Extrajudicial Constitutional Interpretation:

A Review of Two Approaches

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Abstract

Over the past three decades, scholarly dissatisfaction with theories of judicial supremacy in constitutional interpretation has spurred interest in extrajudicial constitutional interpretation. This intellectual shift has revitalized interest in, and spurred scholarly attempts to self-consciously theorize, two longstanding approaches to constitutional interpretation: "departmentalism" and "popular constitutionalism." While popular constitutionalists and departmentalists have an interest in underemphasizing their theoretical disagreements given their shared opposition to judicial supremacy and advocacy for an expanded foundation for constitutional interpretation, in this literature review I outline important empirical and theoretical distinctions between the two theories that cannot be dismissed as mere differences in nuance. I find that in emphasizing different constitutional agents and appropriating divergent theoretical foundations, departmentalists and popular constitutionalists promote distinct understandings of both the dynamics of constitutional politics as well as the function played by the constitutional text in the American political system.

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1 Two Theories of Extrajudicial Constitutional Interpretation

Over the past three decades, scholarly dissatisfaction with theories of judicial supremacy in constitutional interpretation has spurred interest in extrajudicial constitutional interpretation. This intellectual shift has revitalized interest in, and spurred scholarly attempts to self-consciously theorize, two longstanding approaches to constitutional interpretation: "departmentalism" and "popular constitutionalism." Departmentalism holds that "constitutional interpretation is not peculiar to the courts ... Whenever each branch acts, it necessarily exercises an interpretive power" (Whittington 2007: 29-30). Popular constitutionalism, on the other hand, holds that "the American people (and their elected representatives) should play an ongoing role in shaping contemporary constitutional meaning" (Donnelly 2012: 159). These theories are frequently invoked together or treated as a single approach to extrajudicial constitutional interpretation. For example, Larry Alexander and Frederick Schauer discuss advocates of departmentalism and popular constitutionalism together by highlighting that "[m]ost recently, academic proponents of judicial non-exclusivity in constitutional interpretation have been led by Michael Paulsen, who maintains that executive officials should not defer to constitutional decisions of the judiciary they believe mistaken, and Mark Tushnet, who argues that non-exclusivity is the route to a socially desirable "populist" constitutional law." Others posit that the foregoing scholars manifestly promote a "funsion of departmentalism and popular constitutionalism" (Post and Siegel 2004: 1034). To be sure, popular constitutionalists and departmentalists have an interest in underemphasizing their theoretical disagreements given their shared opposition to judicial supremacy and advocacy for an expanded foundation for constitutional interpretation. Nonetheless, in this literature review I outline important empirical and theoretical distinctions between the theories that cannot be dismissed as mere differences in nuance. I find that in emphasizing different constitutional agents and appropriating divergent theoretical foundations, departmentalists and popular constitutionalists promote distinct understandings of both the dynamics of constitutional politics as well as the function played by the constitutional text in the American political system.

2 The Agents and Dynamics of Constitutional Politics

First, departmentalist and popular constitutionalist theories priviledge different interpretive agents. As a result, they forward alternative conceptions of both the driving force and the dynamics of constitutional

politics.

Departmentalism underscores *the agency of the presidency* in interpreting the constitution. The theory, as baptized by Edward Corwin (1938: 69) in the aftermath of Franklin Roosevelt's unsuccessful court-packing plan (Whittington 2001: 783), has always held as its ""driving power" ... *Presidential leadership*" (quoted in Whittington 2007: 30; emphasis in original). Departmentalists emphasize the constitutional duty of the President to abide by his own understanding of the constitutional text without being bound by the constitutional doctrine of the Supreme Court. "The President," writes Michael Paulsen, "may exercise a power of legal review over the determination of the judiciary and over acts of Congess and refuse to give them effect insofar as his constitutional authority is concerned" (Paulsen 1994: 343). This perspective has its origins in the constitutional arguments invoked by several Presidents. In vetoing Congressional legislation providing for the rechartering of the Bank of the United States, Andrew Jackson emphasized that "[the] President [is] still free to support the Constitution "as he understands it" and to form his opinion independently of either the legislators or the judges" (Whittington 2007: 174). Jackson perceived, in contradistinction to the Supreme Court's judgment in *McCulloch v. Maryland*,[1] that the establishment of a national bank constituted a usurpation of federal authority. He also believed, in contravention of Marshall's argument in favor of judicial supremacy in *Marbury v. Madison*, that he was not bound by the judicial department's interpretation of "what the law is."[2] Rather, "[e]ach public officer who takes an oath to support the Constitution swears that he will support it as he understands it" (quoted in Whittington 2007: 33).

A century after Jackson's famous veto, the Roosevelt Administration found itself locked in a battle with the *Lochner* Court[3] over the constitutionality of the New Deal. In this struggle for constitutional leadership, Roosevelt resuscitated Jackson's departmentalism. In a prepared speech that was left undelivered thanks

[1]In *McCulloch*, Chief Justice John Marshall finds that the Constitution contains implied powers for Congress, and through the Constitution's necessary and proper clause (Article 1, Sec. 8), the establishment of a national bank can be considered a necessary and proper means for Congress to achieve its express powers (to collect taxes, to borrow money, to regulate commerce, to conduct a war and support armies, etc.). The necessary and proper clause, Marshall concluded, "is placed among the powers of Congress, not among the limitation on those powers [...] Its terms purport to enlarge, not to diminish the powers vested in the government" Quoted in Paulsen et al. 2013. *The Constitution of the United States, 2nd Ed.* St. Paul, MN: Foundation Press: 201). See: *McCulloch v. Maryland*, 17 U.S. 316 (1819).

[2]In *Marbury*, Chief Justice John Marshall writes that "[it] is emphatically the province and duty of the judicial department to say what the law is." Quoted in Paulsen et al. 2013. *The Constitution of the United States, 2nd Ed.* St. Paul, MN: Foundation Press: 151). See: *Marbury v. Madison*, 5 U.S. 137 (1803).

[3]In *Lochner v. New York*, the Supreme Court struck down legislation passed by the State of New York regulating the working hours of bakers as a violation of freedom to contract. The case is emblematic of the so-called "Lochner-era" where the Court repeatedly opposed state and federal government attempts to regulate the industrial economy. See: *Lochner v. New York*, 198 U.S. 45 (1905).

to the Supreme Court's newly expansive reading of Congressional commerce powers following Roosevelt's court-packing threat,[4] Roosevelt argued that "the president [has] an obligation "to protect the people of the United States to the best of his ability,"" and he could not "stand idly by" as the Supreme Court chipped away at his program for economic recovery (quoted in Whittington 2007: 37-38). In short, while departmentalism does not replace judicial supremacy with presidential supremacy, it does emphasize and legitimate presidential action that is inconsistent with the Supreme Court's constitutional doctrine if the President espouses an alternative constitutional interpretation. Departmentalists therefore underscore the President's potential agency by noting that he "can ignore [the Supreme Court's] mandates" and spearhead Congressional efforts to impeach the Court's Justices, slash its budget, "strip it of jurisdiction ... pack it with new members ... give it burdensome new responsibilities or revise its procedures" (Donnelly 2012: 176). In short, the departmentalist reply to the judicial supremacist is to underscore the interpretive agency of the Skowronekian reconstructive President (Skowronek 1997).[5]

In contradistinction, popular constitutionalism underscores *the agency of "the people"* in expounding the constitution's meaning. "The Supreme Court," argues Larry Kramer, "is our servant and not our master," and it "is not the highest authority in the land on constitutional law. We are" (Kramer 2004: 248). Kramer grounds this populist vision in the spirit of the American founding: "Their Constitution remained, fundamentally, an act of popular will: the people's charter, made by the people. And ... it was the people themselves ... who were responsible for seeing that the Constitution was properly interpreted and implemented. The idea of turning this responsibility over to judges was unthinkable" (Kramer 2001: 12). Bruce Ackerman (1991) posits there exist two additional "constitutional moments" besides the founding, namely postbellum reconstruction and the New Deal revolution, wherein a sustained critical mass of ordinary Americans, speaking through their elected representatives, entrenched their extrajudicial constitutional interpretations within the text without resorting to the Article V amendment process. Through this historical narrative, Ackerman emphasizes that his goal is to "describe, as unmystically as possible, the sense in which our normally elected representatives are only "stand-ins" for the People and should not be generally allowed to suppose that they speak for *the People themselves*" (Ackerman 1991: 236; emphasis in original). In other words, when a

[4]See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Carolene Products Company*, 304. U.S. 144 (1938).

[5]Reconstructive Presidents are opposed to the crumbling *ancien* regime, and they possess the public and political support to dismantle it and to forge a new regime from its ashes. See Skowronek (1997); Whittington (2007: Chapter 2).

President wrestles the reigns of constitutional leadership from the Supreme Court, he is merely acting as a spokesman for the Constitution's true interpretive agents. As a result, Paulsenian efforts to bolster executive authority or the President's ability to alter the composition of the Supreme Court "give him [the President] far too weighty a role," unless the President holds "a mandate for fundamental change of the kind that Franklin Roosevelt plausibly claimed" following his landslide victory in the 1936 general election (Ackerman 1991: 53).

Popular constitutionalists, in other words, are anti-elitists. They locate within the people's ever-growing inter-generational reverence for the Constitution and desire for principled, non-poll-driven politics "reasons to believe that, if the ultimate power to interpret the Constitution's indeterminate provisions were shifted from the courts to the political domain, the American people would prove themselves able and willing to distinguish between their long-term fundamental commitments and their short-term political desires in the kinds of ways that constitutionalism demands" (Pettys 2008: 345). They embrace institutional reforms that enhance direct democratic participation in constitutional debates, such as the introduction of a "People's veto" that would subject controversial 5-4 Supreme Court decisions to popular evaluation via a plebiscite (Donnelly 2012: 164) or, more radically, the eradication of the courts' jurisdiction vis-a-vis constitutional interpretation (Tushnet 2000). Popular constitutionalism thus invites us to recognize the empirical reality and normative desirability of the people fulfilling their constitutional agency and engaging in political acts of "constitutional construction" to endow open-textured constitutional provisions with substantive content (Whittington 1999). Thus the popular constitutionalist reply to the judicial supremacist is to underscore the ways in which the people themselves shaped the drafting and ratification of the constitutional text as well as the trajectory of its subsequent development.

3 The Theoretical Justification of Extrajudicial Constitutional Interpretation

In addition to espousing divergent conceptions of constitutional agency and the dynamics of constitutional politics, departmentalism and popular constitutionalism support extrajudicial constitutional interpretation with distinct theoretical justifications. These justifications expose alternative understandings of the function that the Constitution plays within the American political system.

Departmentalism grounds its justification in the *institutional theory of coordinate powers*. "Departmentalism," writes Keith Whittington, "would hold that constitutional interpretation is not peculiar to the

courts, but rather that each of the three coordinate branches has equal responsibility and authority to interpret" (Whittington 2007: 29). Paulsen proclaims the "coordinacy" of the three branches as "one of the fundamental political axioms of our federal Constitution" (Paulsen 1994: 228). As James Madison described in *The Federalist* No. 49, the three branches are coordinate in the sense that "neither of them . . . can pretend to an exclusive or superior right of settling the boundaries between their respective powers" (quoted in Paulsen 1994: 228). This understanding rejects a Montesquieuian theory of functional separation of powers, whereby each branch would reign supreme over its own distict competence. Rather, it embraces a permeability of function in the context of an inter-branch equality of constitutional authority. Thus, following the degeneration of the founding-era Federalist regime, Thomas Jefferson justified his reconstructive opposition to Marshall's *Marbury* holding by arguing that "the departments of government must be "co-ordinate and independent of each other,"" such that "each branch has an equal right to decide for itself what is the meaning of the Constitution" (quoted in Whittington 2007: 33). Nearly two centuries later, Ronald Reagan's Attorney General, Edwin Meese, justified the President's opposition to the Supreme Court's *Roe v. Wade*[6] decision by stressing that "constitutional interpretation is not the business of the Court only, but also properly the business of all the branches of government" (quoted in Whittington 2007: 39).

Yet if departmentalism is opposed to the substantive prescriptions accompanying the theory of functional separation of powers, its favored theory of coordinate powers does espouse the same underlying logic. This logic is that the Constitution's function is to preserve self-rule by institutionalizing a system of limited government via fragmented federal authority. The fragmentation of constitutional authority is deemed necessary to limit the vicissitudes of malevolent passions and factional interests. The political implications of this institutional arrangement are best articulated in *The Federalist* No. 47 and No. 51. In the former, Madison highlights the function of coordinate powers as an "essential precaution in favor of liberty" (quoted in Paulsen 1994: 229-230). In the latter, Madison posits that "the ambition of one part of government" is thereby "expected to counter that of another . . . It may be a reflection on human nature that such devices should be necessary to control the abuses of government" (quoted in Hirschman 1977: 30). In this light, judicial supremacy tips the scales of constitutional authority too severely in favor of the judiciary. While the preservation of judicial review is necessary for the functional operation of constitutional checks and balances,

[6]In *Roe*, Associate Justice Blackmun finds that a substantive right to privacy under the Due Process Clause of the 14th Amendment extends to a woman's decision over whether or not to terminate her pregnancy. See: *Roe v. Wade*, 410 U.S. 113 (1973).

departmentalism's coordinate theory emphasizes that an inter-branch sharing of interpretive authority is necessary to prevent the emergence of an "Imperial Judiciary"[7] and rule by a "bevy of Platonic guardians" (Hand 1958: 73).

In contradistinction, popular constitutionalism grounds its justification in a *republican conception of deliberative democracy*. At the time of the American founding, Whiggish republican understandings of the public good were as predominant as contemporary liberal conceptions of individual liberty. "Since in a free government the public good was identical with the people's welfare," writes Gordon Wood, " the best way of realizing it in the Whig mind was to allow the people a maximum voice in the government" (Wood 1998: 56). Instead of the distrust of human nature inherent in an institutionalist theory of coordinate powers, this republican understanding "had little doubt of the people's honesty and even of their ability to discern what was good for themselves" (Wood 1998: 56). Kramer (2004) cites an article penned by Madison in the *National Gazette* where he rhetorically asks "Who Are the Best Keepers of the People's Lives?" and quickly delivers the republican reply: "The People themselves. The sacred trust can be no where so safe as in the hands most interested in preserving it." As a result, what is needed is less the institutionalization of coordinate powers and more a framework that will foster democratic deliberation and incorporate popular decisionmaking within the process of constitutional development. Thus Ackerman supports the "dualist" Constitution by noting how it forces popular calls for constitutional change into an extended "period of mobilized deliberation" that will "vastly broaden and deepen the political engagement of the People on the fundamental issues at stake" (Ackerman 1991: 286-287). Similarly, institutional mechanisms for direct democracy, such as a plebiscite, would allow the people to "see the wisdom in implementing a system of procedural rules designed to be sure the electorate proceeded with appropriate caution" (Pettys 2008: 354), particularly when they are structured to allow "sufficient time . . . for sober deliberation" (Donnelly 2012: 188). Under this generous interpretation of the people's "awareness of their own falliability" and deliberative capacities, the institutional fragmentation of authority and the empowerment of countermajortiarian courts loses much of its appeal. One may even begin to wonder, as Mark Tushnet (2000) does, whether it may not be desirable to "take the constitution away from the courts" and entrust it fully to the people themselves.

This republican theory builds on an intuition that was articulated by James Thayer in his exposition

[7]See Associate Justice Scalia's dissent in *Planned Parenthood v. Casey.* Quoted in Paulsen et al. 2013. *The Constitution of the United States, 2nd Ed.* St. Paul, MN: Foundation Press: 1539. See: *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

of the "clear mistake" rule.[8] Thayer feared that the institution of judicial review might cause the people's elected representatives to "[feel] little responsibility" regarding their constitutional duties. Hence "the safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures" (Thayer 1983: 155-156). This conclusion is channeled in Kramer's lament that "we have for all practical purposes turned the Constitution over to the Supreme Court," as well as his call for the American people to "regain confidence in their own judgment" and "return to popular constitutionalism, a lost practice with deep roots in the American constitutional tradition" (Donnelly 2012: 165). In short, where the institutional theory of coordinate powers underlying departmentalism seeks to ensure limited government via the constitutional fragmentation of authority, the republican conception of deliberative democracy underlying popular constitutionalism functions to enable populist self-rule and to invite "modern men and women to take citizenship seriously" (Ackerman 1991: 220).

4 Shared Referents, Different Theories?

It is only natural after a review essay focused on theoretical distinctions to exaggerate the degree to which departmentalism and popular constitutionalism differ. In truth, these theories are responding to the same historical events and intellectual opponents. Historically, departmentalism and popular constitutionalism have both emerged most prominently during periods of regime transition. As the *ancien* regime begins to crumble and a social movement builds behind a President with a reconstructive agenda, populism is likely to emerge as the *lingua franca* of mobilizational efforts and departmentalism is equally likely to be invoked by the President to legitimate his reform platform (Whittington 2007). Abraham Lincoln, for example, forged his opposition to the Supreme Court's *Dred Scott* decision[9] in the language of both departmentalism and popular constitutionalism, proclaiming that if "vital questions affecting the whole people" were to be "fixed by decisions of the Supreme Court," then "the people will have ceased to be their own rulers" (quoted in

[8] Thayer (1983: 150) argued that when the Supreme Court exercises judicial review, it is "revising the work of a co-ordinate department, and must not, even negatively, undertake to legislate. And, again, [it] must not act unless the case is so very clear."

[9] In *Dred Scott v. Sandford*, Chief Justice Roger Taney substantively invoked the Due Process Clause of the 5th Amendment for the first time to rule that no black person, whether slave or free, could constitutionally be a citizen of the United States and any US state, and that the Missouri Compromise was unconstitutional because the federal government had no legitimate constitutional power to limit the spread of slavery to new territories. See: *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

Whittington 2007: 37). In other words, regime collapse at the hands of a reconstructive President backed by a mobilized populace is likely to emerge as a historical referent for both theories. Additionally, both departmentalism and popular constitutionalism attack the theory of judicial supremacy as promoted by the Supreme Court in *Cooper v. Aaron*[10] and by constitutional scholars like Alexander and Schauer (1997).[11] Both theories characterize the view that the the Supreme Court's constitutional doctrine binds political actors as flawed or dangerous: Judicial supremacy is either a threat to liberty through the usurpation of coordinate powers (Paulsen 1994) or the anti-democratic attempt to bind contemporary generations to the "dead hand" of the past through judicial elites (Pettys 2008). In short, what arouses departmentalists to take to the pen, to the ballot box, or to the streets is equally likely to arouse popular constitutionalists to do the same.

It is striking, then, that the foregoing shared referents would generate theories which, at their core, justify and describe different dynamics of constitutional politics. Future scholarship would do well to explore whether unity of referent is enough to promote efforts to combine departmentalism and popular constitutionalism into a single theory, or whether by leveraging theoretical pluralism we stand a better chance of illuminating American constitutional history and forging our own contemporary constitutional understandings.

[10] In *Cooper v. Aaron*, a unanimous Supreme Court argued that its constitutional interpretation binds all political officials, including state officials. See: *Cooper v. Aaron*, 358 U.S. 1 (1958)

[11] Alexander and Schauer (1997: 1379) posit that because the Constitution's function is to settle fundamental political questions, it is necessary to endow the Court with judicial supremacy in order to avoid "interpretive anarchy." For a response, see Whittington (2001).

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