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PRESIDENTIAL INTERPRETATION OF THE
CONSTITUTION

David A. Strauss*

INTRODUCTION: THE PROBLEM AND ITS SIGNIFICANCE

May the executive branch disagree with the Supreme Court's interpretation of the Constitution, and act in accordance with its own view? We tend to associate this question with a few great constitutional crises. Disputes between President Jackson and the Supreme Court over the Bank of the United States; between President Lincoln and the Court over slavery; and between President Franklin Roosevelt and the Court over New Deal legislation, all produced memorable statements by presidents claiming a broad power to act independently from the Court's decisions. The school desegregation controversy was between the Court and some state governments, not the President, but it too produced a memorable sweeping statement, this time by the Court, framed in terms that would deny presidential independence.1

The question does not just arise at times of crisis, however. Every day, officers or employees in the executive branch must interpret the Constitution. By and large, of course, the powers of the executive branch are defined by statutes, and the executive branch determines the limits of its power by interpreting those statutes. But

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I will use "executive branch" and "President" interchangeably. There is a difference between a presidential decision and other executive branch decisions, but in general the difference will not be material to the arguments I consider. Indeed, the difference seems to be overstated in general. Often the decision of the President is treated as if it were the act of a unitary, purposive actor. In fact, presidential decisions are routinely the product of interest group and bureaucratic pressures within the executive branch. "Presidential" decisions are not automatically more unitary than "congressional" decisions. The degree to which presidential decisions are the product of intra-executive interest group and bureaucratic factors is an empirical question that I do not deal with here. See generally Mark A. Peterson, The Presidency and Organized Interests: White House Patterns of Interest Group Liaison, 86 AM. POL. SCI. REV. 612 (1992); Nelson W. Polsby, Interest Groups and the Presidency, in AMERICAN POLITICS AND PUBLIC POLICY (Walter D. Burnham & Martha W. Weinberg eds., 1978). But it seems doubtful that an interpretation of the Constitution nominally made by the President should, for that reason alone, be treated differently from interpretations made (by persons with the authority to make them) elsewhere in the executive branch.
sometimes statutes authorize executive action up to the limits of the Constitution. A statute might explicitly incorporate constitutional standards. Or, more commonly, a statute might, if read literally, authorize some actions that would violate the Constitution. Almost always Congress does not intend to authorize the executive to violate the Constitution; rather, the best interpretation of the statute is that it implicitly incorporates the constitutional limit. For example, some law enforcement statutes authorize a range of actions, including searches and arrests, without explicitly requiring probable cause. In all likelihood, the best understanding of these statutes is that Congress intended the executive to observe constitutional limits. In such cases the executive branch must interpret the Constitution before it can decide what to do, and the executive branch might decide to disagree with the Court's interpretation.

So, for example, whenever a federal law enforcement officer decides whether there is probable cause for an arrest, the executive branch has interpreted the Fourth Amendment; whenever federal employees are disciplined for statements they made, the executive branch has interpreted the First Amendment; whenever a federal official determines that a regulation, authorized by statute, would go too far and therefore constitute a taking of property without just compensation, that official has interpreted the Fifth Amendment. Indeed, if it makes sense to individuate occasions on which the executive branch interprets the Constitution (it probably does not), they are almost certainly more common than occasions on which the courts interpret the Constitution.

Often the executive branch's interpretation of the Constitution will be reviewed by the courts. This does not obviate the question whether the executive can disagree with the courts, but it makes that question less acute in practice. That is because the executive is much less likely to assert the power to interpret the Constitution autonomously when the courts are likely to overturn the executive's action. During some extraordinary times, presidents have been willing to take positions in litigation that they knew were very likely to be rejected by the Supreme Court. Lincoln's reaction to the *Dred Scott* decision

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2 It is relatively easy to identify individual acts of interpretation by the courts because courts are passive institutions. They are authorized to act only when a specific request is made, and then they must act in some way. Sometimes administrative agencies are passive in this way, but often agencies may act without being requested to do so. In such cases, it is difficult or impossible to identify individual instances of inaction. For example, law enforcement agencies must decide how much of their resources to devote to preventing crime, but it would be impossible to identify each specific occasion in which a law enforcement agency decided against taking action to prevent crime.
(although of course the matter was settled by war, not litigation) and Roosevelt's pursuit of New Deal legislation are examples. But usually the executive branch will not take an action that it expects will be declared unlawful by the Supreme Court. The "nonacquiescence" policy that attracted much attention a few years ago involved executive decisions to take actions that were certain to be rejected by the courts of appeals, not actions of a kind that the Supreme Court had condemned. In fact, the principal rationale for the policy was that the executive branch was entitled to persist in its policies until the Supreme Court had rejected them.

Often the executive will try to stretch the Court's precedents to the limits of what is "defensible," but it will seldom go further. From time to time the executive will ask that a precedent be overruled, but except in extraordinary circumstances, the executive will continue to comply until it is overruled. Theoretically, the executive could assert the power to disagree with Supreme Court interpretations of the Constitution and act on its own view, even in cases that will end up in court. But as a practical matter, it very seldom does so.

Many executive branch interpretations of the Constitution will not be reviewed in court, however. Sometimes no one will have standing, or the case will be moot before there is a chance for review, or no one will have a sufficient incentive to sue, or an immunity defense (sovereign or official, absolute or qualified) will preclude review on the merits. This category of cases is large and significant enough to make the question of executive autonomy in constitutional interpretation very important practically, as well as theoretically. In large numbers of cases involving law enforcement or personnel actions, for example, the person affected by the government's action simply will not complain in court. Then the executive's interpretation is the final word. In many of these cases, of course, there is no serious issue about the legal standard; if the executive acts inconsistently with Supreme Court precedents, it does so by ignoring or shading the facts, not by rejecting the precedents. This probably occurs because the bureaucracies involved, such as the law enforcement agencies, are trained—in anticipation of frequent litigation—to follow the standards prescribed by the courts.

But in other categories of decisions, in which the issue seldom ends up in court, the executive is less oriented to the courts' views and the question of executive autonomy in interpreting the Constitution

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arises. For example, intelligence and law enforcement agencies routinely take actions that raise Fourth Amendment issues but that lawfully remain secret. As a result, unless there is a breach of security, no one will discover that an individual's rights may have been violated. Government agencies sometimes must decide whether certain expenditures of public funds are consistent with the Constitution—for example, with the Establishment Clause,\(^4\) or with the clause requiring "a regular Statement and Account of the Receipts and Expenditures of all public Money"\(^5\)—when the constitutional limits are not judicially enforceable.\(^6\) Many important separation of powers issues, ranging from the President's authority to commit troops to the executive branch's right to withhold internal documents from Congress, are likely to be declared nonjusticiable by the courts. In these instances, the executive's determination of the constitutional issue will be the final word (unless Congress can make a different view prevail).

These kinds of questions arise quite frequently; they are everyday issues for some government lawyers. Because they will not end up in court, the executive will not suffer an adverse judgment if it interprets the Constitution autonomously. There may be other practical restraints on the ability of the executive branch to depart from judicial interpretations, such as public opinion or legislative pressure, but often these decisions will not be sufficiently visible to generate such responses. As a result, the executive branch will be free to interpret the Constitution autonomously in these cases, raising the question whether it may lawfully do so.

My principal argument in this paper is that there is no simple, comprehensive answer to that question. (Since simple answers have often been suggested, maybe this is not as inconsequential a conclusion as it seems.) The answer depends on the particular constitutional provision at stake, and it requires difficult judgments of institutional competence. In the end, the question of the proper scope of executive autonomy in constitutional interpretation is as complex and difficult to answer as the question of the proper scope of judicial review.

I will suggest a few principles that, nonetheless, might be applied in practice to determine the limits of executive autonomy in constitutional interpretation. I am mostly concerned, however, with refuting a particular view that has been asserted by presidents from time to time.

\(^4\) U.S. CONST. amend. I.

\(^5\) U.S. CONST. art. I, § 9, cl. 2.

time and seems to have become especially popular in the last decade: the view that the President is sometimes entitled to claim direct access to "the Constitution," unmediated by constitutional law as the courts have developed it.  

I. THE SCOPE OF THE ISSUE

First it is worth clarifying when this question—the extent to which the executive branch may differ with the Supreme Court's interpretation of the Constitution—arises. In order to keep the issue in focus, I will limit the inquiry to the kind of case I described above, in which the statute that authorizes executive action explicitly or implicitly incorporates a constitutional limit.

I limit the question this way because executive interpretation of the Constitution is often discussed in connection with quite different issues, without a recognition of the complexity that those issues introduce. For example, the question when the executive may disagree with the Supreme Court's interpretation of the Constitution is sometimes treated as equivalent to the question when the President may refuse to enforce an act of Congress on the ground that it violates the Constitution. This issue raises a question about executive autonomy in interpreting the Constitution, of course, but it also raises another difficult, and logically prior, question of constitutional law, about the substantive requirements of the Take Care Clause of the Constitution. The two questions are related; the concerns they raise about the President's role in the constitutional scheme are roughly similar. But they are distinct in the sense that answering the question about executive autonomy does not automatically answer the question about the Take Care Clause.

Suppose, for example, that Congress were to reenact the Independent Counsel statute, altered in some way to make it even more questionable constitutionally than the provisions upheld in Morrison v. Olson. For example, Congress might further lower the level of evidence of wrongdoing needed before the Attorney General is required to seek the appointment of an Independent Counsel, or it might expand the class of covered officials. The President would have to decide whether to comply with the statute. One issue would be

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8 U.S. CONST. art. II, § 3. Not just the Take Care Clause, but any constitutional requirement, explicit or implicit, that concerns the President's obligations to comply with acts of Congress.
whether the President was free to view *Morrison v. Olson* as limited to its facts or, even more strongly, to view it as Lincoln viewed *Dred Scott*, as having no generative force at all.\(^{10}\)

Before the President could even reach that question, he would have to interpret the Take Care Clause. Even if the President is entirely free to disregard all judicial precedent in deciding whether the Independent Counsel provisions are constitutional, it is still theoretically possible that the Take Care Clause, properly interpreted, requires the President to comply with all acts of Congress that are not utterly indefensible. Or it is possible (indeed, quite likely) that the Take Care Clause, properly understood, requires some lesser, but still substantial, degree of deference to the constitutional judgments implicit in Congress's decision to enact a law. Then, even if the President were entitled to disagree with the Supreme Court, it would not be enough for the President to conclude that the Independent Counsel statute was unconstitutional; he would have to conclude that its unconstitutionality was sufficiently clear to overcome his duty to defer to Congress.

Or suppose the correct interpretation of the Take Care Clause is that the President must comply with any statute that is not clearly unconstitutional unless that statute infringes the President's prerogatives. (I believe this is generally the view of the executive branch.) According to this view, the President would be entitled to disregard the new Independent Counsel statute if he concluded that it was unconstitutional, all things considered, even if a substantial argument could be made in its defense.

In every case, however, the question whether the President may refuse to comply with an act of Congress is distinct from the question whether he must treat Supreme Court precedent as binding. It is coherent to say that the executive may disregard the new Independent Counsel statute if it is, on balance, unconstitutional, but in deciding whether it is unconstitutional, the executive must treat *Morrison v. Olson* as a binding precedent. And it is coherent to say that the President may disagree with *Morrison* and legitimately decide that it should be given no generative force, but the President still must comply with acts of Congress no matter how unconstitutional they are. It may turn out that the answer to the question about executive auton-

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omy suggests a particular answer to the question about the Take Care Clause, but they remain distinct questions.

A similar issue arises (although the stakes are lower) about the positions the executive may take in advocacy. For example, may the executive urge the courts to interpret the Constitution in a way that favors criminal defendants on the ground that the opposing position, while defensible, is on balance incorrect? This question obviously raises the issue about executive autonomy in interpreting the Constitution. But the prior question is how one defines the limits on the executive’s role as an advocate. The government is always an enforcer of the criminal laws; it is virtually never a defendant. Is it nonetheless consistent with the Take Care Clause, and a proper exercise of “the Executive Power,” for the government to advocate a position that helps criminal defendants?

There are parallel questions about the civil rights laws, the antitrust laws, and limits on government regulation. Similar questions are raised in cases in which the government has little discernable institutional interest on either side. But these issues—which again are everyday matters for some government lawyers—depend first on questions about the scope of the executive’s power that are distinct from the question whether the executive may differ from the Supreme Court’s interpretation of the Constitution.

II. THE EXECUTIVE BRANCH AS AN INFERIOR COURT?

There are two polar views on the question of how autonomous the executive may be in interpreting the Constitution. One view is that the executive branch must follow Supreme Court precedents to the same extent as lower federal courts. If precedents are in tension, or if no useful precedent exists, the executive branch may have some latitude to choose between them based on its own views about what the Constitution requires. On many issues (particularly those that are seldom or never litigated), this may give the executive a great deal of autonomy in practice. But the executive branch may not disregard a Supreme Court precedent solely on the ground that the decision is wrong.

Few people seem to embrace this view of the executive branch’s role explicitly, but I think something like it is common among executive branch lawyers. Supreme Court precedents, and sometimes even lower court precedents, set the boundaries within which the executive

11 Government officials are sometimes criminal defendants in prosecutions for actions committed in their official capacity, and the government may have an interest in their defense. I leave this interest aside for purposes of the discussion in the text.
branch operates. That is what "the law" is. For reasons I suggested above, this outlook is likely to be especially common among lawyers who anticipate litigation, but it is also, I think, widespread among lawyers who do not. The idea that there is some law distinct from Supreme Court precedents seems metaphysical to them. One can disagree with Supreme Court precedents, of course, and even seek to have them overruled, but the idea that the executive branch should follow a different law is, I think, foreign to most government lawyers.

It seems relatively easy to show that this view is wrong in theory. But when we try to decide on how autonomous the executive branch may be, the prevalence of this view in the executive branch (if I am right that it is prevalent) should not be ignored.

The principal reason to reject this view is that the executive branch is not hierarchically subordinate to the Supreme Court. The Constitution treats the executive as a coordinate branch. As such, the executive should have at least as much autonomy in dealing with Supreme Court precedents as the Court itself has. At the very least, the executive branch should be free to "overrule" and limit Supreme Court precedents in ways that the lower courts may not.

The idea that the executive branch may treat Supreme Court precedents in the way that the Court itself does is a departure from what I suggested is the common view among government lawyers. But even this notion—that the executive branch is limited to acting as the Court itself does—seems arbitrary to a degree. Many of the Court's decisions reflect its sense of its own institutional limits. The executive has different institutional limits, and that implies an approach to Supreme Court precedent that may be different even from the Court's own.

To some extent, of course, the duty to follow Supreme Court precedent (the qualified duty of the Supreme Court and the more unequivocal duty of the lower courts) rests on the need for stability and predictability. But the executive branch can take those needs into account when arriving at its own interpretations of the Constitution. Sometimes precedents should be overruled despite the cost to stability and predictability. Unless one can identify a reason why the executive branch should always accept the Supreme Court's determinations of when stability and predictability should give way, the executive should be free to make that determination for itself.

III. COMPLETE EXECUTIVE AUTONOMY?

The other polar position is the one taken, more or less explicitly,
by various Presidents during great constitutional crises. This view—which has become increasingly popular lately—holds that the President owes no deference to Supreme Court precedent. The President must comply with the judgments of the Court in particular cases. Dred Scott must remain a slave; the schools of Topeka must be integrated. But the President need go no further in following what the Court says. His obligation is to the Constitution, not to the constitutional law developed by the courts.

The proponents of this view usually offer two principal arguments. One is the argument I just suggested as a reason for not accepting the view that the executive branch must act like a lower court. So far as the text and structure of the Constitution are concerned, there is no reason to conclude that the executive branch and the judicial branch should be treated differently when it comes to resolving questions of constitutional interpretation. They are coordinate branches; neither is explicitly given the power to interpret the Constitution; and both must interpret the Constitution in carrying out their respective duties.

This argument seems to me substantial, and shortly I will try to shed light on whether it is correct. But the second argument advanced in support of executive branch autonomy in constitutional interpretation seems to me incorrect. This argument relies on the fact that the President, no less than the Justices, takes an oath to uphold the Constitution. Just as Marbury v. Madison relied partly on the oath in justifying judicial review, the President, it is argued, has as much authority as the courts to interpret the Constitution. The oath, it is sometimes added, is to the Constitution, not to the courts' interpretations of the Constitution. So necessarily the executive branch is autonomous.

This argument is question-begging (as was the parallel argument in Marbury). An oath to uphold the Constitution raises—but does not answer—the question: what does the Constitution require? The Constitution might impose a requirement that an official defer to another official's interpretation of the Constitution. It is perfectly plausible to say that the Constitution sometimes requires the President to enforce a law that he considers, on balance, to be unconstitutional. If

12 See supra note 7 and accompanying text.
13 Here, I elide a potentially significant difference between the claim that the executive, a coordinate branch, may interpret the Constitution autonomously, and the possibly far more questionable claim that the states may interpret the Constitution autonomously.
14 5 U.S. (1 Cranch) 137 (1803).
15 See Paulsen, supra note 3, at 86; McGinnis, supra note 10, at 380 n.15.
16 McGinnis, supra note 10, at 380 n.15; see also Paulsen, supra note 3, at 86.
that is what the Constitution requires, then the oath requires the President to enforce the law—not to defy the law in pursuit of his own interpretation of the Constitution. The question of executive autonomy in interpreting the Constitution is similar; it is the question of when, and to what extent, the Constitution requires the President to defer to the Supreme Court's interpretation of the Constitution, as reflected in its precedent. That question cannot be answered by saying that the President is under an oath to comply with the Constitution. The question remains: does the Constitution require the President to defer to another branch on this point?

Millions of government officials and employees, at all levels of government, take oaths to uphold the Constitution. No one suggests that all of them are free to act on interpretations of the Constitution that differ from those of the Supreme Court. It follows that there is nothing in the nature of the oath that entails autonomy. An oath is limiting, not empowering. Sometimes it is emphasized that the President's oath is specified in the Constitution itself. That may bear on the question of executive autonomy because it may be a hint about the structural position that the President occupies in the Constitutional scheme. But the fact that the oath is mentioned in the Constitution does not change its essential nature, which is that it only raises the question of what the Constitution requires, including what it requires by way of deference to other components of the government.

The executive autonomy view therefore depends on the structural argument about the coordinate character of the branches. Although this argument is much more substantial than the argument about the oath, it, too, does not entitle the executive branch to act with complete autonomy in interpreting the Constitution. Specifically, the problem with the complete autonomy view is that it creates several anomalies: certain doctrines that no one questions (on any relevant ground) are inconsistent with the complete autonomy view.

A. Official Liability for Damages

Chief among these doctrines is the qualified immunity that limits government employees' personal liability for damages for constitutional violations. That doctrine provides that government employees will be liable for damages only for violating constitutional rights that were clearly established at the time of the violation. "Clearly established," under this doctrine, means clearly established in light of the Court's decisions. If those decisions clearly establish a right, then offi-

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17 See McGinnis, supra note 10, at 378; Paulsen, supra note 3, at 86.
cials can be held liable for infringing it. This doctrine is inconsistent with the executive autonomy view, but so far as I know no advocate of executive autonomy has ever questioned it on this ground.

Suppose, for example, that the executive branch decided that current judicial interpretations of the Fourth Amendment are erroneous and that searches can always be undertaken with probable cause, even without a warrant. The Warrant Clause,¹⁹ according to this view, was designed to limit the circumstances under which warrants would be issued not because warrants were needed to authorize searches but because warrants immunized officials from damages liability.

This interpretation of the Fourth Amendment is, of course, sharply at variance with the Court’s precedents, which require not just probable cause but a warrant for a search in all but certain specified categories of cases. But this hypothetical executive branch interpretation of the Fourth Amendment is certainly not disreputable. It has substantial support in both the text and the history of the Fourth Amendment, and arguably it makes more sense than the Court’s current interpretation.²⁰ If the executive really is entitled to rely on “the Constitution” instead of the Court’s glosses on the Constitution, then this would be an excellent occasion for the executive branch to diverge from the Court.

Nonetheless, it is clear that executive branch employees who conducted warrantless searches would be subject to personal damages. “Clearly established” means clearly established as a matter of judicial precedent. Theoretically one could have an immunity doctrine that interprets clearly established in light of all possible sources of constitutional doctrine. Then, no matter how well settled an issue was as a matter of Supreme Court precedent, it would not be clearly established unless the executive branch could not plausibly have a different view. The fact that no one (so far as I know), including the most forceful advocates of executive autonomy, has challenged qualified immunity doctrine on this ground suggests that the executive autonomy view is not taken entirely seriously.

B. The Enforcement of Specific Judgments

The executive autonomy view, in nearly all its manifestations, pulls its punches in a way that suggests a deeper incoherence. Almost

¹⁹ U.S. Const. amend. IV.
everyone who advances this view acknowledges that the executive branch must comply with specific judgments of the Supreme Court (and even the lower courts). The executive branch's autonomy is limited to denying that the courts' decisions have any precedential, generative weight.

Why should this be so? The basis of the argument for executive branch autonomy in constitutional interpretation is that the executive is a coordinate branch, equal in all respects to the judiciary. If the judiciary believes that a specific determination made by the executive branch is unconstitutional, the judiciary may refuse to enforce that determination. Why should the coordinate executive not have a symmetrical power to refuse to enforce a decision by a court if it considers that decision unconstitutional?

One answer sometimes given is that “the judicial power” mentioned in Article III of the Constitution is only the power to render binding judgments in particular cases. But this seems to be no more than an assertion. There is no reason that the judicial power has to be given that definition in the face of a supposed structural imperative of executive autonomy in constitutional interpretation. The judicial power might, for example, mean that judgments bind private parties to a case, but that the executive branch's role in complying with or enforcing judgments is a matter for its own determination.

A more common answer is that it would be too destabilizing, or too much of an affront to the dignity of the courts, to allow the executive branch to refuse to enforce a specific judgment. This, too, seems an odd argument. What is unsettling, and an affront to the courts, is for the executive branch to refuse to give effect to a Supreme Court decision in any cases other than the ones that happen to come before the Court. The incremental effect of defiance in the particular cases that come before the Court seems minor, even trivial, by comparison. Even if it is not minor, why draw the line here? Obviously the executive autonomy view, even if it is limited by requiring compliance with specific judgments, entails a good deal of instability and affront to the courts. Why is just the right amount of instability, while permitting defiance of specific judgments would be too much?

The most likely answer is that this apparently arbitrary feature of

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21 Paulsen, supra note 3, at 82; Merrill, supra note 3, at 46.
22 See Paulsen, supra note 3, at 83 for an extended argument to the same effect: that the executive autonomy view is in tension with the position that the executive branch must comply with specific judgments. Professor Paulsen, however, draws the conclusion that the executive branch need not comply with specific judgments. See id. at 84.
the executive autonomy view in fact reveals a deeper failure. The view cannot be faithful to its own premises because those premises are flawed.

C. A False Market Mechanism

There is one additional answer to the anomaly I have just suggested. It might be said that requiring adherence to particular judgments, while permitting the executive branch to refuse to give any further effect to decisions, provides a means for the conflict between the branches to be resolved. The executive branch will act in accordance with its own view; it will be sued; eventually, if the Court sticks to its guns, the executive will lose in court; and at that point, the executive will have to comply with the specific judgment. Thus neither the Court nor the executive branch will automatically have the last word. Ultimately the public will tire of the instability. Either the executive branch will give in, under the weight of repeated losses in court, or the courts will give in, recognizing the practical impossibility of enforcing their view generally.

This notion is familiar; a version of it is often advanced as a way for interbranch conflicts to be resolved generally. Some argue, for example, that the courts should stay out of certain conflicts between the executive branch and Congress because those branches can use their "political weapons" against each other to resolve the dispute. Suppose, for example, Congress and the President have a dispute over whether the executive branch acted lawfully in refusing Congress access to certain internal documents. To settle the dispute, Congress can, for example, refuse to confirm various Presidential appointees unless the President yields access to the documents; conversely, the President can veto proposed legislation until Congress yields its position.

The familiarity of this idea tends to blind us to how perverse it is. It suggests that a dispute between the branches should be resolved by having each branch take actions that, by hypothesis, it considers to be contrary to the public interest until one branch finally concedes. In the example I gave, congressional retaliation would be effective only if Congress refused to confirm appointments that it would otherwise have confirmed. The President's response would be effective only if he vetoed bills that he would otherwise have signed. If each branch acts in the way it would have acted anyway, then the branches are not retaliating. It is hard to see why we should choose this method—inflicting an escalating series of blows to the public interest—as a way of resolving interbranch disputes.
Moreover, there is simply no reason to believe that requiring the executive branch to adhere to specific judgments, while allowing it to litigate every case fully no matter how clear the precedent, will produce a satisfactory resolution of the dispute over constitutional interpretation. This method represents one example of the uncritical adoption of a market-like approach to resolving an issue, without any of the conditions that enable markets to produce desirable results.\footnote{Other examples include: the use of the “marketplace of ideas” metaphor to justify free speech (see David A. Strauss, \textit{Persuasion, Autonomy, and Freedom of Expression}, 91 \textit{COLUM. L. REV.} 334, 349 (1991)); the regime under which the Constitution generally permits the government to withhold information but strictly limits the power to keep the press from publishing it once the press gains access to it (see Cass R. Sunstein, \textit{Government Control of Information}, 74 \textit{CAL. L. REV.} 889 (1986)); and, more generally, the pluralist model of democracy, under which optimal outcomes are thought to be produced by the competition among interest groups.}

The outcome of a battle of this kind between the executive and Congress will be determined mostly by factors that are irrelevant to the legal merits: the resources and endurance of the private parties involved; whether many judgments, or only a few, are needed to enable the courts’ view to prevail; whether the litigation proceeds quickly; and so on. It is true that this sort of conflict will focus public attention on the issue, but there are many other means of focusing public attention. The executive branch, in particular, has many ways of inducing the public to criticize the courts, if the public is so minded. In any event, such short-term expressions of public opinion should not determine constitutional controversies. That is part of the reason for judicial review in the first place.

\section*{D. Deference by the Judiciary}

The executive autonomy view also seems to be unable to account for one of the settled aspects of judicial review that is favorable to the executive branch (and to Congress). Routinely, the courts will defer to those branches’ interpretations of the Constitution. In foreign and military affairs, for example, the courts give enormous weight to executive, especially presidential, interpretations of the Constitution. Also, in a wide range of cases, it is a truism that statutes are presumed constitutional because they rest on an implicit congressional interpretation of the Constitution.

The basis of the executive autonomy view is that the three branches are coordinate and symmetrically situated. If the executive branch is free to disregard the Supreme Court’s views in interpreting the Constitution, then the Court should be under no obligation to defer to either the President or Congress. If it is sometimes appropriate
for the courts to defer to the other branches—and everyone would agree that it is—then the question is not whether the executive branch must sometimes accept judicial interpretations. It is instead a matter of specifying when.

E. Judicial Adherence to Precedent

A final anomaly is that the executive autonomy view has difficulty explaining why the courts themselves should follow precedent, specifically, why the Supreme Court should ever feel an obligation to follow its own precedents. Proponents of executive autonomy often say that the President owes a duty to the Constitution, rather than to the Court’s interpretation of the Constitution. But if that is true, then the Justices also owe a duty to the Constitution itself, rather than to previous judicial interpretations of the Constitution. At times, some Justices have gone quite far in asserting that the Court may disregard precedent in interpreting the Constitution. But no one, so far as I know, has ever said that the Court has no obligation of any kind to follow precedent. A system in which the Court interpreted the Constitution without any regard to precedent is difficult even to imagine.

The proponents of executive autonomy might say that there are good institutional reasons for the Court to follow precedent. Of course there are, but that just raises the question of the extent to which these reasons also apply to the executive branch. This anomaly, therefore, points the way toward a view of the executive branch’s role in constitutional interpretation that is more refined and more plausible than the executive autonomy view.

IV. Precedent and Executive Interpretation of the Constitution

If neither of the polar positions is correct, which intermediate position seems most plausible? As a first approximation, consider the following alternative to the polar views: in interpreting the Constitution, the executive branch is to act, not fully autonomously, and not like a lower court, but rather like the Supreme Court itself. An executive branch official interpreting the Constitution should approach the problem by asking how she would decide if she were a Supreme Court Justice. Simply ignoring Supreme Court decisions in the area, and beginning from scratch—a course that some versions of the executive autonomy view suggest is acceptable and even mandatory—is not the right approach, because an executive branch decision to disregard a Supreme Court precedent is comparable to the Court’s deciding to overrule its own precedent. It certainly should not be done lightly,
especially when the precedent is recent. But it is also not out of the question, in the way that the other polar view, treating the executive branch as comparable to a lower court, would suggest.

It might be argued against this position that it is unclear what "following precedent" entails. Judges, for example, have different ideas about their obligations to precedent. Some view it as almost sacrosanct; others are willing to overrule precedents more readily. But the existence of these different views about the nature of the Supreme Court's obligation to follow precedent does not in the least undermine the view that the obligation of the executive branch (as a first approximation) is to follow precedent to the same extent. Suppose that it were unclear whether the President had an obligation to adhere to statutes. It would be important to decide whether he did have such an obligation—even though there is great controversy about the correct way to interpret statutes. Similarly, it would be valuable to determine that the President has an obligation to follow precedent, even if the precise content of that obligation remains unclear. Of course, deciding that the President has an obligation to follow precedent to the extent that the Supreme Court itself does, does not provide a mechanical way for the President to make decisions about legal questions. But that is as it should be. Any approach that provided simple and mechanical answers should be suspect.

This first approximation—that the President has the same obligation to conform to Supreme Court precedent that the Court itself has—should nevertheless be modified in several ways. The general reason for the modifications is that constitutional law, as developed by the Supreme Court, reflects in part the Court's views of its own institutional capacities. Since the capacities of the executive branch are different, executive branch officials who are interpreting the Constitution should not act in exactly the same way as Supreme Court Justices.

Apart from these differences in institutional competence, however, there seems to be no reason for the executive branch to treat Supreme Court precedent less seriously than the Court itself should treat it. In particular, the distinction between "the Constitution" and "constitutional law," drawn by some advocates of the executive autonomy view, is invalid.25

A. Judicial Deference and Circular Buck-Passing

Sometimes the executive branch should interpret the Constitu-

25 See generally Merrill, supra note 3.
tion to impose stricter limits on its power than the Supreme Court's decisions themselves suggest. That is because in certain categories of cases, constitutional law as developed by the Supreme Court reflects great deference to judgments made by the executive branch. This is an aspect of the problem of underenforced constitutional norms.

Foreign affairs and the governance of the military are two clear examples. The Court defers to the executive because it believes it lacks the capacity to make the necessary judgments. If the executive branch then accepts the Court's decisions as setting the boundaries of its authority, the result is circular buck-passing: the courts defer to the supposed constitutional determinations of the executive, the executive does whatever the courts allow it to do, and no one ever addresses the constitutional issue.

Therefore, in defining its power over foreign and military affairs, the executive branch should develop interpretations of the Constitution that go beyond the cases in limiting executive power. These categories are especially important because many executive decisions in these areas are likely to escape judicial review. In these areas, executive autonomy in constitutional interpretation should lead to less power for the executive branch.

Foreign and military affairs are not the only examples. The courts systematically defer to the expertise of the executive branch in interpreting the Constitution in other areas as well: controlling federal institutions such as prisons, managing the federal work force, setting law enforcement policy, and allocating the resources available for enforcement action by government agencies. In all of these areas, the coordinate status of the executive branch requires it to be stricter with itself than the cases are.

Federalism is a somewhat different and more problematic example. To some extent (less completely now after last Term's decision in New York v. United States),26 the Supreme Court has not enforced federalism-based limits on Congress's power to legislate. The Court has reasoned that the political branches will adequately protect the states' interests. This might be analogous to foreign affairs, where the courts believe they lack the necessary expertise. If so, then the executive branch and Congress should enforce stricter limits on their own power than the cases prescribe. But probably a more plausible interpretation of the Court's approach in this area is not that it believes it lacks the expertise, but that it believes the normal clash of political forces in the legislative and executive branches poses no danger to the

states' legitimate constitutional interests. If that is the basis of the Court's doctrine, then the executive and legislative branches need not self-consciously adopt a more limited view of their own constitutional prerogatives than the cases warrant.

B. The Protection of Minorities and the Political Process

One well known justification for the courts' role in constitutional interpretation is the so-called Carolene Products approach. The idea is that the courts are better able to protect the interests of minorities who do not have their fair share of political power and to remove obstacles in the political process, such as restrictions on speech or malapportionment of legislatures.

To the extent that this is the basis for a principle of constitutional law developed by the courts, the executive branch should not adopt the same attitude as the courts toward the principle. Specifically, the executive branch should be less willing to depart from a principle justified in this way than the Court itself would be. The reason is that constitutional law in these areas is premised on mistrust of the political branches, including the executive branch. It follows that if a particular decision of the Supreme Court is justified on Carolene Products grounds, the President should follow that decision more closely than the Court itself would.

This argument suggests that one of the most famous statements of judicial supremacy, the Supreme Court's opinion in Cooper v. Aaron, may have been right "on the facts," so to speak, even though it is not right in all cases. Cooper itself, of course, concerned defiance of Supreme Court precedent by a state government, but the Court's language was broad enough to reach presidential interpretation of the Constitution. In the narrow area of prohibiting racial discrimination against minorities, the Court was arguably right in saying that, so far as constitutional interpretation goes, the autonomy of other actors in the system is severely limited.

Of course, the Carolene Products justification is controversial,

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27 See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). I do not refer here to the portion of the Carolene Products footnote that suggests that the courts have greater warrant to overturn the decisions of the political branches when "legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." Id.


29 Id. at 18 ("Marbury v. Madison, 1 Cranch 137, 177 [(1803)] . . . declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme law of the land . . . .")
and the notions involved—underrepresented minorities and blockages in the democratic process—are contested. It may be that this justification does not work at all. But to whatever extent it does work, it must affect the nature of the executive branch’s duties when it interprets the Constitution.

This is one of the ways in which the question of executive autonomy in interpreting the Constitution is no less complex than the ultimate justification for judicial review. We cannot expect to have a complete account of the proper sphere of executive autonomy until we have a complete account of the justification for judicial review. Realistically, we will never have either, so we should not be surprised that the question of executive autonomy in interpreting the Constitution is complex and not fully resolved.

C. Disputes Between Congress and the Executive

One of the Court’s functions is to mediate between the other two branches when they have constitutional disputes. Decisions in this area are also entitled to special deference from the executive branch for essentially the same reason as decisions protecting minorities. This is an area where the courts, which (by hypothesis) do not have a stake in the controversy, are likely to do better at interpreting the Constitution than a branch that does have a stake. The executive branch should be much less ready to “overrule” a decision mediating an executive-legislative constitutional dispute than the courts would be, because the executive branch is acting as a judge in its own cause. So, for example, in the hypothetical I posed above about a revised Independent Counsel statute, the executive branch is not entitled to treat *Morrison v. Olson* as an incorrect decision and, in applying *Morrison* to new situations, it should not interpret it more narrowly than the courts would.

D. Disputes Where the Judicial Branch Has an Institutional Interest

All of the categories I have discussed so far were instances in which the executive branch should assert even less power to interpret the Constitution than the courts do; it should follow the Supreme Court’s precedents more closely than the Court itself would. But surely there should be instances in which the executive branch can be more autonomous, that is, where it can depart from precedent more readily than the Court itself would.

Initially, one might say that just as the executive branch should follow the Court rather than its own interpretations when the Court
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has adjudicated a matter involving the institutional interests of the executive branch, so too should the executive branch be more autonomous where the Court has been a judge in its own cause, that is, when the Court's decisions favorably affected the Court's own institutional interests. While this position seems right in principle, implementing it is difficult.

Perhaps the most obvious difficulty is that every decision by the Court involves the Court's institutional interests to some degree. Whenever the Court decides a constitutional issue, it is in a sense asserting its institutional prerogatives. Even if the decision involves mediating between the other two branches, the Court, by deciding the case, is asserting the power to be the mediator. By the same token, however, every act of interpretation by the executive branch also amounts to the executive branch acting as a judge in its own cause. So it might seem that the notion of an institution's being a judge in its own cause is not a helpful one.

The only way that notion can be redeemed at all is by taking account of what must be a presupposition of judicial review: that the courts are less likely than the other branches to be affected by their institutional interests. If judicial review is justified—that is, if judges are to have the last word, even in specific cases—it must be because the ethos of the judicial branch is more conducive to interpreting the Constitution correctly than the ethos of the political branches. Tenure and salary protections are supposed to foster this ethos. It is also not an implausible view; I think most people with experience in both the judicial branch and either Congress or the executive would say that the political branches are more concerned with their programmatic or political interests, which tend to get in the way when legal questions arise, while the judges (although certainly not without programmatic interests of their own) are generally more concerned with figuring out the right answers to legal questions. If this is right, then the possibility of institutional self-interest by the judiciary does not warrant executive autonomy in constitutional interpretation to the same extent that the possibility of executive self-interest requires executive deference to the courts.

In any event, one well-accepted aspect of the executive branch’s approach to the Constitution might be explained by the possibility of judicial self-interest. The executive branch routinely stretches consti-

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institutional restraints on its power (as defined by the courts) to their limits, rather than just deciding whether, on balance, a particular action is justified. Usually, the question in intra-executive deliberations is not whether a proposed action is constitutional, all things considered, but whether it is defensible.

Perhaps the use of the "defensibility" standard, instead of asking whether an executive action is constitutional, is an abuse—an example of how the executive's programmatic interests interfere with its legal judgment. But perhaps it can be justified on the ground I have just discussed: the executive branch is entitled to operate on the assumption that the doctrine developed by the judiciary is to some degree tainted by the courts' institutional self-interest. That does not mean the executive may disregard that doctrine and strike out on its own, autonomous interpretive path: that would give too free a rein to the executive's self-interest. It means that the executive branch is entitled to take into account the possibility of judicial self-interest by shading the doctrine slightly to permit more executive power. This is all quite rough and crude, but it does help make sense of a persistent executive branch practice—judging its own actions neither as a court would, nor according to its own autonomous interpretations, but rather by their defensibility under current doctrine.

Probably if executive branch lawyers were asked, they would say that the reason for using defensibility as the standard is that they are anticipating litigation. If an action is indefensible under existing judicial doctrine, lawyers are professionally obligated to concede its invalidity and, in any event, face certain defeat in court. But this cannot be a complete explanation, because the use of a defensibility standard seems to extend to areas where litigation is not anticipated. This is a puzzle from both directions: it is not clear why the executive branch is entitled to go that far (instead of just judging constitutionality on the merits in the way a court would, giving the same weight to precedent that a court would) and it is not clear why the executive branch cannot go further (disregarding judicial doctrine and developing autonomous interpretations).

Moreover, if anticipated litigation were the only reason for using a defensibility standard, its use would be unjustified. The executive branch is obligated to comply with the Constitution, not just to avoid sure losses in court. Unless there is some coherent account of executive interpretation that supports the use of this standard, it should not be used. Even if the actual reason the executive branch uses defensibility as a standard is that it is anticipating litigation (or has slipped into organizational habits that reflect the anticipation of litigation),
CONCLUSION: ON THE DIFFERENCE BETWEEN THE CONSTITUTION AND CONSTITUTIONAL LAW

However one determines the precise scope of the executive's power to interpret the Constitution, the scope of the executive's autonomous power to interpret the Constitution must depend on institutional considerations of these kinds. Underlying the executive autonomy view is a notion that constitutional law, as developed by the courts, is really only the courts' view of the Constitution. The executive branch, according to this view, is obligated to obey not the courts' constitutional law, but the Constitution itself.

The underlying fallacy of this view is that it mistakenly separates constitutional law as the courts have developed it—which basically means a complex network of precedent—from the Constitution itself. The courts are also obliged to obey the Constitution. If the Constitution is different from the precedents that make up constitutional law, then the courts, as well as the executive, should not be bound by the precedents.

If there were institutional reasons for the courts to follow precedent more faithfully than the other branches, that would justify a greater degree of executive autonomy. But most of the reasons for following precedent apply just as strongly to the executive (and to Congress). One reason, of course, is the need to maintain a reasonable stability and predictability in the law. Another is humility: it is always possible that the decisions reached by previous judges, acting in good faith, are wrong, but one should hesitate before reaching that conclusion. That counsel of humility is as applicable to executive branch officials as it is to judges.

It is sometimes suggested that courts especially must follow precedent because they are not elected. Elected bodies, it is said, have another source of legitimacy and therefore need not follow precedent. But the question is not legitimacy; it is interpreting the Constitution correctly. There is no reason to think that a democratic pedigree always helps a branch interpret the Constitution better. In fact, the opposite is often true; courts sometimes are in a better position to interpret the Constitution because they are not elected. Perhaps we can identify other institutional reasons for the courts to follow precedent that do not apply to the executive. If so, that would be a reason for greater executive branch autonomy in constitutional interpretation. But the inquiry should proceed in that way, by taking tentative
steps based on judgments about relative institutional capacities, rather than by treating the accumulated body of constitutional doctrine as something that concerns only the courts.

Of course there is a difference between constitutional law and the Constitution, and there are times when the former should be changed to make it more consistent with the latter. But an executive branch official is no more entitled than a judge to claim access to the true meaning of the Constitution, unmediated by the constitutional law that has developed. Constitutional law, which in our system has been the work mostly of the courts, limits all of the branches, in much the same way.