

# Securing the Rule of Law Through Interpretive Pluralism: An Argument From Comparative Law

by RICHARD STITH\*

## Introduction

Can law rule? For law to rule, it must be enforced. But when law is enforced, not it but its enforcers may rule. To bind those enforcers firmly to the law, they, too, would have to be subjected not only to law but also to a still stronger force—which itself may then be lawless. The very effort to secure the rule of law appears to lead instead to ever more powerful human rulers.

Put another way: If we abolish the police and the courts, in order to leave people truly “not under man but under God and the law,”<sup>1</sup> we invite disorder. But if we give the police or courts—or their superiors—plenary power to compel obedience, we invite lawless tyranny. Law exists in tension with order, as well as with disorder.

The only way fully to escape this contradiction while holding to the rule of law ideal is to empower final enforcers who are infallible: both perfectly disinterested and perfectly wise in interpreting a complete and

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\* Professor, Valparaiso University School of Law. A.B. (Harvard University); M.A. (University of California, Berkeley); Ph.D. (Yale University), J.D. (Yale Law School). Many colleagues and students deserve thanks for their collaboration, especially the author’s research assistants Joel Vander Kooi and Ghahre Pascale. A draft of this article was selected and circulated as Jean Monnet Working Paper No. 1/07, available at <http://www.jeanmonnetprogram.org/papers/07/070101.html>.

1. This ancient ideal is ordinarily taken to mean only that our political superiors are bound by rules, that they do not act arbitrarily or according to their own will. See MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY 40-41 (1973). But in its stronger form, attributed to Bracton, it could apply fully only to someone who, like the king, had no political superior at all: *Quod Rex non debet esse sub homine, sed sub Deo et Lege*. See 2 HENRY DE BRACON, *The King Has No Equal*, in DE LEGIBUS ET CONSUEUDINIBUS ANGLIÆ [ON THE LAWS AND CUSTOMS OF ENGLAND] 33 (George E. Woodbine ed., Samuel E. Thome trans., Harvard Univ. Press, 1968) (1569), available at <http://hls.law.harvard.edu/bracton/Unframed/calendar.htm>.

principled legal order. Law can rule, can be fully compatible with order, only if the human rulers to whom the law is ultimately entrusted are willing and able to follow nothing but the law.

Perhaps fearing disorder above all, nations may be tempted to hope for this infallibility or something close to it. They may entrust their whole legal system to one "supreme" or "constitutional" court bound by a supposedly systematic and objective legal science. Both disorder and tyranny seem thus to be avoided by having impartial experts hold all others to their correct interpretations of the law.

This Article will argue that total consolidation of legal interpretation in a single high court is a mistake in an age where judges themselves, throughout the world, believe less and less that law is science rather than politics. Omnipotent politicians are potentially lawless despots.

Since an intellectual revival of something like legal science seems unlikely, for reasons discussed in section III below, this Article proposes an institutional remedy for the politicization of legal interpretation that so threatens the rule of law. High court judges (and others) should be given new structural incentives to persuade others of the correctness of their legal decisions, for in so doing they will tend to anchor those decisions firmly in accepted law.

In order to create judicial incentives to convince rather than to command, interpretive centralism must be replaced by interpretive pluralism. Only when a central court needs the cooperation of other interpreters of the law does it have a strong reason to be convincing in its exposition of the law.

Interpretive pluralism<sup>2</sup> can save the rule of law both from tyranny and from anarchy. Official interpretation of the law can be divided or balanced<sup>3</sup> rather than either consolidated or eliminated entirely. For example, in France there exists more than one official interpreter of the constitution.<sup>4</sup> This and other viable compromises can be found in the legal

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2. In this Article, interpretive pluralism (or pluralist interpretation) means nothing more than the absence of a single binding or authoritative interpretation. That is, it simply refers to an openness to multiple interpretations (herein of law). It does not affirm the subjectivist view that all interpretations are equally valid nor that the adequacy of interpretation cannot be measured by how well it comports with that which it interprets.

3. Such was, of course, the solution proposed by James Madison with regard to the control of political power in general. THE FEDERALIST NO. 51, at 261-63 (James Madison) (Bantam Books, 1982) (1787). This Article attempts to apply the same technique to the particular problem of politicized interpretation.

4. The *Conseil Constitutionnel* (Constitutional Council) regarding *lois* (statutes) and the *Conseil d'Etat* (Council of State) regarding *réglements* (regulations). M.A. GLENDON, M.W. GORDON & C. OSAKWE, COMPARATIVE LEGAL TRADITIONS 120 (2d ed. 1994) (referring to the Council of State "in its assumed role as a second constitutional court in France.").

systems of the world, as we shall see. Nations now drafting or revising their constitutions, or entering into a supranational legal order, should not feel pressed into granting unlimited interpretive power to any single court or other institution.<sup>5</sup>

In recent years, American scholarship on both the Left and Right has attacked centralized judicial supremacy under rubrics such as “departmentalism”<sup>6</sup> and “popular constitutionalism.”<sup>7</sup> Though that

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5. Nepal, Ukraine, and the European Community (among others) have in recent decades created basic laws with centralized final interpretation, while Chile has consolidated previously divided authority to interpret its Constitution. This Article is in part a cautionary response to these and like events. See NEPAL CONST. art. 86 (1990), available at [http://www.supremecourt.gov.np/main.php?d=lawmaterial&f=constitution\\_part\\_11](http://www.supremecourt.gov.np/main.php?d=lawmaterial&f=constitution_part_11); UKR. CONST. art. 147, available at <http://www.rada.gov.ua/const/conengl.htm>; Treaty Establishing the European Community art. 220, Nov. 10, 1997, 2002 O.J. (C 325) 33, 132 [hereinafter EC Treaty] (consolidated version), available at [http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C\\_2002325EN.003301.html](http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html). In Chile, the Supreme Court’s final authority over the constitutionality of old law was transferred to the Constitutional Tribunal by Ley No. 20.050, published on 26 August 2005. See CHILE CONST. arts. 93, 94, available at [http://www.tribunalconstitucional.cl/normas\\_reguladoras/constitucion.html](http://www.tribunalconstitucional.cl/normas_reguladoras/constitucion.html).

6. The essence of departmentalism is hostility to the supremacy of any one legal institution (such as the federal Congress or the Supreme Court). An accessible introduction to the two basic forms of departmentalism, separation vs. coordination (in an essay which also felicitously relates the American debates to legal developments in other nations) is Mark Tushnet, *Marbury v. Madison Around the World*, 71 TENN. L. REV. 251, 262-63 (2004). A simple way to contrast the two forms: the first would oppose judicial review of other departments, while the second would have various departments (including the judiciary) review one another. This Article is a new argument for one or both of those forms of departmentalism, with greater emphasis on the second. They have become quite influential in the United States. Writing in opposition, Larry Alexander and Frederick Schauer already conceded in 1997 that “most scholars . . . believe that even when the Supreme Court has spoken on a constitutional issue, non-judicial officials have no more obligation to follow its interpretations than the courts have to follow the constitutional interpretations of Congress or the executive. According to what appears to be the dominant view, non-judicial officials . . . are duty-bound to follow the Constitution as they see it—they are not obligated to subjugate their judgments to what they believe are the mistaken constitutional judgments of others.” Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1360 (1997).

For a fine theoretical and historical analysis of departmentalism, consult ROBERT LOWERY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* (1989). Professor Tushnet counts as a sometime-departmentalist voice on the Left. Note that it is quite a respectable voice: Tushnet was president of the American Association of Law Schools during the year 2003, and he has recently been granted a chair at the Harvard Law School. On the Right, or at least Center-Right, one hears the departmentalist voice of Michael Stokes Paulsen among others. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 225 n.19 (1994), where he lists many distinguished scholars (including Alexander Bickel, Herbert Wechsler, and others across the political spectrum) who have challenged the Court’s interpretive supremacy. For a more recent conservative statement, see RICHARD JOHN NEUHAUS, *THE END OF DEMOCRACY? THE JUDICIAL USURPATION OF POLITICS* (Mitchell S. Muncy ed., 1997) reprinting and discussing Symposium, *End of Democracy? The Judicial Usurpation of Politics*, 67 FIRST THINGS 18 (1996). Close to the view of this Article is the “departmentalism” of each law-abiding citizen found in SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 43-49 (1988) (arguing for individual authority to interpret the Constitution).

literature is rich in nuance, it is too deeply embedded in the myriad peculiarities of American history and legitimacy to be very useful to scholars in other legal cultures. This Article presents a new argument for departmentalism, with emphasis on the sort that would have various departments (including the judiciary) review one another. By working with clarity from first principles, the Article seeks to disentangle the idea of interpretive pluralism from its particular embodiments in the constitutional history of the United States, so that it may be more accessible to those in the wider world who may be engaged in forming or reforming a national or supranational constitution.

The first section of the Article will lay out in greater detail some of the reasons why the rule of law is both appealing and frightening. The next two sections take up and reject the idea of an infallible or relatively infallible court as a solution to the contradiction within the “rule of law”

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7. The essence of popular constitutionalism is the supremacy of “the people” over the meaning of constitutional law. Thus both departmentalism and popular constitutionalism are opposed to judicial supremacy, but they diverge with regard to whether there should be final popular control over the interpretation of the constitution. Of course, popular constitutionalists may see departmentalism as a useful means to further popular control (with elected officials resisting unelected ones in the name of the people, for example) and departmentalists may welcome popular support for officials’ resistance to judicial pretensions of supremacy, so the two camps may often find themselves allied rather than opposed in practice.

Mark Tushnet is, in the end, more a popular constitutionalist than a departmentalist, as can be seen in his strong attack on judicial review, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). Stanford Law School Dean Larry D. Kramer’s recent paean to popular constitutionalism, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004), is a wonderful and widely read foray into the history of popular legal interpretation in the United States. Much of Dean Kramer’s support comes from the early role of the people as rememberers and enforcers of fundamental customary law. If we still lived in a stable society imbued with great reverence for ancient norms, Kramer could well be right that the people as a whole would be the best guardian of our legal foundations. See FRITZ KERN, *KINGSHIP AND LAW IN THE MIDDLE AGES* (S.B. Chrimes trans., Harper Torchbooks 1970) (1914) (on the medieval right of resistance to unlawful rule). But note: the traditional right of American juries to determine the law as well as the facts, to be faithful to their own understanding of the law rather than to that of the judge, has in our day become a (largely unspoken) right of juries to nullify the law. See John D. Gordon III, *Juries as Judges of the Law: the American Experience*, 108 *LAW Q. REV.* 272 (1992), cited in *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) (“legal decisions by juries were sometimes regarded as an expression of faithfulness to the law . . . rather than defiance of the law or ‘nullification.’”). Likewise, an unchecked popular right to determine the meaning of the Constitution could today become a popular right to ignore or nullify the Constitution. For an excellent critique of Kramer’s book along these lines, in clear support of judicial supremacy, see Larry Alexander and Lawrence B. Solum, *Popular? Constitutionalism?*, 118 *HARV. L. REV.* 1594 (2005). Since this Article aspires to secure the rule of law itself, it opposes both judicial supremacy over law and popular supremacy over law.

Furthermore, this Article seeks especially to address problems of supranationalist institutions, where the workability even of democratic legislative mechanisms may be in doubt and any hope for popular interpretation must necessarily be distant. By contrast, departmentalist solutions are ready at hand, as we shall see.

ideal. We shall see that changing ideas both of the nature of interpretation and of the nature of a constitution are likely to lead to an ever more politicized, and thus less trustworthy, judiciary in this twenty-first century. In the final part of the Article, we shall examine closely the only two logically possible ways for law to limit any given supreme or constitutional court's power, without giving up the rule of law ideal: "Separation of powers" prevents that court from reviewing certain other bodies' interpretations of the law, while "checks and balances" permits certain bodies that the court reviews themselves to counter-review the court's decisions. Either approach, or a mixture of the two, involves a compromise that reduces the likelihood of tyranny without incurring an unacceptable risk of disorder (although, of the two, "checks and balances" holds more tightly to the rule of law, as we shall see). Such compromises do not bring about a principled solution to the tension within the idea of the rule of law, but they do offer practical alternatives to the choice between despotism and chaos.

### I. Who's Afraid of the Rule of Law?

Newly designed constitutions<sup>8</sup> sometimes proclaim allegiance to the "rule of law," as opposed to the lawless rule of human individuals. Why is it thought better to be subject to laws rather than to men and women? At least four reasons come easily to mind.

First, without the "rule of law" there can be no "rule of higher law." Those who acknowledge a non-positive natural or other law, existing prior to the State and demanding respect for fundamental human rights, necessarily support the "rule of law" ideal. A tyrant unlimited by law is clearly not bound by human rights. Those who hope for human rights must hope also for the rule of law.

Second, without the rule of law there can be no democracy of any substantial size. There is no way, in any but an inconceivably small polity, for a majority vote of the community to decide every individual dispute. Only if the majority can enact general rules that can and will be faithfully applied by police and courts to individual cases is there any hope that the people can govern. As it was for higher law, the rule of law is necessary

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8. See, e.g., UKR. CONST. art. 8; S. AFR. CONST. 1996 ch. 1, § 1(c), available at <http://www.info.gov.za/documents/constitution/1996/96cons1.htm>. See also AFG. CONST. pmbl. (2004), available at <http://www.moj.gov.af/pdf/constitution2004.pdf>; NEPAL CONST. pmbl., para 3 (1990). Nepal's Constitution is currently in flux; a new constitution is being voted on that would supersede the constitution of 1990. As of the submission of this Article, the interim constitution of 15 January 2007 is in effect; debate is still taking place regarding amendments to the interim constitution. Kantipur Report, *Parliament Discusses Interim Statute Amendment Bill*, EKANTIPUR.COM, Mar. 6 2007, <http://www.kantipuronline.com/kolnews.php?nid=102781>.

for rule by the people—though again it is obviously not sufficient, in that non-democratic dictators may well also impose their will through constitutions and statutes.

Third, the rule of law secures private personal and economic freedom. By providing advance notice of how State officials will deal with crimes and civil disputes, the rule of law allows individuals to plan their lives and their investments. Even a non-democratic regime that ignores basic human rights guarantees a sphere of individuality to the degree that it adheres to its own previously announced rules, rather than changing them *ex post facto*.

Fourth, the rule of law legitimates and thus stabilizes governments. The above-mentioned values (human rights, democracy, and private freedom) are among the chief reasons that women and men are willing to tolerate and support being governed. A government that ignores the rule of law undercuts not only those three values but also its own existence. To the degree that stability is good, preserving the State is another reason to prefer the rule of law over the discretionary rule of political leaders.

Because we care so much about the rule of law, we wish to see it effectively applied and enforced. Through mistake or ill will, private individuals may not always observe the law if left unsupervised. Similarly, a president or a legislator, despite his or her oath to support the constitution, may misinterpret or ignore that document in the pursuit of political results. It is common for courts to take on the function of ensuring that such persons in fact do conform to the law—for example, through judicial review of legislative and administrative acts, and identifications of unconstitutionality (or of potential unconstitutionality). And their decisions may be reviewed by (or referred to) a higher court, a supreme or constitutional court whose interpretation of the law is final as to the case at hand.

In order to achieve uniformity of results without relitigating similar cases all the way up to the same final authority, it seems sensible to make that authority's interpretation of the law final not only as to the parties directly involved, but as to the whole legal system. This efficiency can be achieved either by a "horizontal" version of *stare decisis* (the Anglo-American doctrine that a single case opinion binds all like future cases), under which there is no point in relitigating old issues insofar as the highest court of appeal is committed to not admitting error and correcting its ruling, or else a "vertical" version<sup>9</sup> of *stare decisis*, a legally binding declaration

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9. The United States Supreme Court has never adhered to absolute horizontal *stare decisis* (though it does recognize a significant degree of binding power in its own past decisions), and the Court did not clearly announce the absolute vertical version until 1958, when it declared that its interpretations of the Constitution are the law of the land. *Cooper v. Aaron*, 358 U.S. 1, 18-19

that all other citizens and institutions<sup>10</sup> except that court itself are to abide by the highest court's interpretations of the law rather than by what they themselves consider the law to be. Similarly, in nations that do not formally recognize the doctrine of *stare decisis*, a court's rulings, and even its legal interpretations, may still bind *erga omnes* ("towards all"), not just with regard to the immediate parties to the suit. In the constitution of Ukraine, for example, a result nearly identical to vertical *stare decisis* is achieved by the constitutional provision that the new Constitutional Court issues "the official interpretation of the Constitution of Ukraine and laws of Ukraine"<sup>11</sup> and that these interpretations "are binding throughout the territory of Ukraine, are final, and may not be appealed."<sup>12</sup>

Sensible though it may seem, in the above legal contexts, the idea of "binding interpretation" is a very strange animal. It would be shocking and even ludicrous in a literary context, for example. In an open society, we would not tolerate the issuance of an official, binding interpretation of, say, Shakespeare—no matter how highly we respected the good faith and wisdom of the interpreter. The reason is simple. The very idea of interpretation contains the notion of a report and with it the idea of faithfulness to that about which the report is speaking. Although we know that every interpretation or report is a filter as well as a conduit, that which makes an interpretation different from a creation is the element of faithfulness to a preexisting original. Put another way, an interpretation is of value not primarily because of what it is in itself but because that which is interpreted is of value. An interpretation is a secondary source of information to which we resort when we cannot assess the primary source for ourselves. But because we care about that primary source, we care also

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(1958). That assertion put the Court's interpretations of the Constitution on a level with the Constitution itself, which sounds like both versions of *stare decisis* at once. But the Court cannot have meant what it said because it has continued to overturn its own prior rulings on occasion, something it could not do to the Constitution itself. Thus, the *Cooper* doctrine in the end amounts simply to a doctrine of judicial supremacy, in that everyone except the Court itself must treat its interpretations as the law of the land.

10. *Stare decisis* is ordinarily treated solely as a court practice. Thus it may sound odd to refer to *stare decisis* as binding "all other citizens and institutions." But this is surely the doctrine's effect. If all courts were to announce their readiness to ignore precedent, citizens would be unlikely to continue to feel bound by it.

11. UKR. CONST. art. 147; EC Treaty, *supra* note 5, art. 220; S. AFR. CONST. 1996 art. 167, cl. 4. Similarly, the Supreme Court of Canada, which was created by the Federal Government by the Supreme Court Act through §101 of the Constitution Act of 1867, has become the final interpreter of all Canadian law, animated apparently by a desire to impose continent-wide uniformity. See PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA, § 8.5(a) (3d ed. 1992).

12. UKR. CONST. art. 150, para. 2. The context of this provision makes clear that such interpretations bind universally. They do not bind only the particular private parties in the case at hand.

about correcting errors in the secondary source, once we have the means to do so. To make a secondary source binding would be to say that we no longer care about accurately understanding the primary source—Shakespeare's works themselves, in our example. But it was because we cared about the primary source that the secondary source had value to begin with. "Binding interpretation" thus makes no sense.<sup>13</sup>

It might be said that law is different. Although we care about being faithful to legal texts and other sources of law, especially to constitutional ones to the degree that they contain our national foundations, it might be argued that the need for uniformity and certainty in law is so great that judges must stick with the first interpretation with which they happen to come up in the press of deciding a particular case. Judges must adhere even to clearly erroneous judicial interpretations, even on matters of fundamental importance, because otherwise the public application of law will be less uniform and certain.

Unfortunately, binding interpretation may sacrifice fidelity to an original source without securing uniformity or certainty of application. If interpretation is to bind, then interpretations of prior interpretations will come to bind, displacing the earlier ones. For example, the United States Supreme Court has held itself bound not by its first interpretation of a constitutional text, but by its later interpretation of that first interpretation and so on *ad infinitum*, without regard to the actual meaning of that text.<sup>14</sup> As in the parlor game where each person seeks solely to repeat a whispered message down a line, the message will change and change again.<sup>15</sup> Neither the original nor a uniform substitute survives. Furthermore, uncertainty is

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13. Similarly, a dogmatic sort of "pluralist interpretation" would make no sense, at least in law. Because the project of legal interpretation is always an attempt to be faithful to a binding original source, to hold that contradictory interpretations are equally valid would be self-contradictory, an abandonment of their binding foundation. Contradiction in interpretation ought to be overcome, but only by mutual submission to the original, not by labeling one interpretation "authoritative." See *supra* note 2.

14. "[Later] decisions put *Griswold* in proper perspective. *Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in the light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977) (referring to *Griswold v. Connecticut*, 381 U.S. 479 (1965)). Of course, this is an example of horizontal *stare decisis*. If a prior interpretation bound only the lower courts, not the highest court itself, then escape back to the original could be possible for that upper court. But see text *infra* at note 123 for problems that even vertical *stare decisis* can generate for the highest court.

15. No matter how skillful a group of translators may be, they will inevitably distance themselves from the original if (for each new language in a series of translations of the original) they seek only to translate their latest translation, rather than attempting once again to be faithful to the original.



generated by the fact that each new legal interpretation normally will be applied retroactively to non-party events that have already occurred, thus surprising those who did not anticipate the change.<sup>16</sup>

Indeed, if binding interpretation of law is a necessity for public order, it has become so only relatively recently. The history of continental European law is, in fact, marked by repeated rejection of the idea that those who apply the law should seek to follow someone else's apparently incorrect interpretation of that law rather than the law itself.

The great scholars who rediscovered and explicated Justinian's Roman texts had immense prestige in the late medieval and early modern periods, and they had enormous influence on the development of modern Romano-Germanic legal systems. But legal uniformity came about by argumentative and political persuasion. Judges were not legally bound to follow scholars' interpretations.<sup>17</sup> After the modern European codes were adopted, scholars continued to have great impact as the chief interpreters of these new primary sources of law, but those scholars' interpretations never displaced the codes as a matter of law.

If even the scholarly leaders of the law in continental Europe never acquired binding authority, we would not expect the much-less-prestigious judiciary to do so. And they clearly did not. The core tradition of Europe, unlike that of Great Britain, rejected the idea of *stare decisis* and other doctrines that could lead to a government of judges. Traditional French

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16. Americans are accustomed to thinking of *stare decisis* as adding greater certainty to the law, because it often adds specificity to prior general terms. But if one conceives this doctrine to permit retroactive legislation at any time on any subject, albeit often narrowly tailored, its disruptive potential becomes readily apparent. For example, if a judge were to hold three witnesses necessary for a valid will (rather than just two, as previously required), he might surprise and bind not only a litigant but also many others who had thought their estates wholly in order. A court may occasionally make its rulings only prospective, thus protecting such reliance interests on old law—except, in order to avoid stating mere *obiter dictum*, for those of the losing party in the case at hand. But a court will do so only where it thinks those interests sufficient to outweigh the harm done by the court's overt departure from the role of an even-handed applier of preexisting law. For more detail, see WALTER V. SCHAEFER, *THE CONTROL OF SUNBURSTS: TECHNIQUES OF PROSPECTIVE OVERRULING* (1967).

17. Aphorisms such as "*Chi non ha Azo non vada a Palazzo*" and "*Nemo jurista nisi Bartolista*" do indicate a strong *de facto* influence of legal scholarship in European courts and doctrine. But the very fact that such quips were thought useful tends to show that Azo and Bartolus did not bind *de jure*. No one would think it clever to remark "Whoever does not have laws on his side should not go to court." This is not to deny that a legislative authority could declare selected scholars' works to be legally binding. Cf. FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE* 40-41 (Tony Weir trans., 1995) (discussing the authority of Azo and Accursius); cf. also Donald R. Kelley, *Jurisconsultus Perfectus: The Lawyer as a Renaissance Man*, 51 J. WARBURG & COURTAULD INST. 84, 87-89 (1988) (both discussing the influence of Bartolus during the Renaissance); Stefan Vogenauer, *An Empire of Light? Learning and Lawmaking in the History of German Law*, 64 CAMBRIDGE L.J. 481, 487 n.23 (2005).

doctrine and practice are perhaps the clearest in refusing to treat judicial interpretations as infallible or legally binding: "The highest courts of each [French] judicial system meet resistance from below, and this may well cause them to reverse their original opinions. Uniformity is not as highly valued as correctness in the legal system as a whole . . . ."<sup>18</sup>

Put simply, it has long made perfect sense in Europe to say that one or all courts are *mistaken* in their interpretations of a code or of another source of law. Under the strange doctrine of "binding interpretation," such talk would be almost as senseless as saying that a legislature's statutes are erroneous. A legally binding interpretation is a secondary source turned into a primary source. It is the law itself. It therefore cannot be mistaken about the law.

The famous quip by England's Bishop Hoadly captures what surely must be a central reason for the traditional European fear of binding interpretation: "[W]hoever hath an absolute authority to interpret any written or spoken laws, it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spake them."<sup>19</sup> Anyone who cares a great deal about a text or custom will not permit it to be displaced by an interpreter. Either because the law embodies natural rights, or because it embodies the will of the people, or because it gives rise to private expectations, or for other reasons, Europeans have been "legalists"<sup>20</sup> in that they have sought to be loyal to the law even at the cost of continuing disunity as to its meaning.

America, too, has lived long and well without much uniformity of law. The vast majority of everyday issues (criminal, contract, tort, property, and the like) are dependent upon rules that may change at the border of each state. These differences often arise because of varying interpretations of the same legal principles. Moreover, there has long been a special resistance to the idea of binding judicial interpretation of the federal Constitution.<sup>21</sup> One reason is obvious. The dangers of binding interpretation are far more acute

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18. JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 53 (1992). *But cf. id.* at 48-56 (the developing interpretive hegemony of the Constitutional Council).

19. H.L.A. HART, *THE CONCEPT OF LAW* 141 (2d ed. 1994). *See also* JOHN CHIPMAN GRAY, *THE NATURE AND THE SOURCES OF THE LAW*, 102-03, (photo. reprint 1983) (Roland Gray ed., 2d ed. 1921) (further discussion on Hoadly's assertion).

20. Franz Wieacker has called "personalism," "legalism," and "intellectualism" the three invariables in European legal culture. Franz Wieacker, *Foundations of European Legal Culture*, 38 *AM. J. COMP. L.* 1, 19-27 (Edgar Bodenheimer trans. & ann. 1990).

21. *See supra* notes 6-7. The United States Supreme Court considers its interpretations of constitutional law to be less binding than its interpretations of statutes: "Our willingness to reconsider our earlier decisions has been 'particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible.'" *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)).

where it claims to be based on an authority that cannot easily be changed. Courts can achieve much more permanent ascendancy over hard-to-amend sources of law than they can over most statutes<sup>22</sup> and over readily amendable constitutions. The American President Thomas Jefferson once wrote that the “opinion which gives the judges the right to decide [the meaning of the Constitution for the Legislative and Executive branches of government] would make the judiciary a despotic branch.”<sup>23</sup> President Abraham Lincoln, in his first inaugural address in 1861, warned that if “the policy of the Government is to be irrevocably fixed by decisions of the Supreme Court the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers.”<sup>24</sup> These men saw clearly that the doctrine of binding constitutional interpretation can lead to unchecked tyranny. Fidelity to the Constitution may require resistance to a Court that acts unconstitutionally.<sup>25</sup>

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22. Where statutes themselves are difficult to change, their interpreter likewise has great power. Thus a binding interpretation of a venerated code could have staying power even if widely considered mistaken. Again, the interpretation of statutes (called “regulations” or “directives” in European Union parlance) by the European Court of Justice has a hegemonic quality inasmuch as a statutory clarification requires both an initiative by the Commission and a supermajority in the Council of Ministers.

23. Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 8 WRITINGS OF THOMAS JEFFERSON 310-11 (P. Ford ed. 1897), as found in PAUL BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 70-71 (1975).

24. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS, 1859-1865, at 221 (Don E. Fehrenbacher, ed., Library of America 1989). See *infra* note 115 for full text of Lincoln’s remarks.

25. Note that although the U.S. Constitution proclaims itself “supreme,” it does not explicitly designate its own official interpreter. See *supra* notes 6-7. In some nations there may be an added complication. Where the constitution itself clearly binds all to a certain court’s interpretations, how could that court ever be plausibly resisted in the name of the constitution? The answer may be that the power to interpret is not the power to amend. Thus, if the court sought to amend the constitution under the guise of mere interpretation, fidelity to the constitutional order could still require resistance to the court. This was the argument made by the Constitutional Court of Germany, threatening resistance to the European Court of Justice should its official interpretations permit disguised amendments to the Treaty of European Union.

[I]n future, it will have to be noted as regards interpretation of enabling provisions by Community institutions and agencies that the Union Treaty as a matter of principle distinguishes . . . the amending of the Treaty, so that its interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects for Germany.

*Brunner and Others v. the European Union Treaty (The Maastricht Judgment)*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court, 2d Senate] Oct. 12, 1993, 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 155 (F.R.G.), Case 2 BvR 2134/92 & 2159/92, 1 C.M.L.R. 57, 105 (1994), 1993 WL 965303, at \*105. Compare the subsequent speech by Prof. Paul Kirchhof, the primary author of the *Brunner* decision:

If, in an adjudication of the European Court of Justice, the judges were not only to apply their judicial skill in interpreting the treaty but also extended the latter in some

One might summarize the argument so far in this way: The “rule of law” is a valuable ideal. In order to secure the “rule” part of this ideal, in order to make sure law *rules*, it seems at first sight sensible to entrust the law to a supreme tribunal. But if this trust is abused, there emerges the frightening possibility of rule without law, i.e., of judicial despotism. Both in Europe and in America, there have been important efforts to avoid this result by preserving the possibility of legal dissent, of legally significant disagreement with interpretations of the law made by the courts.

Is it enough, however, to do as Jefferson and Lincoln have suggested—i.e., to recognize the right of the legislative or executive branches of government to resist a judiciary that is unconstitutionally despotic? It is certainly conceivable that the same political faction could come to dominate all three branches of government and that all three could connive at undermining a constitution. Professor Sanford Levinson has argued for “citizen review” as a backup to judicial review. He reasons that ultimately the only guarantee that the appointed enforcers of the Constitution will not subvert it lies in private citizens themselves scrutinizing judicial and other official acts for unconstitutionality and refusing cooperation with those that are egregiously illegal: “[C]itizen review is a vital necessity for any polity that purports to call itself constitutional.”<sup>26</sup> No doubt remembering the Nazi capture of all state institutions, Germany has made citizen resistance to unconstitutional acts of judges and others an explicit constitutional right, if the constitutional order itself is at stake and if no other recourse is available. Article 20(4) of the Basic Law declares “[A]ll Germans have the right to resist any person or persons seeking to abolish [the] constitutional order, should no other remedy be possible.” The rule of law in Germany includes the right to resist all rulers in the name of law.<sup>27</sup>

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substantive respect, this legal instrument would not be valid on German territory . . . . The [European] Court of Justice develops European law further, the national courts make sure that the application of European law does not overstep the limits on interpretation and does not represent a *de facto* amendment to the treaty . . . . [Furthermore, if] a provision of the treaty cannot be adequately defined, it remains non-binding.

Paul Kirchhof, *The Functions of the European Court of Justice and of the Courts of the Member States*, in *ROUNDTABLE ON THE DEVELOPMENT ROLE OF THE EUROPEAN COURT OF JUSTICE*, (European Policy Forum/ Frankfurter Institut May 12, 1995).

26. LEVINSON, *supra* note 6, at 53.

27. The context of this provision suggests that resistance could be against all three branches of government, including the judiciary. The prior subsection, Article 20(3), reads “Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice.” GRUNDGESETZ [GG] [Constitution] art. 20(3) (F.R.G.).

But if the elevation of “rule” over “law” was frightening, is not the elevation of “law” over “rule” likewise to be feared? If citizen fidelity to rulers avoids disorder at the price of possible tyranny, citizen fidelity to the law avoids tyranny at the price of possible anarchy. What if many radicalized Germans were to conclude that the present legal regime is unconstitutional as a whole? The explicit permission to resist could conceivably contribute to the creation of chaos.<sup>28</sup>

Who’s afraid of the “rule of law”? The answer should be “all of us.” For this self-contradictory idea leads both to unchecked concentration of power and to unchecked decentralization of power, both of which are fearful possibilities.

## II. Infallibility as Consolation

There is only one conceptually possible way to escape completely the conundrum we have been examining. The essential reason that the rule of law tends to degenerate into tyranny or disorder is the indeterminate nature of interpretation, which subjects all interpreters to the possibility of error and the temptation of manipulation. If only one final interpreter exists, the indeterminacy of interpretation makes despotism possible; if many exist, then disorder can arise. On the other hand, if interpretation were infallibly correct, neither scenario would pose a danger, no matter how few or how many individuals were given final interpretive power.<sup>29</sup>

The nature of our problem can perhaps best be seen through a religious analogue. As the same Professor Levinson has pointed out,<sup>30</sup> the relation of Christians to the Bible is in many ways similar to the relation of citizens to a constitution. The Bible is, so to speak, the Constitution of Christianity. But who has the power finally to interpret the Bible? Protestant Christians may point out that if the Pope is the final interpreter, he can manipulate Scripture for his own ends—making himself a tyrant.

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28. Perhaps for this reason, Ukraine finally rejected such an explicit provision in its new Constitution. The Ukrainian draft Constitution of 20 February 1996 had contained (in Article 14) a more cautiously worded version of the German Constitutional Article 20(4).

29. There might seem to be another way to ground binding interpretation, besides infallibility. One strand in European legal thought would make the legislator the “authentic” interpreter of his own past proclamations. For example, the current code of canon law in the Roman Catholic Church states “[t]he legislator authentically interprets laws . . . .” Canon 16 §1, 1983 CIC [Codex Iuris Canonici]. But this appearance would be an illusion, for any “interpretation” by the legislator necessarily has the same rank as the original and so can simply be considered new legislation. Thus, in any legal tradition, if an amendment appended to a constitution read: “Article I of this Constitution forbids discrimination by race,” its binding quality would come from the force of the re-constituting process, not from the force of the original Article I; it need not even be thought to be an interpretation of Article I.

30. Levinson, *supra* note 6.

Catholic Christians may respond that if every believer follows *sola Scriptura* ("Scripture alone," the Bible as sole authority), without relying on hierarchical authority, Christianity will be forever shattered by multitudinous interpretations.

In response to Protestant fear of the Pope, Catholics have pointed to papal infallibility. When the Pope deals with fundamental religious matters, his interpretations are said to be infallible by the grace of God.<sup>31</sup> Protestants do not have quite so decisive a comeback. They cannot claim that God leads every individual Bible reader infallibly to the truth, because the fact that many readers strongly disagree means they cannot all be right. But Protestants may suggest that a truly humble and prayerful believer will, with the Holy Spirit's help, apply the Bible correctly to the situation at hand.

Since few of us believe that the Holy Spirit guides secular law interpreters to the right results, it might seem that no one would propose infallibility as a solution to our antinomy with regard to positive law. And, indeed, no one to my knowledge has ever claimed that every citizen will inevitably understand a nation's law correctly. But, most curiously, the claim of infallibility—or something very close to it—has seemed often plausible with regard to the interpretations of high courts. For example, it has been asserted that when the Plenum of the Supreme Court of the old Soviet Union issued "binding interpretations," it neither added to nor subtracted from the law, but only explained the true meaning that should already have been clear to a careful reader.<sup>32</sup> The standard presumption of the United States Supreme Court—that it has merely discovered the true meaning of the Constitution—is quite similar,<sup>33</sup> though it is belied by the fallibility revealed by that Court's self-overrulings. (If the Court itself

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31. Cf. secs. 2034-35, CATECHISM OF THE CATHOLIC CHURCH (speaking of the charisma of infallibility).

32. Professor Christopher Osakwe has made such a claim, writing:

These guiding interpretations are an application of the real meaning of the law or of an individual norm of law but do not in themselves create a new legal norm. In these guiding explanations is contained such understanding of the operative norms which in actual practice ought to have been followed even without such explanations. Such explanations are generally given if and when a legal norm is differently understood and applied by the courts. They do not add anything to the norm, nor do they detract from it. They merely define its true contents.

*Contemporary Soviet Criminal Law: An Analysis of the General Principles and Major Institutions of Post-1958 Soviet Criminal Law*, 6 GA. J. INT'L & COMP. L. 437, 442 n.20 (1976).

33. Justice Marshall, in the original case asserting the Supreme Court's power of judicial review over a certain sort of congressional legislation, seemed to assume that the Court understood the true meaning of the Constitution, for he argued only for the supremacy of the Constitution, not for the supremacy of the Court. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

declares that it has made a mistake, then it necessarily has done so—either in its first interpretation or in its declaration that the prior interpretation was mistaken.) And quite a few of my law students, in the United States and abroad, have argued that well-trained and carefully selected legal experts appointed to a high court are relatively unlikely to make a mistake about the basic meaning of a law or a constitution. Though Americans rarely use the term today,<sup>34</sup> “legal science” appears to be these students’ substitute for the Holy Spirit, protecting juridical scientists from the confusions and temptations to which ordinary mortals are subject.

There is no *a priori* reason not to think my students’ confidence justified. Even if well-chosen legal experts were not as fully infallible as the Pope is said to be, they could be relatively trustworthy. If they were right or correct (in the sense of selecting the wisest interpretation of the law) in nearly every case, or perhaps even if they were just better interpreters than those who criticize them, we would arguably be doing the best we can in giving them final interpretive power. If years of specialized training, followed by a careful appointment process, were required for accurate Shakespearean interpretation, we might well decide to treat the consensus of the holders of university Chairs of Shakespearean Studies as the last word in the field. This would amount to a kind of vertical *stare decisis*.

Let us, then, ask ourselves whether we can, without self-deception, fairly hope that future members of high courts will be likely to be faithful to the law entrusted to them.

One clarification may be necessary before we begin. No one doubts that legal experts are masters of a range of esoteric terminology not accessible to lay persons. But even if we assumed (incorrectly, of course) that those experts appointed to a supreme or constitutional court were the most learned and least biased in the nation, such expert and impartial mastery of vocabulary would not in itself guarantee better decisions than those reachable even by uneducated and opinionated lay people. The

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34. In the nineteenth century, the term “legal science” was still widely used in the United States. David Dudley Field, the largely unsuccessful advocate of codification, found certitude in this idea:

The science of law is our great security against the maladministration of justice. If the decision of litigated questions were to depend upon the will of the Judge or upon his notions of what was just, our property and our lives would be at the mercy of a fluctuating judgment, or of caprice. The existence of a system of rules and conformity to them are the essential conditions of all free government, and of republican government above all others. The law is our only sovereign.

MAGNITUDE AND IMPORTANCE OF LEGAL SCIENCE, AN ADDRESS AT THE OPENING OF THE LAW SCHOOL OF THE UNIVERSITY OF CHICAGO, September 31, 1859, *reprinted in* STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY*, 812, 816 (6th ed. Thomson/West 2006) (1884).

crucial question is whether expert knowledge, "legal science," *determines* interpretation. If special expertise only adds layers of complication to legal arguments, without making one choice more obvious to intelligent and fair-minded observers, it is not more trustworthy after all. Suppose one were having trouble deciding whether to order coffee or tea. If a linguistic expert at the table were to say "Wait! Let me explain how to express your choice in five different ways in each of three different languages," should one stop and listen to him?

### III. Can High Courts be Trusted To Be Faithful to the Law in the Twenty-First Century?

The above question does not posit some sort of possible degeneration in human nature. Let us assume in fact that judges in the future will be just as humanly good or bad as they have been in the past. The problem brought into focus below is not one of increasingly malevolent judicial motivation but of increasingly vague judicial standards. New ideas of the nature of interpretation as well as new ideas of the nature of a constitution discourage judges from any strong attempt at fidelity to a text or other source of law.

The story of interpretation in the twentieth century was largely one of evolution from supposedly non-political legal scientism or conceptualism to overtly result-oriented judicial activism or nominalism. That is, the notion gained ground that concepts cannot be true or false, that they do not necessarily refer to any given reality,<sup>35</sup> and therefore that legal rules (which are made up of concepts) can or should or must be used to generate whatever results a final interpreter of the rules wishes and can get away with. Without firm concepts, convention is too weak to stabilize meaning. Thus to state "the law" on any particular subject is and can be only to *predict* what that final interpreter will say the law is.<sup>36</sup>

This philosophy is "nominalist" in that it treats legal categories merely as names ("*nomina*" in Latin), i.e., as labels that can be attached or

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35. Note, however, that there was some resistance to this trend. Contemporary philosophers have contended that there are some "natural kinds" to which our concepts conform. See S. KRIPKE, *NAMING AND NECESSITY* (Cambridge: Harvard University Press 1980). Philosophers of law have also disagreed that concepts are indeterminate. See, e.g., Michael Moore, *Law as a Functional Kind*, in, *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* (Robert George ed., Oxford: Clarendon Press 1992), or, for a more traditional defense of legal concepts, JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (Oxford: Clarendon Press 1980).

36. O.W. Holmes, Jr., was among the first to reason this way. In 1897, he wrote: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." 10 HARV. L. REV. 457. Karl Llewellyn later derided "the theory that rules decide cases." *The Constitution as Institution*, 34 COLUM. L. REV. 1, 7 (1934).



unattached at will, so that words have no inherent reference to any particular facts. However, in America, it has long gone under the ironic name of "Legal Realism."<sup>37</sup> For purposes of this Article on interpretation, it might perhaps better be called "non-interpretivism,"<sup>38</sup> since, at least in its extreme forms, it holds that interpretation as a form of faithfulness is impossible. The meaning of the law (the connection of its words/concepts to any given reality) exists only in the mind of its interpreters, not in the law itself. If so, then as an early Realist concluded, "The ideal of a government of laws and not of men is a dream."<sup>39</sup>

Legal Realism is unquestionably the dominant philosophy in United States law schools<sup>40</sup> and was so for much of the past century.<sup>41</sup> Admittedly, most law teachers<sup>42</sup> do not spin out the radical consequences of their non-interpretivism: the loss of the possibility of the rule of law, and with it the loss of human rights, democracy, personal security, and governmental legitimacy and stability.<sup>43</sup> But this reticence may mean only, as their still less legalistic critic Roberto Unger has caustically pointed out, that they are like priests who have lost their faith but cling to their jobs.<sup>44</sup>

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37. "Ironic" because, in the history of Western thought, philosophical "realism" took certain concepts to subsist in reality itself, rather than only in names, as philosophical "nominalism" held. For more on Legal Realism, see AMERICAN LEGAL REALISM (William W. Fisher III ed., et al. 1993). For an excellent historical summary of this school, see EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY, 74-94, 159-77 (1973).

38. This term is used here in the wide sense found in Alexander and Solum, *supra* note 7 at 1619, not in the narrower meaning developed by John Hart Ely in DEMOCRACY AND DISTRUST (1980).

39. Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 478-479 (1928).

40. Bailey Kuklin and Jeffrey W. Stempel have averred that "we are all Realists" in America today. FOUNDATIONS OF THE LAW 28 (1994).

41. *Id.* However, PURCELL, *supra* note 37, at 159-77, points out that just before and after the confrontation with Nazism in World War II, Legal Realism came under attack for its skepticism and cynicism regarding the rule of law ideal.

42. For a discussion of Realism's effect on teaching, see Richard Stith, *Can Practice Do Without Theory? Differing Answers in Western Legal Education*, 80 ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE 426 (1994).

43. "Those who dismiss formalism as a naïve illusion, mistaken in its claims and pernicious in its effect, do not know what they are in for. Their contempt is shallower than the doctrine they ridicule, for they fail to understand what the classical liberal thinkers saw earlier: the destruction of formalism brings in its wake the ruin of all other liberal doctrines of adjudication." ROBERTO M. UNGER, KNOWLEDGE AND POLITICS 92 (1975).

44. Speaking for himself and fellow radicals in the Critical Legal Studies Movement, Harvard Law Professor Unger writes: "When we came, they were like a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars." Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 675 (1983).

It is beyond the scope of this Article to examine the question of whether conceptualism or nominalism is a more accurate description of the connection between mind and reality, between idea and being. But it seems obvious that if future judges are increasingly taught only or mostly nominalism, that legal labels can and must be attached arbitrarily, they will be likely to feel free to apply texts as they wish. In America at the beginning of the twenty-first century, it is difficult for judges honestly to be anything other than non-interpretivists.

It is true that much of the rest of the world has taken legal nominalism less seriously than the United States. But this does not mean that American skepticism and cynicism will not spread to Europe and elsewhere in the twenty-first century—and not only because global communication is becoming exponentially more thorough and rapid each year. Non-conceptual jurisprudence and judicial activism acquired a bad name in Europe in the first half of this century by being associated with fascism and Nazism.<sup>45</sup> Judges were urged to ignore the formal rules of law in order to secure the common good (as seen, of course, through the eyes of the then-dominant ideologies). But now over a half century has passed.

Respected observers have long noted the fading of the legal science tradition in Europe,<sup>46</sup> partly in response to U.S. Legal Realism. John Henry Merryman, a prominent supporter of American-style legal practice, pointed out some time ago that

German legal science has been the object of satire, ridicule, and direct attack by legal thinkers in Germany and elsewhere from the time of its emergence. More recently . . . its critics have begun to have more effect.<sup>47</sup>

Merryman went on to declare that a “fundamental readjustment”<sup>48</sup> is occurring in the European legal tradition, making it in certain ways more like that of contemporary America.

45. J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 360-61, 379 (Clarendon Press and Oxford University Press 1992).

46. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION*, 149-59 (1969). With regard to France, Pierre Manent has averred: “The profound recent changes of the French constitutional system have been influenced by the American system and experience and the American debates about it. To put it simply, if there were no United States Supreme Court, there would, in France, be no constitutional [sic] Council or at least the French constitutional [sic] Council would not have acquired the powers it has acquired in recent years.” *A WORLD BEYOND POLITICS?: A DEFENSE OF THE NATION-STATE* 177 (Princeton University Press 2006).

47. MERRYMAN, *supra* note 46, at 155.

48. *Id.* at 156.

Disregard of rules in favor of results has enjoyed especial favor in Europe on the Left. The “*uso alternativo*” of law in Spain, and a similar movement in Italy and Latin America, constituted a kind of “Legal Realism” more explicitly partisan than that found in the United States and still influential in civil law nations.<sup>49</sup> One critic has summarized this attitude toward law as follows:

All laws should be interpreted with this yardstick: partisanship is a virtue and neutrality a misconception or a fraud; so is independence; a judiciary cloaking itself with these sham values is a servant of power and ought to be told as much; judges must defend the oppressed and the down-trodden, cooperate with the labor movement  
 . . .<sup>50</sup>

Where Italian judges held these views, “For an employer to emerge from their hands as a winner was harder than for a camel to go through the eye of a needle.”<sup>51</sup>

It cannot be assumed that so partisan an approach will not capture the highest court in the land. Members of India’s Supreme Court, for example, have for some time been announcing their vision of an active judiciary. One has stated:

It is necessary for every Judge to remember constantly and continually that our Constitution is not a non-aligned . . . charter. . . . The judiciary has therefore a socio-economic destination and a creative function. It has . . . to become an arm of the socio-economic revolution and perform an active role. . . . It cannot remain content to act merely as an umpire . . . . [T]his approach to the judicial function may be all right for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities’ justice . . . . [The judiciary] must become an active participant . . . through a proactive goal oriented approach. But this cannot happen unless we have judicial cadres who share the fighting faith of the Constitution.<sup>52</sup>

Another has asserted: “An activist role . . . is a sine qua non for the judiciary. If value packing [of the courts] connotes appointment of [such]

49. ANTONIO-CARLOS PEREIRA MENAUT, LECCIONES DE TEORÍA CONSTITUCIONAL 262-64 (2d ed. 2006).

50. See FREDERIC SPOTTS & THEODOR WIESER, ITALY: A DIFFICULT DEMOCRACY 158-61 (1986).

51. *Id.*

52. S.P. Gupta v. Union of India, A.I.R.1982 S.C. 149, 197 (P.N. Bhagwati, J.).

persons otherwise well qualified . . . then not only the value packing is not to be frowned upon . . . but it must be advocated with a crusader's zeal."<sup>53</sup> In 1985, during his tenure as Chief Justice, P.N. Bhagwati commented that judges need not "feel shy or apologetic" about their "law creating roles":

The Supreme Court of India has been performing this role in the last 7 or 8 years by wielding judicial power in a manner unprecedented in its history of over 30 years . . . . The courts of India . . . started the legal aid movement . . . fostered the development of social-action groups . . . developed the strategy of public interest litigation. . . . In the process [the Court] has rewritten some parts of the Constitution . . . contrary to the intent of the makers of the constitution.<sup>54</sup>

New literary and philosophical movements also joined with American Legal Realism and the Left to create a certain synergism. In the wake of European thinkers like Derrida<sup>55</sup> and Lyotard,<sup>56</sup> it became commonplace to deny that a literary text could have any meaning other than that constructed by its interpreters. It would be odd not to apply such skepticism to legal texts as well.

For these reasons—American influence, leftist politics, and general post-modern subjectivism—it is not realistic to imagine that even mainstream judges in Europe and elsewhere around the world will long continue in the tradition of conceptualist legal science. The idea of a high court judge as a neutral and relatively infallible scientific expert is just not credible to many legal minds today, and judges are unlikely to seek to pursue what they and their peers regard as impossible or fraudulent.<sup>57</sup> If judges are told they must be political—even if this assertion is philosophically still in doubt—they are likely to become political.

The increasing contemporary skepticism about the objectivity of the process of interpretation means that trust in a supreme or constitutional court to apply the law correctly is more and more misplaced. As belief in legal science fades, the only secular analogue to papal infallibility

53. *Id.* at 446 (Prabodhbhai D. Desai, J.).

54. *Judicial Activism in India*, 17(1) GARGOYLE 6, 7-8 (2002).

55. *See generally*, JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., Johns Hopkins Press 1976).

56. *See generally* JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., University of Minnesota Press 1979).

57. Those peers are likely to be increasingly transnational, according to the impressive facts and arguments marshaled in ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 65-103 (2004). Global communities of judges are emerging and are affecting the substance of the law.

disappears. To grant any court binding power to interpret the law is thus to secure only order, not some preexisting law.

This conclusion concerning changing views of interpretation can be buttressed by pointing to changing views of the nature of constitutions and of the courts that interpret them.

Here, the United States is actually lagging behind Europe in the degree of freedom granted to its highest court. Modern European courts have been influenced by the work of Hans Kelsen, who in the 1920s first argued for a special court to enforce the constitution.<sup>58</sup> Kelsen viewed constitutional law as inherently “political law.” It needed to be kept out of the ordinary courts both in order to prevent a “government of judges” and in order to preserve the relatively non-political legitimacy of these courts. But by the same token, the members of a constitutional court are thus expected to be political.<sup>59</sup>

Then, too, in the very heart of old Romano-Germanic formalist Europe, there has arisen an almost incomparably activist Court. The *Van Gend en Loos v. Nederlandse Administratie der Belastingen* and *Costa v. ENEL* decisions of the European Community’s European Court of Justice (ECJ), arguing that greater uniformity would be a useful effect, an *effet utile*, managed to transform international duties into national disabilities.<sup>60</sup> The Court made member state disobedience to European law not just wrong but impossible, a court-led revolution that created a new “Rule of Recognition” (Hart)<sup>61</sup> or “Grundnorm” (Kelsen)<sup>62</sup> for every nation in the European Community (EC). Furthermore, the ECJ has mandated that

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58. ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE, 34-37 (1999); Alec Stone Sweet, *Why Europe Rejected Judicial Review—and Why It May Not Matter*, 101 MICH. L. REV. 2744, 2765-72 (2003). See also Pereira Menaut, *supra* note 49, at 296.

59. So, for example, it is considered appropriate for constitutional interpretations by the Constitutional Court of Germany to “try to create an integrative effect with regard to the various parties to a constitutional dispute as well as to social and political cohesion.” Winfried Brugger, *Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View*, 41 AM. J. COMP. L. 395, 396 (1994). However, by candidly recognizing the political nature of constitutional courts, Kelsen also helped to make such tribunals more easily subject to political control, e.g., through a clearly politicized process for selecting their term-limited members. Sweet (2003), *supra* note 58.

60. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1 E.C.R. (1963), 1963 CMLR 105; Case 6/64 *Costa v. ENEL*, 585 E.C.R. (1964), 1964 CMLR 425. For more detailed arguments, see R. Stith, *El problema del alto tribunal no razonable*, in DOS VISIONES NORTEAMERICANAS DE LA JURISDICCION DE LA UNION EUROPEA 29-32 (Universidad de Santiago de Compostela 2000).

61. H.L.A. Hart, *THE CONCEPT OF LAW* (2d Ed. 1994).

62. HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (Anders Wedberg trans., Harvard University Press 1949) (1945).

national courts join it in reasoning according to *effet utile*, i.e., in interpreting the law to say whatever is *useful* for it to say.<sup>63</sup> The European Community has thus spread Kelsen's "political law" in ways that he would not have expected: to a single supreme court (for the EC has no separate constitutional court) and even to all the ordinary national courts of Europe, who are forced to imitate the methodology of the ECJ.<sup>64</sup>

Moreover, even though the interpretive freedom and activism of the United States Supreme Court once led a prominent law school dean to suggest approvingly that it is the American analogue to a Communist nation's "central committee,"<sup>65</sup> the American constitution is still conceived of primarily as a set of negative limits on state and federal governmental powers, not as a program of positive requirements operative in all spheres of public activity.<sup>66</sup> Like a criminal code, that fundamental law results almost exclusively in prohibitions on action, not in duties to act. For example, according to the United States Supreme Court, the Constitution prohibits states from banning abortion, even in the last weeks of fetal development, whenever an abortion is necessary to preserve a mother's "health," broadly defined.<sup>67</sup> But at the same time, a legislature may refuse to fund even medically-indicated abortions, out of concern for the fetus.<sup>68</sup>

63. Stith, *supra* note 60.

64. In Case 106/89, *Marleasing v. La Comercial Internacional de Alimentación*, 1990 E.C.R. I-4135, for example, the ECJ required the Spanish courts to reinterpret Spain's hundred-year-old Civil Code in line with the purpose of a still-unimplemented Community directive. In addition, national constitutional courts, and later the ECJ, have begun enforcing individual rights (contrary to Kelsen's recommendation, for the often open nature of such rights increases the lawmaking capabilities of judges). See SWEET, *supra* note 58. Pierre Manent argues that our contemporary infatuation with the language of human rights is perhaps the primary force behind the growing worldwide power of judges, for "the declarations of human rights are nobler but much vaguer than national laws and constitutions. If one relies chiefly on human rights, there can be no 'fixed way of judging' . . . [And] a power that discovers it can act arbitrarily will soon use and abuse this latitude. It tends toward despotism." *Supra* note 46, at 186-87.

65. William Ray Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A. J. 1212, 1216 (1977).

66. See, e.g., *Harris v. McRae*, 448 U.S. 297, 317-18 (1980).

67. After spelling out the right to post-viability abortions for maternal health reasons, *Roe* directs the reader to its companion case, *Doe v. Bolton*. *Roe v. Wade*, 410 U.S. 113, 164-65 (1973). *Doe*, in turn, indicates that the word "health" includes all factors—including "psychological" and "familial"—relevant to maternal wellbeing. *Doe v. Bolton*, 410 U.S. 179, 192 (1973). In 2007, the United States Supreme Court issued a ruling upholding the Partial Birth Abortion Act despite the Act's failure to allow the banned procedure when necessary for the mother's health in a case called *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007). However, *Gonzales* dealt only with abortions occurring during delivery. The law of *Roe* for the nine months of intrauterine pregnancy was not changed.

68. See *Harris*, *supra* note 66.

In other words, the Court's constitutional value preference (maternal freedom over fetal life) results only in a particular negative limitation on the State, not in a mandatory positive direction for state action. Not so in the Old World. Many of the new constitutions of the twentieth century read like party platforms, proclaiming grand programs of social construction that the State has a duty to bring about.<sup>69</sup> Because one can never really know what will be effective in the future, instrumental judgments can never be as certain as rules forbidding actions. A high court undertaking to direct a positive constitutional program thus has far greater discretion than one asked only to enforce a list of negative prohibitions.

An example of the divide between negative and positive rules can be seen in the two German constitutional decisions on abortion.<sup>70</sup> In both cases, the judges agreed unanimously on the negative rule, that the fetus has a constitutional right not to be killed at any time during pregnancy. There would thus have been no dissent to holding only that the State itself may never act to kill a fetus. But the Constitutional Court majority went on to design (and, in the second case almost twenty years later, to redesign) a mandatory plan of affirmative protection for fetal life, sparking the following dissent:

As defense rights the fundamental rights have a comparatively clear recognizable content; in their interpretation and application, the judicial opinions have developed practicable, generally recognized criteria for the control of state encroachments—for example, the principle of proportionality. On the other hand, it is regularly a most complex question, *how* a value decision is to be realized through *affirmative* measures of the legislature. The necessarily generally held value decisions can be perhaps characterized as constitutional mandates which, to be sure, are assigned to point the direction for all state dealings but are directed necessarily toward a transposition of

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69. Several examples of positive directive principles can be found in the current constitutions of Ireland, Mexico, Ukraine, Germany, Italy, India, and Spain; *see e.g.* SPANISH CONSTITUTION [C.E.] art. 43(3): "The public authorities shall foster health education, physical education and sports. Likewise, they shall encourage the proper use of leisure time." It is true that many of these are nominally non-justiciable (*see infra* note 94), but they may nevertheless be influential. Some, such as those in the Constitution of Ukraine, are clearly intended to be justiciable. *See also* MENAUT, *supra* note 49, at 369-82 (chapter authored by José Ignacio Martínez Estay).

70. Bundesverfassungsgericht [BVerfG] [federal constitutional court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (F.R.G.) (translated in John D. Gorby & Robert E. Jonas, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 605, 606 (1975-1976)) and Bundesverfassungsgericht [BVerfG] [federal constitutional court] May 28, 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 203 (F.R.G.).

binding regulations. Based upon the determination of the actual circumstances, of the concrete setting of goals and their priority and of the suitability of conceivable means and ways, very different solutions are possible. The decision, which frequently presupposes compromises and takes place in the course of trial and error, belongs, according to the principle of division of powers and to the democratic principle, to the responsibility of the legislature directly legitimized by the people.<sup>71</sup>

Insofar as emerging constitutional orders around the world contain positive mandates for state action,<sup>72</sup> similarly wide discretion in constitutional interpretation is necessarily possessed by any court that has been given, or has taken upon itself, the duty to enforce that constitutional order.<sup>73</sup>

Not only are the world's emerging constitutions likely to contain positive duties, they are also likely to be interpreted in principled and programmatic ways. The United States Constitution, again, is usually treated like a criminal code in that it limits state freedom only in certain fairly well-defined respects, not linked by principle or analogy. These new constitutions, by contrast, are being interpreted much more like the classic civil codes—that is, as comprehensive regimes containing in principle the solution to every possible dispute. New positive state and even private<sup>74</sup> duties are being discovered by analogy to old ones and the whole order is being arranged by the courts in a mandatory hierarchy of values governing all public action. Spain's Constitutional Tribunal has affirmed the implications of this new approach:

It is also pertinent to make. . . some references to the scope, meaning and function of fundamental rights in the constitutionalism of our day inspired by the social State of Law. . . . [F]undamental

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71. [1975] 39 BVerfGE 1, *id.* at 71-72. H. Jonas & J. Gorby trans., *id.* at 665-66 (1976) (emphasis in original). For further discussion, in agreement with this dissenting opinion, see R. Stith, *New Constitutional and Penal Theory in Spanish Abortion Law*, 35 AM. J. COMP. L. 513, 534-40 (1987).

72. *E.g.*, UKRAINE CONST., *supra* note 5, art. 42 (rights of consumers), art. 43 (state's duty to provide opportunities for safe employment), art. 47 (right to housing), art. 48 (right to satisfactory living standards) & art. 50 (right to a safe and healthy environment). See also *supra* note 69.

73. Constitutionally speaking, the Supreme Court of Ukraine could order economic reintegration with Russia, if the Court found this step the most effective way to protect the "rights of consumers" (art. 42), or "the right to work, including the right to have the possibility to earn one's living by work which he/she chooses or agrees to freely" (art. 43). By calling its order only an "interpretation" rather than a "change" of the Ukrainian Constitution, the Constitutional Court could claim not to transgress art. 157 (forbidding constitutional amendments tending to abolish Ukrainian independence).

74. This is what German constitutional theory calls *Drittwirkung*.



rights...are the legal expression of a system of values that, by decision of the framers, has to inform the whole legal and political organization. . . . Consequently, from the obligation of all powers to submit to the Constitution, one deduces not only the negative obligation of the State not to injure the individual or institutional sphere protected by these fundamental rights, but also the positive obligation to contribute to the effectiveness of such rights, and of the values that they represent, even when a subjective claim does not exist. . . .<sup>75</sup>

Under such a regime, it could easily be held that if the value of maternal freedom is constitutionally higher than the value of fetal life (as the U.S. Supreme Court has said),<sup>76</sup> the State must not only permit abortion, it must also fund and otherwise support it. Or (as has been averred in Germany)<sup>77</sup> if the value of fetal life is held to be higher than the value of human freedom, then the State must not only refrain from killing fetuses, it must also work effectively to protect them.

If the “rule of law” means governance by previously announced descriptions of forbidden or permitted actions, it is hard to see how it could continue to coexist with a high court’s insistence on effectuating a wide range of valuable results. After all, “effectiveness” (*effet utile*, in the words of the ECJ) sometimes requires violation of almost any rule. Take the fundamental rule against killing another human being. Does this rule forbid three starving men on a lifeboat to kill and eat a fourth?<sup>78</sup> Perhaps not, for it could be argued that the rule against killing is an expression of the value of life and this value is promoted rather than hindered by cannibalism in this case—in that killing and eating the fourth person permits three to survive where four would otherwise perish. A court requiring effective promotion of life could forbid punishment of the cannibals.<sup>79</sup> Indeed, such a court could *require* punishment (for attempted murder of the would-be cannibals) of any sailor whose fears or qualms had

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75. Decision of 11 April 1985, STC 53/1985, 1985-49 BJC 515, 532 (R. Stith trans). Galician law professor Antonio-Carlos Pereira Menaut quips: “One is tempted to deduce that good citizens should not start their day without asking what the Constitution decrees.” *A Plea for a Compound Res Publica Europea: Proposals for Increasing Constitutionalism without Increasing Statism*, 18 TUL. EUR. & CIV. L.F. 75, 77 (2003).

76. See *Roe*, *supra* note 67.

77. See 25 February 1975, 39 BVerfGE 1; 28 May 1993, 88 BVerfGE 203; & 1975, 39 BVerfGE 1, 71-72, *supra* notes 70-71.

78. See, e.g., *R. v. Dudley and Stevens*, 14 Q.B.D. 273 (1884).

79. On the other hand, if a court decided (correctly, in my view) that the value underlying laws against murder were peace rather than the preservation of life, then it would not hold that killing *in extremis* promotes the value behind the rule against killing.

led him to try to stop the killing. But would most citizens have noticed beforehand that "Thou shalt not kill" may mean "Thou mayest kill" or even "Thou shalt permit killing?" Unlimited judicial instrumentalism is incompatible with governance by law.

Some may discount the danger of judicial tyranny because they assume that a constitution could always be amended to rein in a maverick court. But this is not necessarily so. The amending process may be quite difficult, as in the United States. Moreover, many constitutions contain significant limits to the amendatory power.<sup>80</sup> And even without any explicit textual support, a high court given binding interpretative power over a constitution could well find some important tacit limits on amendments. India's Supreme Court has done just this—successfully holding unconstitutional various amendments affecting some undefined "basic structure" of the constitution<sup>81</sup>—without any explicit textual support in that document.

Amending the constitution, furthermore, relies on politics to remedy judicial overreaching, and providing ready political remedies (such as a very easy amendment process or quite limited judicial terms and a politicized process of appointment to the courts) is also worrisome. The problem is that political resistance to judicial politics might well not be made in the name of fidelity to law and constitution. The body politic might not seek to restore the legal order by opposing the acts of a faithless high court. It might just decide to make new law. Indeed, it might so decide even if it thought that court to have been faithful to the original law or constitution. In other words, facilitating political resistance may weaken judicial tyranny, may make courts more closely follow the election returns, without leading a nation back to the rule of law. Political remedies might induce a court to be popular rather than law abiding, or they might instead let a court feel free to be capricious, confident that any serious mistakes

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80. Ukraine, for example, would not permit amendments that would "aboli[sh] or restrict human and civil rights and freedoms," so a Court holding that the rights of consumers and laborers required partial reintegration with Russia would not have to defer to a contrary constitutional amendment. UKRAINE CONST., art. 157 (1996). The 1990 Nepal Constitution forbade any amendments that violated "the spirit of the Preamble." NEPAL CONST., art. 116(1). See constitutions of Ukraine and Nepal, *supra* note 5. See also R. Stith, *The Extraordinary Counter-Majoritarian Power of the New Supreme Court of Nepal*, 4 ASIA L. REV. 38 (New Delhi 1995); reprinted with minor revisions as *Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court*, 11 AM. U. J. INT'L L. & POL'Y 47-77 (1996).

81. Stith, *Unconstitutional Constitutional Amendments*, *supra* note 80, at 57-69. The attorney general of India once quipped that trying to determine what the Supreme Court means by "basic structure" is like "a blind man in a dark room searching for a black cat which is not there." *Women's Rally on Violence*, HINDUSTANI TIMES, Oct. 10, 1991.

would be reined in. This Article, however, seeks to find ways not only to prevent judicial despotism but also to secure the rule of law.

Others may try an *ad hominem* escape to avoid facing up to the dangers for the rule of law posed by courts given binding interpretive power. It might be said “But our judges just are not that sort of person. We know them. They would never be so aggressive.” This statement, indeed, would be quite true of judges appointed and promoted in traditional European ways. In most Romano-Germanic countries, there is a judicial career track open to recent law school graduates. Because judges do their work relatively anonymously in Europe, those choosing this path tend to be persons satisfied with a secluded life, and, as they are gradually promoted to senior positions by their superiors, they carry with them a kind of deferential psychology.<sup>82</sup> By contrast, important American courts are staffed laterally from among those who have already been successful as hard-driving and well-connected lawyers, law professors, or politicians. Having been leaders before judicial appointment or election, they are unlikely to become deferential followers of legislators once on the Bench. A well-known American federal appellate court judge (who requested anonymity) once remarked that the root cause of judicial activism in the United States is not liberalism or conservatism or any other political “ism.” The “ism” that drives judicial activism in America is the “metabolism” of those placed on the Bench.

Courts around the world with the power of binding constitutional interpretation and enforcement are not staffed only, or even primarily, by those with a traditionally tranquil European judicial mentality and level of energy.<sup>83</sup> Instead, lateral appointments of proven legal leaders may be made, *à la américaine*.<sup>84</sup> American-style appointments are likely to result in American-style judicial activism—and more, given the new and more expansive concept of a constitution found today outside the United States.

It is clear, therefore, that any grant to a high court of binding power to interpret and enforce the law cannot be justified by the assumption that the court will be quasi-infallible or otherwise derive its decisions in some kind of objective scientific way from legal texts and traditions. Both the process of interpretation and the meaning of a constitution have today become so

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82. See GLENDON ET AL., *supra* note 4, at 155-56, 158-59.

83. *Id.* at 159.

84. In the Ukraine constitution, no judicial experience at all is required for appointment to the proposed Constitutional Court—only the age of forty years, higher legal education, and ten years of professional experience. See UKRAINE CONST. *supra* note 5, at ch. 12, art. 148.

politicized that no thoughtful observer can fail to recognize the potential for tyranny in centralized judicial power.<sup>85</sup>

But is there any alternative, other than total disorder? The answer is yes, as we shall see below. The “rule of law” need not require a choice between one supreme ruler or no ruler at all. Multiple rulers—in other words, interpretive pluralism—may provide a secure foundation for the rule of law.

#### IV. The Theory and Practice of Interpretive Pluralism

The theoretical problem we face can be quite simply restated. A fallible interpreter can obscure or obliterate the law to the degree that its interpretations thereof are final. Finality itself has two components. A given court is the final arbiter of the meaning of the law to the extent that (1) it can review all other interpreters and (2) it is not itself reviewable by any other interpreter. Its monopoly of interpretive power is broken if either the first or the second component of finality is weakened.

“Separation of powers” is an appropriate name for divisions that counter the first bulwark of high court supremacy. If an otherwise final court is deprived of the power to review certain other institutions’ interpretations of the law, or if its jurisdiction is reduced in scope, then concentration of interpretative power at the apex of a single pyramid has been eliminated. Multiple final interpreters have replaced a single such interpreter, making it more difficult for a single idiosyncratic and unpersuasive political view to be forced by a few upon the entire law. For example, by eliminating any appeal to a central supreme or constitutional court, the highest court in each state of a federation could have final authority over the meaning of the federal constitution within that particular state. Or a constitution might assign to the legislature the interpretation of the limits on legislation and to the judiciary the interpretation of the procedures for the conviction of crimes, with each branch required to accept the other’s interpretation of its assigned portion of the constitution.<sup>86</sup>

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85. For additional empirical confirmation of this thesis, see, e.g., C. NEAL TATE & TORBJORN VALLINDER, *THE GLOBAL EXPANSION OF JUDICIAL POWER* (1995); ROBERT BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2003); RAN HIRSCHL, *TOWARDS JURISTOCRACY* (2004).

86. Separation of powers would seem to require some ability of each branch to invalidate the acts of other branches of government in order to protect this very separation, in order to protect its own jurisdiction. (If not, separation of powers may collapse into the unreviewable supremacy of the boldest power.) Put another way, separation of powers, as used in this Article, construes the law or constitution to impose only duties on each branch, not disabilities, so long as that branch remains within its jurisdiction. It is disabled, however, from acting *ultra vires* so as to nullify the appointed powers and duties of the other branches of government. Arguably, Justice Marshall’s decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), was “departmentalist”

As we shall see, there are many more modes that can be, and have been, developed for the separation of interpretive powers.

“Checks and balances” is an appropriate term for the second manner of cutting back on an excessive concentration of interpretive power. Even if a supreme or constitutional court successfully claims the power to review all other interpreters of the law, its own interpretations need not be accepted as binding, i.e., as final, by each of those others. Separation of powers weakens a court by restricting review; checks and balances achieves a similar result by expanding review, making it mutual or coordinate. The court can review others, but they can review it, too. For example, a president might refuse to execute supreme court decisions that she considered unconstitutional. Perverse interpretation of the law is made less likely by increasing the number of persons who can refuse to cooperate with apparently unfaithful interpretations.<sup>87</sup> Here, again, a number of variations that are important in theory and in practice will be explored below.<sup>88</sup>

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in this separation-of-powers sense, in that he simply recognized a disability in Congress to alter a constitutionally-assigned Supreme Court jurisdiction. He need not be read as claiming that the Court could nullify acts of Congress that did not encroach upon the Court—i.e., he need not be read to make a broad claim of judicial power to check and balance Congress. See Clinton, *supra* note 6. For a different solution to the problem of preserving separation, see *infra* note 108 and accompanying text.

87. If this “checks and balances” approach were to treat every legal or constitutional duty as containing an equally extensive disability to breach that duty, which disability would require refusal of cooperation (with any attempted breach) by all other branches of government, everyone would be forced to do exactly the same interpretive job, second guessing every single interpretation by anyone else: a formula for utter stagnation. So checks and balances is workable only if it is combined with a degree of separation of powers. For example, different courts or other departments of government might review one another’s decisions only in cases of *manifest* error on quite *significant* matters, thus leaving the vast majority of daily business up to each separate entity. Put theoretically, each branch’s duties would be much more extensive than its disabilities. Each would be disabled, would act *ultra vires*, only in cases of egregious derelictions of duty, not of minor deviations from duty. This is sometimes called “accommodation” or the allowance of “some discretion” or a “margin of appreciation.” The German Constitutional Court has accordingly averred that it will put up with poor treaty “interpretations” by the European Court of Justice but not with treaty “amendments” disguised as interpretations, thus preserving a substantial division of labor between the two courts without giving up the right of review. See *supra* note 25 and accompanying text.

Another solution would be to construe review as a right but not a duty, so that other branches of government do not feel bound to respond to their neighbors’ errors. Thus, for example, a legislature that disagreed with a court’s invalidation of one of its statutes *could* reenact that statute, and thus challenge the court, if it wished, but it *need not* do so. Again, a third-instance appellate court could have the right to overturn lower court decisions that it thought wrong, without having the duty to do so (as is the case with most appeals to the U.S. Supreme Court).

88. I am particularly indebted to CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* (rev. ed. 1994) for much of the analysis below, although the terminology I use, and the

To return briefly to our religious analogue: The extremes of Catholic papal supremacy and Protestant individual disorder can be avoided if either different Christian churches can render independent interpretations of the Bible for their respective members, or those churches must mutually approve one another's interpretations. The Eastern Orthodox tradition has used elements of both approaches—incorporating both relative autonomy among patriarchates and the need for continuing mutual recognition by those same sister churches.

### A. Separation of Powers

Turning first to separation of powers, two major sub-possibilities present themselves in theory. The first involves giving certain legal actors the power to interpret the law for themselves, subject to no review at all of their interpretations. The second involves subjecting legal actors to some review, but without concentrating that power of review ultimately in a single interpretive body.

Many living examples of the first possibility can be adduced from throughout the world. Limitations on standing come easily to mind: In the United States a legally cognizable stake in the outcome is required in order to raise a constitutional question;<sup>89</sup> in France only certain named political entities may challenge a bill's constitutionality;<sup>90</sup> similarly in Ukraine, the constitution sharply restricts standing to raise constitutional issues to certain named officials and institutions.<sup>91</sup> Where no one is able to request review, political and legal actors are free to interpret the law autonomously. On a more mundane level, a jury in a criminal trial in the United States is told to apply the law, but if the jury acquits, its interpretation of the law is subject to no review whatsoever.<sup>92</sup>

More directly substantive is the exclusion of "political questions" from review by the United States Supreme Court; on such questions Congress is left to apply the Constitution to itself.<sup>93</sup> Still more amply, the whole category of positive constitutional duties binding on the legislature

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solutions for which I argue, are not his. See especially his discussion of "Alternatives to Judicial Review" at 90-96.

89. See, e.g., *Flast v. Cohen*, 392 U.S. 83 (1968).

90. 1958 CONST. 61 (Fr.).

91. UKRAINE CONST., *supra* note 5, at art. 150(1).

92. This is so because the state is not permitted to appeal a general verdict of "not guilty," even where the jury has ignored the judge's interpretation of the law. The jury thus checks the judge, while remaining itself unchecked. See *Thomas*, *supra* note 7 (pointing out that jury behavior has sometimes been "regarded as an expression of faithfulness to the law (regardless of the authority of institutions or officeholders), rather than defiance of the law . . .").

93. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

may be unenforceable by the courts,<sup>94</sup> thus leaving the legislative interpretation of those legal duties unreviewable (and avoiding much of the conflict between effectiveness and the rule of law discussed above). In other words, some of a legislature's constitutional duties may be subjected to interpretation and review by the highest court, and some not.

Perhaps most widely known is the absence of judicial review of statutes for unconstitutionality in Great Britain. Britain possesses a constitution, though not one reduced to a single document, but Parliament has the duty of policing itself for unconstitutionality, while the courts review administrative actions for the same.<sup>95</sup> Nor is such separation of powers limited to countries with an unconsolidated constitution. France has often had a unified written constitution along with limited or no review of legislation for constitutionality; its legislators have been subject only to the constitution itself, not to other human interpreters.<sup>96</sup> Even today, French legislation once promulgated cannot be declared unconstitutional by any court or by any other tribunal. The Constitutional Council in France can inhibit change in the law, by declaring new legislation invalid before it goes into effect, but cannot surprise the nation by overturning established laws.<sup>97</sup> Ukraine's constitution appears to immunize present law from review in a different way: Although the Constitutional Court may declare any law—old or new—unconstitutional, it may do so only prospectively.<sup>98</sup>

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94. Such, for example, is at least nominally the rule found in the Constitution of India with regard to the long list of "directive Principles of State Policy." Article 37 declares that these principles "shall not be enforceable in any court." INDIA CONST. art. 37. The Constitution of Ireland is even stronger in rejecting judicial implementation of positive principles. "The Principles of social policy set forth in this article are intended for the general guidance of the Oireachtas. The application of those principles in the making of the laws shall be the care of the Oireachtas exclusively, and shall not be Cognizable by any Court under any provisions of the constitution." Ir. CONST., 1937, art. 45, available at <http://www.constitution.ie/reports/ConstitutionofIreland.pdf> (last visited March 6, 2007). *But cf. supra* notes 69, 71-72 and accompanying text.

95. *See generally* Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1044-56 (1989). For the classic American argument against judicial review of legislation for constitutionality, *see* Eakin v. Raub, 12 Serg & Rawle 330 (Pa. 1825) (Gibson, J., dissenting). *See also* CLINTON, *supra* note 6. Mark Tushnet has proposed abolishing judicial review of legislation in the United States, leaving America with something closer to the British system. *Cf.* TUSHNET, *supra* note 7.

96. "The typically republican tradition . . . was that Parliament itself was the guardian of constitutionality . . . with an ultimate control exercised by the electorate." BELL, *supra* note 18, at 21.

97. 1958 CONST.61 (Fr.). *But see* BELL, *supra* note 18, at 48-56, for a discussion of the Constitutional Council's attempts to extend its power.

98. UKRAINE CONST., *supra* note 5, at art. 152. The Chilean Constitution of 2005 has a like provision, Art. 94. *See supra* note 5. *Compare* Mapp v. Ohio, 367 U.S. 643 (1961) for a similar but narrowly applied American rule. Of course, the optional and occasional non-retroactivity

Thus state officials and the public know that they can rely on the validity of presently promulgated laws for all current activity; much of the legal uncertainty ordinarily generated by judicial review (the ever-present possibility of retroactive nullification of current law) has been eliminated. The Ukrainian Constitutional Court may still become a tyrant, but it will have to exert its will in a certain sense through the “rule of law,” i.e., by giving advance notice of the rules to which the nation must conform.

It is, of course, quite possible to have ordinary legislation subject to judicial review for constitutional validity, with constitutional amendments left almost entirely free of review. Even where a constitution explicitly declares certain types of amendments invalid, the courts need not take upon themselves the task of seeing that those limits are properly interpreted and applied—as has been the case in Norway.<sup>99</sup>

All the above examples are subject to a possible misgiving. Is it really wise to permit legal actors, who are interested primarily in results, to be the sole judge of the legality, including the constitutionality, of their own decisions? Is this not a bit like letting someone be judge in his or her own case? Should not some disinterested (or at least less interested) body review such actors’ interpretations of the law? An affirmative answer to these questions has much merit.

Yet even if some disinterested appellate process is a good idea, those appeals need not culminate in a single supreme national tribunal. A legislature could have its own independent council of jurists scrutinize bills for constitutionality, as is arguably what has happened in the United Kingdom,<sup>100</sup> rather than turning the task over to the courts. Or a constitution could divide jurisdiction over constitutional questions among different tribunals. This is the case in France today, where the Constitutional Council is permitted to review only legislative bills, while the Council of State reviews administrative actions and regulations for

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found in U.S. constitutional rulings cannot provide the legal certainty found in the mandatory Ukrainian and Chilean rules.

99. Article 12 of the Constitution of Norway provides that no amendment is valid if it alters “the spirit of the Constitution.” NORWAY CONST., art. 12. But the prevailing interpretation of this clause has long been that it is only a directive to the legislature and does not authorize any court or other tribunal to refuse to recognize an amendment. See D. Conrad, *Limitation of Amendment Procedures and the Constituent Power*, 15-16 INDIAN YEARBOOK OF INT’L AFF. 347, 379-80 (1970).

100. Since February 8, 2001, the Constitutional Committee in the House of Lords has been tasked to scrutinize bills for their “constitutional implications” for the British Constitution. The stated purpose of the Committee is, however, only to facilitate “informed debate.” House of Lords: The Constitutional Committee (April 2005), available at <http://www.parliament.uk/documents/upload/HofLBpConstitution.pdf>.



constitutionality.<sup>101</sup> Again, in Chile, the Pinochet regime resurrected a Constitutional Tribunal with the power to invalidate new legislation *erga omnes*, no doubt in order to halt any new drift toward socialism, while the old Supreme Court continued to have final say over whether already promulgated legislation was valid (but only as to the parties at hand, the Court's decisions being without *stare decisis* or *erga omnes* effect).<sup>102</sup> Thus both in France and in Chile there could easily develop two differing visions of what the constitution means, each vision being applicable in a largely separate field.

Even in nations with but a single interpreter of the constitution, a degree of interpretive pluralism may be preserved if that interpreter is not at the same time the final interpreter of all sub-constitutional law as well. Here examples abound. The constitutional courts of Germany, Spain and Italy are officially the final and binding interpreters of the constitution, but one or more separate supreme courts may be the final interpreters of other parts of the law.<sup>103</sup> Even in the United States, where the Supreme Court claims final interpretive power both over the federal constitution and over federal legislation, the interpretation of the law of the separate states is left almost entirely up to fifty different state supreme courts. In such regimes, it would be difficult or impossible for the members of any single court to impose their way of understanding law on the whole legal system. Pluralism of interpretive approach is free to survive.<sup>104</sup>

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101. Harvard Law Professor Mary Ann Glendon has thus called the Council of State "a second constitutional court of France." GLENDON ET AL., *supra* note 4, at 120. *But cf.* BELL, *supra* note 18, at 48-56.

102. POLITICAL CONSTITUTION OF THE REPUBLIC OF CHILE art. 82 & art. 80 (1980), respectively. The Supreme Court's final authority over the constitutionality of old law was recently transferred to the Constitutional Tribunal. *See supra* note 5. Only a simple majority of the Tribunal is required to declare any law unconstitutional as applied to the case at hand. *Id.* at art. 93(6). However, a four-fifths majority is required for the further holding that the law is unconstitutional *erga omnes*. *Id.* at art. 93(7). Thus a bit of interpretive pluralism is preserved, in that only the parties to the case would be held to the Tribunal's view of the Constitution unless that view commanded a supermajority. The Tribunal remains unbound by its own precedents. *Id.* at art. 94.

103. In Italy, there is a separate Court of Cassation as in France, COSTITUZIONE [COST.], art. 111, 134, while Spain has the Supreme Tribunal as well as the Constitutional Tribunal. CONSTITUCION [C.E.] §§123, 159, 160. Germany has five separate non-constitutional final courts of appeal at the federal level, besides its Constitutional Court. GRUNDGESETZ [GG][Constitution] art. 95(1), 96 (F.R.G.). In France at least, the Constitutional Council appears (by means of "reservations of interpretation") successfully to have claimed the power to give a final interpretation to the laws that it approves as constitutional, even though it has no direct way to enforce its interpretations once approval has been given. BELL, *supra* note 18, at 53-56.

104. Unfortunately, such may not be the case in Ukraine, for a single body (the new Constitutional Court) has been given the power to issue binding interpretations both of the Constitution and of all other law throughout the nation. UKRAINE CONST., *supra* note 5, art. 147,

“Free to survive” does not, of course, mean that many interpretations will in fact survive, but only that wherever unity of meaning does appear, it will come through persuasion rather than through coercion. Independent jurisdictions whose reasoning merits mutual respect are likely to be troubled by significant conflicts in interpretation and to seek to resolve their differences. Witness the common law in the United States today, especially in those areas largely independent of statutes, such as contracts or torts: On the one hand, the court systems of each state are jurisdictionally separate from one another, so that differing interpretations of the same legal language or principle are fully permissible. On the other hand, if the interpretation arrived at in a particular state is rejected by many other states’ courts, it may well be reconsidered and overturned even in the first state.<sup>105</sup>

One criticism that might be made of the separation-of-powers method of preventing judicial tyranny is that it cuts short the appellate process—by cutting off the top of the judicial pyramid—thus permitting interpretive mistakes made by lower courts or other institutions to stand more easily. This is not, however, a telling argument against separation of powers. If it is thought, for example, that at least two appeals are appropriate before any interpretation of law becomes final in a given case, this can easily be instituted without entrusting the ultimate appellate instance on every kind of issue to the same tribunal. What is crucial for separation of powers is that the appellate process be split up, not that it be shortened.

Another critique<sup>106</sup> is that unless some tribunal is given what the Germans call *Kompetenz-Kompetenz* (jurisdiction over questions of legal power), jurisdictional conflicts will defeat any separation-of-powers scheme. This is probably true, but we need not convert any separated power into a super-tribunal. Instead, for example, each branch could be given a limited power to check overreaching by the other branches<sup>107</sup> or else a tribunal authorized only to resolve jurisdictional issues, along the

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150(2). Similarly, the Supreme Court of Canada, which was created by the Federal Government by the Supreme Court Act through §101 of the Constitution Act of 1867, has become the final interpreter of all Canadian law, animated apparently by a desire to impose continent-wide uniformity. See PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 8.5(a) (3d ed. 1992).

105. Especially where the texts and other sources of law being interpreted differ between jurisdictions, however, this process of mutual adjustment is plausibly motivated not by faithfulness to law but by the desire to please one’s judicial peers in other jurisdictions. See SLAUGHTER, *supra* note 57. It is thus important (for purposes both of separation of powers and of checks and balances) that some interpretive authority be given to self-confident non-judicial persons and institutions—e.g., presidents, legislatures, ethnic regions, religious groups and any others whose democratic or cultural base makes them less likely to need the esteem of judges.

106. This critique appears in Alexander and Solum, *supra* note 7.

107. See *supra* note 86 and accompanying text (outlining such a suggestion).

lines of the French Tribunal des Conflicts or the original lines of the Constitutional Council, could be created.<sup>108</sup>

A more profound criticism would be this: Whether final interpretation is united in a single court or divided among many institutions, the rest of us are left subject not to the law itself but to the interpretations of the law handed down by fallible human beings, interpretations that may over time distance themselves greatly from the original legal sources. Do we really wish our officials, or our citizens, blindly to follow what they perceive to be clearly erroneous interpretations of fundamental law—even if those interpretations are less potentially despotic because they emanate from multiple interpreters? Even if it is better for the President of France to be bound to the constitutional interpretations of two tribunals (the Constitutional Council and the Council of State) rather than only of one, what if he thinks both to be wrong? Should he not have some additional duty to be faithful to the French constitution as he himself perceives it? Separation of Powers may escape from the “Rule of One Supreme Court,” but it does not secure the Rule of Law.

## B. Checks and Balances

A deep desire to be faithful to the law generates “checks and balances,” the second method of limiting high court power. The essential idea here is to entrust multiple interpreters not with separate powers over the meaning of the law, but with joint power. For example, rather than attempt carefully to divide power to interpret a constitution among the legislative, executive and judicial branches of government (the separation-of-powers approach), a nation could give each a right or duty to refuse to participate in unconstitutional acts by the other two, to be faithful to that basic document as a whole rather than only to its own part of it. Thus a supreme court would refuse to apply unconstitutional legislation,<sup>109</sup> while

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108. For example, Professor Weiler has advocated the creation of an additional European tribunal (or council) with jurisdiction over competences (and subsidiarity): “I have gone so far as suggesting the creation of a new Constitutional Tribunal, composed of sitting judges of the highest Courts in each of the Member States (sitting only ad-hoc so they do not become socialized into a Community ethos) which would decide issues of division of competences between the EU and its Member States and . . . take that job away from the European Court of Justice!” R. Stith & J.H.H. Weiler, *Can Treaty Law Be Supreme, Directly Effective, and Autonomous—All at the Same Time?* (An Epistolary Exchange), 34 N.Y.U. J. INT’L L. & POL. 729, 738 (2002). See also Menaut, *supra* note 75, at 94; J.H.H. Weiler, *The European Union: Enlargement, Constitutionalism, and Democracy*, *Forum Constitutionis Europae*, November 29 (1999), <http://www.rewi.hu-berlin.de/WHI/english/fce/fce799/weiler.htm>.

109. Such was Justice Marshall’s classic argument in *Marbury v. Madison*, 5 U.S. (1 Cranch) at 137 (1803). Marshall reasoned that a justice taking an oath to follow the Constitution is bound in conscience to refuse to comply with orders from another branch of government that the justice

the legislature and executive would likewise not carry out unconstitutional supreme court decisions. Whenever some governmental action required cooperation among the three branches, a consensus about the constitution's meaning would be needed. The danger of unconstitutional state action would be decreased at the cost of an increase in the frequency of governmental paralysis. Of course, this is what checks and balances are all about—balancing power against power, a balance coming here not from conflicting interests but from joint faithfulness to the same basic law.<sup>110</sup>

This necessarily cooperative faithfulness to the law is what makes checks and balances preferable to separation of powers as a rule-of-law alternative to judicial supremacy. Both alternatives avoid the political danger of consolidated judicial power, but mere separation may not make fidelity to law sufficiently likely. With mutual review, each interpreter has a stronger motive to persuade others that its interpretation is the most plausible. The ensuing conversation will thus tend to center on and circle about the law, restraining any centrifugal forces that might otherwise cause interpreters to fly away from that which they are interpreting.

In other words, the checks-and-balances (mutual review) approach is a structural way to overcome the politicized skepticism about legal meaning that so threatens the rule of law today. Lawyers may merely offer predictions of judicial decisions when they speak to their clients, but not when they speak to judges. Even the most skeptical lawyer must argue about the true meaning of the law when standing in court. Likewise, no matter how personally “Legal Realist” or result-driven a judge may be, if she must persuade others that she has found the correct meaning of a text, she will have to so argue. Since argument presupposes truth,<sup>111</sup> everyone

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thinks unconstitutional, at least where those orders impinge on the Court's own constitutionally assigned jurisdiction. *Id.* The checks-and-balances approach emerges from the recognition that oath-takers in other branches of government would accordingly have a like duty to refuse to cooperate with Supreme Court justices who appear to be acting unconstitutionally. Marshall's oath-based argument for judicial non-compliance with the legislature thus becomes an argument for legislative (and executive) non-compliance with the judiciary.

110. If it were thought necessary to avoid all possibility of paralysis, this mutual review model could be used only to limit central or supranational authority, so that provincial or national governments remained unified and thus free to act with more dispatch. *See also supra* note 87 and accompanying text (outlining ways to avoid paralysis through accommodation).

111. Only if truth exists but is not known to be fully contained in any one opinion, will argument have purpose. If there is no truth, or if just one opinion of it counts, we have no motive to reason with one another. The most powerful preference simply wins without argument. Similarly, if one opinion or even several (jurisdictionally separate) opinions about the law are final regardless of their persuasive power, law fails to join us together in a deliberative community. Only if we think ourselves necessarily engaged in a common effort to be faithful to juridical truth will we reason together around and about the law. In a nation that seeks to be bound together through constitution and law, this unitive effect matters. But still more important

who is forced to argue becomes committed to truth—at least in public.<sup>112</sup> If we can institutionalize a need for the highest courts to convince rather than only to declare, we can make them at once less despotic and more faithful to the law. This is the fundamental intent and argument of this Article.

There is, of course, no reason that separation of powers could not be combined with checks and balances.<sup>113</sup> For example, constitutional requirements for quorum might be interpreted solely by the legislature, those for administrative agency appointments wholly by the executive, and those concerning trial procedures wholly by the courts, while all three were charged with the duty of refusing to cooperate in another branch's limitations on freedom of speech.

Two theoretically and historically important questions arise in regard to checks and balances: (1) What *degree* of non-cooperation is appropriately authorized in a given legal regime? (2) What *persons or institutions* are appropriately authorized to refuse cooperation with what they perceive to be illegal acts by high courts?

Absolute non-cooperation with unconstitutional or otherwise illegal high court decisions would mean that some cases could never be settled. This is just what happened for a time in immediate post-revolutionary France. Ideological commitment to the will of the legislature and concomitant suspicion of high courts led to lower courts being authorized to refuse to apply a higher court's seemingly erroneous interpretation, after appeal and remand, the lower court thus having permission to remain faithful to the law itself, rather than to the higher court's interpretation

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may be the epistemological effect mentioned in the text: that an institutionalized need to engage in persuasive interpretation can generate an effort to find the law's true meaning.

Mark Tushnet seems to foresee a different consequence of interpretive pluralism. In his article, *supra* note 6, he writes:

conflict [over interpretation] . . . would demonstrate that constitutional law is indeed political law, and that conflicts over the proper interpretation of the Constitution have to be worked out through a political system that, although taking into account the Constitution's text, is not determined by the text or, worse, by authoritative interpretations of the text.

That is, Tushnet seems to say that this Article's checks-and-balances proposal would move interpretation away from texts and toward politics. I do concede that interpretive centralism in a high court, especially if combined with a prohibition on publishing dissenting court opinions, may *appear* more tied to a text. But this Article has endeavored to show that such a non-political appearance is likely to be both false and non-credible in this new century. Given that politicized interpreters are likely to depart notoriously from the law, the question is how to draw them back. This Article proposes that the need to convince others of the meaning of the law will be a centripetal influence. Neither all-powerful single interpreters nor purely political actors have this motive to slow their flight from the law.

112. See R. Stith, *The Problem of Public Pretense*, VIII(1) INDIAN PHIL. Q. 13 (1980).

113. See also *supra* notes 86-87 and accompanying text (showing that each must inevitably contain an element of the other in any event).

thereof. Thus a trial court might decide a case under one legal interpretation; the Court of Cassation might disagree with that interpretation and send the case back for a new lower court decision; the lower court might be unpersuaded by the high court and reaffirm the first interpretation, leading to another appeal, and so on indefinitely. France finally modified its appellate rules to require the lower court to go along with the high court at the second remand,<sup>114</sup> and this surely makes sense. For any given set of parties, there ought to be an end to litigation at some point, not an endless stalemate founded in common loyalty to law rather than to courts.

Such was essentially President Abraham Lincoln's position in response to the United States Supreme Court's *Dred Scott* decision refusal to apply a Congressional statute the Court considered unconstitutional. That is, although he considered restoring the slave Dred Scott to his master "evil," he accepted that result as *res judicata*, because not to do so would have led to still greater evils. But at the same time he denied any strong vertical *stare decisis* effect of that decision.<sup>115</sup> He accepted judicial review of statutes for unconstitutionality but refused to recognize the consequent expansion of slavery to be binding beyond the parties to the case at hand. In an ongoing debate with Stephen Douglas, Lincoln had defended his position with the following argument:

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114. Regarding this sequence of events, see JOHN P. DAWSON, *THE ORACLES OF THE LAW* 487 (1968). Saudi Arabia, a nation whose legal system has been strongly influenced by France, also permits a period of back-and-forth dialogue between trial and appellate court, before the latter finally imposes its interpretation. Articles 187-188 *THE LAW OF PROCEDURE BEFORE THE SHARI'AH COURTS*, Royal Decree No. (M/21) 19 August 2000, Umm al-Qura No. 3811 15 September 2000.

115. Lincoln's classic exposition of his recognition of *res judicata* combined with his rejection of judicial supremacy is found in this paragraph in his First Inaugural Address:

I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.

LINCOLN, *supra* note 24, at 220-21.

[I]n respect for judicial authority, my humble history would not suffer in a comparison with that of Judge Douglas. He would have the citizen conform his vote to that [Dred Scott] decision; the member of Congress, his; the President, his use of the veto power. He would make it a rule of political action for the people and all the departments of the government. I would not. By resisting it as a political rule, I disturb no right of property, create no disorder, excite no mobs.<sup>116</sup>

Lincoln was not original in his split between deference to final judicial interpretation in the individual case and refusal to acknowledge that interpretation to be permanently binding on non-parties (as the doctrine of *stare decisis* would demand).<sup>117</sup> The core of European legal thought has long denied judicial precedent to be binding, though the opprobrium attached to “government of judges” may be of more recent origin.<sup>118</sup> In

116. Speech at Springfield Illinois (July 17, 1858), in ABRAHAM LINCOLN: SPEECHS AND WRITINGS, 1859-1865 at 472-473 (Don E. Fehrenbacher ed., Literary Classics of the United States 1989). Lincoln later crossed the line he had drawn and resisted the Court in the name of the Constitution even in a particular case, indeed, even when faced with a direct order from the Chief Justice of the Supreme Court. See Paulsen, *supra* note 6, at 278-82 (discussing the *Merryman* affair).

117. Theodore F.T. Plucknett concludes that in English law a single judicial decision (as opposed to a long-standing custom of the courts) did not become fully binding in later cases until the nineteenth century, after the American colonies had become independent. A CONCISE HISTORY OF THE COMMON LAW 347-50 (1956). Federalist 78’s claim that the judiciary is the “least dangerous” branch, having “no influence over either the sword or the purse,” would make little sense if the judiciary could impose its constitutional interpretations upon these other branches beyond the case at hand. THE FEDERALIST NO. 78 (Alexander Hamilton), at 393-94. One careful scholar has concluded: “One may summarize by saying that it can be established that American cases, up to the year 1800, had no firm doctrine of *stare decisis*. By 1825 some of the older states had come to a firmer stand on the authority of prior cases, and by 1850 this stand was solidified.” Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 50 (1959). Writing and research in this area is often marred by a failure to distinguish the binding quality of numerous precedents, an essential element of all customary law, and the binding (even if not absolutely binding) quality of a single precedent, the hallmark of *stare decisis*.

Writing in the 1830s, de Tocqueville appears to describe legal life in an America under a form of decentralized judicial review lacking *stare decisis*:

[O]n the day when a judge refuses to apply a law [that he considers unconstitutional] in a case, at that instant it loses a part of its moral force. Those whom it has wronged are then notified that a means exists of escaping the obligation of obeying it: cases multiply, and it falls into impotence. . . . [T]he law thus censured is not destroyed: its moral force is diminished but its material effect is not suspended. It is only little by little and under the repeated blows of jurisprudence that it finally succumbs.

In the end, assuming the courts are not persuaded to change their view, “one of two things then happens: the people change their constitution or the legislature rescinds the law.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 96-97 (H.C. Mansfield & D. Winthrop trans., 2000).

118. Vogenauer, *supra* note 17, at 489 (citing the Emperor Justinian’s admonition “cum non exemplis, sed legibus iudicandum est”); Bart Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 382 n.67 (1982) (explaining that

thus denying courts the power to make law beyond the case at hand, important checks and balances are put into place. Courts are not rendered impotent; after all, they may still have their interpretive way if they persist in their views on a case-by-case basis. Unless the Supreme Court changes its mind, other slaves will eventually be re-attached by the Court to their masters—just as Dred Scott was re-attached—but without the help of Lincoln’s executive branch. But the courts cannot easily or efficiently impose their views on the nation by fiat. Instead, they must use persuasion.

Faithful interpretation requires above all such restriction of the doctrine of *stare decisis*, for this doctrine holds in its essence that truth does not matter. All courts, in every nation, follow prior judicial decisions that they think were correctly decided. Binding precedent requires something more, namely, that they abide by prior decisions they think wrong. Its entire purpose is to avoid further deliberation about original meanings. It is a doctrine of unfaithfulness, a pledge not to be true to the law but only to its latest interpreter.<sup>119</sup>

Horizontal *stare decisis* prevents the law from ever becoming settled in the sense of converging on an interpretation agreed to be accurate, as the doctrine of *jurisprudence constante* permits in Europe. A series of constantly repeated interpretations becomes overwhelming evidence of their correctness only where each has looked back to the original law. A similarly long line of cases following an absolutely binding precedent is no evidence at all of the correctness of that precedent.<sup>120</sup>

the French Left first used the phrase “government of judges” in opposition to the *Lochner*-era U.S. Supreme Court’s use of judicial review). Dawson cites German authorities from the 1920s indicating that since “all judges are bound by the law . . . each judge is free—indeed obligated—to fasten his sights on the legislative text and draw his own conclusions independently.” *Supra* note 114, at 487.

119. “It is the view that because we have got into a mess we must grow messier to suit it; that because we have taken a wrong turn some time ago we must go forward and not backwards; that because we have lost our way we must lose our map also; and because we have missed our ideal, we must forget it.” G.K. CHESTERTON, *WHAT’S WRONG WITH THE WORLD* 124-25 (1994). (Dodd, Mead and Company 1910) (speaking of precedent in contexts other than courts). Continuing Chesterton’s metaphor, we may note that any binding quality in precedent warns us against taking a short side trip (making an exception to a rule out of a felt sense of the equities of the case) or exploring a possible shortcut (tentatively following an apparently better rule) under pain of having to continue in that direction. That is, to the degree to which precedent binds, it makes us choose between rigidly adhering to our ideals and flatly giving them up, neither of which seems a good way to live.

For a listing of articles arguing that *stare decisis* regarding interpretations of the U.S. Constitution is actually unconstitutional, in that it raises prior institutional error above what the sitting justices think the Constitution really requires, see Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 *AVE MARIA L. REV.* 1, 3 nn.11, 12 (2007).

120. Fortunately, in the United States horizontal *stare decisis* has rarely been treated as absolute. Nevertheless, it remains true that insofar as a precedent is thought binding,



In its purely vertical form, *stare decisis* is analogous to “democratic centralism,” the political doctrine that disagreement and debate are permitted only until the central authority has reached a decision.<sup>121</sup> Vertical *stare decisis* binds all courts and other institutions subordinate to the court making the precedential decision.<sup>122</sup> Although (unlike horizontal *stare decisis*) this vertical version does not stop the highest judicial authority from correcting its own past errors, the doctrine can still have irrational effects, and is especially dangerous in areas where subsequent legislative clarification is difficult or unlikely. The binding character of prior high court legal interpretation on future cases in the lower courts means that, although the high court might change its mind if it realized its prior mistakes, it is unlikely to be adequately informed of any errors. Lower courts will enforce interpretations that descend from on high, regardless of whether they agree with them, so that attempting to retry an issue already decided by the high court becomes almost pointless. Like a democratic-centralist leader who has closed himself off from news of dissatisfaction among the populace, the supreme court in a vertical *stare decisis* system ordinarily refuses to hear of any objections to its prior legal interpretations.<sup>123</sup>

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reexamination of its original correctness is excluded. To this degree, then, a line of cases does not provide proof of original meaning.

121. The term “democratic centralism” refers here to an organizational principle espoused by Vladimir Illich Lenin, the leader of the Russian Revolution of 1917:

Freedom of discussion, unity of action—this is what we must strive to achieve. . . . In the heat of battle, when the proletarian army is straining every nerve, *no* criticism *whatever* can be permitted in its ranks. But before the call for action is issued, there should be the broadest and freest discussion and appraisal of the resolution, of its arguments and its various propositions.

V.I. Lenin, Report on the Unity Congress of the R.S.D.L.P: A Letter to the St. Petersburg Workers (May 1906) in V.I. LENIN, COLLECTED WORKS vol. 10 376-81 (Andrew Rothstein ed., 4th English ed., Progress Publishers 1972) available at <http://www.marx2mao.com/Lenin/RUC06.html#s8> (last accessed Mar. 16, 2007).

122. American practice is a combination of this vertical form with horizontal elements. While lower courts are bound absolutely by prior Supreme Court decisions, that Court itself may overrule its prior cases. Simply realizing it made a mistake and acted unconstitutionally cannot be a sufficient reason to alter its mandate, however, for otherwise the doctrine of *stare decisis* would have no effect. The essence of the doctrine of *stare decisis* is the requirement to adhere to erroneous precedents.

123. Judge Edith Jones recently pointed to the structural blindness of the United States Supreme Court:

[T]he problem inherent in the Court’s decision to constitutionalize abortion policy is that . . . the Court will never be able to examine its factual assumptions on a record made in court . . . . That the Court’s constitutional decision making leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer not only about the abortion decisions, but about a number of other areas in

Judicial review of statutes need not include either form of *stare decisis*, and so need not involve binding interpretation.<sup>124</sup> If a supreme court is empowered only to refuse to apply an unconstitutional statute to the parties in a particular case, its interpretation obviously has quite minimal power to bind, as Lincoln saw clearly. Except in matters of *res judicata*, no other officials are bound to prefer that court's interpretation to their own interpretation of the constitution.<sup>125</sup> Even where a tribunal has been constitutionally empowered to strike down a statute *erga omnes*—i.e., to impose its constitutional interpretation upon the whole nation—a particular interpretation by that court need not become *stare*-like, i.e., binding upon the future. The legislature may be left free to enact like legislation, flying in the face of the court's interpretation of the constitution, and lower courts may be left free to uphold that legislation. Judicial review may ultimately give a constitutional court its way with any statute. But if its constitutional interpretations are not persuasive, it may well soon have a chance to change its mind as long as judicial review remains wholly without horizontal or vertical *stare decisis* effect.<sup>126</sup>

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which the Court unhesitatingly steps into the realm of social policy under the guise of constitutional adjudication.

McCorvey v. Hill, 385 F.3d 846, 852-53 (5th Cir. 2004).

The European Court of Justice has adopted a more open-minded form of vertical *stare decisis*. While national courts are permitted to rely on a prior ECJ interpretation of the treaties, they may, upon request, have the ECJ revisit the question at issue and perhaps change its mind. "[Even] where previous decisions of the Court have already dealt with the point of law in question . . . it must not be forgotten that . . . national courts and tribunals remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so." Case 283/81, CILFIT SRL v. Ministry of Health, 1982 E.C.R. 3415. Note also that the ECJ has never declared itself limited by any doctrine of horizontally binding precedent.

124. A court's ability to strike down a statute certainly increases the reach of its interpretations of the law. Such decisions do empower politicized judges. However, without the doctrine of *stare decisis*, judicial review still permits interpretive pluralism, debate about the meaning of the constitution, in that it does not make earlier interpretations binding on later interpreters.

Put another way: Centralized judicial supremacy is supported by three pillars. The first is the highest court's freedom from the past (linguistic skepticism or legal realism); this pillar is the one often attacked (in vain, this Article has argued) by conservatives. The second is the court's power over the people (judicial review of statutes), the most common objection of populists and decentralists. See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346 (2006). Last is the court's power over the future (*stare decisis*). Lawless invalidation of a statute is, by itself, only a grave sin against the legal order. The doctrine that a fundamental and erroneous precedent is binding amounts to apostasy.

125. Both Federalist 78 and de Tocqueville accept judicial review but not in ways that appear to bind non-parties. Cf. *supra* note 117. This was the situation with regard to the Supreme Court of Chile until recently. See *supra* note 102.

126. Chile appears to have preserved such a practice in its recent consolidation of constitutional review. The Constitutional Tribunal may only strike down a "*precepto legal*." See

We have already begun to answer the second question posed above, namely the question of which persons or institutions are appropriately authorized to check and balance what they perceive to be constitutional errors by a high court. The national executive, the national legislature, and the lower courts have been mentioned. It has also been suggested that at least the highest court itself should be authorized to change its mind (i.e., not be bound by horizontal *stare decisis*). This last check may seem quite minimal, but it could be significant in those regimes that (unlike the United States of America)<sup>127</sup> provide for frequent membership turnover on the court in question.<sup>128</sup> In Ukraine, for example, the constitution mandates a tenure of only nine years for each judge on the Constitutional Court.<sup>129</sup> If no horizontal *stare decisis* doctrine limits the Ukrainian Court, then the Court's interpretations might not be very binding after all, since they can in effect be "appealed" to a different panel of judges nine years later.

In a given legal order, there could be few or many institutions or persons authorized to refuse to follow what appears to be an erroneous supreme or constitutional court decision. *Many* would, however, be preferable to *few*, for the goal should be to have the various interpreters share as little as possible besides the common law they are interpreting. That way, they will be less likely to find agreement on any basis other than the requirements of the law.<sup>130</sup>

It would be impossible to list all available mechanisms for checking and balancing a high court. But a few interesting possibilities can be touched upon.

For example, the logic of compact suggests that nations entering a federal union retain the ability to check any central government of limited

*supra* note 102, art. 93(6) and 93(7). It is given no power to impose a doctrine or a general principle of law.

127. In the U.S., Supreme Court Justices are appointed during "good behavior," which means for life, unless impeached and removed by Congress, which has never happened. U.S. CONST. art. III, §1.

128. *See* COSTITUZIONE [Constitution], tit. VI, art. 135(3) (Italy) (judges on the Constitutional Court in Italy are elected to nine-year terms), *available at* [http://expired.oefre.unibe.ch/law/icl/it00000\\_.html](http://expired.oefre.unibe.ch/law/icl/it00000_.html); *see also*, South Korea—[Constitution], ch. VI, art. 112(1) (1948) (terms for judges on the Constitutional Court is six years), *available at* [http://www.oefre.unibe.ch/law/icl/ks00000\\_.html](http://www.oefre.unibe.ch/law/icl/ks00000_.html).

129. UKRAINE CONST., *supra* note 5, at art. 148 (reappointment to Constitutional Court is not possible), *available at* <http://www.rada.gov.ua/const/conengl.htm>; *see also* COSTITUZIONE [Constitution] (Italy) (reappointment is not permitted for judges on the Constitutional Court), *available at* [http://www.oefre.unibe.ch/law/icl/it00000\\_.html](http://www.oefre.unibe.ch/law/icl/it00000_.html); *compare* Constitution of South Korea, art. 112(1) (reappointment permitted on Constitutional Court), *available at* [http://www.oefre.unibe.ch/law/icl/ks00000\\_.html](http://www.oefre.unibe.ch/law/icl/ks00000_.html).

130. *See supra* note 105 for a discussion of the need for some interpreters other than professional judges.

powers that they have created. If a federal government—backed by the highest federal court—exceeded the mandate agreed upon by those member states when they originally set it up, they would have a right to refuse to comply with that government's *ultra vires* acts. This was the argument of many American states before the Civil War, and it has been raised especially by Germany in providing a rationale for resistance to the European Court of Justice.<sup>131</sup>

Canada has contributed an imaginative sort of check upon its Supreme Court. The Canadian Constitution (1982) provides in Part I, Article 33, that when provincial or national law has been declared unconstitutional by the Court, the legislature from which the law came may bring it back into force “notwithstanding” its unconstitutionality, but only for a renewable period of five years.<sup>132</sup> The intent here seems to be to give democratically elected legislators the final word, but on condition that they continue to listen to the Court, in the hope that one side or the other might eventually change its mind. However, this Canadian device cannot count as an instance of institutionalized interpretive pluralism, of checks and balances regarding interpretation, for the Court's interpretation of the Constitution remains final. The legislature is simply given the power to act unconstitutionally for renewable five-year periods. Unfortunately, the political burden of re-passing an officially declared “unconstitutional” law has been so great that no dialogue has ever begun.<sup>133</sup> After all, those who resist the Court are also resisting the Constitution, albeit with permission to do so. Things might have been different had the legislature explicitly been

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131. See Steve J. Boom, *The European Union After the Maastricht Decision: Will Germany Be the “Virginia of Europe”?*, 43 AM. J. COMP. L. 177 (1995). A further question is which branch or branches of the member state governments are authorized to decide upon such resistance.

132. See Constitution Act 1982, Pt. I Art. 33:

- (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
- (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
- (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
- (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Available at [http://laws.justice.gc.ca/en/const/annex\\_e.html#I](http://laws.justice.gc.ca/en/const/annex_e.html#I).

133. See Stephen Gardbaum, *The New Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 719-27 (2001).

given a power of interpretive (rather than merely political) dissent—had the Canadian Constitution made clear that the Court can be wrong and that each legislature has an equal right, along with the Court, to interpret the Constitution, and a right to re-pass its nullified statute as long as the legislature remains unconvinced by the Court's arguments for the law's unconstitutionality. With such encouragement, a legislature might be much more likely to resist extravagant judicial interpretations.

Check and balance is also less likely to occur where it is associated, as it often is, with a constitutional crisis. In Canada, at least there is clear legal permission for the legislature to resist the Supreme Court. In the European Union, by contrast, the European Court of Justice is the sole interpreter of Community law, according to the Treaty on European Union,<sup>134</sup> and the ECJ has recognized no legitimate opposition to its interpretations. It takes an utterly self-confident court in a powerful nation, e.g., the German Constitutional Court, to stand up the ECJ and say “your power to interpret does not include a power to amend.” Because the ECJ fails to recognize the lawfulness of German resistance, any actual resistance would lead to a constitutional crisis in Germany as to which court to obey. Neither court would know in advance that it would be victorious. Perhaps for this reason, no resistance has ever actually occurred; it has been only threatened (though the threat may well have had some effect).<sup>135</sup>

Constitutional crises are not, however, a necessary part of the check-and-balance proposals put forward in this Article. If all agree that only the parties to a case are bound by a judicial declaration of unconstitutionality, as is still possible in Chile, no crisis occurs when the executive continues to enforce the impugned statute. Where there is a consensus that precedent is not binding, as may occur in France, official refusals to conform to the rationale behind earlier high court decisions result in no breakdown of the rule of law. Crises occur, rather, when significant public institutions become convinced of their duty of fidelity to the law while a great court instead continues to demand fidelity to itself. Mutual review is not internally unstable, but there may well be temporary instability if it must first defeat entrenched judicial supremacy.

What of the argument that ordinary citizens, as well as state officials, should feel (and be explicitly) authorized to resist unfounded high court interpretations of their nation's laws and constitution? If law itself is to rule, rather than some court's interpretations thereof, then shouldn't any

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134. EC TREATY, *supra* note 5, art. 220 & 234.

135. See J.H.H. Weiler, *European Neo-Constitutionalism: In Search of the Foundations of European Constitutional Order*, 44 POL. STUD. (3) 517, 531-33 (1996).

law-abiding citizen be as free as a president to resist fundamentally erroneous interpretations by that court?

Such a check might seem to go too far, might seem to slide back into the disorder we rejected at the beginning of this article, by advocating a “right of resistance.” Yet even “citizen review” need not lead to instability, as long as we attend carefully to the distinction between *res judicata* and *stare decisis*. If every citizen had a right to resist erroneous interpretations of the law in every individual case, chaos might well erupt—though in extreme circumstances disorder could be the lesser evil.<sup>136</sup> But if each citizen is only freed to think for herself about what the constitution or the law means in future cases, freed to refuse to bow to *stare decisis* in any form, she has merely a right (in a test case perhaps) to ask state officials and courts—who are also wholly unbound by *stare decisis*—to revisit issues already reached by the highest court, which is not a radical doctrine at all. These officials, after all, will enforce the Constitution as they understand it, not as the dissenter understands it. If they agree with the highest court’s jurisprudence, the dissenter will not get far. But if some came to agree with the dissenter’s constitutional interpretation, the issue would again be appealed. A high court that remained convinced of its own righteousness might be able to force each separate dissenter to comply with its commands, but in order to elicit voluntary cooperation and enforcement it would have to persuade many courts and other listeners that it truly spoke for the constitution.

### Conclusion

As the distinction between interpretation and politics diminishes, the need for pluralism in interpretation increases. The more the judiciary arrogates political power to itself, the more necessary a pluralism of legal interpretation becomes. No one tribunal should possess the power to bind a whole legal system to its politicized interpretations of the law.

This article has analyzed two tested alternatives to concentrating interpretive authority in a single court. Under the “separation of powers” approach, some or many jurisdictionally distinct institutions are granted powers to interpret and apply the constitution and the laws. A multiplicity

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136. As we saw in note 27, citizen resistance to the courts, even in certain individual cases, seems to be permitted by the Basic Law of Germany. Section 20(4) of that Constitution reads “[A]ll Germans have the right to resist any person or persons seeking to abolish [the] constitutional order, should no other remedy be possible.” GRUNDGESETZ [GG] [Constitution] art. 20(4) (F.R.G.). If the courts side with an unconstitutional regime, no other remedy remains and citizen resistance is authorized. So far at least, the clause has not led Germany into anarchy. Whether it has been effective in moderating the interpretive license of major legal actors is another question.

of interpreters helps to prevent domination by any one legal ideology and to encourage reasoned dialogue about the meaning of law.

“Checks and balances” likewise can hobble doctrinal despotism by requiring various degrees of coordination among interpreters of the law. Under the version that this Article has favored, each interpretation of law (or at least of constitutional law) binds only as to the claims in the case at hand, with no *stare decisis* control over future decisions. The efforts of any interpreter to dominate and control political developments may thus be checked and balanced by loyalty to the law and constitution themselves, wherever that interpreter seems to stray too far from the source of its authority. In this way, even in a skeptical age, courts and other public authorities are given an incentive to construct arguments convincingly moored to governing law. Despite its difficulties and dangers, we need not abandon the rule of law.

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