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Ambivalence about the Law

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Abstract

It is commonly thought that the United States is a highly legalistic nation, and as a result it is commonly thought as well that official disobedience of law is publicly and politically disfavored. Yet when we look at numerous contemporary and not-so-contemporary examples, we discover that public and political condemnation of officials who violate the law is so closely linked to condemnation of the underlying substance of the act that it is not clear whether breaking the law qua breaking the law is very much subject to public or political sanction at all. When officials break the law in the service of what are taken to be good ends, the violation of law is rarely taken to justify condemnation in the court of public opinion or punishment at the ballot box. And if this is so, then not only is official violation of the law not nearly as disfavored as is ordinarily supposed, but we have also created a climate of politics and public opinion that does little to discourage officials from treating the violation of law as substantially irrelevant to their policy and political decisions.

AMBIVALENCE ABOUT THE LAW

Frederick Schauer¹

Should Presidents obey the law? And how about governors, mayors, admirals, sergeants, members of Congress, police officers, and various other public officials? So too with various non-governmental leaders, including officers of labor unions, religious organizations, universities, and influential non-profits, about whom we can also ask whether they should obey the law. To most people, of course, the answer to these questions is obviously “yes,” for in a country that is often thought of as, if anything, excessively dominated by law,² it is widely believed that “obedience” and “deference” are the best characterizations of how public officials and other leaders should and generally do behave towards the law.

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²The claim about the intrusiveness of law on American politics and policy is typically attributed to Alexis de Tocqueville, *Democracy in America* (J.P. Mayer ed., George Lawrence trans., 1969), but it is possible that Tocqueville’s claim was somewhat overstated even when first made. See Mark A. Graber, [Resolving Political Questions into Judicial Questions: Tocqueville’s Thesis Revisited](#), 21 Const. Comm. 485 (2004).

But perhaps things are not so clear. At first blush it seems plain that elected and appointed public officials and other public leaders ought to obey the law, and Senator Russell Feingold's proposed censure³ of President Bush for violating the Foreign Intelligence Surveillance Act of 1978⁴ in authorizing the warrant-less domestic surveillance of American citizens is plainly premised on the view that Presidents ought to obey the law. Neither Senator Feingold nor other members of Congress, after all, attempt to censure Presidents for even the most mistaken or disastrous but nevertheless legal policy misjudgments. Yet although the obligation of Presidents and other officials to obey the law seemed plain to Senator Feingold, it was not so plain to Abraham Lincoln when in his First Inaugural Address he defended flouting the Supreme Court's Dred Scott decision,⁵ nor was it to Franklin Roosevelt when he proposed urging Congress to ignore court decisions invalidating New Deal legislation,⁶ nor was it to Bill Clinton when he led the United States (and NATO) into combat in Kosovo in likely violation of international law,⁷ nor was it to Mayor Ray Nagin of New Orleans when in September, 2005, he appeared unconcerned about the effect of the Posse Comitatus Act of 1878⁸ in restricting the ability of federal troops to assisting in disaster relief in the absence of a request from the

³S. Res. 398, introduced on March 13, 2006. See Erin P. Billings, Censure Hearing No Big Draw, Roll Call, April 3, 2006, at 1.

⁴50 U.S.C. §§ 1801-29 (2002).

⁵See Gerald Gunther, Constitutional Law 23 (12th ed. 1991).

⁶Gunther, supra note 5, at 23-24.

⁷See Michael J. Glennon, Limits of Law, Prerogatives of Power: Intervention After Kosovo (2001); Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2090 n. 186 (2005); Abraham D. Sofaer, International Law and Kosovo, 36 Stan. J. Int'l L. 1 (1999); Ruth Wedgwood, Editorial Comments: NATO's Kosovo Intervention, 93 Am. J. Int'l L. 828 (1999).

⁸18 U.S.C. § 1385 (2004).

Governor of Louisiana,⁹ nor was it to Fawn Hall, Oliver North's secretary, when she testified during the Iran-Contra investigation that "sometime you have to go above the written law, I believe."¹⁰ And nor was it so clear to prominent non-governmental leaders like Arthur Sulzberger, the publisher of the New York Times, when in February, 2005 (and thereafter) he supported Judith Miller's disregard of a federal subpoena,¹¹ nor was it to Roger Toussaint, head of the New York City Transit Workers Union Local 100, when in December, 2005 he took his union out on strike against the Metropolitan Transit Authority in violation of New York's Taylor Law.¹² And nor has it been to those who have criticized the judges who, prior to the Civil War, persistently enforced a legally valid Fugitive Slave Law they believed to be wrong,¹³ and to those who have similarly criticized the South African judges who refused in the performance of their official duties to ignore the numerous laws that created and supported apartheid¹⁴ And nor is it now to any admissions or hiring officer at the University of California who would seek surreptitiously to circumvent the absolute prohibition in California's Proposition 209 on taking race into account in making such decisions,¹⁵ nor was it to (now) Senator Menendez of New

⁹Testimony of Mayor Ray Nagin, Hearings of the Senate Homeland Security and Governmental Affairs Committees, February 1, 2006.

¹⁰Dan Morgan & Walter Pincus, Hall Testifies of Necessity "To Go Above Written Law", Washington Post, June 10, 1987, at A1.

¹¹See In re: Grand Jury Subpoena, Judith Miller, 397 F.3d 964 (D.C. Cir. 2005), aff'd en banc, 405 F.3d 17 (D.C. Cir. 2005), record unsealed in part, 438 F.3d 1138 (D.C. Cir. 2006).

¹²See Steven Greenhouse & Sewell Chan, Transit Union Calls for Strike in Divided Vote, The New York Times, December 20, 2005, at A1, col. 6 (quoting Toussaint as saying that "There's a calling that is higher than the law, and that's the calling of justice.").

¹³See Robert Cover, Justice Accused: Antislavery and the Judicial Process (1975).

¹⁴See David Dyzenhaus, Law's Mimicry of Law: Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order (1998); David Dyzenhaus, Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy (1991).

¹⁵See Coalition for Economic Equality v. Wilson, 122 F.3d 692 (9th Cir. 1997).

Jersey when, while serving as the mayor of Jersey City, he praised those who broke American law in order to support for what he saw as the liberation of Cuba, nor was it to Princeton University officials when they bestowed graduation honors on a student who had unashamedly entered the United States illegally, and nor was it to the mayors of San Francisco, California, and New Paltz, New York, when they married same-sex couples in violation of state law, and to the state legislators of Massachusetts when they disregarded the Massachusetts Constitution in refusing to put an anti-same-sex marriage amendment to a popular vote.

These examples are representative rather than exhaustive, and the American political tradition is replete with instances of presidents, governors, cabinet officials, members of Congress, and countless less exalted officials and leaders who have relatively shamelessly taken the position that immoral and at times simply unwise laws and legal decisions need not be considered binding when they conflict with what those officials and their constituents believe is moral necessity or wise policy. And in taking that position these officials have situated themselves, often openly and proudly, within a post-Nuremburg tradition in which “I was just following the law” is hardly more of a defense to morally wrongful official action than “I was just following orders.”

My goal in this Article is to explore this collection of interrelated issues, and with a two-pronged focus. One prong, which is especially timely these days, is to examine just what we mean by “the law” when we say, commonly, that we expect presidents and other high government officials to obey the law. With increasing frequency, Presidents and their allies from a wide variety of political perspectives assert that there is a large difference between what “the law,” especially constitutional law, is, and what the courts, especially the Supreme Court, say the law is. While there may be an obligation to obey the Constitution, it is said, there is no presidential (or congressional) obligation to obey what the Supreme Court says the Constitution

says.¹⁶ The courts are just one branch of government, so the argument goes, and accepting the premise that there is an obligation (whether from the Oath of Office or otherwise) to follow the Constitution does not entail the conclusion that there is an obligation to follow the Supreme Court's understanding of the Constitution.¹⁷ Chief Justice Hughes notwithstanding, the Constitution is not what the Supreme Court says it is.

In light of these issues and debates about judicial interpretive supremacy, one important task is that of attempting to sort out just what it means to follow the law,¹⁸ especially in the context of American constitutional law. And that is why it is crucial at the outset to acknowledge that there are potential differences among an official obligation follow the clear

¹⁶Prominent contemporary examples of this view include Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004). And much the same view is implicit, a fortiori, in the views of those who question or reject the power of judicial review. Mark Tushnet, *Taking the Constitution Away from the Courts* (1999); Jeremy Waldron, *Law and Disagreement* (1999).

¹⁷In terms of the current debates, there is a distinction between genuine popular constitutionalism, which is the view that the constitution should ultimately be interpreted by the people, *see* Kramer, *supra* note 10, and departmentalism, the somewhat more plausible position holding that each branch of government should have constitutional interpretive authority for its own purposes, rather than the Supreme Court possessing that authority both for itself of and for the other two branches. For a discussion of the distinction and its importance, albeit a discussion ultimately skeptical of both, *see* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 *Harv. L. Rev.* 1594 (2005) (Book Review).

¹⁸An important argument is one version of an argument from natural law, an argument that proceeds from the premise that compatibility with the minimal requirements of morality is a necessary condition for a state's directive being law at all. *See* William Blackstone, 1 *Commentaries on the Laws of England* *44 (1765); Cicero, *De Legibus* bk I, § (C.W. Keyes trans., 1928); Dyzenhaus, *supra* note 9. And if an official directive superficially resembling law was not in fact law at all, then there would be no obligation to obey it. An official who disregarded such a directive, therefore, would not in fact be disobeying the law. In a world of moral disagreement, however, this argument, when placed in the hands of individual agents, reduces to the argument that those agents should make the morally best decision, and in the hands of society the argument reduces to the view that officials should be evaluated by the morality and not the (positivist) legality of their official actions. But that of course is exactly the matter in issue.

language of the Foreign Intelligence Surveillance Act, an official obligation to follow the clear language of the Constitution (by not running for a third term as President, for example), and a putative official obligation to follow Supreme Court interpretations of the First Amendment or the Equal Protection Clause.

But even if we can get clear about the question of judicial interpretive supremacy, there remains the other prong of the analysis, the question whether there is,¹⁹ on the part of public officials and public leaders, an obligation to obey the law (however we define it) and an obligation to obey the Constitution (however we define it). When breaking the law is also morally or politically problematic (or simply wrong), it is often easy to chastize those who do the wrong thing for breaking the law as well as for being wrong. So although we criticize Richard Nixon and his aides for breaking the law, we would likely criticize them for their various transgressions against democratic governance even were it not illegal to steal documents from one's political opponents, or unlawful to deploy the audit power of the Internal Revenue Service in the goal of punishing those who would dare to criticize official authority. Accordingly, while we deploy the language of illegality against Nixon and others, it is less than clear that breaking the law is doing the real work, and references to the illegality of unwise or immoral official action may, once we see the widespread acceptance of illegality for wise and moral official actions, be little more than piling on. So it is not at all apparent that either citizens or officials believe that there is an official obligation to obey the law qua law, and indeed many citizens and officials appear to behave as if there is not. But if there really is no obligation on the part of presidents to obey the law just because it is the law, then it is wrong for an official to follow the

¹⁹The “is” in the text is ambiguous, because it is the word we would use to make a normative or prescriptive claim about the existence of an obligation as a matter of morality (whether universal or contingent to some discrete political setting), but it is also the word we would use to make a much more descriptive claim about the behaviors that are in fact rewarded and punished in a particular political environment at a particular time. And although I deal with both of these dimensions in this Article, my primary focus is in fact on the latter, on the question whether the political expectations and incentive structure in the United States in recent years has been consistent with the widespread use of “obligation to obey the law” rhetoric.

law when the law commands what is wrong, and it is right for an official to break the law in the service of higher moral or policy goals. An obligation to obey the law has real bite when the law commands that which is wrong or prohibits that which is right, and from this perspective it is far from clear, public opinion and political rhetoric aside, that the obligation to obey the law is an unqualified good.²⁰ And as the examples above illustrate, it is hardly clear, except as opportunistic political rhetoric, that we really expect our political leaders to follow the law when following the law conflicts with simply doing the right thing. So after examining just what it is to obey the law, with a particular focus on the Constitution, I will turn to the question of whether there is, especially on the part of public officials, an obligation to obey the law at all and to obey that particularly important component of the law that we call the Constitution.

I

There is no good order for this inquiry. If we commence with the question of official obligation to obey the law, we fall quickly into confronting the question of just what law, if any, an official is expected to obey. And if we start with trying to trying to understand what the law is for these purposes, we discover that even that question is inextricably tied to the question of obedience. Still, the latter course is somewhat cleaner, and consequently it is best first to approach the definitional question, asking what we might mean by “the law” when we say that we expect officials and others to obey it.

The definitional question is important precisely because, in the context of official

²⁰“Hardly clear” is an understatement, for there is a distinguished tradition, often referred to as “philosophical anarchism,” denying the existence of an obligation to obey the law *qua* law. See, e.g., A. John Simmons, *Moral Principles and Political Obligations* (1979); Robert Paul Wolff, *In Defense of Anarchism* (1970); Heidi Hurd, *Moral Combat* (1999); Heidi Hurd, Challenging Authority, 100 *Yale L.J.* 1611 (1991); Heidi Hurd, Why You Should Be a Law-Abiding Anarchist (Except When You Shouldn’t), 42 *San Diego L. Rev.* 75 (2005); M.B.E. Smith, Is There a Prima Facie Obligation to Obey the Law?, 82 *Yale L.J.* 950 (1973).

obligation to the law, a primary (but not the only) legal item of relevance is the Constitution.²¹ Yet when we think about official obligation to obey the Constitution, it turns out that in the overwhelming proportion of instances, the bare text of the document is of little assistance.²² It is true that a President who initiated and managed a prosecution for treason with only one witness against the defendant would be in explicit violation of the constitutional requirement (in Article III, Section 3) that there be two witnesses against the defendant in any trial for treason, as would a President, slightly more plausibly, who attempted to run for a third term in violation of the Twenty-Second Amendment. Yet although the text is plain in such cases, the words of the document are not nearly so helpful for most of the other issues to which the Constitution appears to apply, and to almost all of the issues that provide the basis for actual constitutional controversies. A Congress which wished to prohibit affirmative action in all federal programs could non-laughably draw some support the requirement in the Fourteenth Amendment that the

²¹One reason for focusing on the Constitution is that such a focus allows us to isolate, for analytical purposes, the belief in the bindingness of law. In the typical case involving statutes and regulations, whether applied to officials or to ordinary citizens, disobedience of law carries with it the likelihood of punishment. So when I (more or less) obey the speed limit on the Massachusetts Turnpike, it is not clear to the external observer whether I am respecting the law because it is the law or just seeking to avoid a fine. In the case of the Constitution, however, things are often different. Although police officers and city councillors, for example, may be personally liable when they violate the Constitution or clear court decisions interpreting it, that is not the case for constitutional violations by the President or members of Congress, who can, at least in terms of formal official penalties, disobey the Constitution with relative impunity. A police officer can be personally liable for instituting a search in violation of clear law, but a member of Congress cannot be held personally liable for voting for a law that equally unconstitutionally authorizes such searches. And with formal legal sanctions out of the picture, examining the behavior of high officials with respect to the Constitution enables us to see whether those officials (or their constituents) believe that there is an obligation to obey the Constitution just because it is the Constitution.

²²And that is why the question of obedience to typically much clearer ordinary statutes is less problematic. Still, even in the context of statutes there is a question whether executive and administrative agencies should obey judicial interpretations of statutes with which they disagree. On this issue, and on the frequent practice of some agencies of refusing to follow the lower federal courts when they disagree with their interpretations, see Samuel Estreicher and Richard Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679 (1989).

states guarantee the “equal protection of the laws,” but so too could a Congress which wished to expand and vigorously support such programs. Similarly, both sides of the contemporary controversies about a journalist’s privilege (and its argued constitutional basis) to refuse to disclose confidential sources could rely on the skimpy words of the First Amendment, as could both sides of disputes about campaign finance reform, child pornography, flag desecration, and numerous other free speech and free press issues. The First Amendment’s prohibition on the “establishment” of religion might or might not ban prayer in the public schools (or government financial assistance to religious schools), the reference to “liberty” in the Fifth and Fourteenth Amendments could or could not protect the right of a woman to have an abortion, and the limitation of federal action, normally, to “commerce among the several states” might or might not allow Congress and the President to regulate racial discrimination in hotels and restaurants, guns in schools, and the wages that states and their subdivisions pay to their employees. For all of these controversies, and countless others, it is a characteristic (and, arguably, unique²³) feature of the American Constitution that the constitutional text is so indeterminate as to plausibly support either side of the debate.²⁴

The upshot of this is that in terms of the question of official obedience to the

²³The Constitution of Brazil is, in the standard published version, 219 pages long, and that of the Republic of South Africa 114. And although these are extremes (and the proposed but now dead in the water European Constitution is even longer still), the typical modern constitution is far longer and far more precise than that of the United States, with only Canada’s Charter of Rights and Freedoms approaching the Constitution of the United States in brevity and indeterminacy of language.

²⁴And even recourse to so-called “original intent” is rarely helpful, partly because the records are often scanty, and partly because the original intentions of the drafters in 1787 (for the constitutional text) or 1791 (for the Bill of Rights) or 1868 (for the Fourteenth Amendment) now often strike us as unhelpfully obsolete, as with the views in 1791 that the First Amendment did not concern actions for libel and obscenity at all and may not have even prevented criminal prosecutions for sedition, or the widespread view in 1868 that the Equal Protection Clause of the Fourteenth Amendment did not bar segregation in the public schools, and said nothing at all about issues of discrimination on the basis of gender.

Constitution, almost all of “the action,” as it were, surrounds the question whether a President or any other non-judicial official should obey – treat as authoritative²⁵ – Supreme Court interpretations of the constitutional text. A President who wished to prosecute people for burning the American flag could rely on the indeterminacy of the constitutional text to support his action, and could rely as well on history, for nothing in the original intentions of the drafters and little in actual practice from 1791 to the 1960s would suggest that the First Amendment stands as a barrier to such action. But whatever the lessons from the text or history, it is plain that the Supreme Court, first in 1989,²⁶ and then again a year later,²⁷ has interpreted the First Amendment to prohibit state and federal prosecutions for desecrating the American flag. A President who wished to initiate such a prosecution might be able to draw some support from the text, and much support from history, but it would be clear that he was directly contravening the Supreme Court’s understanding of the Constitution. So too with a President who wished, again with plausible support from text and history, to propose a federal statute prohibiting abortion,²⁸ outlawing homosexual sodomy,²⁹ limiting the advertisement of cigarettes and alcohol,³⁰ restricting spending to more than a nominal amount on television advertising in congressional

²⁵To treat the Constitution as authoritative is not necessarily to treat it as absolutely authoritative. The central question is whether the Constitution qua Constitution provides a reason for action (or inaction), and not whether that reason for action is necessarily conclusive in all cases. On these issues, which often are discussed under the rubric of whether rights or obligations are “prima facie,” see Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991); Robert Nozick, Moral Complications and Moral Structures, 13 *Natural L. Forum* 1 (1968); John R. Searle, Prima Facie Obligations, in *Practical Reasoning* 81 (Joseph Raz ed., 1978); Judith Thomson, Some Ruminations on Rights, 19 *Ariz. L. Rev.* 45 (1977).

²⁶*Texas v. Johnson*, 491 U.S. 397 (1989).

²⁷*United States v. Eichman*, 496 U.S. 310 (1990).

²⁸In violation of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

²⁹In violation of *Lawrence v. Texas*, 559 U.S. 503 (2003).

³⁰See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

elections,³¹ banning the mailing of indecent but not obscene literature,³² or requiring that a set percentage of minorities be hired in federal agencies.³³ In each of these examples, plausibly contestable questions of deep constitutional meaning have been addressed and resolved³⁴ by the Supreme Court, and a President who proposed any such action would be squarely at odds with the Supreme Court's continuing³⁵ understanding of the Constitution.

It is in such cases that most of the controversies about presidential obedience to the Constitution have arisen. When Lincoln's Emancipation Proclamation directly contradicted the Dred Scott decision,³⁶ Lincoln did not claim that he was violating the Constitution – he claimed only that he preferred his own interpretation of the Constitution to the Supreme Court's, and that with respect to his own actions he would follow his own interpretation of the Constitution. Lincoln's position is thus similar to the position taken by Roosevelt in urging Congress to pass that New Deal legislation it thought wise and constitutional,³⁷ potential Supreme Court invalidation notwithstanding, to the position urged by Attorney General Edwin Meese in 1985 when he opined that the states were free to disregard Supreme Court opinions regarding school prayer and abortion save in the very cases in which the decision had been reached,³⁸ to the

³¹Buckley v. Valeo, 424 U.S. 1 (1976).

³²Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983).

³³Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

³⁴It is common to see the phrase “authoritatively resolved,” but whether such resolutions are authoritative is precisely the question at issue.

³⁵In almost all of the examples I give there would have been no plausible case that the relevant precedents were old, and that the current Court would contemplate overruling them. When there is a plausible belief that formal precedents would not be followed, the issues are very different.

³⁶Dred Scott v. Sandford, 19 How. (60 U.S.) 393 (1857).

³⁷See note 4, supra.

³⁸Later published in expanded form as Edwin Meese III, The Law of the Constitution, 61 Tul. L. Rev. 979 (1987).

position taken by Congress³⁹ in attempting to undercut the Supreme Court's ruling in Miranda v. Arizona.⁴⁰ And Lincoln's position is of course quite similar to the position of the Bush Administration regarding numerous aspects of emergency and national defense powers, for in such instances the Bush Administration has consistently claimed that its actions are at least consistent with, and arguably commanded by, its understanding of, inter alia, the Commander in Chief power in Article II, section 2 of the Constitution.

At least in the American context, presidential insistence on the right to a President's own constitutional interpretations, the Supreme Court's views notwithstanding, is assisted in part by the absence of explicit authorization in the text for the very power of judicial review,⁴¹ and even more by a view of separation of powers in which the power to interpret the Constitution is central to the activities of all branches and nowhere exclusively delegated to the courts. The Supreme Court might have the power to interpret the Constitution for its own purposes, so the argument goes, but so too do the other departments, and the Supreme Court no more has the power to interpret the Constitution for the President than the President has to interpret it for the Supreme Court.

Not all questions about presidential obedience to the law surround this question of judicial interpretive supremacy (or not) regarding the Constitution. Sometimes the questions involve Presidents disregarding statutes that they believe to be unconstitutional even though there has never been a judicial ruling, as for example with the statements of Presidents from both parties from Nixon to the present as to the possible or likely unconstitutionality of the War Powers Resolution. And sometimes the questions and controversies involve the even more direct

³⁹Dickerson v. United States, 530 U.S. 428 (2000).

⁴⁰Miranda v. Arizona, 384 U.S. 436 (1966).

⁴¹See William W. Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 Duke L.J. 13.

claim that some statute must be disregarded because of the demands of the higher moral and social good, which is what Fawn Hall is best understood as arguing in the Iran-Contra hearings, and what Roger Toussaint explicitly argued in the context of his union's disregard of New York's Taylor Law. But most often the question is about Supreme Court interpretations of the Constitution, and thus about the question whether the President must obey such interpretations when he believes them to be mistaken as interpretations. And it is to that question that I now turn.

II

Much ink has been spilled over the question whether there is a moral obligation to obey the law. And the question is an interesting and important one only when the law commands what its addressee otherwise believes to be wrong. It is true that it is illegal to kill, to rape, to steal, to sell heroin, and to buy and sell stocks on the basis of inside information known to one party but not to the other. But it is also true that it would be wrong to engage in any of these activities⁴² even were they not illegal. Law provides the penalty for morally wrong activities, but the person considering whether to rape or steal ought not to get to the question whether such activities happen to be illegal. It is only when the law requires that which would be immoral (as with many of the Nazi laws) or prohibits that which would be morally obligatory (as with Lincoln's freeing of the slaves, and as with many of the prohibitions of the South African apartheid laws) does the true question of a moral obligation to obey the law arise, for only in such cases is the issue of legal command relevant to the morally motivated agent.

From Plato⁴³ to Rawls,⁴⁴ theorists have argued that there is indeed a moral obligation to

⁴²Although there would be dissenters from this view with respect to this view with respect to insider trading and perhaps even the sale of heroin to a willing buyer.

⁴³Especially in Crito.

⁴⁴John Rawls, *A Theory of Justice* (1973).

obey the law, and to those theorists there is a (prima facie) obligation on the part of citizens to follow even morally erroneous legal directives. But at least for the past thirty-five years, other theorists have argued that there is no such obligation, and that various arguments from social contract, from consent, from fair play, and from cooperation and coordination, among others, are ultimately unsound.⁴⁵ They have argued that the moral obligations of the moral agent are simply to do the morally right thing, law's occasionally (or frequently) erroneous emanations notwithstanding.

It is not my goal here to rehearse these debates.⁴⁶ But in the service of (the morally desirable practice of) engaging in those assumptions that make things hardest for one's own position, I want to assume here that the latter group has the better of the argument, and that there is in fact no moral obligation – not even prima facie – to obey a morally iniquitous law just because it is the law. Now even on this assumption, it remains an open question whether officials – Presidents, for example – have such an obligation even if citizens do not. One possibility is that they do because of the oath they take, but we can let that pass here because in our context the existence of an oath simply to obey the Constitution does not help us with the question whether there is an obligation to obey the Supreme Court's interpretations of the Constitution, a dimension that is our central question but not part of the oath for any American public official.

Even without the oath, however, it may still be the case that officials have special obligations (Simmons calls them “positional obligations,” and they bear some affinity to questions of role morality⁴⁷) to the law because of their special and voluntary roles. Maybe

⁴⁵See note 8 *supra*.

⁴⁶For my more extended commentary on the issue, see Frederick Schauer, The Questions of Authority, 81 Geo. L.J. 95 (1992).

⁴⁷See Arthur Isak Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and*

citizens have no obligation to obey the law qua law, so the argument would go, because they cannot plausibly be understood to have genuinely consented or entered into a voluntary social contract with their fellow citizens. But officials – like Presidents – are not in the same position. They have voluntarily stood for office, and as such can be taken to have consented to a wider range of obligations than have ordinary citizens.

But even if this is so, it is not entirely clear what presidents and other government officials have actually consented to. They may have consented to obey the law, but they have not consented, typically, to obey judicial interpretations of the law, and so for the moment let us assume simply that a President, for example, has no obligation to obey a Supreme Court interpretation of the Constitution when that interpretation conflicts with what the President – who has also agreed to pursue the general welfare, and has agreed to preserve and protect the Constitution – thinks is the morally best thing, all things considered, to do for the population. We will return to the question whether the President actually does have an obligation to follow judicial interpretations of the Constitution, but for now we will assume that, from the President's lights, he does not.

III

But what does it mean to say that the President has no obligation to obey Supreme Court interpretations of the Constitution? It may mean that an unconstrained President should do what he or she thinks is morally and constitutionally best, the Supreme Court notwithstanding, but it says nothing about the obligations of those who create the environment – and the incentives – under which presidents function. To put it differently, it does not follow from the fact that the President should do what he thinks best, all things considered, that other officials and the population at large should let him do so. For if the President's lack of an obligation to subjugate

Professional Life (2001); David Luban, *Lawyers and Justice: An Ethical Study* (1988).

his best all things considered judgment, or even his best constitutional judgment, to that of others flows from his moral autonomy as much as from his role, then the moral autonomy of the public just as plainly requires that the public not subjugate its best all-things-considered judgment to others, including the President.⁴⁸

In the context of the immediate discussion, the implication is that a President's lack of his own obligation to follow Supreme Court interpretations he believes constitutionally and/or morally erroneous says little about the way in which the decision-making environment should be designed, and little about the extent to which the designers – the public, and all of the other institutions create the framework of incentives and obligations and goals that inform public decision-making – might well put in place a series of incentives designed to prevent a President from doing what he from his lights has a moral and constitutional obligation to do. If you in the exercise of your autonomy were to plan to engage in acts that I in the exercise of my own autonomy believed were likely to cause injuries to third parties, then I in the exercise of my autonomy would, from my perspective, have good reason to try to prevent you from exercising your autonomy just as you, in the exercise of your autonomy, would have good reason to try to prevent me from doing so.⁴⁹ To say that a President is not from his perspective obligated to follow Supreme Court precedents thus tells us little about whether it would be a good thing from a larger perspective to put in place mechanisms and incentives that would attempt to prevent the President from engaging in his own unconstrained but potentially erroneous moral and constitutional judgment.

⁴⁸See Frederick Schauer, Imposing Rules, 42 San Diego L. Rev. 85 (2005). See also Larry Alexander & Emily Sherwin, The Rule of Rules: Morality, Rules, and the Dilemmas of Law (2001); Larry Alexander, The Gap, 14 Harv. J.L. & Pub. Pol. 695 (1991).

⁴⁹This plainly relates to the question when the demands of tolerance, if such demands exist, require or even allow us to tolerate those activities that would cause harm to others. See Frederick Schauer & Richard Zeckhauser, Cheap Tolerance, 9 Synthesis Philosophica 439 (1994).

This asymmetry of authority, in which the illegitimacy of authority from the perspective of the President does not entail the illegitimacy of that authority from the perspective of the authority, is especially applicable to the question of the authority, or not, of Supreme Court interpretations of the Constitution. In many respects the point of a written constitution is to impose second-order constraints on first-order policy preferences. Although one purpose of a constitution is to prevent bad leaders from doing bad things in the service of their own misguided or power-enhancing goals, another purpose is to prevent good leaders from doing first-order good things that have bad second-order consequences.⁵⁰ State governors and state legislatures, for example, are constitutionally prohibited from protecting their own industries from out-of-state competition not because only an evil governor or legislator would wish to do such a thing, but because well-meaning governors and legislatures appropriately focusing on their own constituents will collectively damage the national economy. And the point is even clearer with respect to individual rights. Not all (or even most) of the government officials who restrict freedom of speech and press are self-aggrandizing despots who seek to stifle criticism. More commonly, such officials seek in good faith to achieve genuine short-term good – think of the officials who in 1978 sought to keep the Nazis from marching in Skokie, Illinois, or the officials now who with good cause and good faith wish to restrict the advocacy of terrorism or the distribution of plans for manufacturing explosive devices – but at the expense of even more important and enduring long-term values. Much the same can be said of the rights of those charged with crimes, some dimensions of equality rights, some dimensions of the constraints on permissible punishment, and many more. In all of these cases the Constitution serves not to keep bad leaders from doing bad things, but instead keeps good leaders from taking good short-term or first-order actions in the service of even better (or more fragile) long-term or second-order values.

⁵⁰See Frederick Schauer, Judicial Supremacy and the Modest Constitution, 92 Cal. L. Rev. 1045 (2004).

Once we see that much about the Constitution – and indeed much about law in general – is about imposing constraints on the well-intentioned, public-serving, and short-term beneficial actions of people in general and leaders in particular, it follows that some mechanism is needed to ensure that such second-order constraints can be effectively enforced. And although in theory leaders could enforce second-order constraints on their own sound first-order policies, in practice, especially given political incentives, this is highly unlikely. Consequently, one way of thinking about the Supreme Court as an authoritative interpreter of the Constitution is as the external institution necessary to enforce second-order constraints effectively. If it is indeed the case that enforcing such constraints on one’s self – doing what seems to be the wrong thing now in the service of larger or longer-term values – is systematically difficult, then authoritative Supreme Court interpretation of the Constitution may be the best mechanism we have for giving genuine bite to American constitutional law.

Seeing authoritative judicial interpretation – judicial supremacy in constitutional interpretation, as it is often put – in this way does not presuppose a grandiose picture of the Supreme Court or its individual members. The Justices of the Court are no more imbued with wisdom or insight than Presidents, and they are no more committed (but no less) to the genuine welfare than are Presidents or a host of other public officials. And although the Justices do have life tenure, they are hardly immune from the pressures of reputation or the desire for glory.⁵¹ What they do have, however, is their very externality, and the comparative advantage of the courts in constitutional interpretation is not in the judges’ greater wisdom but in their greater distance. Just as we have inspectors general and departments of internal affairs to ensure that officials do not have the conflict of interest inherent in investigating one’s self, so too do we

⁵¹See Frederick Schauer, Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior, 68 U. Cinc. L. Rev. 615 (2000).

have a Supreme Court to provide the same kind of external and comparatively independent (at least of the political pressures on elected officials) check on the natural – and, indeed, expected – pressures, goals, incentives, and values of those officials who are expected to pursue policy and the immediate public welfare first and foremost.

Just as this account of judicial interpretive authority does not presuppose an unrealistically grandiose picture of the capacities of the Justices of the Supreme Court, nor does it presuppose an unrealistically dim view of the goals and motivations of elected and appointed officials. Elected officials typically desire re-election, to be sure, but the good ones – and there are many – are also genuinely concerned about the public good and about the prosperity in all respects of those whom they represent. But it is precisely the point that even good-faith pursuit of these goals may conflict with the pursuit of those long-term goals that require short-term or even long-term sacrifice of the general welfare. It is in those instances that external interpretation and enforcement of constitutional values is most important, for it is in those cases that we have the greatest reason to suspect that leaving such interpretation and enforcement to even the most public-spirited and public-focused of public officials will likely over an aggregate of instances be ineffective.

IV

It does not follow from the above that Lincoln, Roosevelt, Reagan (through Meese) and most other Presidents have been mistaken – from their lights – in claiming the authority to interpret the Constitution. Nor does it follow that Roger Toussaint, Fawn Hall, Arthur Sulzberger, Ray Nagin, and countless other non-President public leaders have been mistaken -- from their lights -- in interposing their own moral and constitutional views between the courts (or the law) and their ultimate actions. But let there be no mistake about the implications of that claim. Presidents and other officials and leaders who have made such a claim are claiming – in actuality even if not in theory – the authority to interpret the Constitution in a way consistent

with their own policy goals and their own conception of morality in a world of moral disagreement, and in a way consistent with what they perceive to be the short- and intermediate-term moral and policy goals of the population at large. An example from Congress is instructive. For the past two decades we have seen an increasingly acrimonious and increasingly salient debate about campaign finance reform, a debate that has both policy and constitutional dimensions. In terms of policy one side claims that money is distorting politics, and that legislative action is necessary to limit campaign contributions and campaign expenditures, and consequently to limit the effect of wealth on political choices and official behavior. And the other side claims that large campaign contributions essentially represent the aggregation of smaller interests in a way that reflects rather than distorts democracy, that campaign contributions are a good measure of preference intensity, and that governmental restriction of campaign contributions and expenditures would be dominated by partisan interests.

In addition to this policy debate, there is a constitutional debate, in which it could plausibly be argued, as the Supreme Court has⁵² -- to oversimplify -- held, that restrictions on campaign contributions and expenditures amount to a restriction on political speech in violation of one of the core values of the First Amendment. And on the other side it could also be plausibly be argued either that money is not speech and that restrictions on campaign finance do not even implicate the First Amendment, or that, even if the First Amendment is implicated, the compelling interest in integrity and equality in elections is just the kind of interest that could outweigh the First Amendment.

Given that there are two different policy positions and two different constitutional positions, there are thus four possible combinations of constitutional and policy views on the

⁵²Buckley v. Valeo, 424 U.S. 1 (1976); Federal Election Commission v. National Conservative PAC, 470 U.S. 480 (1985). See also McConnell v. Federal Election Commission, 540 U.S. 93 (2003).

issue of campaign finance reform. In theory a person could believe that campaign finance restrictions are both constitutionally permissible and advisable as a matter of policy, are constitutionally permissible but unwise policy (just like lowering the speed limits on interstate highways to forty-five or increasing the salaries of members of Congress to \$800,000 per year), are wise policy but constitutionally impermissible (like allowing one-house legislative vetoes⁵³ or prohibiting the distribution of virtual child pornography⁵⁴), or are both unwise policy and constitutionally impermissible (like enforcing racial segregation in the public schools or establishing an official national religion).

Yet although there are four possible combinations of policy and constitutional views, it is telling that at no time in the past two decades has any member of Congress taken either the second or third view mentioned above. Every member of Congress who believes that campaign finance reform is unwise policy has also insisted that it violates the First Amendment, and every member of Congress who believes that such reform is sound policy has also argued that such a policy would not violate the First Amendment. The combined number of members of Congress who in their public statements have said that campaign finance reform is constitutionally permissible but unwise as a matter of policy or wise as a matter of policy but unconstitutional is zero.

The lesson from this should be clear. When allowed to offer their own opinions about constitutionality, members of Congress almost invariably interpret the Constitution to align with their policy and political views, and we have no reason to believe that Presidents and countless other public officials do or would behave otherwise. If allowed to claim their own authority to interpret the linguistically (and historically) indeterminate provisions of the Constitution,

⁵³Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

⁵⁴Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

Presidents and elected and appointed officials can be expected to interpret the limitations on federal (and executive) power, the requirements of separation of powers, and the constraints of freedom of speech, freedom of religion, due process, equality, and many others in ways that not-so-coincidentally happen to align with their own constitutionally-unconstrained policy and political preferences. So even though public officials have good reason from their perspective to behave in just this way, there exist even stronger reasons from the perspective of constitutional governance not to permit them to do so. Official interpretive authority is thus asymmetric, because from the perspective of an official it would be wrong to cede the power to interpret the Constitution, but from the perspective of the Constitution it would be wrong to allow an official, and perhaps especially the President, to claim just the kind of authority that from the official's perspective it would be right to claim.

V

The question is now transformed. There is a strong case that public officials should be made to obey the Constitution and the law even if there is not a strong case, by hypothesis, that public officials should believe in their heart of hearts that public officials should obey the Constitution and the law. And thus the issue is one of designing an incentive system to impose upon public officials an obligation to obey the law, because any approach other than imposition is almost certainly destined to failure, as current controversies about the President and national security make so clear.

But even this may be too easy. Those who would enforce such an incentive system on public officials are, in the final analysis, the public, and thus the real question is one of whether the public, any more than a President or any more than members of Congress or any more than police officers, can be expected to impose and enforce second-order constraints on their own first-order policy and political preferences. And if this seems unlikely, even more unlikely than for elected officials, then one way to think about judicial interpretive supremacy is as an almost

fortuitous feature of the American constitutional culture that would be unlikely to be ratified popularly today but which turns out to have highly desirable consequences.

Yet we are a long way from recognizing this feature of American constitutional practice. Consider, for example, the controversy during the 1988 presidential campaign regarding Michael Dukakis's veto, while Governor of Massachusetts, of a bill that would have compelled all teachers in the state to lead the Pledge of Allegiance on a daily basis.⁵⁵ Relying on an advisory opinion issued by the Massachusetts Supreme Judicial Court,⁵⁶ and on the United States Supreme Court case of West Virginia Board of Education v. Barnette,⁵⁷ Governor Dukakis explained his veto in terms of constitutional (and judicial) compulsion, an explanation widely hooted down as a major political gaffe.⁵⁸

Viewing Dukakis's explanation as a political mistake, however, merely reinforces the view that neither the law as law nor the Constitution as the Constitution have very much purchase in presidential or political decision-making. For some this is a good thing. But if it is a good thing, then we can see that much of the rhetoric about official obligation to the law and to the Constitution is hollow. And thus much of the criticism of President Bush for violating the law -- as opposed to doing the wrong thing -- is hollow as well. But if it is instead a bad thing that the law as law means so little in political debate and public and political decision-making, then we have a long way to go before we as a nation have recognized that the Constitution operates as a genuine constraint on even the best of immediately desirable decisions. In order to

⁵⁵See David Whitman, Behind the Pledge Flap: The Nasty History of Our Oath of Allegiance, Washington Post, September 18, 1988, at C1.

⁵⁶Opinions of the Justices to the Governor, 363 N.E.2d 251 (1977).

⁵⁷319 U.S. 624 (1943).

⁵⁸See Tom Wicker, It's Still Bush League, New York Times, September 16, 1988, at A35, condemning Dukakis's defense as "too legalistic."

get there, it would be necessary to create a political environment in which reliance on Supreme Court interpretations of the law and of the Constitution, even by people who disagree with those interpretations, is no longer considered foolish. But until we are there, grandiloquent statements about presidential obligations to the Constitution and to the law should be perceived as shallow rhetoric with little effect on actual official decision-making.