

JUST FOLLOWING ORDERS

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In response to Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565 (2006).

The term “executive review” is a bland phrase for a disturbing concept. The concept maintains that an official may lawfully resist the command of one who is otherwise a lawful superior in the name of a higher law. The oxymoronic ring to this phrase—lawful resistance to lawful authority—hints at a dilemma.

Within the context of an unambiguous hierarchy, we expect bureaucrats and other executives to carry out unambiguous commands given by their superiors. It seems to violate the essence of bureaucratic legality to excuse these officials from their duty to execute the will of their acknowledged superiors through the invocation of gauzy notions of equality, due process, or similarly vague constitutional rhetoric. However, even the most rigidly constrained official must resist commands that flout ordinary notions of decency: the Nuremberg defense of “just following orders” is unacceptable even for the lowliest of enlisted men and women.

“Just following orders” is indeed the essence of the problem: when is just following orders all that justice *allows*?

Our collective obsession with the federal Constitution destroys our capacity to ask whether it is just to follow orders in an interesting way. The three neat federal departments, each with its own Article, vesting clause, and chief (unitary or otherwise), make it easy to choose one or the other horns of the dilemma uncritically, without really contemplating the stakes of the problem.

Starting from federal assumptions, the departmentalist would argue that, in ignoring the statute and instead enforcing the higher law of the Constitution, the Executive *is* just following orders—the orders given by “We the People” in the Constitution.¹ After all, the President must take care that *all* of the laws of the nation are faithfully exe-

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¹ U.S. CONST. pmbl.

cuted—and the Constitution is one of those laws.² Congress does not have authority superior to the President; instead, both are inferior agents of the People. Though supreme within their allegedly distinct spheres of legislation and execution respectively, each is entitled to enforce the Constitution in its own peculiar manner.

The judicial supremacist can be equally breezy about the special duty and province of Article III courts to say what the law is. She would argue that the other two departments must follow judicial precedents when they are available and predict what the Court would do as best as possible when precedents do not exist. As a practical matter, this means that the President should uphold all of those statutes that the Court has upheld or would likely uphold; moreover, when the President is uncertain about what the Court would do, she ought to take the necessary steps to ensure expeditious judicial review, even if it means enforcing criminal statutes against individuals just to make certain that they raise whatever constitutional defenses might be available in a judicial forum.

Norman Williams's first and most important contribution is simply to recognize that, whatever the merits of these two positions as interpretations of the U.S. Constitution, both are hopelessly unpersuasive when applied to state constitutions.³

First, consider departmentalism. In state constitutions, the executive consists of a menagerie of exotic governmental fauna—not just the canonical secretaries of state, comptrollers general, and attorneys general (usually elected), but also those state “constitutional agencies,” such as the boards of regents for state universities, game commissions, alcoholic beverage commissions, state boards of tax equalization, workers' compensation boards, railway commissions, civil service commissions, and civil rights commissions. Professor Williams makes quick and effective work of the notion that all of these entities are automatically entitled to disregard state statutes to enforce their own notions of constitutionality.⁴ There are simply too many of these officers, and chaos would ensue should they ignore the controlling state statute. Do all of these “departments” get to ignore any legislation in

² *Id.* at art. II, § 3.

³ See Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565, 566 (2006) (“[O]ne cannot simply transplant the federal model of executive review to the states.”).

⁴ See *id.* at 614-23 (criticizing the claim that state constitutions give interpretive authority to executive officials such that they are free to engage in executive review in any situation).

the name of the state constitution? And what about counties, cities, townships, and other local governments, many of which are frequently recognized by state constitutions? Do they also have an independent power to construe the constitution? It is inconceivable that these questions could be answered broadly in the affirmative.

Professor Williams makes an equally effective case against judicial supremacy in the construction of state constitutions. He argues that the actual practice of state courts makes judicial supremacy untenable.⁵ If the state courts adopt any doctrine of deference to agency interpretation analogous to *Chevron*,⁶ then they will give executive officials the first opportunity to construe statutes. But the administrative task of statutory construction, of course, ordinarily includes constitutional “savings constructions.”⁷ Thus, judicial supremacy is self-defeating, because the state judiciaries do not wish to rule supreme over the meaning of their constitutions.

The constructive side of Professor Williams’s work is his effort to defend a third method—“the legislative model”—for determining when agencies should just follow orders from the legislature.⁸ On his account, executive review is really just a problem of statutory construction. If the statute creating the agency confers authority on the agency to construe the state constitution, then the agency has the power of executive review. The natural corollary is that, if an agency is created by the state constitution, then the agency’s power of executive review depends on constitutional rather than statutory law.⁹

This legislative model has one great strength—and a matching weakness—as a method for determining agency powers. The strength is that it focuses one’s attention away from nebulous generalities about the essential nature of “executive power” and towards the specific statutes that govern particular institutions. But the weakness of Professor Williams’s theory is that it tries to elude a genuine policy dilemma by invoking legal texts that, in reality, are usually too indeter-

⁵ See *id.* at 599-601 (arguing that courts often accept the role of executive officials in evaluating a statute’s constitutionality).

⁶ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984) (holding that courts must give deference to an administrative agency’s reasonable interpretation of its governing statute).

⁷ See Williams, *supra* note 3, at 600-01 (referring to the role of executive officials in “refusing to perform some task . . . because the statute as read in light of the constitution does not require it”).

⁸ See *id.* at 624-28 (asserting that the degree to which an executive official has a right to refuse to enforce a statute on constitutional grounds should depend on that official’s statutory authority).

⁹ *Id.* at 637-43.

minate to provide any refuge from the dilemma.

The problems with any text-based defense of the legislative model become apparent in Part IV.B of Professor Williams' article in which he describes "Statutory Indicia of the Delegation of Interpretive Authority."¹⁰ Professor Williams does not offer any convincing explanation of his canons. He notes that procedural formality "is a good proxy for such legislative intent" to delegate interpretative authority, citing *United States v. Mead Corp.*¹¹ But *Mead's* emphasis on procedural formality turns out to be controversial. Justice Scalia denounced the idea,¹² and both the U.S. Supreme Court and lower courts have signaled that procedural formality would be neither necessary nor sufficient for *Chevron* deference to apply.¹³ Why import it into state law?

Professor Williams argues that "one would ordinarily expect the legislature to require the type of process in which the official could amass the necessary information and arguments to perform that task [of executive review] in a thorough fashion."¹⁴ But this sentence begs the critical question: what makes "formal" procedures such a laudable way of acquiring information and arguments? It is commonplace to argue that courts "underenforce" constitutional values precisely because formal judicial procedures are so cumbersome that they cannot confirm the sorts of legislative facts that are relevant for constitutional decision making.¹⁵ The whole point of executive review is to correct

¹⁰ *Id.* at 628.

¹¹ *Id.* at 629 (citing *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001)).

¹² *Mead*, 533 U.S. at 250 (Scalia, J., dissenting) ("[I]n an era when federal statutory law administered by federal agencies is pervasive, and when the ambiguities . . . that those statutes contain are innumerable, . . . deference is a recipe for uncertainty, unpredictability, and endless litigation.").

¹³ The Court rejected procedural formality as a necessary condition for *Chevron* deference in *Barnhart v. Walton*, 535 U.S. 212, 221 (2002) ("[T]he fact that the Agency previously reached its interpretation through means less formal than notice and comment rulemaking . . . does not automatically deprive that interpretation of the judicial deference otherwise its due."). See also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1003-05 (2005) (Breyer, J., concurring) (asserting that formal rulemaking authority is "neither a necessary nor a sufficient condition for according *Chevron* deference"); *Davis v. U.S. EPA*, 348 F.3d 772, 779 n.5 (9th Cir. 2003) (citing *Barnhart*, 535 U.S. at 221).

¹⁴ Williams, *supra* note 3, at 629.

¹⁵ See generally KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* 25-26 (2006) (describing how legislative deference may lead to underenforcement in the context of the Equal Protection Clause); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 84-88 (2004) (examining the view that the judiciary has created an "abstruse and legalistic" constitutional doctrine through a "mindnumbing array of formulas, tests, prongs, and tiers" (quoting Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the*

this deficiency, not mimic it. Of course, in a quasi-judicial hearing where individual liberty or property is at stake, formality might be required by constitutional due process. But, as Professor Williams himself notes, official exercise of executive review often does not burden such interests. For instance, it is not obvious how any individual's constitutionally protected liberty interest is burdened by a mayor's decision to issue a letter requiring the county clerk to issue marriage licenses to same-sex couples.¹⁶ In such a context, why should *any* formality whatsoever be required in order to permit executive review?¹⁷

If formal procedures are no measure of whether an executive is a reliable constitutional decision maker, then what about the level of an executive's "discretion"? The difficulty is that defining executive review in terms of executive discretion is circular: if an official enjoys the power of executive review—that is, the power to determine whether a law violates the state constitution—then that official will *pro tanto* enjoy policymaking discretion. The slogan that "ministerial" responsibilities do not confer the power to question the constitutionality of a law,¹⁸ therefore, begs the question: is the statutory duty in question really "ministerial" given that it might be used to enforce a constitutional norm?

Given the inadequacies of these canons, Professor Williams might say a bit more about pure policy: quite simply, what sorts of officials make good constitutional interpreters? Consider two values: democratic accountability and expertise.

One reason why one might trust an official to enforce constitutional norms is that the official is a highly visible public figure who is likely to accurately interpret the norms and beliefs of the state's citizens. As Elena Kagan and David Barron have argued in defending an analogous rule to govern the scope of *Chevron* deference, such a rule is normatively justified to the extent that courts seek to protect public

Doctrine, 114 HARV. L. REV. 26, 46 (2000)); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213-20 (1978) (outlining the phenomenon of judicial underenforcement of constitutional norms).

¹⁶ See, e.g., Letter from Gavin Newsom, Mayor of the City and County of San Francisco, to Nancy Alfaro, San Francisco County Clerk (Feb. 10, 2004), available at http://www.ci.sf.ca.us/site/mayor_page.asp?id=22779.

¹⁷ See Williams, *supra* note 3, at 604 ("Unlike judges, who are expected to perform their task in a neutral, unrushed, unbiased fashion, executive officials are expected to do the public's bidding and to do so sometimes in a quick, energetic fashion.")

¹⁸ See *id.* at 590 (quoting *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 499 (Cal. 2004) (holding that an official cannot disregard a statute that "imposes a ministerial duty" "based on the official's own determination that the statute is unconstitutional"))

accountability rather than fidelity to some nonexistent legislative intent.¹⁹

Second, consider the role of expertise. Constitutional doctrine often requires courts to make complex empirical judgments. For instance, determining whether a high school's curriculum complies with the state constitution's doctrine on educational adequacy requires some knowledge of educational policy and assessment standards.²⁰ It makes sense for courts to rely on state agency experts to implement these sorts of empirically complex constitutional norms. Consider, for instance, how heavily the New Jersey Supreme Court relied on the state Council on Affordable Housing (COAH) to collect the data necessary to implement the Court's *Mount Laurel* doctrine.²¹

Professor Williams mostly ignores these normative considerations of political accountability and expertise, instead focusing on close readings of statutes delegating power to executive officials. To be sure, he gleans some big grains of insight through his careful scrutiny of text. It is helpful to note, for instance, that California county clerks only have statutory authority to conduct an examination into whether the procedural prerequisites of a marriage license have been met—a statutory limit of authority that would seem to preclude a clerk's conducting an “examination” of state constitutional equality norms.²² Sometimes it pays to read the text carefully.

But not always. For instance, Mayor Gavin Newsom, the chief executive of the City and County of San Francisco, derives his authority from the charter of the City and County of San Francisco,²³ which derives its authority from article XI, section 5(a) of the California Constitution. Article XI, section 5(a), in turn, provides that city charters can “provide that the city governed thereunder may make and enforce

¹⁹ See David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 242-43 (“[I]t is only the involvement of [high-level agency] officials in decision making that makes possible the kind of political accountability that *Chevron* viewed as compelling deference.”).

²⁰ See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) (finding the right to an adequate education is fundamental and measuring compliance by whether students achieve certain benchmark skills).

²¹ See *Hills Dev. Co. v. Twp. of Bernards*, 510 A.2d 621, 632-34 (N.J. 1986) (upholding the factfinding role of the COAH in “vindicat[ing] the *Mount Laurel* constitutional obligation” (citing *S. Burlington County N.A.A.C.P. v. Mt. Laurel*, 336 A.2d 713, 724-25 (N.J. 1975) (requiring that municipalities' land use regulations provide a realistic opportunity for low- and moderate-income housing))).

²² Williams, *supra* note 3, at 634-35 (comparing the statutory authority of California county clerks to that of their Oregon counterparts).

²³ CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO, art. III, § 3.100 (1996).

all ordinances and regulations in respect to municipal affairs;” though, “in respect to other matters” the chartered cities “shall be subject to general laws.”²⁴

Why are the mayor’s efforts to enforce constitutional equality in marriage not a “municipal affair”? Oddly, Professor Williams entirely ignores this issue of the mayor’s authority, focusing instead on the statutory authority of county clerks and registrars. Perhaps he avoids the topic because his method of closely reading text will not yield much persuasive insight into the scope of Mayor Newsom’s authority.

It is easy to make a textual case that Mayor Newsom’s authority concerns “municipal affairs.” He is not, after all, trying to write a new law of marriage—a well-established statewide concern generally regarded as beyond municipal power—but instead is simply applying existing constitutional norms to the existing marriage laws. The latter might seem like an ordinary executive responsibility to take care that the laws (all of the laws, including constitutional law) are faithfully executed within city limits. Professor Williams’s argument about the special status of constitutional officers also seems to cut in Mayor Newsom’s favor. According to Professor Williams, state governors normally should have broader powers of executive review because state constitutions confer power on the governor to execute the laws, a power that implicitly includes the power to see that the state constitution is faithfully executed.²⁵ But state constitutions confer broad administrative power on chartered cities as well. Why, then, cannot Mayor Newsom take advantage of his article XI, section 5(a) constitutional grant of power?

Two obvious answers are that (1) Mayor Newsom lacks democratic accountability with the relevant statewide constituency and (2) municipal power over marriage would create conflict-of-law chaos. Mayors represent voters who could be ideological outliers in the state, especially if voters segregate themselves by political preferences. Mayors’ views, therefore, are unlikely to reflect the median state voter’s positions on matters such as same-sex marriage. Moreover, if municipalities adopt radically different views on constitutional equality in marriage, then one would predict conflict-of-law nightmares. Richard Schragger has suggested that these conflicts, generated by differing municipal rules on marital status, would be manageable be-

²⁴ CAL. CONST. art. XI, § 5(a).

²⁵ See Williams, *supra* note 3, at 637-41 (arguing that the “take care clauses” in state constitutions “on their face contemplate some constitutionally based nonenforcement” by state governors).

cause “the state court [would] simply apply the relevant state marital law as it is dictated by domicile.”²⁶ However, the difficulty is not so much coming up with abstract rules, but rather coping with the practical effect of those rules when cross-border mobility increases exponentially. California has 109 chartered cities in close proximity to each other, such that it is frequently easy for the residents of these cities to change their domicile without changing their employer.²⁷ One’s visitation rights should not change every time one’s ex moves to the suburbs.

These are fairly obvious reasons why a court might be reluctant to embrace mayoral enforcement of constitutional equality in marriage. But neither of these practical criteria forms a part of Professor Williams’s analysis. This gap suggests a problem with his theory. An administrative agency’s action could pass Professor Williams’s test for executive review and yet fail the test of common sense.

Suppose, for instance, that the Arkansas Game Commission ignores state statutes that limit duck hunting as a way to vindicate hunters’ Second Amendment right to bear arms. Such executive review seems preposterous because Game Commissioners have no expertise in firearms regulation or civil liberties and enjoy little public visibility sufficient to make them spokespersons for the state’s median voter. Yet such executive review would arguably pass Professor Williams’s legislative model test because the Commissioners are constitutional officers exercising powers that seem to fall within the literal terms of the constitutional text.²⁸ Again, the difficulty is that Professor Williams’s theory ignores the facts about democratic accountability and expertise that most of us would regard as critical.

In short, Professor Williams’s conclusions are sensible, but he does not defend them in terms of the empirical predictions and norms that really ought to decide the question. By focusing on non-federal institutions, Professor Williams has powerfully diverted the discussion of executive review away from the usual discussion of the

²⁶ Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 157 (2005).

²⁷ For a list of the chartered and general law municipalities in California, see League of California Cities, *Facts at a Glance* (2007), <http://www.cacities.org/index.jsp?zone=locc&previewStory=53> (last visited Oct. 11, 2007).

²⁸ Cf. ARK. CONST. amend. 35 (“The control, management, restoration, conservation and regulation of birds, fish, game and wildlife resources of the State . . . [and] the administration of the laws now and/or hereafter pertaining thereto, shall be vested in a Commission to be known as the Arkansas State Game and Fish Commission, to consist of eight members.”).

platonic essence of constitutional interpretation or executive power. He has also reminded us that more can be milked out of statutory language than is at first readily apparent. But even so, much remains unspoken in the text. In that textual gap, the only recourse for a candid decision maker is to determine sound policy. Professor Williams' next article on executive review ought to help make that policy determination.

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