

## INTERPRETATIVE EQUALITY AS A STRUCTURAL IMPERATIVE (OR “PUCKER UP AND SETTLE *THIS!*”)

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To serious students of the Constitution, Chief Justice Marshall's discussion of judicial review in *Marbury v. Madison*<sup>1</sup> was about judicial equality—the power of the courts, co-equal to the similar powers of the legislative and executive departments, to construe and apply the Constitution in the course of their duties. To less serious students of the Constitution, *Marbury* was about judicial supremacy—the supposedly *paramount* power of courts to interpret and apply the Constitution in a fashion that binds other legal actors, including the legislative and executive departments and state officials.

*Marbury's* recent past, dating roughly from *Cooper v. Aaron*<sup>2</sup> in 1958 through the early 1990s, reflected the triumph of a judicial supremacist revolution (or coup). Persons who doubted judicial supremacy, such as Attorney General Edwin Meese,<sup>3</sup> were generally treated by the legal intelligentsia as something akin to Raelians. *Marbury's* present, dating roughly from the publication by the Federalist Society of a pamphlet on the debate over interpretative authority in 1992<sup>4</sup> to the current day, reflects the triumph of the “departmentalist” counterrevolutionaries (or freedom fighters), who maintain that the courts' interpretative powers are no greater than those of other legal actors. The counterrevolution has enjoyed considerable—and one might even say remarkable—success; today, it is difficult to find

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\* Professor, Boston University School of Law. I have no one to thank because I have not asked anyone for comments. I know what they will say, and I don't want to hear it.

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

2. 358 U.S. 1 (1958).

3. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

4. THE FEDERALIST SOCIETY, WHO SPEAKS FOR THE CONSTITUTION? THE DEBATE OVER INTERPRETIVE AUTHORITY (1992).

people who will defend judicial supremacy “with anything other than hot air or bluster.”<sup>5</sup>

I have no talent for prognostication, so I will not venture to predict the future direction of this battle. In part, the direction of the debate depends on the reasons for its past course. If, for instance, departmentalism has triumphed in recent years because of the power of its arguments and the eloquence of its advocates, one might expect the departmentalist reading of *Marbury* to enjoy a long and healthy life. A truly cynical soul, however, might suggest that the legal intelligentsia’s acquiescence to departmentalism in the past decade had more to do with the combination of a Democratic President and a conservative-leaning Supreme Court than with the intellectual force of the arguments for departmentalism—in which case *Marbury*’s future is largely in the hands of the electoral college.

In any event, I do not intend here to rehearse the traditional constitutional arguments for departmentalism or the traditional arguments for a departmentalist reading of *Marbury*. Those arguments have been made at length by many people, including myself.<sup>6</sup> Instead, I want to explore some reasons why a rational person might design a constitution along departmentalist lines—in other words, to suggest why the interpretatively correct reading of the Constitution, and the doctrinally correct reading of *Marbury*, might also be a normatively sound institutional scheme. I offer this in direct response to the argument advanced by Larry Alexander and Fred Schauer that, even if the Constitution of 1787 is departmentalist as a matter of text, structure, and history, modern political actors should nonetheless accept Supreme Court pronouncements on the Constitution as authoritative.<sup>7</sup> Their case, in brief, is that the settlement function of law, and especially of constitutional law, requires a supreme interpreter, and because the Supreme Court is the best available candidate for that role, legal actors should treat Supreme Court decisions as the final word on constitutional meaning. The argument is explicitly normative and accordingly can only be answered by other normative arguments.

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5. Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996).

6. For an accounting of the literature, see Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 458 nn.12-13 (2000); Lawson & Moore, *supra* note 5, at 1269 n.4.

7. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Alexander & Schauer, *supra* note 6.

I am uncomfortable treading this normative ground for two reasons. First, I am dubious about the value of normative legal scholarship, even when it comes from such luminaries as Alexander, Schauer, or Lawson.<sup>8</sup> Second, Alexander and Schauer's particular normative argument for judicial supremacy rests, as it must, on the conditions that make the Constitution of 1787 politically authoritative for contemporary actors, and I am not at all persuaded that any such conditions exist. It is no small matter to explain why the American Constitution of 1787 has any greater normative status than does the Alexander-Schauer Constitution of 2000.<sup>9</sup> Thus, in order to engage Alexander and Schauer on their own terms, I would have to make normative arguments that I do not think can be grounded in an academically responsible fashion, based on assumptions about the normative status of the Constitution that I do not accept. Accordingly, I confine myself to a somewhat more limited point: the normative case for a departmentalist constitution has elements that Alexander and Schauer did not adequately address and that persons interested in normative questions about the Constitution may find interesting. Further the deponent saith not.

Alexander and Schauer are right about many things. They are right that law's settlement function is vitally important. They are right that such a function is especially important in constitutional law, where the whole point of a constitution is to lock in certain resolutions of contested questions. They are right that, in general, such a function is better served by a clear hierarchy of interpretative authority than by a system of coordinate interpreters. And let us even assume that they are right about something on which they are actually embarrassingly wrong: that the Supreme Court is the best candidate for a supreme interpreter if there must be one.<sup>10</sup> Grant all of this and the case against departmentalist interpretation still has not been made.

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8. See, e.g., Gary Lawson, *The Ethics of Insider Trading*, 11 HARV. J.L. & PUB. POL'Y 727, 778 (1988) ("It is conceivable that the ethical, epistemological, and metaphysical problems of the ages will be solved by an article in a twentieth-century, English-language law journal. But I rather doubt it."). I am not substantially more optimistic about the likely contributions to moral knowledge from twenty-first century law journals.

9. See Alexander & Schauer, *supra* note 6, at 465.

10. The best candidate for supreme interpreter is, obviously, me. The second best candidate is probably Mike Paulsen, though I suppose that reasonable people could disagree on the proper sequence once we get past me on the list. In any event, there are going to be quite a few people who are well ahead of the Supreme Court. Of course, I am not mentioned anywhere in the Constitution as a potential authoritative interpreter, but it is unclear why that is relevant to a preconstitutional argument.

Consider the more general case for a regime that divides governmental power through separation of powers and bicameralism. Separation of powers, as its critics are quick to point out, is very messy.<sup>11</sup> The American system of separation of powers and bicameralism, which provides for the possibility, and even likelihood, of divided government, is especially messy. The lawmaking process is slow, cumbersome, and difficult. The laws that emerge from such a divided regime are likely to lack coherence, and thus likely to lack some of the characteristics that make law valuable. The separation of execution from lawmaking increases the cumbersomeness, unpredictability, and incoherence of the system: the actual effect of laws will vary enormously across space and time with variations in enforcement regimes. Throw in a separate judicial body and the problems of predictability and coherence multiply. Separation of powers and bicameralism significantly threaten the settlement function of law. The same arguments can be made about federalism. The dispersion of authority among distinct governmental actors creates the possibility of conflicts among jurisdictions and reduces the clarity of signals sent by any one jurisdiction to its subjects. Federalism significantly threatens the settlement function of law.

Separation of powers, bicameralism, and federalism are all mechanisms for dispersing power that make it more difficult for wise lawmakers to produce and enforce a stable, coherent body of law and make it more difficult for subjects to conform to the commands of their masters. If one was confident that the governmental masters were likely to be wise and benevolent rulers who would do the right thing a substantial percentage of the time, it is hard to imagine why one would ever adopt a regime containing these structural features. That may be why many countries have not in fact adopted such a regime and why modern America has effectively abandoned it through adoption of administrative mechanisms that mostly dispense with the structural niceties of the Constitution.<sup>12</sup>

But there is nonetheless a powerful normative case for an eighteenth-century-American style system of separated powers,

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11. See, e.g., Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

12. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994). Modern administrative government emerged from an express rejection of eighteenth-century principles of federalism and separated powers. See JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* (1938) (heaping contempt upon strategies for dividing governmental power).

bicameralism, and federalism.<sup>13</sup> Quite simply, separation of powers works better than more concentrated systems, whether parliamentary or dictatorial, if governments are likely to reach a lot of wrong results—whether through corruption, stupidity, disinterest, or lack of knowledge.<sup>14</sup> Put bluntly, separation of powers reduces the amount of damage that any particular bad people can do. A really bad American President (and we have had plenty) can do a lot of damage—but less than he could if he also had all legislative and judicial powers. A really bad Senator (and we have had plenty) can do a lot of damage, but less than if all power was concentrated in the hands of the Senator or his/her cronies. A really bad state (and we have had plenty) can do a lot of damage, but less than if its decisions were uniformly imposed on a larger region. Separation of powers, federalism, and bicameralism are destabilizing, or un-settling, to the point that they seriously threaten some of the core reasons for having law in the first place. Maybe they are in fact a bad idea. But maybe they aren't. It doesn't take very much risk aversion to think that dividing power is, all things considered, likely to work better across a broad range of real-world scenarios than concentrating it in one authority.

Interpretative power is a kind of governmental power—a very potent and important kind of governmental power. Concentrating it in one place furthers some important values that go to the very core of law. But it is a very risky strategy. If the supreme interpreter is in fact likely to be bad at the job, then one must face the costs of imposing bad decisions on a whole country. The same arguments that justify dividing the power of substantive lawmaking among different bodies also justify dividing the power of interpretation among different bodies. It does not take very much risk aversion to justify departmentalism.

Nor does it take much empiricism. The Supreme Court does a generally miserable job of interpreting the Constitution, judged by pretty much any plausible standard that one could advance. That is not to say that presidents, members of Congress,

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13. Steve Calabresi has eloquently (at least for a non-libertarian) defended some aspects of American-style separation of powers, see Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51 (2001); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995), and federalism, see Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995).

14. See RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (1998) (discussing the problems of knowledge, interest, and power).

or state officials are any better; we are assuming, remember, that the Supreme Court is the best choice among the available candidates for the role of supreme interpreter. That is exactly the point. The best choice is still a really bad one. Any choice of supreme interpreter (other than me) poses extraordinary risks of great harm; just ask any partially-born baby whose brain is about to get sucked out.<sup>15</sup> Rather than choose a supreme interpreter, why not cut your losses by dividing interpretative authority across many actors? The price of liberty is eternal vigilance—and it just might also cost some settlement in the bargain. Even if settlement is the *sine qua non* of law, the bargain might still be a good one. After all, law is the handmaiden of liberty, not vice versa.

In sum, the case for dividing interpretative authority is no different than the case for dividing legislative authority horizontally or vertically, for separating legislative from executive authority, or for dividing power geographically among distinct units. Alexander and Schauer either need to distinguish interpretation from other legal activities or acknowledge that they are making a substantially stronger claim about constitutional design than they are letting on.

A focus on the separation-of-powers rationale for departmentalism has important consequences for departmentalists as well. First, it means that one needs to think carefully about the role of state officials in the constitutional scheme. Alexander and Schauer note that many departmentalists balk (as I do not) at giving state officials interpretative authority on a par with Supreme Court Justices.<sup>16</sup> As a textual, structural, and historical matter, state officials have the same power of interpretation as federal officials; if departmentalists don't talk about the states, it is probably for no better reason than that they do not want to be associated with a guy named Faubus any more than Alexander and Schauer want to be associated with a guy named Taney. On a pure normative level, it is true that increasing the number of interpreters increases the costs of divided authority. It may well be that there is an optimal level of dispersion of interpretative authority that is less than the full dispersion that would result from the constitutional scheme recognized by *Marbury*. But for Alexander and Schauer, that would be, as it were, haggling over the price as long as the optimal degree of dispersion is not zero.

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15. If your stomach can handle it, see *Stenberg v. Carhart*, 530 U.S. 914 (2000).

16. Alexander & Schauer, *supra* note 6, at 475-76.

Linking departmentalism to the more general risk-averting case for structural constitutionalism also requires some serious thought about precedent. A strong form of precedent concentrates power in temporally situated actors. A regime of weak or no precedent better disperses power, albeit at a cost in terms of settlement. A person who is worried about governmental power may well be suspicious of precedent. A person who is really, really worried about governmental power and its tendency to corrupt might even question whether there ought to be vertical precedent—that is, whether district judges should have to follow the Supreme Court's edicts.<sup>17</sup> Again, as a normative matter, there is likely to be an optimal level of dispersion of interpretative authority within a judicial system. Again, that level may be somewhere between zero and complete dispersion; it seems unlikely to be zero.<sup>18</sup>

Finally, as Alexander and Schauer perceptively suggest,<sup>19</sup> concerns about dispersion of power may raise doubts about the value of constitutionalism itself. What is constitutionalism, after all, if not the concentration of power in a specific group of temporally-situated actors? Does that enterprise not pose the risk that really bad decisions could be locked in across a whole country (and across a whole temporal universe of future countries)? If we worry about concentrating interpretative authority in a Supreme Court, shouldn't we also worry about concentrating substantive authority in the Constitution?

Of course we should. There can be no plausible normative case for constitutionalism in the abstract. A constitutional regime might be better than the available alternatives, but that depends on, inter alia, the particulars of the constitution, the structures that surround and support it, and the range of available alternatives. That is why there can never be a normative case for the authority of the American Constitution that does not pay serious attention to the substance of what that Constitution prescribes. My narrow point in this essay is only that if there are any normative reasons for adhering to the most obvious structural features of the American Constitution, those reasons can also

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17. See Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Theme of Robert M. Cover's Justice Accused*, 7 J.L. & RELIGION 33, 77-88 (1989).

18. This is not a statement about the actual regime of precedent prescribed by the Constitution. I have ruminated about that elsewhere, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994), and hope to ruminate more carefully in the future.

19. Alexander & Schauer, *supra* note 6, at 457-58.

justify the departmentalist interpretative method that is an integral part of that structure. And if the Constitution's most obvious structural features are normatively undesirable, it is very hard to see why we do not simply remove the word "Constitution" from the legal vocabulary and start over.