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THE ROLE OF THE LEGISLATIVE AND EXECUTIVE BRANCHES IN INTERPRETING THE CONSTITUTION

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As many of you know, I have spent a good part of the last twenty years as both a law professor and a litigator for the American Civil Liberties Union. Over those years, I have harbored a heretical, but not a particularly novel, belief that the political spectrum is much better represented as a circle than a line; and that libertarians at both ends of the spectrum are often much closer to each other than to the people in the middle. I suspect that there is a great unity of interest among many of us who labor in the libertarian groves, even though we may differ very dramatically on particular issues and the means to our shared ends.

Let me raise with you the problem of judicial precedent. The question of how one construes the Constitution before the courts act, of course, poses no problem. Each branch does the best it can. But assume with me, if you will, that the Supreme Court has acted in a way that is indisputably, formally complete. People may disagree or agree with the correctness or incorrectness of the Court's decision, but the court has laid down an intelligible and finite rule. The question now is "What is the duty or obligation of the other two branches of government with respect to the precise rule established by the holding of the Supreme Court?"

There are two polar positions in response to this question. We heard John Harrison beautifully expound the first polar position a moment ago. He argued that precedent, even Supreme Court precedent, is nothing but a prediction of future consequences. The government, as any other actor in the legal system, must take into account the prediction of future consequences because it is likely to be haled into court and shellacked if it fails to follow the precedent. As a matter of self-interest, the goverument ought to, and probably will, comply with the precedent; but no formal legal obligation exists compelling the government to abide by Supreme Court precedent. That theory, and it is a respectable theory, flows from a hard

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and sharp reading of *Marbury v. Madison*.[1] Under this view, the Court's power to expound the law in the first place flows from the power to decide a case; deciding a case is essentially an in-house judicial function. While, of course, the courts should continue, in-house, to perform as they think they should, this does not necessarily mean that the two other branches of the government, the executive and the legislature, are obliged to defer to the judgments of the courts when they are performing their, respective, in-house duties. This theory leaves us, if it is in fact a correct interpretation of what the Constitution permits or even requires, with a cacophonous Constitution; a Constitution that speaks with many mouths simultaneously to the populace; the judicial construction is "correct" because it is the last construction, not because it is the construction that one is legally obligated to follow.

I argue for the polar position on the other side; I believe that as long as the Court's decision complied with the formal constraints of *Marbury*, as long as it satisfied the Article III case or controversy requirements, then judicial precedent should be treated as creating a positive duty to comply. It should be treated as the enunciation of a positive rule of law and not simply a rule of prediction.

Let me make four quick distinctions before we talk a little bit more about what that duty to comply might look like. First, I want to distinguish the notion of duty from the notion of sanction. We are not talking about making every violation of a precedent a contempt of court. That, I think, would be an extraordinary enhancement of judicial power and very bad policy. We are simply asking whether or not there is some formal, legally recognizable duty to comply with precedent, leaving aside the question of sanction.

Second, I want to distinguish the government from private persons, because we may have a very different theory defining the way a private person ought to relate to a Supreme Court precedent, as opposed to the way one of the other branches of government, one of the states, or a local government should relate to precedent. I would like to talk only about the duty of a government official and the way he or she should relate to precedent.

Third, let me distinguish a legal duty to comply with precedent from the right to criticize the precedent and the right to try to foster change by any lawful means—by relitigating the issue or by attempting to overrule it through the legislature or by constitutional amendment. There cannot be any principled argument that says: "Once the Supreme Court acts, everybody has to roll over and accept what they say as correct." Criticism and attempts to change

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1 5 (1 Cranch) 137 (1803).

and foster re-litigation are part of the system and should be encouraged. There can be no argument from judicial precedent that, as a principled matter, would cast any doubt upon the legitimacy of such criticism.

Finally, let me reiterate the difference between holding and dictum. Dictum can never be any more than a predictive phenomenon. Dictum cannot be read as creating positive law because it goes beyond the Article III powers of the courts in the first place. Although dictum may give a hint as to what courts will do in the future, and thus allow efficient ordering of conduct, it cannot be read, and should not be read, as creating a positive duty to obey. So we are talking only about the narrow precedential holding of a case.

My thesis is that once you have a narrow precedential holding in a case, there is a legal duty on the part of the organs of government to defer to the Supreme Court's reading of the Constitution or the statute. Such a legal duty flows, not from *realpolitik*, or from fear of losing if forced into court again, but from a positive legal obligation to comply with the law as it is enunciated by the Supreme Court pursuant to the mandates of Article III and *Marbury v. Madison*.

Let me stress that there is a limited practical difference between the two polar positions. I would expect that whether one views it as a matter of *realpolitik* or a matter of legal obligation, in the vast bulk of situations you are going to have compliance. Although it is an important matter of legal theory, and it can be quite important pragmatically to individuals in a number of cases, one ought not exaggerate the practical consequences of accepting either position here. We are not talking about a breakdown of the rule of law under either theory. We are, however, talking about a very important dispute about what the theory should be. Finally, there may be nuances as between the executive and the legislative branch. Since there can be no argument that people should be forced to refrain from activity that would permit the relitigation of important issues, you may well have a slightly different obligation if you are a legislator than if you are in the executive branch. There may be nuances in the degree of compliance that is required.

With those qualifications, let me quickly sketch the consequences of thinking about precedent solely as a predictive device, and then ask whether or not those consequences are required by the Constitution. I will suggest that they are not required; indeed, they are forbidden by the Constitution.

The first consequence of treating precedent as solely predictive is a dramatic decline in the ability of the Constitution and statutes to

exert serious effect on pre-event, primary behavior.[2] I think all of us agree that law acts best when it acts without the necessity of formal enforcement. The moment that you abandon the notion that the law, as expounded by the Supreme Court, creates a legal duty to obey, then there are at least three, and perhaps more, equally legitimate expositors of what the law is. At that point you have a cacophonous set of voices directed to the public. It is virtually impossible to expect the Constitution or a statute to affect primary behavior in a significant way under cacophonous circumstances because the people who are trying to align their behavior in accordance with what they understand the law to be are being told three different things by three different bodies, each of which has legitimate authorization. The situation is even worse than the cacophonous regime we abandoned as unworkable under *Swift v. Tyson*.[3] A jurisprudence that hopes to use law to influence primary, pre-event behavior cannot succeed if it cannot speak with a single authoritative voice.

Second, and I think equally important, the other function of law is to ascribe consequences to behavior after the event. Think for a moment of what the consequences of a non-acquiesence position would be in the area of post-event behavior. It would mean that anybody with the resources to seek a second judicial opinion could go into court and enjoy the benefit of the rule of law as expounded by the Supreme Court. But those segments of the society that lack the resources or sophistication to get access to the courts would be obliged to live under whatever set of rules they can afford access to, which means essentially what the executive says the law is. That means that the nature of the justice that would be dispensed in the society would often be a function of the resources of the individuals in the society. I suggest to you that a theory of law that says that the law depends on how much money you have and not on a uniform, self-executing duty to comply, is fundamentally inconsistent with our values.

Only a very naive theory of law could argne for such a result. You have to believe that there is always a single, objectively correct interpretation of a statute or a single, objectively correct interpretation of the Constitution to which all three branches have an equal right to attempt to repair. I suppose one can think of the Constitution as that type of naive document, but I know of no one who thinks

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[2] My use of "pre-event" and "post-event" behavior is drawn from Justice Harlan's concurrence in Hanna v. Plumer, 380 U.S. 460, 474 (1965). My argument is set forth in more detail in Neuborne, *The Binding Quality of Supreme Court Precedent (Perspectives on the Authoritativeness of Supreme Court Decisions)*, 61 TUL. L. REV. 991 (1987).

[3] 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

that there is a single right answer to hard cases. Once we admit that interpretation and choice enters into the equation of statutory construction and constitutional law, it seems to me that the jurisprudential underpinning of compelling the kind of cacophonous jurisprudence that I have just described is impossible. The Constitution may not require one or the other. We probably have a choice. We can decide whether we want a cacophonous Constitution or one that speaks through a single judicial voice. It seems to me that based on the law's role in influencing pre-event and assessing post-event behavior, there really is only one choice, and that is to view the word of the Supreme Court as positive law, until it is changed.