* empirically based work arguing that traditional accounts of judicial supremacy misdescribe American politics, *or* theoretical and normative analyses of why judicial supremacy is a flawed or desirable basis for a system of constitutional interpretation. While classifying the scholarship into these two broad camps is somewhat crude,[82] in general the research does not systematically explore the connections between these two analytic tacks, including the ways in which they could productively inform one another. Thus, normative proposals for ending the interpretive hegemony of the judiciary and moving to some other interpretive scheme often suffer from needless abstraction, analytic vagueness, or misplaced anxiety about how such schemes would function in practice, concerns that might well be overcome by engaging in systematic studies of the ways in which nonjudicial constitutional construction has actually been conducted.

IV. AN AGENDA FOR FUTURE RESEARCH

The problems illustrated by Alexander, Schauer, and Sherwin's essays and the inadequacies of the general literature examining nonjudicial constitutional interpretation point to a number of issues and concerns that should guide future research. In the remainder of this essay, I propose a four-point agenda for scholarship on nonjudicial interpretation: this research should give greater attention to (1) definitional efforts as well as (2) empirical studies; in addition, it should (3) explore the relationship between the constitutional separation of powers and nonjudicial interpretation, and (4) reflect back upon what our scholarly discoveries tell us about the needs and problems of our regime.

82. I concede that some of the more "empirical" work makes important normative arguments or prescriptive claims, and many of the most theoretical critiques of judicial supremacy (or nonjudicial interpretation) are at least partially grounded in empirical investigations that highlight and dramatize the supposedly deleterious effects of these systems.

The importance of renewed attention to definitional and empirical analysis has already been indicated, but a few additional points should be made. First and most obviously, by elucidating precisely what is being studied, and by delineating (and choosing from) different conceptions of judicial and nonjudicial interpretation, scholars would be in a position to announce confidently what their work has determined, and how their inquiries build upon, diverge from, or contradict the work of others. In this way researchers could identify emerging intellectual fault lines and promote increasingly sophisticated and integrated scholarly discussions. In addition, by better understanding exactly what their studies entail and prescribe, scholars would make clear what questions and phenomena they are *not* investigating, helping us to understand what is distinctive about the questions and problems associated with nonjudicial interpretation.

Future research that draws upon sustained empirical analyses would make several important contributions to our understanding of interpretation outside the courts. First, this scholarship would continue a project already begun: correcting popular and professional misconceptions about judicial supremacy and its place in American politics.[83] Scholars who pay little attention to historical and empirical research tend to adhere (often implicitly) to one of two dubious claims: (1) nonjudicial interpretation has never been an important aspect of American politics, and judicial supremacy has been the interpretive norm since our founding,[84] or (2) robust, independent interpretation by nonjudicial actors has been and remains the norm in our political order.[85] Future work would need to test these claims and explore whether different conceptions of nonjudicial interpretation might better describe its historic development and current form.[86]

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83. See text accompanying note 80.

84. See, e.g., Mikva, 61 N.C. L. Rev. at 609 (cited in note 61) (claiming that "[e]ven from the earliest years of the Republic, the Congressional Record casts little light on the great constitutional debates that have periodically divided the country").

85. See, e.g., Louis Fisher, *Constitutional Dialogues* (Princeton U. Press, 1988) (especially chapter 7).

86. Some useful research along these lines has already been conducted. See, e.g., Whittington, *Oppositional Presidents* (cited in note 81); Hickok, 21 Ga. L. Rev. 217 (cited in note 40), Brest, 21 Ga. L. Rev. 57 (cited in note 81).

Constructing bridges between empirical and theoretical work would also help to bring different scholars into productive conversation, collaboration, and disagreement. While scholars in law, history, and political science have all studied nonjudicial contributions to constitutional interpretation, their efforts are, at times, needlessly insulated from one another.[87] Finally, increased attention to empirical research would help scholars assess the implications of the debate on nonjudicial interpretation by illustrating the consequences of various forms of interpretive pluralism. By tracking the interpretive dynamics that have developed throughout American history, and by considering how nonjudicial interpretation has been worked out in particular political settings, we will be better able to assess the effects of a range of different interpretive systems. Implicit in the contemporary debates on nonjudicial interpretation is the assumption that the question of *who* interprets has a substantive or political importance (or, most likely, both), but the exact nature of this significance needs to be clarified, illustrated, and explained.[88]

In addition to giving increased attention to definitional issues and empirical studies, future work examining nonjudicial interpretation should pay special attention to what is arguably *the* distinctive American contribution to constitutionalism: the separation of powers. Conceiving of the problem of nonjudicial interpretation as inextricably linked with the Constitution's separation of powers system offers several insights. First, one should note that the Constitution's "partial intermixture" of departmental powers strongly suggests that judicial supremacy—at least in any unnuanced form—runs counter to basic assumptions and commitments of the American republic. As a critical component of an intricate system of "auxiliary precautions" designed to protect liberty and prevent tyrannical rule, the

87. See, e.g., Paulsen, 83 Geo. L.J. 217 (cited in note 40) and Currie, *The Constitution in Congress* (cited in note 36) (legal scholars); Burgess, *Contest for Constitutional Authority: The Abortion and War Powers Debates* (cited in note 36) (a political scientist).

88. See Murphy, 48 Rev. Pol. 401 (cited in note 2) (discussing the importance of the question of "who interprets"). Existing research on nonjudicial interpretation often treats it as essentially identical to interpretation rendered by the courts. See, e.g., Currie, *The Constitution in Congress* (cited in note 36). Some recent research, however, suggests that constitutional interpretation is not undifferentiated in this way, an unsurprising discovery given the disparate political and constitutional responsibilities of each branch. See Whittington, *Constitutional Construction* (cited in note 28); Whittington, *Oppositional Presidents* (cited in note 81).

separation of powers is premised on the belief that it is "essential to a free government" that each political department be "connected and blended, as to give to each a constitutional control over the others."[89] This commitment to an imperfect division of institutional powers and functions suggests that "the power to interpret law is not the sole province of the judiciary; rather, it is a divided, *shared* power not delegated to any one branch but ancillary to the functions of all of them within the spheres of their enumerated powers."[90]

Exploring the nexus between constitutional interpretation and the separation of powers should also induce scholars to think more systematically about the ways in which the different departments must consult the Constitution in order to understand, fulfill, and protect the institutional duties, roles, and responsibilities distinctive to each branch.[91] Similarly, future research should attempt to account for and explain in a more systematic manner the ways in which the different branches recognize and negotiate the boundaries marking their constitutional powers.[92]

Future scholarship on nonjudicial constitutional interpretation should be attentive to a fourth and final consideration. Debates about the relative merit of different interpretive arrangements should be evaluated in light of the commitments and needs of the political regime as a whole.[93] This approach requires us to articulate and reexamine our nation's constitutional foundations in order to consider

89. Federalist 48 (Madison) at 308 (cited in note 18).

90. Paulsen, 83 Geo. L.J. at 221 (cited in note 40). Given the modern pervasiveness of the understanding that we live in a polity of "separated institutions *sharing* powers" it is curious that so few scholars conceive of constitutional interpretation as a power shared between the legislative, executive, and judicial branches. Richard Neustadt, *Presidential Power and the Modern Presidents* 29 (John Wiley & Sons, 1990). As John Agresto notes, "[c]hecks and balances seem fine in theory, but highly suspicious when applied to the Court." Agresto, *The Supreme Court and Constitutional Democracy* at 100 (cited in note 1).

91. See text accompanying notes 27-33.

92. For an example of one scholarly effort along these lines see Eisgruber, 83 Geo L.J. 347 (cited in note 72). In general, greater attention to the relationship between interinstitutional relationships and nonjudicial review would also help to expand what tends to be a scholarly focus "either on the institutional competence of the branches or on the propriety of nonjudicial constitutional interpretation." Neal Devins, *The Constitution Between Friends*, 67 Tex. L. Rev. 213, 217 (1988).

93. See generally, Stephen Salkever, *Aristotle's Social Science* in Carnes Lord and David K. O'Connor, eds., *Essays on the Foundations of Aristotelian Political Science* 11-48 (U. of California Press, 1991) (outlining an "Aristotelian" approach to scholarship that targets these general concerns).

both the ideal and extant relationship between this foundation and the processes through which constitutional interpretation is rendered; such a perspective would enable us to reconsider existing dynamics of constitutional interpretation, imagine alternatives to our current interpretive order, and gain renewed insight into problems resulting from disjunctions between our fundamental political commitments and contemporary interpretive practices.[94] Scholars could also use this reassessment of the purposes of nonjudicial interpretation as an opportunity to reflect upon the role of citizens[95] and the states[96] as constitutional interpreters.

The problems of *On Extrajudicial Constitutional Interpretation* and *Ducking* Dred Scott*: A Response to Alexander and Schauer* illustrate both the remaining challenges facing the expanding body of scholarship examining nonjudicial constitutional interpretation and the great potential of this literature to broaden our legal and political understanding. By defining their inquiries with care and precision, by invoking empirical research to ground and test theoretical claims, and by returning to the separation of powers framework and the foundations of American constitutionalism, those studying this phenomenon will en-

94. In addition to expanding our understanding of the Constitution's role in politics we might, for example, gain renewed leverage on contemporary political problems, especially in circumstances where robust constitutional politics appear to have been replaced with "ordinary" policy and political disputes. Consider in this regard contemporary frustration with the judicial confirmation process. See Jeffrey K. Tulis, *Constitutional Abdication: The Senate, The President, and Appointments to the Supreme Court,* 47 Case W. Res. L. Rev. 1331 (1997) (discussing historical changes in how Supreme Court confirmation hearings are conducted); Stephen L. Carter, *The Confirmation Mess: Cleaning Up the Federal Appointments Process* (Harper Collins, 1994) (offering a critique of the current judicial appointments process).

95. For an account suggesting the necessity of active, independent constitutional interpretation amongst the citizenry see Levinson, *Constitutional Protestantism* at 376 (cited in note 74) ("If one *does* honor the Constitution for the specific values it presumably instantiates, then should not all citizens serve as 'monitors' of the constitutional fidelity of their officials?"); see generally Levinson, *Constitutional Faith* (cited in note 2). Alternatively one might argue that one of the purposes of American constitutionalism is to remove citizens from constitutional questions (at least under ordinary circumstances). See, e.g., Agresto, *The Supreme Court and Constitutional Democracy* at 100 (cited in note 1) (the separation of powers and overall structure of the Constitution "allow[s] the sovereign people to go about their daily lives and endeavors securely, without the need for absolute vigilance . . . or perpetual daily oversight over every branch and department power").

96. See, e.g., Murphy, 48 Rev. Pol. at 420 n.28 (cited in note 2) (discussing "confederational departmentalism"). See generally, Keith Whittington, *The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change*, 26 Publius 1 (1996).

sure that their work is useful to scholars and citizens alike. While not every project on nonjudicial interpretation requires systematic attention to each of these agenda items, attending to these points will help identify what intellectual progress has been made, target enduring problems and questions, and keep scholarship relevant to the concerns and needs of the polity.