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Constitutional Rules, Constitutional Standards, and Constitutional Settlement: Marbury V. Madison and the Case for Judicial Supremacy

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CONSTITUTIONAL RULES, CONSTITUTIONAL STANDARDS, AND CONSTITUTIONAL SETTLEMENT: *MARBURY v. MADISON* AND THE CASE FOR JUDICIAL SUPREMACY

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As we mark the 200th anniversary of *Marbury v. Madison*,[1] it should be noted that huge forests have been levelled and tons of ink spilled in analyzing, interpreting, and debating the merits of John Marshall's opinion in that case, and that the best forecast is to buy pulp and ink in the commodities market. The *Marbury* literature shows no signs of abating, and not just because of the spate of anniversary conferences and symposia. As other nations consider the merits of American-style judicial review—and as we ourselves, with every Supreme Court decision striking down legislation that we believe to be constitutionally valid, continually reassess its merits and provenance—*Marbury* scholars will have plenty of demand for their wares.

The *Marbury* debate, of course, proceeds on different levels. There is a huge and rich literature on the merits and implications of the Marshall opinion apart from its assertion of judicial review. Was Marshall's interpretation of the Original Jurisdiction clause—that Congress could not alter the Court's original jurisdiction—correct (and how does it square with, say, *Cohens v. Virginia*[2])? Do appointments to federal office really vest *after* the signing and sealing of a commission but *before* the commis-

* Warren Distinguished Professor, University of San Diego School of Law. I want to thank the participants in the bicentennial celebration of *Marbury v. Madison* for stimulating exchanges, and I want particularly to thank Mike Paulsen, Sai Prakash, and Fred Schauer for their comments. Any remaining errors in this article are, it goes without saying, their fault.

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

2. 19 U.S. (6 Wheat.) 264 (1821) (upholding Supreme Court appellate jurisdiction over federal question case in which state was a party). *And see* Illinois v. Milwaukee, 406 U.S. 91 (1972) (upholding lower court jurisdiction over cases within Supreme Court's original jurisdiction).

sion's delivery? Is a suit seeking a writ of mandamus *always* an invocation of original jurisdiction, and is that true as well of suits seeking, say, writs of habeas corpus?[3] Did the Judiciary Act of 1789 really purport to enlarge the Court's original jurisdiction?[4] And so on.

Moreover, there is a less well-developed but hopefully growing literature on other aspects of *Marbury*. Why did Marbury sue in the Supreme Court instead of in some lower court?[5] And why didn't Marbury himself pursue his federal magistrate's position after losing in the Supreme Court, perhaps by attaching Marshall's opinion to his petition? Indeed, why did Marbury need the commission—the actual piece of paper, that is—after having had Marshall declare him to have been legally appointed to his office?

But, of course, the main body of the vast *Marbury* oeuvre concerns judicial review. As everyone in Con Law 101 learns, in *Marbury* John Marshall held that the Supreme Court could declare an act of Congress to be unconstitutional and refuse to enforce it or otherwise give it effect. That holding has been—and will undoubtedly continue to be—debated from two basic vantage points. One debate focuses on the constitutional legitimacy of judicial invalidation of congressional acts. Is judicial review provided for in the Constitution, and if so, where? Or did the Court just run it up the flagpole to see if we would all salute? In other words, is judicial review pre or meta-constitutionally legitimate—because, like the Constitution itself, we have accepted it as such—even if it is not *in* the Constitution of 1789?

The other great debates regarding judicial review are over its scope and force. *Marbury* invalidated a congressional act that unconstitutionally enlarged the Court's own jurisdiction. So one could read it quite narrowly. But, of course, judicial review has been extended to every constitutional question raised by the activities of any governmental actor, state or federal, with the exception of that rarefied set of constitutional questions known as "political questions," constitutional questions deemed by the Court to be committed to some nonjudicial body. (When will we know that we have a real "political question"? Only in cases where the Court identifies a constitutional limit on some other

3. *See, e.g.*, Ex Parte Bollman, et al, 8 U.S. (4 Cranch) 75 (1807).

4. *See* William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 15.

5. *See* Susan Low Bloch, *The* Marbury *Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 CONST. COMM. 607 (2001).

governmental actor's permissible range of action, announces that, in its opinion, that actor has transgressed that constitutional limit, but concludes that it is the actor's interpretation of the limit rather than the Court's that the Court will and should follow. This shows why some commentators are doubtful about the existence of political questions.[6])

Although the debate over the proper scope of *Marbury* rages on, I believe that the better arguments are those that find it assumed by the Framers and probably validly inferred from the text.[7] Article III's reference to "cases arising under the Constitution," although susceptible to counter-*Marbury* interpretations,[8] surely is arguably read to countenance judicial review of all constitutional cases, including those dealing with congressional power. And the "state judges" portion of Article VI seems to contemplate state judicial determinations of the validity of congressional acts as a predicate to deeming those acts supreme over inconsistent state laws.[9] Putting these textual passages together with the strong evidence that the Framers contemplated judicial review[10] makes the case for judicial review's broad scope satisfy for me the "more probable than not" standard of proof.

The debate over *Marbury*'s *force* is somewhat more episodic than the debate over its scope. The debate over its force is no doubt the reason I've been invited here, for it's the only *Marbury* debate on which I have uttered an opinion in public.

On the weakest plausible reading of *Marbury*, the Court's decisions on constitutional issues are binding on other officials only with respect to the cases in which those decisions are reached. Those decisions settle the particular controversies in which the constitutional issues arise. They have *res judicata* effects, but no *stare decisis* effects. If similar issues arise in other cases, no official, judicial or non-judicial, including the Court itself, is bound to give any effect to the Court's previous interpretations of the Constitution. This is essentially the view attributed to Lincoln[11] and in recent history espoused by Ed Meese.[12] For

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6. *See, e.g.*, Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597 (1976).

7. *See* Saikrishna B. Prakash & John C. Yoo, *The Original Understanding of Judicial Review* 70 U. CHI. L. REV. 887.

8. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 6 (1962).

9. Article VI states in relevant part that "the Judges in every State shall be bound [by the Constitution], anything in the Constitutions or Laws of any State to the Contrary notwithstanding." *See* Prakash and Yoo, *supra* note 7.

10. *See, e.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton).

11. *See* Abraham Lincoln, Sixth Debate with Stephen A. Douglas, *in* 3 THE

them, the Constitution, not the Court's interpretations of it, is what is authoritative for citizens and officials. The Court can bind us to its decrees only insofar as is necessary to resolve particular lawsuits. That is the limit of "judicial power."

At the other end of the "force" spectrum of glosses on *Marbury* is the Court's own gloss in *Cooper v. Aaron*.[13] There the Court essentially declared that although both officials and citizens may believe that the Court's interpretations are incorrect, those interpretations function as supreme law—they function as Article VI says the *Constitution* functions—unless and until the Court itself repudiates them. (An even stronger version of *Marbury*, but one that the Court did not adopt in *Cooper*, would make the Court's constitutional precedents immune from overruling, *even by the Court itself.*)

Now the *Cooper* gloss on the force of *Marbury* is what gives rise to one version of the so-called countermajoritarian difficulty. There are two versions of the countermajoritarian difficulty. One version finds troubling the idea that a past generation can lay down rules constraining the will of the majority in the present and future generations. On that version, *constitutionalism* is the culprit, not *Marbury* or *Cooper*. I have written elsewhere that I do not find this type of countermajoritarianism at all problematic,[14] unlike, for example, such anti-constitutionalists as Jeremy Waldron.[15] Indeed, on my view of law, on which law's essential function is to resolve moral controversy and its concomitant uncertainty through determinate rules, *all* law consists of the past binding the present.[16]

The other version of the countermajoritarian difficulty *is* associated with judicial review and with *Cooper* in particular. It views as troubling, not constitutional constraints themselves, but the fact that judicial interpretations of those constraints trump all other interpretations.

Now this version of the countermajoritarian difficulty itself has two versions. On one—I'll call it the M.P./G.L. version after

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COLLECTED WORKS OF ABRAHAM LINCOLN 245, 255 (Roy P. Basler ed., 1953); Abraham Lincoln, First Inaugural Address, *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953).

12. Edwin Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983-86 (1987).

13. 358 U.S. 1 (1958).

14. *See* Larry Alexander, Introduction, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 1-15, 11-13 (1998).

15. *See* JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

16. *See* LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES (2001).

its most famous proponents—the problem with judicial supremacy a là *Cooper* is that it elevates judicial *interpretations* of constitutional constraints over the constraints themselves.[17] On the M.P./G.L. version, only the Constitution, not its judicial gloss, is the "Supreme Law of the Land." M.P./G.L. and their running dogs argue for radical protestantism in constitutional interpretation. (There can be degrees of this, of course: each governmental official might follow his own interpretation, or each governmental branch might follow its own interpretation, with the President's interpretation binding all other Executive Branch officials, the Court's interpretation binding the rest of the judiciary, and so on. Gary Lawson refers to this as "departmentalism" and subscribes to it.[18] But the underlying logic of the position—that the Constitution, not its interpretation by particular officials, is what binds us—leads to the more radical anarchical position.)

The other version of the *Cooper*-based countermajoritarian difficulty goes like this. Whenever the Constitution is not completely transparent, so that its interpretation is at issue and is controverted, its interpretation should be settled by majoritarian institutions. In other words, this version accepts constitutionalism—constraint of present majoritarian bodies by past majorities—and, unlike the M.P./G.L. position, it accepts the need for settling disputed constitutional matters, even if the settlement is, in others' eyes, erroneous as a matter of constitutional interpretation. What it does not accept in *Cooper* is that it is the Supreme Court rather than the popularly elected officials whose interpretation should count as having settled the matter.[19] (Jeremy Waldron at times voices this complaint along with the anti-constitutionalism one, and at times he conflates the two, though they are quite different.[20])

Fred Schauer and I have written a couple of vigorously criticized articles extolling the virtues of constitutional settlement and of the courts as constitutional settlers.[21] We find more to

17. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Gary Lawson, *Interpretative Equality as a Structural Imperative (or 'Pucker Up and Settle This!')*," 20 CONST. COMM. 379 (2003).

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

19. Perhaps the strongest version of this view is Mark Tushnet's. *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

20. *See, e.g.*, WALDRON, *supra* note 15, at Chapter Twelve.

21. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMM. 455 (2000).

praise in *Cooper* than most constitutional scholars, or at least most of the constitutional scholars who do not imagine that the Supreme Court reads their articles or will adopt their favorite theories if transmitted through the law clerk pipeline.

In the remaining time I would like to examine the virtues and drawbacks of *Cooper* by making some more distinctions. (Making lots of distinctions may, alas, be my highest and best use.) One relevant distinction is between constitutional issues that it is important to settle with some finality and constitutional issues that can be left controverted and unresolved without too much damage. Actually, this is less a binary distinction than a continuum. Most constitutional provisions that organize the federal government, prescribe the method of making laws, separate the powers, and so forth, are provision on which it's important to have a high degree of settlement. Some rule, even if not the wisest, is better than no rule. On the other hand, constitutional provisions setting forth the powers of the federal government vis-a-vis the states or prescribing rights present less urgent cases for settlement. For them, a bad rule may be worse than no rule.

So that's one relevant distinction, or rather continuum—the relative value of settlement vis-a-vis normative optimality. A second relevant distinction is between those constitutional provisions that were intended by the Framers to function as determinate rules and those that were intended by them to be vague, abstract standards. The latter (standards) are essentially delegations to future decisionmakers to determine what really is just, fair, and reasonable. The former (rules) are preemptive of future decisionmakers' own normative judgments.

Now the Framers may have prescribed a rule in an area where settlement is not so important and a standard in an area that cries out for settlement. So the two distinctions I have made are not really one distinction differently described. If the Framers did intend a standard, not a rule—they employed concepts that are indeterminate because vague or essentially contested[22]—and if there is no urgent need for settlement, the judicial interpretations might well be left unentrenched against other branches or officials and against subsequent courts as well. The court might, for example, rule in favor of Katz in a wiretapping case, in favor of Kyllo in a thermal imaging one;[23] but other offi-

22. W.B. Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167 (1956).

23. *See* Katz v. United States, 389 U.S. 347 (1967); Kyllo v. United States, 533 U.S.

cials might legitimately keep on engaging in those practices if they believe them not to be "unreasonable searches," and the court could at any time do an about face and concur.

The third relevant distinction is between those questions that a court is more likely to answer correctly and those questions that a majoritarian body is more likely to answer correctly. The more legalistic the question—"What did the Framers mean, given that they intended the provision to be a rule, not a standard, when they worded the provision thus and so?"—the more likely it is that a court will be superior to other officials in reaching the right answer. On the other hand, matters are more complicated when it comes to vague standards regarding rights or powers. First, assuming the Framers intended a standard, does it govern an area where the value of settlement is high? In other words, is it a standard that can be left indeterminate, except as necessary to resolve individual lawsuits, or does the domain governed by the standard cry out for "rulification"—translating the standard into determinate rules? And second, if the standard is to be "rulified," will a majoritarian body or the President outperform the courts in getting matters right under such a constitutional standard? Or will the courts instead outperform the popular institutions? Or would some Canadian-style dialogic relation be superior to either judicial supremacy or majoritarian supremacy?[24] That is an empirical question about which I surely have no special expertise.

So my conclusions about the *Cooper* gloss on *Marbury* are these. First, if the Framers put a *rule* in the Constitution, whether or not a rule is desirable, and the rule's interpretation is at issue, *Cooper* makes good sense. The question is a legalistic one, and Courts have a comparative advantage in answering legalistic questions. If the issue is one that requires settlement more than optimality, then *Cooper* should reign and the Court itself should adhere to a strong doctrine of *stare decisis*. If the issue is not one that urgently requires settlement, however, the Court should be open to revisiting its prior interpretations; but it should only reverse them when it concludes both that they were wrong as a matter of interpretation and also that they are at least arguably normatively

27 (2001).

24. In Canada, the Parliament can pass a statute deemed by the courts to violate the Charter "notwithstanding" such a judicial ruling. *See* CAN. CONST. pt. I (Canadian Charter of Rights and Freedoms) section 33 (providing that Parliament or provincial legislatures may expressly declare that their enactments shall operate notwithstanding Charter provisions interpreted to be in conflict with such enactments).

inferior to the correct interpretation. (There is no virtue in reversing an incorrect interpretation that everyone concedes is normatively superior to the correct interpretation. Getting the Constitution right is not as important as settlement, even in areas where settlement is not itself so important, when the right interpretation is not normatively superior to the previously settled one. That is what Fred and I argued in our earlier pieces.[25])

Second, if the Framers enacted a *standard*, and thus failed themselves to settle the matter and instead delegated it, the desirability of *Cooper* judicial supremacy and strong *stare decisis* is a function of relative institutional competence and relative urgency of settlement. The more urgent the need for settlement, the more appealing are judicial supremacy and strong *stare decisis*. The relative institutional competence question focuses on not only *epistemic* comparisons—which institution is most likely to discern the best answers to the normative questions the standards delegate—but on motivational comparisons as well. A legislature may be institutionally better equipped to answer some normative questions but because of various pressures or constraints less motivated than courts to answer them correctly. Thus, only where the Framers intended a standard, and where there is either (1) no need for settlement (rulification) or (2) the majoritarian institutions both can settle matters and settle them better than courts can, is *Cooper* inappropriately invoked.

Finally, a word about liberty and law. There are two principal threats to liberty. One is tyranny; and it is the tyranny of power concentrated in the Supreme Court that makes folks like Gary Lawson recoil from the *Cooper* gloss on *Marbury*.[26] The other threat is anarchy. Lawson finds anarchy more attractive than most people do, perhaps because his picture of the state of nature is more Lockean than Hobbesian. But the Hobbesian in-

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25. *See* Alexander and Schauer, *On Extrajudicial Constitutional Interpretation*, *supra* note 21, at 1379-81.

Consider, in this respect, the rule in the Constitution that the President must be thirty-five years of age. U.S. Const., Art. II, § 1, cl. 5. Suppose that the question is whether that rule refers to the President's age at the time of his election or to his age at the time he takes office, and the Supreme Court resolves that question one way or the other. Moreover, suppose the Supreme Court's resolution of the question is regarded by Congress and the President as erroneous in light of the evidence of the original meaning of the Constitution. There is still good reason to adhere to the Court's misinterpretation and treat the issue as settled. There is a much greater need for some settlement than for the ideal settlement—see Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (Brandeis, J., dissenting: "[S]ometimes it is better that things be settled than that they be settled correctly."). And here, neither the Court's settlement nor the correctly interpreted Constitution's, if different, are mischievous ones.

26. *See* Lawson, *supra* note 17, at 379-80.

dictment of anarchy is not merely that humans are ill-motivated, though some surely are. The more serious Hobbesian indictment is that in the state of nature, no matter how well-motivated we are, we will disagree about our rights and duties vis-a-vis one another, and the results will be morally calamitous. Put differently, the problem to which law is a solution is not motivation but knowledge.[27] If law is to provide that knowledge, it must settle that which is controverted; and where the lawgiver attempts to do so but fails—because it lays down a norm that is a rule of unclear meaning or that is not a rule at all—then some other institution must provide the settlement. Lawson's antipathy toward settlement transcends the Constitution, *Marbury,* and *Cooper.* It applies to statutes and common law as well, so long as we disagree about their prescriptions. It is, indeed, an anti-law position, a general case for anarchy, and no stronger than such a case can be.

Well, that's where I'm going to leave these quite messy matters—in a mess. The *Cooper* gloss on *Marbury* is not some derelict attempt to overthrow the Constitution through judicial coup d'etat. For most constitutional questions, *Cooper* has a lot to recommend it. Indeed, for some constitutional questions, *Cooper* might usefully be supplemented by a very strong doctrine of *stare decisis.* On the other hand, there may be some constitutional questions on which *Cooper* should be weakened. Perhaps *City of Boerne*[28] was an inappropriate invocation of the *Cooper* view, though whether it was depends on such matters as whether the Free Exercise Clause is a rule or a standard and the relative competence of Congress and the Court in implementing it. I take no

27. *See* Larry Alexander, *With Me, It's All er Nuthin': Formalism in Law and Morality,* 66 U. CHI. L. REV. 530, 549 (1999); ALEXANDER AND SHERWIN, *supra* note 16, chapters 1 and 2.

28. City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act of 1993 on the ground that it was not an enforcement, in pursuance of section 5 of the Fourteenth Amendment, of the right to the free exercise of religion, guaranteed under section 1 of that amendment, but rather was a congressional redefinition of that right in opposition to the Supreme Court's definition in Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990)).

There is an interpretive question whether the Equal Protection Clause is a standard regarding equal treatment or a rule that merely mimics the provisions of the Reconstruction Civil Rights Acts. The Supreme Court has treated the clause as a standard and rulified it in such cases as Brown v. Board of Education, with respect to de jure racial school segregation, in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) and Grutter v. Bollinger, 539 U.S. (2003) with respect to racial affirmative action, and Craig v. Boren, 429 U.S. 190 (1976) with respect to gender classifications. Arguably, any or all of these decisions may have either misinterpreted the clause to be a standard or, if the clause *is* a standard, rulified it suboptimally or even mischievously. Many who decry *Cooper* in other contexts support it with respect to these cases, however.

position here on such matters. What I do claim is that the *Cooper* gloss on *Marbury* should get at least two cheers and certainly no boos.