

## IS LEGALITY POLITICAL?

FREDERICK SCHAUER\*

### INTRODUCTION

Following the law just because it is the law seems surprisingly unpopular in the United States these days. Or maybe it is not just “these days.” And perhaps this should not be surprising. For some time now, political figures, public officials, and legions of commentators have treated the law—formal sanctions aside—as something to be followed when it produces results perceived as desirable on first-order policy or political grounds, but as something to be disregarded or slighted when what the law demands differs from the course of action that might otherwise have been pursued for law-independent reasons. Quite often, it appears, officials and citizens alike condemn the unlawful character of policies they oppose on substantive grounds, but ignore any illegalities in the policies they favor.

Examples of this phenomenon are ubiquitous. The Bush administration seemingly treated the law as an annoying yet ultimately surmountable obstacle when the Foreign Intelligence Surveillance Act<sup>1</sup> interfered with what the administration believed was the valuable or even necessary warrantless domestic surveillance of American citizens,<sup>2</sup> but much the same attitude toward the law was

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\* David and Mary Harrison Distinguished Professor of Law, University of Virginia. This Article was prepared for the *William and Mary Law Review's* Symposium, *Constitutional Transformations: The State, the Citizen, and the Changing Role of Government*, held at the William & Mary School of Law on February 25-26, 2011. I am grateful for valuable insights and information from John Harrison and Trevor Morrison.

1. Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, § 102, 92 Stat. 1783, 1787 (codified as amended in scattered sections of 18 U.S.C. and 50 U.S.C.).

2. Most attempts to litigate FISA violations have become embroiled in questions regarding state secrets and related issues surrounding the confidentiality of national security information. See, e.g., *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1205-06 (9th Cir. 2007); *Ciralsky v. CIA*, No. 1:10cv911 (LMB/JFA), 2010 WL 4724279, at \*6 (E.D. Va. Nov. 15, 2010). But see *In re Nat'l Sec. Agency Telecomm. Records Litig.*, 700 F. Supp. 2d 1182,

embodied in the decisions by the mayors of New Paltz, New York, and San Francisco, California, to marry same-sex couples in violation of the prevailing law in those states.<sup>3</sup> President Bush's decision to invade Iraq was inconsistent with international law,<sup>4</sup> but little more or less so than President Clinton's decision to authorize military action in Kosovo.<sup>5</sup> And numerous other instances of what we might call "selective legality" pervade public and political life.<sup>6</sup> Indeed, the debate over the appropriateness of referring to people who have entered the United States in violation of existing law as "illegal immigrants," rather than as "undocumented workers," provides a nice example of the widespread tendency for people to stress any illegality in the policies they disfavor while striving to downplay it with respect to the policies they support.<sup>7</sup>

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1195-97 (N.D. Cal. 2010) (reaching the merits in finding a violation). For examples of the widespread public commentary, see Editorial, *Compromising the Constitution*, N.Y. TIMES, July 8, 2008, at A20; Editorial, *Mr. Bush v. The Bill of Rights*, N.Y. TIMES, June 18, 2008, at A20; Amy Schatz, *Paul Camp, Liberals Unite on Spy Bill*, WALL ST. J., June 26, 2008, at A16.

3. For descriptions, see Jennifer Medina, *Charges Dropped Against Mayor Who Performed Gay Weddings*, N.Y. TIMES, July 13, 2005, at B5; Dean E. Murphy, *California Supreme Court Considers Gay Marriage Licenses*, N.Y. TIMES, May 26, 2004, at A14. Those who believe that this example involves morally defective law whereas the FISA case does not should recall that the Bush administration perceived the necessity of defending the United States against terrorism in undeniably urgent moral terms. See, e.g., Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140 (Sept. 20, 2001) (describing fight against terrorism as a "great cause" to defend "principles" of "freedom," "justice," "religious" freedom, "liberty," "democra[cy]," "pluralism," and "tolerance" against "evil" and "repress[ion]"). That both same-sex marriage and warrantless surveillance in the service of national security are defended on moral grounds does not, of course, mean that such moral claims are necessarily correct. Making a moral claim is not the same as making a sound moral claim. Still, the fact that many people might evaluate the moral claims in the two instances differently is exactly the point, because distinguishing the two cases on the soundness of the underlying moral claims would treat the moral correctness of the decision, and not its legality or illegality, as the basis for criticism or praise.

4. See Philippe Sands, *Lawless World? The Bush Administration and Iraq: Issues of International Legality and Criminality*, 29 HASTINGS INT'L & COMP. L. REV. 295, 296 (2006).

5. See MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 34-35 (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, 2-3 (2000).

6. I discuss many of them in Frederick Schauer, *Ambivalence About the Law*, 49 ARIZ. L. REV. 11, 11-16 (2007); Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769, 770-74 (2010).

7. See *Which is Acceptable: "Undocumented" vs. "Illegal" Immigrant?*, NPR (Jan. 7, 2010), <http://www.npr.org/templates/story/story.php?storyId=122314131>.

As the examples in the previous paragraph were designed to demonstrate, avoidance of the law in the service of what are perceived to be sound political, policy, or moral goals appears at first glance to have little political valence. Of course, these substantive—or first-order—political, policy, and moral goals assuredly do vary with time, place, political party, and presidential administration, but the willingness or unwillingness to subjugate the law to those law-independent goals seems at times to be politically, temporally, and geographically indiscriminate.<sup>8</sup>

It is thus a large and important question whether legality as such—the fact of law just because it is the law, and not because of the substantive content of the law—has any political incidence. Is respect for the law because it is the law more the province of some political orientations or parties than of others? In this Article, I propose to examine this question, albeit more anecdotally than systematically. But the anecdotes and the available data span a wide variety of further questions: Do Congress or the executive branch consider themselves bound by Supreme Court or lower court judicial opinions with which they disagree? Do legislative bodies follow the rules they have set forth for their own procedures? Do federal, state, and local officials follow the law when they need not worry about first-order public opinion or formal legal sanctions? Much of popular “rule of law” rhetoric appears to assume that the law both is and should be a significant constraint on the behavior of nonjudicial public officials and policy-relevant public figures.<sup>9</sup> But a closer look at the evidence may suggest—albeit tentatively—that the willingness to disregard inconvenient law is a common phenomenon, and that it exists across the political spectrum. To the extent that this is so, it may indicate that acquiescence to the law more broadly is similarly politically indiscriminate, such that for all of the substantive changes that political or electoral transformations may produce, changes in the attitude about the law *qua* law is rarely among them, and has not been among them in the most recent American political transformations.

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8. Within the United States, at least.

9. See, e.g., Editorial, *Even for Gov. Christie, This One's a Stretch*, N.Y. TIMES, May 1, 2011, at A24; Editorial, *The Rule of Law*, N.Y. TIMES, Jan. 8, 2011, at A20; Editorial, *What Rule of Law?*, N.Y. TIMES, Dec. 29, 2011, at A22.

## I

In order to situate the inquiry, a fair amount of brush clearing will be necessary. And the first swath of brush to be cleared is the question of just what it is to obey or follow the law. What do we mean when we say that a policymaker obeys the law, or that a policy follows or complies with the law? Initially, it is important to distinguish compliance from conformity, or consistency. That is, the question whether an official *follows* or *obeys* a law *because* it is a law is different from the question whether official action happens to be consistent, for reasons other than the existence of the law, with what the law demands.<sup>10</sup> The same applies to following or obeying a court decision. It is one thing for a lower court or public official or political body to make a decision that is merely consistent or in conformity with what the Supreme Court has decided. Consider California Proposition 209,<sup>11</sup> for example, a state political decision that happened to prohibit the same types of preferential use of race in public employment, public education, or public contracting that the then-prevailing and most applicable Supreme Court decision, *Regents of the University of California v. Bakke*,<sup>12</sup> also prohibited.<sup>13</sup>

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10. The distinction is common in the jurisprudential literature. Prominent analyses include Joseph Raz, *The Obligation To Obey: Revision and Tradition*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 139, 154-55 (1984); Donald H. Regan, *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995, 996-97 (1989); Donald H. Regan, *Reasons, Authority, and the Meaning of "Obey": Further Reflections on Raz and Obedience to Law*, 3 CAN. J.L. & JURISPRUDENCE 3, 15-16 (1990).

11. CAL. CONST. art. I, § 31. It is relevant to the overarching theme of this Article to ask whether, if at all, faculty and staff at California public institutions of higher education treat this provision—this *law*—as something to be followed, or instead as something to be surreptitiously avoided. If, as I libelously suspect but cannot firmly document, there are at least some such faculty and staff who treat the law in this case as other than something to be obeyed, it would support the larger thesis of this Article. If there are such people, and if their actions are plausibly in support of what they believe to be law-independent moral necessity, their actions are not necessarily to be condemned. Obedience to law as law, regardless of the moral consequences, is by no means always to be valued. And if this is so, and I believe it to be so, then we need to be clearer than we have been about when and why disobeying the law is itself subject to condemnation without reference to the substantive aims of the particular disobedience.

12. 438 U.S. 265, 319-20 (1978).

13. Proposition 209 went further of course, in prohibiting any preferential use of race, rather than just the numerical quotas or separate applicant pools prohibited by *Bakke* and

Proposition 209 was thus coincidentally consistent with the governing Supreme Court decision, but that is in contrast to a decision made by a public body just *because* of a court decision, as when the University of Michigan altered the way in which it took race into account in undergraduate admissions solely because of the Supreme Court's decision in *Gratz v. Bollinger*.<sup>14</sup> Only in the latter case can we say that the state has *obeyed* the Supreme Court, or complied with it, because only in the latter case did the state act the way it did just because of what the Supreme Court had decided.

Thus, it is important to exclude from the category of obedience those actions that are consistent or in conformity with the law but which are not taken because of the law.<sup>15</sup> I do not, for example, kill

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then by *Gratz v. Bollinger*, 539 U.S. 244, 271-76 (2003). Compare CAL. CONST. art. I, § 31, with *Bakke*, 438 U.S. at 289. But the distinction between what the Supreme Court prohibited and California's broader prohibitions is not pertinent to the precise point under discussion, which is that California's prohibition on quotas and separate applicant pools was consistent with *Bakke*, but not necessarily motivated by a desire to comply with *Bakke*.

14. 539 U.S. at 275-76. On the University of Michigan's modification of its undergraduate admissions policies because of the Supreme Court's decision in *Gratz*, see Press Release, Univ. of Mich., New U-M Undergraduate Admissions Process To Involve More Information, Individualized Review (Aug. 28, 2003), available at <http://ns.umich.edu/index.html?Releases/2003/Aug03/admissions>.

15. An interesting and important recent example comes from President Obama's letter to Congress reporting on American military involvement in Libya. Press Release, White House, Letter from the President Regarding the Commencement of Operations in Libya to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Mar. 21, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>. In that letter, the President said that he was providing the report "consistent with the War Powers Resolution." *Id.* Given that the President had not complied with the Resolution's requirement that there be advance consultation "in every possible instance," War Powers Resolution of 1973, 50 U.S.C. § 1542 (2006), and given the persistent insistence of Presidents on the existence of broad commander-in-chief powers that are unaffected by the Resolution, see Memorandum Opinion for the Deputy Counsel to the President on the President's Constitutional Authority to Conduct Military Operation Against Terrorists and Nations Supporting Them (Sept. 25, 2001), available at <http://www.justice.gov/olc/warpowers925.htm>, it is not surprising that President Obama noted the consistency of his actions with parts of the Resolution without acknowledging any obligation to comply with those parts that he may believe trench on his constitutional powers.

As this Article was going to press, the legal issues regarding American military operations in Libya sharpened in ways that provide confirmation for some of the Article's main themes. As it became clearer that Congress was unwilling to provide explicit authorization for the Libyan actions within the time constraints of the War Powers Resolution, the administration sent a 32-page report on "United States Activities in Libya" to Speaker of the House John A. Boehner on June 15, 2011. See generally U.S. DEP'T OF DEFENSE & U.S. DEP'T OF STATE,

or otherwise physically attack those of my colleagues who speak at interminable length at faculty meetings, however tempting it might be, but that is not because murdering or assaulting my colleagues happens to be against the law. Rather, I refrain from such actions because I believe them to be morally wrong and personally risky, and those reasons would be sufficient to determine my nonmurder and nonassault even absent the law. Similarly, my unwillingness to eat human flesh is not a function of the laws against cannibalism. It is simply that I find the prospect of such behavior repulsive—or perhaps it is better to say “distasteful.” Were the laws against cannibalism to be repealed,<sup>16</sup> my culinary habits would not change one whit. And thus with respect to these and countless other examples, the law, designed primarily in such instances to control the behavior of outliers to otherwise accepted social norms,<sup>17</sup> is

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UNITED STATES ACTIVITIES IN LIBYA (2011) [hereinafter UNITED STATES ACTIVITIES IN LIBYA], available at [http://www.nytimes.com/interactive/2011/06/16/us/politics/20110616\\_POWERS\\_DOC.html?ref=politics](http://www.nytimes.com/interactive/2011/06/16/us/politics/20110616_POWERS_DOC.html?ref=politics). In that document, and in subsequent hearings before the Senate Committee on Foreign Relations, the administration took two positions. One was that the President had the constitutional authority without congressional approval to initiate the military action in Libya. *Id.* at 25. In taking this position, the President aligned himself with all of the incumbents of his office since the passage of the War Powers Resolution, implicitly claiming that the Resolution was unconstitutional insofar as it would limit the President's powers under Article II. The second position, and the one that attracted much more attention, was the claim that the Resolution was not in any event triggered because the military action did not amount to “hostilities.” *Id.*; see also Trevor W. Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 62 (2011), [http://www.harvardlawreview.org/media/pdf/vol124\\_forum\\_morrison.pdf](http://www.harvardlawreview.org/media/pdf/vol124_forum_morrison.pdf). In taking what appears to me and others, Morrison, *supra*, at 62; Bruce Ackerman, Op-Ed., *Legal Acrobatics, Illegal War*, N.Y. TIMES, June 20, 2011, at A27, to be a highly implausible legal position, and one that had been rejected by the Office of Legal Counsel, Morrison, *supra*, at 65, the administration thus appeared to confirm the view that an unwillingness to take seriously the constraints of the law knows no politics and knows no party, especially in the area of war and foreign policy. And although the dominance of issues relating to spending and the national debt during the relevant time is an obscuring variable, the relative invisibility of the legal issues lends some support to the view that the law *qua* law has very little political salience.

16. Although cannibalism is widely abhorred, its illegality is more complex. The laws against murder deal with most cases of cannibalism without the necessity of specific prohibition. But some specific prohibitions address conduct that falls outside the scope of murder laws, such as consuming an already-deceased human being. *E.g.*, TENN. CODE ANN. § 39-17-312 (West 2010) (prohibiting indecently disposing of a dead body).

17. Sometimes legal rules are designed, as with these examples, to protect prevalent social norms against outliers. At other times, however, legal rules are enacted in order to change those norms, as we see, for example, with respect to the laws dealing with the environment and protection of endangered species. See Holly Doremus, *Restoring Endangered Species: The*

entirely consistent with my first-order moral and personal preferences. The fact that the law happens to be aligned with those preferences makes no difference at all to my behavior. But if, on the other hand, we are interested in what the law *does*, and in how officials perceive the law and act with respect to it, then we should be interested, at least in part, in the extent to which the law actually influences official behavior. For that purpose, the existence of coincidentally conforming or compatible official behavior turns out to be largely beside the point.

Thus, to revert to an earlier example, even if we believe that a Clinton or an Obama administration would not have invaded Iraq in 2003, and assuming all other events—including September 11, 2001—remained the same, we still should want to know the reasons for the presumed difference. More particularly, we should ask whether a different President or administrative course of action would have been based on some aspect of domestic or international law, or instead simply have been based on the moral, political, and foreign policy differences between the Clinton and Obama administrations and those of the Bush administration. Similarly, even if we assume that neither President George H.W. Bush nor President Clinton would have authorized illegal<sup>18</sup> aid to the Nicaraguan Contras in 1986, we should want to know whether that position would have been, for them, based on moral, political, and foreign policy considerations on the one hand, or on legal considerations on the other. If the moral, political, and foreign policy views of those administrations would have been sufficient to produce a refusal to provide military aid to the Contras, and thus a policy different for nonlegal reasons from the policies undertaken during the Reagan

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*Importance of Being Wild*, 23 HARV. ENVTL. L. REV. 1, 90-92 (1999). Here and elsewhere the law undoubtedly has the purpose of changing social norms rather than just enforcing compliance against outliers to existing social norms. Much the same might be said about many laws prohibiting discrimination on the basis of gender and sexual orientation, although again the causal contribution of the law, as opposed to that of other cultural and political factors and forces, is an empirical question rather than a self-evident axiom.

18. The aid was illegal under the Boland Amendments of 1982 to 1984. Continuing Appropriations Act for Fiscal Year 1985, Pub. L. No. 98-473, § 8066(a), 98 Stat. 1837, 1935 (1984); Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2907, 98 Stat. 494, 1210; Further Continuing Appropriations Act, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982); H.R. REP. NO. 98-122, pt. 1, at 11 (1983).

administration, then once again it may be that the law's constraints were for the most part causally inconsequential.

It is thus of considerable interest whether the existence of law, as law, and just because it is law, provides content-independent reasons, sanctions aside, for public officials to take the actions that the law demands.<sup>19</sup> Still, the reasons that may at times be provided by law *qua* law are not necessarily conclusive reasons. So although it is a mistake to conflate legal conformity with legal compliance, so too is it a mistake to assume that legal nonconformity is necessarily a product of the law being viewed as irrelevant. The law can provide a reason for making a decision consistent with the law even if and when that reason is outweighed or overridden by other reasons inclining a decision in the opposite direction.<sup>20</sup> That the Supreme Court in *Grutter v. Bollinger* held some forms and some degree of race-based affirmative action to be constitutional in the context of higher education does not mean that the norm against taking race into account—a norm emerging from previous cases and encapsulated in the “strict scrutiny” and “compelling interest” standards<sup>21</sup>—was not operative for even those Justices who agreed with the outcome in *Grutter*.<sup>22</sup> One reason can be outweighed by another and

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19. On the content-independent nature of authority in general, and legal authority in particular, see JOSEPH RAZ, *THE MORALITY OF FREEDOM* 35-37 (1986); H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 243, 253-55 (1982); Kenneth Einar Himma, *H.L.A. Hart and the Practical Difference Thesis*, 6 *LEGAL THEORY* 1, 2-3 (2000); Gerald J. Postema, *The Normativity of Law*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART* 81, 86-87 (Ruth Gavison ed., 1987); Scott J. Shapiro, *Authority*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 382, 389-90 (Jules Coleman & Scott Shapiro eds., 2002). For a challenge to the conventional wisdom about content-independence, see George Klosko, *Are Political Obligations Content Independent?*, 39 *POL. THEORY* 498 (2011); P. Markwick, *Independent of Content*, 9 *LEGAL THEORY* 43, 61 (2003).

20. On the distinction between the existence of reasons—or rights, or rules, or duties—and the degree of their stringency, see, for example, FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 113-15 (1991); Robert Nozick, *Moral Complications and Moral Structures*, 13 *NAT. L.F.* 1, 1-42 (1968); Frederick Schauer, *A Comment on the Structure of Rights*, 27 *GA. L. REV.* 415, 430-34 (1993); John Searle, *Prima Facie Obligations*, in *PRACTICAL REASONING* 81, 81-90 (Joseph Raz ed., 1978); Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 *ARIZ. L. REV.* 45, 45-53 (1977).

21. 539 U.S. 306, 346 (2003) (Ginsburg, J., concurring); e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (adopting strict scrutiny for race-based affirmative action programs); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 469, 505 (1989) (same).

22. This is entirely a conceptual point, and I make no claims about what any of the

still be a reason. Thus, as a conceptual matter, the existence of a reason to follow the law just because it is the law is consistent with that reason's being outweighed in a particular case by other reasons, such as morality, policy, or political prudence.

That said, however, if the very fact of law actually provides a reason for some actor, set of actors, or institution to decide in accordance with the law, then over the long term, and for a large enough array of decisions, we can expect the law to be dispositive in some number of those decisions. This is an empirical and not a conceptual point, but it should hardly be a controversial one. It would indeed be surprising if a reason that was actually operative as a reason for some actor or institution never, over a large and long enough series of decisions, actually determined an outcome. Thus a useful, even if not necessary, method for locating instances of actual legal compliance is to attempt to identify those official decisions that appear to reach conclusions other than the conclusions that some official or institution would have reached had the law been otherwise, or had the law simply not been pertinent to the decision. Accordingly, with respect to the question of whether the law *qua* law matters more to some Presidents than to others, or more to some administrations than to others, or more to some political parties than to others, one useful indicator of the extent to which Presidents and their administrations genuinely take the law seriously is to see when, if ever, those administrations make decisions because of the law, and especially because of the law itself and not because of any sanctions that may attach to violation of it. And the way to isolate those decisions is to look for decisions that are different than the ones that the same Presidents, administrations, or parties would have made absent the law.

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Justices might believe or what they might do in other cases. Indeed, I make no claims about the extent to which, if at all, nonabsolute constitutional rules and principles actually make a difference in the Supreme Court. Still, the fact that Chief Justice Rehnquist and Justice O'Connor subscribed to the strict scrutiny approach in *Adarand* and *Croson* but were also in the majority in *Grutter* demonstrates the conceptual possibility of agreeing that there could be both a strong reason militating against race-based affirmative action and an even stronger reason in favor of such affirmative action in a particular case.

## II

Although there are numerous dimensions of official obedience to the law, a particularly salient one, albeit a highly controversial one as well, is the question of official obedience to court decisions—in particular, Supreme Court decisions—interpreting the Constitution. As is well-known, the issue is controversial because of the hotly debated question of the authority of such decisions in the first place.<sup>23</sup> The so-called judicial supremacists, including myself,<sup>24</sup> as well as most of the Justices of the Supreme Court,<sup>25</sup> take Supreme Court interpretations of the Constitution to be strongly—which is not the same as absolutely<sup>26</sup>—authoritative. For judicial supremacists, Supreme Court decisions can of course be criticized as poor interpretations of the Constitution. But those decisions nevertheless have the status of law and should be obeyed, at least presumptively albeit not conclusively, by officials purporting to profess an obligation to obey the law and the Constitution.<sup>27</sup> The Constitution may not be what the Supreme Court says it is<sup>28</sup> for purposes of external

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23. A useful overview is Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 43-45 (1993).

24. See Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 480-82 (2001); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1387 (1997); Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045, 1046 (2004).

25. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003); *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365 (2001); *Dickerson v. United States*, 530 U.S. 428, 432 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

26. See *supra* text accompanying notes 20-23.

27. See Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387, 403-12 (1982); Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991, 993 (1987); Frederick Schauer, *The Questions of Authority*, 81 GEO. L.J. 95, 106-10 (1992); Suzanna Sherry, *Justice O'Connor's Dilemma: The Baseline Question*, 39 WM. & MARY L. REV. 865, 903-05 (1998); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1594, 1640 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)); Michel Rosenfeld, Comment, *Executive Authority, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137, 138-42 (1993).

28. "We are under a Constitution, but the Constitution is what the judges say it is." Justice Charles Evans Hughes, Speech at Elmira, New York (May 3, 1907), in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 700 (Emily Morison Beck ed., 15th ed. 1980).

critique of what the Supreme Court has done,<sup>29</sup> but for the judicial supremacist, the Constitution is what the Supreme Court says it is for purposes of establishing the constitutional obligations of lower courts<sup>30</sup> and members of the legislative and executive branches of government.

In recent years, judicial supremacy has been challenged in two different but related ways. The more venerable challenge, dating at least as far back as Abraham Lincoln's denial that the *Dred Scott* decision<sup>31</sup> was binding on the President,<sup>32</sup> is what these days goes by the name of "departmentalism."<sup>33</sup> For the departmentalist, the Supreme Court has the power to make constitutional determinations for its own purposes, including the purpose of entertaining challenges to the constitutionality of legislation.<sup>34</sup> But the Supreme Court's authority to make constitutional determinations for *its* purposes is no greater than the authority of Congress and the President to make constitutional determinations for *their* purposes.<sup>35</sup> Except with respect to orders in particular cases, therefore, the departmentalist rejects the notion that Supreme Court interpretations of

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29. Cf. H.L.A. HART, *THE CONCEPT OF LAW* 85-91, 124-54 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994) (arguing that having an internal point of view with respect to the law entails and explains criticism of legal outcomes for departing from the law).

30. On the substantially less controversial view that lower courts should follow even those decisions of higher courts with which they disagree, see Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 *TEX. L. REV.* 1, 6-8 (1994). The issue is treated extensively, and with more sympathy to judges who might disregard what others see as "the law," in JEFFREY BRAND-BALLARD, *LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING* 8-15 (2010); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 *STAN. L. REV.* 817, 821-23 (1994).

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

32. Abraham Lincoln, Sixth Debate with Stephen A. Douglas (Oct. 13, 1858), in 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 245, 255 (Roy P. Basler ed., 1953); Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN*, *supra*, at 262, 268.

33. See Keith E. Whittington, *James Madison Has Left the Building*, 72 *U. CHI. L. REV.* 1137, 1148 (2005) (reviewing J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM* (2004)).

34. And thus a challenge to judicial interpretive supremacy need not constitute a challenge to judicial review in general or to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), in particular.

35. See John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 *CORNELL L. REV.* 371, 372-73 (1988).

the Constitution are authoritative for the other branches of government.<sup>36</sup>

Departmentalism should be distinguished from the closely related *popular constitutionalism*, which sees public decision making and the process of public deliberation as the ultimate determinant of constitutional meaning, the Supreme Court's views notwithstanding.<sup>37</sup> For popular constitutionalists, the Constitution is in important ways different from ordinary law. Consequently, the people, in public deliberation and in the expressions of their culture and political activity, have a substantial role to play in determining what the Constitution means, not only ultimately but even in the short and intermediate term.<sup>38</sup>

These debates about the locus of constitutional interpretive authority are important and ongoing, and I describe them briefly

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36. For prominent expositions of departmentalism, albeit with some variations among them, see SANFORD LEVINSON, CONSTITUTIONAL FAITH 27-53 (1988); Franklin Roosevelt, Draft Speech on the Gold Clause Cases (Feb. 19, 1935), in F.D.R.: HIS PERSONAL LETTERS 1928-1945, at 459-60 (Elliot Roosevelt ed., 1950); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 106 (1998); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 392-94 (1997); Edward Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 156-58 (1999); Gary Lawson & Christopher Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1329-30 (1996); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985 (1987); Robert F. Nagel, *Name-Calling and the Clear Error Rule*, 88 NW. U. L. REV. 193, 210-11 (1993); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994); Bruce G. Peabody, *Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research*, 16 CONST. COMMENT. 63, 67-69 (1999); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1542-43 (2005); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 845-46 (2002).

37. See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2004); Robert C. Post, Foreword, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 110-12 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1950 (2003); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People, Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 25-26 (2003) [hereinafter Post & Siegel, *Protecting the Constitution*]. Although taking on a more capacious agenda, there is also somewhat of the flavor of popular constitutionalism in MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 194 (1999). Outside of the United States context, the same could be said of RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 211-17 (2004).

38. See Larry D. Kramer, Foreword, *We the Court*, 115 HARV. L. REV. 4, 164-65 (2001).

here to emphasize that associating obedience to the Constitution with obedience to judicial interpretations of the Constitution is a highly contested position. Nevertheless, at least one form of obedience to law is obedience to what courts, including courts operating as constitutional interpreters, have announced the law to be. So although obedience to judicial judgments and opinions may be a less important form of obedience to law for some observers than it is for others, this form of obedience can still provide a useful way of approaching the question of whether obedience to the law, as clarified in the foregoing section, is an attitude or a set of behaviors that can be said to have a political valence.

### III

Although I have just been using the debates among judicial supremacists, departmentalists, and popular constitutionalists for purposes of clarification, those debates are a useful entry into the main theme of this Article. More precisely, we can ask whether there is a politics of judicial supremacy, and whether the position that judicial interpretations of the Constitution need not be considered binding is one that varies with political party or political orientation.

If we were to look at this question based on history, it would be hard to identify very much political incidence for positions in the vicinity of departmentalism. In the modern debates, departmentalism is often associated with Attorney General Edwin Meese's speech at Tulane University,<sup>39</sup> which sparked much of the contemporary interest in the subject.<sup>40</sup> And it is plausible to suppose that at least one motivation for Meese's position was a desire to free the nation from excess—in his view, and in the view of the Reagan administration generally—deference to the Supreme Court's abortion and school prayer decisions.<sup>41</sup> Still, Attorney General Meese's

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39. Meese, *supra* note 36, at 979 (annotated reprint of October 21, 1986, speech at Tulane University).

40. For some of the contemporaneous debate, see Symposium, *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 TUL. L. REV. 979, 985-88 (1987).

41. See Meese, *supra* note 36, at 988. In a subsequent clarification (or, some might say, retreat), Meese emphasized that he was not saying that Supreme Court decisions should be entitled to *no* deference. But he did emphasize his view that Supreme Court decisions could

rejection of judicial constitutional interpretive supremacy received some endorsement, even from those with few, if any, political sympathies with Meese in particular or with the Reagan administration in general.<sup>42</sup> Moreover, there is a remarkable compatibility, as Meese himself noted at the time,<sup>43</sup> between his position and that espoused by Abraham Lincoln.<sup>44</sup> And Franklin Roosevelt's view about what Congress should do in the face of what he and a majority of Congress believed to be unfortunate Supreme Court precedent also occupied similar conceptual space,<sup>45</sup> although Roosevelt's politics, especially when understood in the New Deal context, were hardly those of Meese half a century later.

One explanation for the political diversity of what we might call the Lincoln-Roosevelt-Meese-Levinson-Paulsen<sup>46</sup> view is some amount of agreement, even in the face of political differences, about fundamental propositions of political theory, including propositions about the respective roles of the courts, the legislature, and the executive in a system of separation of powers. Another explanation might be that at least for some departmentalists, even if not for all of them, departmentalism is not a first-order political value, but is instead instrumental to other values, especially first-order substantive values of morality and policy. Insofar as that is the case, there would be nothing disingenuous in a theorist or political figure choosing to be a departmentalist precisely because departmentalism was perceived to be the position most conducive to the desirable first-order political or policy or moral goals. So if someone believed—as many people did believe in 1986—that restrictions on abortion and the permissibility of prayer in the public schools were desirable first-order political and policy and moral positions based on even deeper political and policy and moral principles, and believed as well that those ends were more likely to be achieved in

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be viewed as narrow holdings rather than as broad statements of what the law is. Edwin Meese, *The Tulane Speech: What I Meant*, 61 TUL. L. REV. 1003, 1003, 1004, 1006 (1987). On Meese's substantive disagreement with *Roe v. Wade*, see *id.* at 1004.

42. E.g., Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071, 1078 (1987).

43. Meese, *supra* note 36, at 984-87.

44. See *supra* notes 32-33 and accompanying text.

45. Roosevelt, *supra* note 36, at 459.

46. Paulsen, *supra* note 36, at 221, was for some years the most extended academic defense of departmentalism, at least among those who might loosely be called "conservatives."

state legislatures, in Congress, and in the executive department than in the federal courts, one could advocate departmentalism for a principled reason, albeit a principle relating to these first order positions and not a principle about departmentalism itself.<sup>47</sup> Thus, we might hypothesize that Lincoln, Roosevelt, and the Reagan Department of Justice all believed in their first-order substantive values—antislavery, the New Deal, and the so-called Reagan Revolution, respectively—to oversimplify the issue dramatically—and were opportunist departmentalists, advocating departmentalism as a strategy for maximizing the likelihood of acceptance of their first-order political or moral or policy positions. Insofar as this speculation is true, and more importantly, insofar as it is representative, then the diverse politics of departmentalism would lend some credibility to the claim that there are no politics of obedience to the Supreme Court, but only the politics of the underlying positions that obedience or disobedience to Supreme Court decisions might or might not facilitate.<sup>48</sup>

These days we might reach similar conclusions about the complex politics of popular constitutionalism.<sup>49</sup> The leading academic advocates of popular constitutionalism, Deans Kramer and Post most prominently,<sup>50</sup> are commonly associated with liberal or progressive or left-of-center or Democratic politics, but perhaps the leading nonacademic advocates of popular constitutionalism these days are the members of the Tea Party movement.<sup>51</sup> In making constant reference to their view of the Constitution, in wrapping an entire political movement in the language and the iconography of the Constitution, and in relying heavily on their reading of the history and purpose of the Constitution, the leaders of the Tea Party movement can be said to be advancing the view, not too far removed from Kramer's, that constitutional meaning—and perhaps also

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47. For an extended version of this argument, see Frederick Schauer, *Neutrality and Judicial Review*, 22 L. & PHIL. 217, 231-35 (2003).

48. See Post & Siegel, *Protecting the Constitution*, *supra* note 37, at 25-26.

49. See *id.*

50. See *supra* notes 37-38; see also Larry D. Kramer, *Undercover Anti-Populism*, 73 *FORDHAM L. REV.* 1343, 1343 (2005). And for a response, see Lawrence G. Sager, *Courting Disaster*, 73 *FORDHAM L. REV.* 1361, 1361 (2005).

51. For a discussion of the popular constitutionalism of the Tea Party movement, see Jared A. Goldstein, *The Tea Party Movement and the Contradictions of Popular Originalism*, 53 *ARIZ. L. REV.* 827 (2011).

constitutional interpretive methodology—should be determined not by the Supreme Court, and certainly not by what past Supreme Courts have done, but in public and popular debate by the people now.<sup>52</sup>

It may well be that either Dean Kramer or the Tea Party Movement is mistaken about the substantive consequences of popular constitutionalism. That is, one or the other may be mistaken about the principles and interpretations the people may in fact select in engaging in the popular constitutionalist enterprise. Or it may be that both hold similar and principled positions about the value of public determinations of constitutional meaning, independent of the particular meaning that might be chosen. But it is nevertheless clear that popular constitutionalism has produced and is now producing some strange bedfellows, a phenomenon that again might lend some support to the view that positions about the degree of deference to the courts may be substantially a function of first-order substantive preferences, and not necessarily about whether the deference or nondeference has an intrinsic political orientation.<sup>53</sup>

#### IV

In examining the politics of legality, we can also look more closely at the behavior of the Office of Legal Counsel (OLC), the branch of the Department of Justice charged with providing legal advice to the President specifically and the executive branch of government more generally.<sup>54</sup> OLC provides its advice in many different public and not-so-public ways, but because many of its opinions and policy statements are publicly available, these public documents provide a useful window through which we can examine the question of official attitudes toward the law.

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52. *Id.* at 1-4.

53. For a discussion of the politics of popular constitutionalism, and the strategic implications that follow from those politics, see Emily Zackin, *Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU Turned to Courts*, 42 *LAW & SOC'Y REV.* 367 (2008).

54. *Office of Legal Counsel: About the Office*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/olc/> (last visited Oct. 31, 2011).

One of the things that OLC opinions reveal is that departmentalism may exist more as a public presidential or political position than as a genuine operating principle in any administration. It turns out, for example, that in the twenty-five years since Attorney General Meese's prominent speech,<sup>55</sup> only one OLC legal opinion has actually taken the strong departmentalist position that a more-or-less on point Supreme Court need not be followed by the other branches of government.<sup>56</sup> That 1992 opinion, albeit with a bit of hedging about holding and dicta,<sup>57</sup> dealt with the question of the ratification of what is now the Twenty-Seventh Amendment to the Constitution,<sup>58</sup> which was originally introduced 200 years earlier as the (then) Second Amendment, prohibiting members of Congress from raising their own salaries in the absence of an intervening election.<sup>59</sup> Because of the length of time between the original passage by Congress and the ratification by the thirty-eighth state, Michigan, in May of 1992, the question arose as to whether the amendment had become part of the Constitution as a result of Michigan's action. Explicitly rejecting plainly applicable language

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55. See Meese, *supra* note 36 (annotated reprint of October 21, 1986, speech at Tulane University).

56. Memorandum from Timothy E. Flanigan, Assistant Attorney Gen., to Counsel to the President (May 13, 1992), available at <http://www.justice.gov/olc/congress.17.htm>.

57. Some of us are inclined to think that almost all of the distinction between holding and dicta is hedging. See FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 54-57, 180-84 (2009). But the degree of hedging in the 1992 OLC opinion would likely seem as such even to those who believe there is more to be said for the holding-dicta distinction.

58. Memorandum from Timothy G. Flanigan, Assistant Attorney Gen., to Counsel to the President, *supra* note 56.

59. U.S. CONST. amend. XXVII. The amendment actually refers to "varying" the compensation of senators and representatives, but typically there is less likelihood that members of Congress will be inclined to lower their own salaries. Still, a recent event, germane to the general theme of this Article, raises precisely this issue. When Senator Barbara Boxer of California proposed that the salaries of Congress and the President be suspended during a possible budget-impasse-inspired governmental shutdown, Senator Patrick Leahy pointed out that such an action would violate both the Twenty-Seventh Amendment with respect to Congress and Article II, Section 1 with respect to the President. Senator Boxer took the position that the action would not be unconstitutional until and unless it was challenged in court, and no senator joined in Senator Leahy's textually impeccable objection. For a description of the event, see Josiah Ryan, *Dem Senator Slams Dem Colleague's Measure as Unconstitutional*, THE HILL'S FLOOR ACTION BLOG (Mar. 1, 2011, 7:03 PM), <http://thehill.com/blogs/floor-action/senate/146859-dem-senator-slams-dem-colleagues-measure-as-unconstitutional>.

in a 1921 Supreme Court decision,<sup>60</sup> OLC offered the opinion that the amendment had become part of the Constitution as a result of Michigan's action,<sup>61</sup> an opinion that was ultimately, even if only implicitly, accepted by both the President and Congress.

Neither this opinion nor the Twenty-Seventh Amendment itself are of major importance these days,<sup>62</sup> but the fact that no other OLC opinion appears to adopt a strong departmentalist position may say something about the legal—as opposed to political and rhetorical—importance of departmentalism. And if it is true that departmentalism in its most explicit form emerges only episodically, and almost never as an official executive branch position, this may tell us something about the extent to which departmentalism and its associated respect for applicable Supreme Court opinions varies with political party.

Some support for this conclusion is provided by the extensive and impressive research carried out on OLC opinions by Professor Trevor Morrison.<sup>63</sup> Morrison is concerned less with the effect of Supreme Court judgments on OLC opinions than with the stare decisis effect of OLC opinions on subsequent OLC opinions.<sup>64</sup> But through his examination of 1191 OLC opinions issued over the course of thirty-three years (from the beginning of the Carter administration) and six administrations (Carter, Reagan, Bush, Clinton, Bush, and Obama), he reached the conclusion that the OLC's willingness to follow its own previous opinions varied from administration to administration, but—importantly for my purposes—did not vary in a statistically significant way between Democratic and Republican administrations.<sup>65</sup> Insofar as we take stare decisis

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60. *Dillon v. Gloss*, 256 U.S. 368, 375 (1921).

61. Memorandum from Timothy E. Flanigan, Assistant Attorney Gen., to Counsel to the President, *supra* note 56.

62. The fact that the Twenty-Seventh Amendment was originally the Second—the original First Amendment, dealing with congressional terms, has never been ratified by even close to the requisite number of states—is, however, a useful bit of trivia for challenging the view, particularly popular among journalists, that the First Amendment is especially important just because it is the *First* Amendment. See Donnis Boggett, Op-Ed., *The First Amendment is First for a Reason*, HAYS FREE PRESS (Kyle, Tex.), July 6, 2011, <http://haysfreepress.com/archives/21177>.

63. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1484 tbls.3 & 4 (2010).

64. *Id.* at 1455.

65. *Id.* at 1484 tbl.3.

itself as a form of legality, and thus the willingness to accord *stare decisis* effect to previous opinions as a measure of adherence to legality for its own sake, Morrison's data lend support to the view that legality itself may have little political incidence, a view further supported by the inference we might draw from the almost complete absence of OLC opinions, regardless of the party of the administration, directly challenging the authority of applicable Supreme Court rulings.<sup>66</sup>

Of further note in this regard is an article published by Dawn Johnsen during the time that her ultimately withdrawn nomination to be the Director of the Office of Legal Counsel was pending.<sup>67</sup> Although Johnsen was harsh in her criticisms of what she perceived as Bush administration abuses of its powers, she was clear in her view that, "in many circumstances, Presidents may develop, declare, and act upon distinctive, principled constitutional views that do not track those of the Supreme Court or Congress."<sup>68</sup> She also emphasized that, to her, the actions of Presidents Lincoln, Roosevelt, and Reagan, among others, in contradiction of existing judicial interpretations, were within the proper scope of presidential interpretive authority.<sup>69</sup> Johnsen's views should not necessarily be taken as either definitive or representative, but it is telling that on the basic question of whether a President must accede to a judicial interpretation to a judicial interpretation with which he disagrees—as a question of interpretation and not of obedience to a particular order—she appears to side, in the abstract and without regard to particular applications, with the basic departmentalist position commonly associated with Lincoln, Roosevelt, Meese, and many others.<sup>70</sup>

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66. See *supra* text accompanying note 56.

67. Dawn E. Johnsen, *What's a President To Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395 (2008).

68. *Id.* at 399.

69. *Id.* at 408-09.

70. The most recent OLC "Best Practices for OLC Legal Advice and Written Opinions" Memorandum, dated July 16, 2010, is (presumably intentionally) ambiguous on the point, stating that OLC analysis "should focus on traditional sources of constitutional meaning, including the text of the Constitution, the historical record illuminating the text's meaning, the Constitution's structure and purpose, and judicial and Executive Branch precedents interpreting relevant constitutional provisions." Memorandum from David J. Barron, Acting Assistant Attorney Gen., to Attorneys of the Office (July 16, 2010), <http://www.justice.gov/>

## V

Of course it is important not to ignore matters of degree. And many matters of degree have arisen in the context of the so-called signing statements that Presidents have long used to signal constitutional objections, and thus potential nonenforcement, to bills they will nevertheless sign and thus allow to become law.<sup>71</sup>

Signing statements became widely discussed during the administration of George W. Bush. Some of the initial reaction of outrage from some journalists and political opponents of the President was tempered by the view, coming even from some who disagreed with the President on most policy matters, that such actions—exercises of presidential interpretive independence—were neither unique to this presidency nor necessarily to be condemned as a general method of operation.<sup>72</sup> Indeed, the data indicate that President George H.W. Bush issued 174 signing statements in four years, President Clinton 388 signing statements in eight years, President George W. Bush 163 in eight years, and President Obama eighteen in slightly over two years.<sup>73</sup> These data may of course be highly misleading. They ignore the scope of a signing statement; one signing statement may in fact challenge a larger or smaller number of

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[olc/pdf/olc-legal-advice-opinions.pdf](#).

71. See William Baude, *Signing Unconstitutional Laws*, 86 IND. L.J. 303, 319 (2011); Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 310-11 (2006); Ronald A. Cass & Peter L. Strauss, *The Presidential Signing Statements Controversy*, 16 WM. & MARY BILL RTS. J. 11, 13 (2007) (discussing matters of degree with respect to signing statements). For the view that the President should veto rather than sign with qualifications laws he thinks are unconstitutional, see Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81, 81 (2007); Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 736-37 (1993).

72. See, e.g., Laurence H. Tribe, Editorial, *"Signing Statements" are a Phantom Target*, BOS. GLOBE, Aug. 9, 2006, at A9.

73. See *Presidential Signing Statements: Hoover-Obama*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/signingstatements.php> (last visited Oct. 31, 2011) (select first year of desired presidency; then follow "Display" hyperlink; then add the number of results displayed; aggregate results for each year of presidency for total number of signing statements); see also Neil J. Kinkopf & Peter M. Shane, *Signed Under Protest: A Database of Presidential Signing Statements, 2001-2009 (Version 2.0)* (Ohio State Pub. Law Working Paper No. 141, 2011), available at [http://papers.ssrn.com/so13/papers/cfm?abstract\\_id=1748474](http://papers.ssrn.com/so13/papers/cfm?abstract_id=1748474).

legislative changes. And they ignore the substance of signing statements, and thus ignore the differences between the important and the inconsequential. But they also ignore the effect of the publicity and controversy about signing statements, much of which started in 2006,<sup>74</sup> and thus the figures for the last two years of the George W. Bush administration and for the Obama administration may be lower than they would have been absent the signing statements controversy.<sup>75</sup>

Still, for all of the ambiguities about the data, they do suggest that the very idea of a signing statement, or even using signing statements with considerable frequency, has little political incidence. The most important analysis, however is yet to be done, and that is an analysis examining signing statements, OLC opinions, and related indicia of presidential legal and constitutional opinions (such as, for example, positions taken in Supreme Court litigation by the Solicitor General, and positions taken in other litigation by various executive departments) in order to determine the extent to which administrations were willing to take legal positions contrary to that administration's own policy positions because of the perceived dictates of the law or the Constitution. And even that analysis would need to take account of the base rate of agreement between what the Constitution or the law required and what some administration preferred. If, for example, the Constitution were to be rewritten in 2017 by a Republican-dominated constitutional convention, and then ratified by the requisite number of state legislatures, and if a Democratic President were to be elected in 2020 to take office in January of 2021, we might expect to see a greater degree of willingness to press against that Constitution by that President than we would see with a President who found the substance of the Constitution more congenial.

Thus, the question we should genuinely want to ask is about the extent to which Presidents are willing to subjugate their own policy views to the demands of the law or to the Constitution. We cannot

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74. Robert Pear, *Legal Group Says Bush Undermines Law by Ignoring Select Parts of Bills*, N.Y. TIMES, July 24, 2006, at A12.

75. For a recent update, and some confirmation of the view that the publicity surrounding signing statements has made their use more difficult, see Todd Garvey, *The Obama Administration's Evolving Approach to Signing Statements*, 41 PRESIDENTIAL STUD. Q. 393 (2011).

answer this question, however, unless we can control for the substance of the policy views, the substance of the law, and the substance of the Constitution, as well as numerous other variables, and doing so is a methodologically daunting prospect. Yet were we able to do this, we could then—and only then—actually determine the extent to which the willingness to comply with the law *qua* law, or with the Constitution *qua* Constitution, or with Supreme Court (or other judicial)<sup>76</sup> holdings just because of their source and not because of their content, was something that varied with Presidents or varied with political party. At the very least, however, what we do know may suggest that, when law is appropriately isolated as a factor in presidential decisions, it may turn out that this factor varies less with presidents and less with political alignment than is commonly supposed in much of public and even academic commentary.

## VI

Although much of the previous section has been about the executive department, we can ask the same questions about legislative bodies, and the answers may well produce similar conclusions. Consider, for example, the conclusions reached by Ittai Bar-Siman-Tov in a recent issue of this journal.<sup>77</sup> In examining the extent to which Congress was willing to violate its own internal rules of procedure, and the extent to which presidents were willing to acquiesce in those violations, Bar-Siman-Tov found such willingness

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76. Consider, for example, the practice of nonacquiescence by administrative agencies—the practice by which administrative agencies will refuse to acquiesce in, and thus change their practices on account of, federal appellate court decisions. See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681-83 (1989). Although the agencies that practice nonacquiescence—the Internal Revenue Service, for example—have some degree of political and ideological independence from the administrations in power, that independence is not total. As a result, it might be interesting to examine whether the degree of nonacquiescence varied with administration or with political party. Again, it would be ideal to control for the political makeup of the courts whose judgments are the subjects of acquiescence or nonacquiescence. But even though that would likely be an impossible task, we still might learn something from examining comparative nonacquiescence strategies across time, place, administration, party, and agency.

77. Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 871 (2010).

and acquiescence surprisingly prevalent.<sup>78</sup> But he also found, drawing on the work of Thomas Mann and Norman Ornstein,<sup>79</sup> that “both parties have been increasingly guilty of deviations from lawmaking rules and process abuses when they controlled Congress.”<sup>80</sup>

The question of obedience to law, and more particularly the question of departmentalism, also arises for Congress in the context of congressional willingness (or not) to follow Supreme Court decisions that would render unconstitutional various forms of publicly appealing legislation. Several examples are most prominent. One is Congress’s unhesitating willingness to pass by an overwhelming majority a flag desecration statute almost immediately after the Supreme Court’s decision *Texas v. Johnson*.<sup>81</sup> Only by the most tortured reasoning could that statute be thought distinguishable from the state law invalidated in *Johnson*. Moreover, Congress passed the new law so quickly after that case that the likelihood of a different Supreme Court result because of a change on court personnel, intervening precedents, or simple passage of time was essentially nonexistent. And as virtually everyone, including the members of Congress who voted for the bill, expected, the Supreme Court promptly invalidated the law in *United States v. Eichman*, although there is no indication that any of the members of Congress who voted for a law sure to be found unconstitutional by the Supreme Court suffered any political repercussions on account of their votes.<sup>82</sup>

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78. *Id.*

79. THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 7-9, 100-06, 169-75, 212-16 (2008) (discussing abuses by political parties).

80. Bar-Siman-Tov, *supra* note 77, at 849.

81. 491 U.S. 397, 397 (1989); *see* 18 U.S.C. § 700 (1988).

82. 496 U.S. 310, 310 (1990). Indeed, insofar as official compliance with the law because it is the law is surprisingly low, *see supra* note 6 and accompanying text, the highly likely explanation is that officials, especially elected officials, respond to voter preferences. If legality *qua* legality is not within the array of voter preferences, and there is scant indication that it is, then there is little reason to suspect that it will be within the array of motivations for the actions or votes of elected officials. There is a vast political science and political economy literature on voter motivation and its effect on the behavior of political officials. *See, e.g.*, TIMOTHY BESLEY, *PRINCIPLED AGENTS?: THE POLITICAL ECONOMY OF GOOD GOVERNMENT* 36-38 (2006); John Ferejohn, *Incumbent Performance and Electoral Control*, 50 *PUB. CHOICE* 5, 5-9 (1986); James Snyder & Michael Ting, *Interest Groups and the Electoral Control of*

Another example comes from the law invalidated in *Dickerson v. United States*.<sup>83</sup> The law was essentially a congressional overturning of *Miranda v. Arizona*,<sup>84</sup> and again was predictably overturned by the Supreme Court, with Chief Justice Rehnquist, hardly an admirer of *Miranda*,<sup>85</sup> writing for the 7-2 majority. And still another example, not a surprising one given the limited political power of the child pornographer lobby, comes from the persistent attempts by Congress to press against Supreme Court decisions regarding the unconstitutionality of restrictions on virtual child pornography.<sup>86</sup>

In all of these instances, the laws passed by Congress were ones reacting against what might loosely be called “liberal” Supreme Court opinions. Whether there are examples in reverse—in which more or less liberal congressional majorities were willing to enact laws appealing to their constituencies that were almost certain to be invalidated by the Supreme Court—is far less clear. And if the examples of congressional disregard of Supreme Court precedent turned out to be less politically indiscriminate than other forms of disregard for law or for judicial decisions, this might tell us something about Congress, or about law, or, most likely, about the kinds of Supreme Court opinions that are most likely to enrage the population.

## VII

The examples and data I provide here are preliminary and incomplete. And the hypothesis I suggest—that the inclination to

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*Politicians*, 92 J. PUB. ECON. 482, 482 (2008); Matthew C. Stephenson & Jide O. Nzelibe, *Political Accountability Under Alternative Institutional Regimes*, 22 J. THEORETICAL POL. 139, 139 (2010). But none of this literature even comes close to suggesting that following the law just because it is the law figures significantly in voter motivation, and thus in voter-responsive official motivation.

83. 530 U.S. 428, 431-32 (2000).

84. 384 U.S. 436 (1966).

85. See *Illinois v. Gates*, 462 U.S. 213, 237 (1983) (citing *Miranda*, 384 U.S. at 539 (White, J., dissenting)) (rejecting a rule that would “seriously imped[e] the task of law enforcement”).

86. See generally *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656 (2004); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002). Also relevant is *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), in which the unanimous invalidation of a congressional prohibition on “indecent” telephone conversations, with Justice White writing for the Court, was a good indication of the ex ante likelihood at the time of passage that the law would be upheld.

disobey statutes, rules, regulations, and judicial opinions knows no party and no political orientation—is less important, at least to me, than the question it was designed to address. We exist in a political and rhetorical world in which political opponents are with some frequency accused of being unfaithful to the law, or unfaithful to the rule of law. But if faithfulness to the law is to be understood as a value to which political officials and public figures should aspire—and it is hardly necessarily true that this be so<sup>87</sup>—we need to be able to isolate for analytic purposes the idea of obeying the law just because it is law. And once we have done that, we may discover that the practice of following the law just because it is the law is less common in public political decision making and policymaking than is commonly supposed and is far less rewarded by the electorate and in public political life than is commonly supposed. To the extent that this is true, and thus to the extent that first-order questions of moral and political and policy substance vastly outweigh second-order questions of legality in public and political perception,<sup>88</sup> then

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87. It is important to bear in mind that many great moral tragedies—slavery, Nazism, and apartheid in South Africa, to name just three—have involved obedience and not disobedience to positive law. Sorting out the jurisprudence of these tragedies requires dealing with the issues of legal philosophy that have justifiably put such events at the center of disputes about just what law is, and about how, if at all, law connects with morality. Thus, see, in the context of slavery and the Fugitive Slave Laws, ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); in the context of South Africa, DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* (2d ed. 2010); and in the context of Nazi Germany, JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* (1964); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 630-33 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). And for such issues more generally, and more recently, see JEFFREY BRAND-BALLARD, *LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING* 3-6 (2010); HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE* 23 (1989); W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* ch. 1 (2010). So although we can identify obedience to law as a form of human behavior, it takes further argument to establish that obedience to law is an “unqualified human good.” See Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 561 (1977) (book review).

88. This hypothesis is in some tension with the view that content-independent legitimacy, especially procedural legitimacy, is a significant factor in determining legal compliance. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 19-22 (2d ed. 2006); Tom R. Tyler, *Multiculturalism and the Willingness of Citizens To Defer to Law and to Legal Authorities*, 25 L. & SOC. INQUIRY 983, 996-97 (2000); Tom R. Tyler, *Psychology and the Law*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 711, 711-19 (Keith E. Whittington et al. eds., 2008). Almost all of Tyler’s research, however, is in the context of ordinary citizen compliance with law when such compliance is to the disadvantage of the complier. Little of it deals with compliance with

we should not be surprised to discover that the disinclination to value that which the public does not value exists across the political spectrum. I suspect that not only is the value of legality in its own right more rare than many commentators believe, but also that its presence or absence is roughly equally distributed across political party and across ideology. In this Article I have offered a few facts, a few figures, and a few anecdotes that might support this hypothesis, but testing it more systematically must wait for another occasion.

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laws that the putative complier believes are mistaken, and none of it deals with the question of official compliance.