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Why I Can't Be Like Mike: At Least With Respect to His Overly Broad View of Presidential Power to Act on Independent Constitutional Interpretation

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ARTICLE

WHY I CAN’T BE LIKE MIKE—AT LEAST WITH RESPECT TO HIS OVERLY BROAD VIEW OF PRESIDENTIAL POWER TO ACT ON INDEPENDENT CONSTITUTIONAL INTERPRETATION

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I. INTRODUCTION

In my brief Response (and for various reasons it must be brief) there is no way I can do full justice to Mike Paulsen’s ambitious, thoughtful, and provocative Article1 that (as he documents)2 has literally been decades in the making. Instead, what I hope to do in these pages is to convince readers that (my version of) the “general academic consensus”3 is not necessarily “chicken-hearted[ ]”4 nor “incoherent”5 nor “unprincipled.”6 Whether or not one finds, on balance, my approach to be more attractive than Mike’s is a somewhat different question, but for present purposes I consider it sufficient to describe the contours of my alternative position in a fair amount of detail, identify my key premises, and demonstrate that those premises (and the conclusions I draw from them) are, at a minimum, quite plausible.

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2. Id. at 603 n.2.
3. Id. at 604.
4. Id.
5. Id.
6. Id.
II. WHERE IT’S OK TO BE LIKE MIKE

Let’s start with areas where Mike and I agree. Both of us deny the idea that the Supreme Court is the only institution whose constitutional judgment and interpretation matters. We reject the literal and broad understanding of the Court’s language in *Cooper v. Aaron* stating that it “follows [from *Marbury v. Madison* and the Supremacy Clause of the Constitution] that the interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States [and presumably other actors] ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’”

The *Cooper* approach—literally equating the *U.S. Reports* with the text of the Constitution—“wrongly submerges the meaning of the Constitution itself and improperly elevates the importance of the Justices’ decisions. In other words, “[it] privileges cases over the Constitution—the doctrine over the document.”

Such an approach is refuted by logic, history, and even by *Marbury* itself. It was the Constitution, not the Court’s case law, that “We the People” ratified in the 1780s and later through the amendment process. It is the document that creates the judiciary, not vice versa.

Indeed, the same Constitution that establishes the federal courts and empowers them to hear cases “arising under this Constitution” requires all judges to swear an oath of allegiance not to their past rulings, but to the document itself. If neither the executive nor legislative branch of the federal government may unilaterally change the meaning of the Constitution, neither should the judiciary be able to do so.

If [I] had to identify precedents supporting this view, [I] would point first to John Marshall’s fountainhead 1803 opinion in *Marbury*, [which] makes clear that the entire basis of judicial review is to ensure compliance with the Constitution itself, as opposed to the misinterpretations of the Constitution by any branch of government—whether Congress or the president, or the judiciary itself.

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12. *Id.* This, by the way, also explains why the Court was wrong, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), to insist that there be some “special justification” beyond the wrongness of an earlier Court ruling before the Court will overrule itself.
Mike and I thus fully agree that there is significant room for “constitutio-
nal review”—independent of the judiciary’s constitutional interpreta-
tions—by the president and other institutions of government. So I concur
with Mike that a president has the power (and indeed the duty) to veto bills
passed by Congress that he thinks violate the Constitution, even if the Court
has made clear it would uphold such measures as constitutionally permis-
sible.\textsuperscript{13} Similarly, a president can decline to enforce against private persons
laws enacted (over his veto or by prior Congresses) whose enforcement he
feels would violate the Constitution.\textsuperscript{14} And, again as Mike points out, a
president can use the appointment power to install persons (on the judiciary
or in the executive branch) who have views of the Constitution that diverge
from the Court’s\textsuperscript{15} and issue pardons for persons who were convicted (or
might be convicted) under laws or circumstances he feels violate the Con-
nstitution.\textsuperscript{16} Indeed, I might list some additional powers/duties a president
has in this regard that Mike undoubtedly agrees with but does not mention.
A president can, in deciding whether and how to enforce a law, read Su-
preme Court and other judicial precedent narrowly, unless such a reading
(of Supreme Court precedent) is frivolous. He can ignore a particular circuit
court’s precedent (though not nationwide injunctions) he feels wrongly in-
terprets the Constitution, when deciding how to proceed in other circuits.
He can even ignore circuit precedent in that very circuit if there is a rea-
sonable chance he will prevail on the merits of his own constitutional inter-
pretation in the Supreme Court. He can defy Supreme Court precedent he feels
was constitutionally erroneous if he has a non-frivolous belief that either the
passage of time or a change in membership of the Court would lead to a
different result today. And there are other specific acts of his legitimate
independent constitutional interpretative power that it would become tedi-
ous to enumerate entirely.\textsuperscript{17}

\section*{III. WHERE MIKE GOES TOO FAR}

Here is where Mike and I diverge: I (but not Mike) think that a presi-
dent MAY NOT defy or ignore an injunction or Supreme Court holding
(that reflects the Court’s current willingness to exercise jurisdiction and its
current view on the merits) that expresses the judiciary’s view that a partic-
ular course of affirmative conduct undertaken or contemplated by the presi-
dent that alters the status quo would violate the Constitution. I don’t know
that any president has actually done this—that is, disregarded constitutional
objections by the Court and gone ahead with action that the Court thinks

\begin{itemize}
  \item \textsuperscript{13} Paulsen, \textit{supra} note 1, at 604.
  \item \textsuperscript{14} \textit{Id.}
  \item \textsuperscript{15} \textit{Id.} at 603–604.
  \item \textsuperscript{16} \textit{Id.} at 604.
  \item \textsuperscript{17} Some might involve situations that would never reach the Supreme Court because of,
say, the political question doctrine or other justiciability hurdles.
\end{itemize}
would violate the Constitution—but Mike believes such a course of action would be justified by the president so long as he feels the Court’s constitutional interpretation was wrong.

Why do Mike and I part company here if we both believe the Court’s word is not the same as the Constitution itself? The key distinction I draw is between a determination (by any participating branch, not just the Court) that a proposed course of government action is unconstitutional, versus a determination (again, by any branch) that the proposed course of action is constitutionally permissible and even highly desirable.\(^{18}\) My theory of constitutional review is that any one federal branch’s determination that a proposed course of government action would violate the Constitution should control over any other branch’s determination that the proposed course of action is permissible and even extremely advisable. My theory erects, in essence, a one-branch constitutional veto that gives each participating federal government organ an absolute constitutional negative over changes in the status quo that it feels run afoul of the Constitution.

As I put the point many years ago, the enactment and enforcement of federal policy routinely requires more than one federal governmental body to interpret the Constitution and arrive at a consensus [of constitutional permissibility]. . . . [T]he Constitution generally prefers the status quo if any one of the involved governmental bodies finds the proposed action constitutionally unacceptable. For example, in federal legislation, four bodies—the House, Senate, the executive branch and the federal judiciary—must usually agree that a proposed law is constitutional before it is enacted and effectively applied. In effect, each of the four bodies has a constitutional veto.\(^{19}\)

Mike rejects my kind of approach, acknowledging that it is in some respects “attractive,” on the ground that close inspection reveals that “all legal questions present interests on opposing sides; a ‘stop’ in one direction and a ‘go’ in the other, and there is no intrinsic right assignment of what constitutes ‘stopping’ another branch’s actions as opposed to ordering another branch to engage in action.”\(^{20}\) To illustrate his objection, he offers the following: “Is the holding in \textit{Roe v. Wade} protective of individual rights to reproductive freedom or destructive of individual rights to life?”\(^{21}\) Mike’s invocation of \textit{Roe} is helpful, because it allows me to sharpen my point so that Mike (and readers) may see it more clearly.

\(^{18}\) That’s why Mike and I agree on the outcome of the Sedition Act hypothetical in his essay (which involves a determination by the president that prosecution or punishment would violate people’s rights), but not on Mike’s broader theory.


\(^{20}\) Paulsen, \textit{supra} note 1, at 606 n.7.

\(^{21}\) \textit{Id.}
Assume arguendo that Roe was wrong, and that nothing in the Constitution protects reproductive autonomy. None of that alters the fact that the Roe Court was making clear its view that Texas’s (it could have been the president’s—it doesn’t matter for these purposes) proposed course of action (punishing abortion providers) was constitutionally impermissible, whereas Texas was arguing (only) that its prosecution of abortion providers was constitutionally permissible and highly advisable. It may be true, as Mike suggests, that “all legal questions present interests on opposing sides,” but it is not true that the interests on the opposing sides all take the form of constitutional rights or immunities. And constitutional freedoms and liberties are—in our system—categorically different from government powers. In Roe, for example, so far as I know, Texas was not arguing that if it was not permitted to punish abortion providers, such a situation would itself violate the Constitution. That is, Texas did not maintain that it had a duty under the federal Constitution to punish abortion providers, but rather only that it had governmental authority to do so. In most settings, any federal constitutional obligation to regulate would be hard to find, because almost all powers conferred in the Constitution to the legislative and executive branches do not impose duties to act.

Again, the key distinction is between constitutional impermissibility on the one hand, and permissibility/advisability on the other. When we say someone’s constitutional rights have been or are going to be violated, we mean that the unremedied state of affairs will itself violate the Constitution; by contrast, when the legislature’s efforts to protect individuals’ interests—even important interests—are blocked by a wrong-headed interpretation of the Constitution by the judiciary (or by the president for that matter), no one’s constitutional rights have been violated, at least not in the conventional sense in which we use the term “rights.”

Another example (and one that illustrates the fact that my approach treats courts no better than other branches, at least so far): if the Court finds that race-based affirmative action is literally necessary to accomplish an overriding purpose, and is thus not only constitutionally permissible but highly advisable, but the president (say, in administering federal funds or in the District of Columbia) concludes that race-based affirmative action violates the Fifth Amendment in all instances, he can (and should) fail to enforce an affirmative action policy enacted by Congress and already upheld by the Court. And when he does so, just because one branch (the president) thinks something is constitutionally forbidden that the other branches

22. Id.


24. For example, if a president vetoes a bill because he finds it unconstitutional, and his constitutional interpretation is wrong (i.e., the government in fact does have the authority to enact and enforce the bill), no one’s constitutional rights are even arguably violated as a result.
gress and the Court) think is constitutionally permissible and highly necessary, we don’t say anyone’s constitutional rights are being violated.

Now there may be circumstances (and Mike might think Roe is one of them)\(^{25}\) where one branch feels an affirmative course of action is not just constitutionally permissible and advisable, but \textit{required} by the Constitution itself (such that inaction is itself a violation of people’s constitutional rights), and another branch thinks that the proposed course of action is constitutionally forbidden. For example (and maybe Mike’s invocation of \textit{Dred Scott v. Sandford}\(^{26}\) foreshadows this kind of question), suppose a president thinks that a particular state of affairs in existence constitutes slavery and must be addressed (because unlike almost all the rest of the Constitution, the Thirteenth Amendment lacks a state action requirement and makes the very existence of slavery a violation of constitutional rights). Based on this view, the president embarks on an affirmative course of conduct to eliminate the slavery he perceives. And further suppose that the Court rules that slavery means something different than the president believes and that the president’s proposed course of action would violate the Fifth Amendment rights of affected individuals. In such a situation, then perhaps constitutional push has come to shove, and we \textit{may} need to decide who wins the tie (I will come back to this in a moment). But, and this is a crucial point, Mike’s theory does not limit the president’s power to flout on-point Court holdings to just these extremely rare (and they are super rare because of the state action requirement) circumstances in which the president and the Court, respectively, believe that the other’s preferred state of affairs would itself violate the Constitution; Mike would permit the president to flout even when the president does not believe a course of action is itself constitutionally required, but only constitutionally permissible and desirable as a matter of policy.

Consider, in this regard, the main hypothetical legislation Mike’s Essay introduces—the so-called Sedition Act of 2017.\(^{27}\) Mike and I can agree that even if the Court were to uphold the (patently unconstitutional) convictions under the Act, the president can and should use his constitutional interpretive powers to refrain from carrying out any sentence (let alone the death penalty). For Mike, this is a simple, almost generic, example of independent presidential interpretive power. And for me, it is an example of that power being permissibly exercised \textit{because it is in the direction of avoiding what any one branch (the president) thinks would violate the Constitution}. But, crucially, Mike’s theory—but not mine—would mean that if the Court were to be the hero in our play, and the one to blow the constitutional whistle on the Sedition Act, then the president, if \textit{he} were the wrong-headed

\(^{25}\) Again, the vast majority of situations in which legislatures do not, or are not permitted to, protect existing lives do not violate the Constitution.

\(^{26}\) \textit{See} Paulsen, \textit{supra} note 1, at 606 n.7 (citing \textit{Dred Scott v. Sandford}, 60 U.S. 393 (1857)).

\(^{27}\) \textit{Id.} at 610–613.
one, would be permitted to ignore the Court’s constitutional objections and execute me and Mike (heaven forbid!) so long as the president’s warped and crabbed understandings of the First Amendment and Due Process were consistent with his actions. That is the tough hypothetical that Mike needs to deal with. The one he offers, by contrast (where the Court has the broader reading of permissible federal authority), is answered the same way under both our theories, and thus doesn’t provide an occasion or a reason to choose between them.

As should be pretty clear from the discussion to this point, my theory would, as a general matter, treat the Court and the president equally—insofar as each has a veto over affirmative governmental conduct that it thinks violates the Constitution—but what I have said thus far doesn’t account for the difficult situation adverted to above when one branch thinks a proposed course of action is not just permissible and advisable but constitutionally required, and another branch thinks that such a course is constitutionally forbidden. Happily, as noted, this situation arises very infrequently, and certainly not often enough to question the application of my theory in the large run of cases where we lack this kind of crisp constitutional interpretive conflict.

In instances of a momentous conflict where one branch thinks some action is constitutionally required and the other thinks the action is constitutionally prohibited, perhaps we don’t need a constitutional tiebreaker, and we unleash the president the way Mike contemplates. Again, we’re talking about very rare and limited circumstances in which the president would have to subjectively believe that the state of affairs the Court thinks is constitutionally required is not only not required, but is itself violative of someone’s constitutional (and not just statutory) liberties. For purposes of this brief Response essay, I am content to say that perhaps presidents can legitimately defy Court rulings in such circumstances, subject, of course to Congress’s impeachment powers.

But I should note there may also be a decent argument to be made that in cases like this, the default rule should be to prefer the Supreme Court’s interpretation. To begin with, as Alexander Hamilton and Alex Bickel both pointed out, the Court has fewer weapons in its arsenal than does the president, and thus may be less likely to advance adventurous interpretations that it can’t convince the world are correct. Second, contrary to some of Mike’s arguments, not all aspects of the reasoning in Marbury (if that case be taken of special value) are equally applicable to the president as to the judiciary. Certainly the requirement of an oath of allegiance to the Con-

28. See generally Alexander M. Bickel, The Least Dangerous Branch (1962) (discussing Alexander Hamilton’s arguments in the Federalist Papers concerning the judiciary’s lack of the power of the purse or the sword).

29. Paulsen, supra note 1, at 614–616.
stitution is.30 But when the Court said it is “emphatically” the province of the judiciary to say what the law is, Chief Justice Marshall might have rightly had in mind that courts spend all their time on the interpretation of legal texts, whereas the other branches are part-time legal interpreters. With experience comes expertise.31 In this vein, as my brother Akhil Amar has pointed out, there is a clear intratextual parallel between the language conferring jurisdiction on federal courts in Article III and the precise wording of Article VI making the Constitution the supreme law of the land that might suggest a distinctive role for courts to interpret the Constitution in cases and controversies over which they have jurisdiction.32

It is true, as Mike suggests,33 that giving the Court the power to decide the scope of jurisdiction in controversies before it, and then (in the instance when it finds an action to be constitutionally required) giving it the power to command others to act (in violation of their own sense of the Constitution’s limitations) is dangerous. But so too, maybe more so, is giving the president the power to decide the scope of his affirmative obligations stemming from the Take Care Clause, and then giving him the power to use the coercion of the executive branch (which as a practical matter is much larger than that of the judiciary) to accomplish anything he wants.

IV. COOPER REDUX?

The final question I should address is why, if I am at least potentially open to the notion that we ought to prefer the Court to the president when they think opposing status quos are constitutionally required, we are not back in the realm of Cooper v. Aaron? The answer is that a distinctive role (or even an emphatic province) doesn’t equal an exclusive job that crowds out all others. As Mike and I both point out, many arguments Marbury makes fully justify meaningful interpretive roles for actors other than the Court, and this is especially true when we consider, as we must, that the overall design of the Constitution is one seeking to maximize constitutional liberty from government coercion even when that makes affirmative changes to the regulatory status quo quite difficult and cumbersome.34 As I wrote a while ago:

31. This is why, for example, appellate courts might defer to fact-finding of trial courts, even if social science proves that hearing and seeing testimony live does not help someone discern honesty any better than does reading a cold transcript.
33. Paulsen, supra note 1, at 609–610.
34. Consider how conservative (“little c”) the overall design of the Constitution’s lawmaking procedures are: thirty-five of the five hundred and thirty-six elected federal officials (that is, the president and thirty-four senators) can (by a veto that cannot be overridden) stymie the legislative wishes of the other five hundred and one elected participants in the lawmaking process who seek to change the status quo.
If we were choosing one body to interpret the Constitution and minimize the sum of error costs (i.e. costs of upholding unconstitutional [government action] and costs of striking down constitutionally permissible government action), we might very well choose the institution with the most expertise. But the Constitution is not neutral as between these two types of costs. By setting up successive screens, the Constitution effectively favors the narrowest reading of federal power that any one branch might have. For this reason, absent extraordinary circumstances, each branch must follow its own constitutional interpretation.35

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35. Amar, supra note 19, at 1123 n.65. As I did then, let me repeat the words of Hamilton in Federalist 73 on this point: “The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest. It is far less probable that culpable views of any kind should infect all the parts of the government at the same moment and in relation to the same object than that they should by turns govern and mislead every one of them. . . . The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.” The Federalist No. 73, at 443–444 (Alexander Hamilton) (Clinton Rossiter ed., 1961).