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BOSTON UNIVERSITY

The Executive Power of Constitutional Interpretation

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INTRODUCTION

It is emphatically the province and duty of the President to say what the law is, including the law embodied in the Federal Constitution. In the mid-1980s, a claim of this sort would have been received by the legal intelligentsia with some combination of bemusement and outrage. One would have heard, loudly and often, that it is the special province of the federal *courts* to declare the meaning of the Constitution, and that any attempt to question the judiciary's supreme interpretative role, especially in favor of an interpretative role for the President, was an attack on the rule of law itself.

Indeed, that is precisely what was heard from much of the American legal community in 1986 when then-Attorney General Edwin Meese III suggested in a speech that there might be a relevant difference between the Constitution and the courts' interpretations of the Constitution.[1] Attorney General Meese's claim that the executive department (and Congress) had the power and duty to consider the constitutionality of their actions independently of the views of the courts generated an overwhelmingly, and often ferociously, negative response among commentators.[2] Moreover, when the executive department put the principle of interpretative independence into practice in the 1980s and actually construed the Constitution (and federal statutes) in a fashion that did not conform to prior judicial interpretations, the federal courts joined the chorus of disapproval with a vengeance.[3]

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1. *See* Edwin Meese III, The Law of the Constitution, 61 Tul. L. Rev. 979 (1987) (reprinting Attorney General Meese's speech).

2. *See, e.g.*, Burt Neuborne, The Binding Quality of Supreme Court Precedent, 61 Tul. L. Rev. 991 (1987); Michael Kinsley, Meese's Stink Bomb, Wash. Post, Oct. 29, 1986, at A19; Anthony Lewis, Law or Power?, N.Y. Times, Oct. 27, 1986, at A23; Mr. Meese's Contempt of Court, N.Y. Times, Oct. 26, 1986, at 4-22; Why Give That Speech?, Wash. Post, Oct. 29, 1986, at A18. To be sure, the immediate response was not wholly negative. *See, e.g.*, Sanford Levinson, Could Meese Be Right This Time?, 61 Tul. L. Rev. 1071 (1987).

3. A panel of the Ninth Circuit Court of Appeals ruled that it was bad faith, for purposes of awarding attorney's fees, for the Executive to act upon a constitutional view different from that of the courts. *See* Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1119-26 (9th Cir. 1988), *rev'd and remanded*, 893 F.2d 205 (1989) (en banc). The federal courts' reaction to the longstanding policy of some federal agencies to refuse in some circumstances to follow

More recently, however, the tide has turned, and the 1990s have given rise to a growing and constructive dialogue on the role of the President (and Congress) in the interpretation of the Federal Constitution.[4] It is now widely recognized, at least among those scholars who take such questions seriously, that the debate over institutional interpretative authority has a long and distinguished pedigree that transcends the

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circuit court precedent concerning the meaning of statutes bordered on the hysterical. For a sample, see Joshua I. Schwartz, Nonacquiescence, *Crowell v. Benson*, and Administrative Adjudication, 77 Geo. L.J. 1815, 1821 n.15, 1823 n.23 (1989). And one can only imagine the response that a challenge to judicial supremacy would receive from the Supreme Court Justices who recently wrote or signed onto the following statement:

> Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals.

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 869 (1992). *See* Daniel O. Conkle, Nonoriginalist Constitutional Rights and the Problem of Judicial Finality, 13 Hastings Const. L.Q. 9, 12 (1985) ("[T]he Court does not . . . expect executive or legislative officials to reevaluate for themselves the validity of the Court's constitutional rulings.").

4. *See, e.g.*, Michael J. Perry, What Is the Constitution?, *in* Constitutionalism: Philosophical Foundations (Lawrence A. Alexander ed., forthcoming 1997); Gary Apfel, Whose Constitution Is It Anyway? The Authority of the Judiciary's Interpretation of the Constitution, 46 Rutgers L. Rev. 771 (1994); Steven G. Calabresi, Thayer's Clear Mistake, 88 Nw. U. L. Rev. 269, 272-76 (1993); Frank H. Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905 (1990); Christopher L. Eisgruber, The Most Competent Branches: A Response to Professor Paulsen, 83 Geo. L.J. 347 (1994); David E. Engdahl, John Marshall's "Jeffersonian" Concept of Judicial Review, 42 Duke L.J. 279 (1992) [hereinafter Engdahl, John Marshall's "Jeffersonian" Concept]; David E. Engdahl, What's in a Name: The Constitutionality of Multiple "Supreme" Courts, 66 Ind. L. Rev. 457 (1991); Sanford Levinson, Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics, 83 Geo. L.J. 373 (1994); Christopher N. May, Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative, 21 Hastings Const. L.Q. 865 (1994); John O. McGinnis, Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon, 15 Cardozo L. Rev. 375 (1993); Thomas W. Merrill, Judicial Opinions as Binding Law and as Explanations for Judgments, 15 Cardozo L. Rev. 43 (1993); Geoffrey P. Miller, The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law, 56 Law & Contemp. Probs. 35 (1993); Robert F. Nagel, Name-Calling and the Clear Error Rule, 88 Nw. U. L. Rev. 193 (1993); Michael Stokes Paulsen, The *Merryman* Power and the Dilemma of Autonomous Executive Branch Interpretation, 15 Cardozo L. Rev. 81 (1993) [hereinafter Paulsen, The *Merryman* Power]; Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217 (1994) [hereinafter Paulsen, The Most Dangerous Branch]; Michael Stokes Paulsen, Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber, 83 Geo. L.J. 385 (1994) [hereinafter Paulsen, Reply]; Michel Rosenfeld, Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers, 15 Cardozo L. Rev. 137 (1993); David A. Strauss, Presidential Interpretation of the Constitution, 15 Cardozo L. Rev. 113 (1993); *see also* Michael B. Rappaport, The President's Veto and the Constitution, 87 Nw. U. L. Rev. 735, 738 (1993) (describing some consequences of a presidential power to interpret the Constitution without taking a position on the power's scope).

partisan politics of the moment.[5] Moreover, the structural, historical, and normative case for "departmentalist" constitutional interpretation—for the federal legislative, executive, and judicial departments[6] each having an obligation, in the exercise of its granted powers, to interpret and apply the Constitution—is now familiar. Some version of departmentalism may even reflect the consensus view among serious scholars of the Constitution.[7]

Our goal is to add a textual element to the structural, historical, and normative arguments for and against departmentalism that have been so well developed in prior scholarship.[8] We seek to identify the textual sources of the President's power to interpret the Constitution and of any limits that the Constitution, either directly or by implication, imposes on that power in different contexts.

In Part I, we lay the groundwork for our analysis by examining the constitutional sources of, and limits on, the interpretative power of the federal courts. We show that the general grant of "[t]he judicial Power" in Article III includes a power (and duty) to interpret and apply the Constitution in the course of resolving disputes. Moreover, we find that the best understanding of the constitutional scheme establishes that the courts should, at least generally, interpret the Constitution *independently* of Congress and the President; courts should act without giving legally-binding deference to the prior constitutional decisions of the political departments.[9]

In Part II, we establish that the arguments for independent judicial review also establish a prima facie case for a power of independent presidential review, derived from the constitutional grant to the President of "[t]he executive Power." We then show that, in all but one context, no textual provisions of the Constitution defeat this prima facie case for independent presidential review, and that the President accordingly is not bound by, or legally required to give deference to, the constitutional determinations of Congress or the courts. Of course, the determinations of Congress or the courts may, in many circumstances, be good indicators of the right answer to constitutional questions and may thus be entitled to

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5. *See* The Federalist Society, Who Speaks for the Constitution?: The Debate over Interpretive Authority (1992) (collecting many of the most important historical sources).

6. We follow the dominant practice of the founding generation by referring to the federal legislature, executive, and judiciary as "departments," reserving the term "branches" for the different houses of a multicameral legislature. *See generally* Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1156 n.6 (1992).

7. It is less certain, however, that departmentalism prevails across a wider sample of the legal academy. *See* Miller, supra note 4, at 39 ("Judicial supremacists probably represent the majority view among U.S. legal academics.").

8. Professor Michael Stokes Paulsen in particular deserves credit for elevating the debate to new levels. *See, e.g.*, Paulsen, The Most Dangerous Branch, supra note 4; Paulsen, The *Merryman* Power, supra note 4.

9. This Article largely postpones to another day the related issue of whether courts must or may give deference to the prior constitutional decisions of other courts.

deference by a President who is conscientiously seeking the right answers. But such deference stems only from a contingent judgment, perhaps based on an assessment both of the interpretation and of the interpreter, that a particular Congress or court in a particular circumstance is likely to have correctly interpreted the Constitution. We refer to such deference that is a by-product of an independent search for the right answer as "*epistemological* deference," as opposed to "*legal* deference" that results from the constitutionally-prescribed authoritative status of the prior interpreter.

The one context in which the President must give legal rather than epistemological deference to the views of other actors concerns the enforcement of specific court judgments—the raw determinations of liability or nonliability (as opposed to the explanations for those determinations embodied in judicial opinions) rendered in specific cases. We conclude, as have almost all modern legal commentators who have addressed the subject, that the President is generally obliged to obey and enforce federal court judgments. We further conclude, however, albeit without a great deal of confidence, that there are limited circumstances in which such judgments are not necessarily legally binding on the President. Specifically, the President has the power to refuse to enforce federal court judgments that rest on constitutional errors, or whose execution would entail constitutional violations, but only when the President is *very certain* of the constitutional error or constitutional violation. It is not enough that the President thinks, on balance, that the judgment is erroneous. In other words, the President owes a substantial, although not unlimited, measure of legal deference to the constitutional determinations of federal courts that are expressed in specific, concrete judgments.

In Part III, we comment briefly on the role of departmentalism in the Constitution's scheme of separated and divided powers. Although conflict between the institutions is inevitable in departmentalism, we conclude that such conflict is no greater than that found elsewhere under the system of separation of powers.

We emphasize that our methodology in this Article is explicitly originalist and our task is strictly descriptive rather than prescriptive: we are trying to determine the meaning that the relevant provisions of the Constitution would have had to a fully-informed general public in 1789.[10] We leave for another day the questions whether there are any sound non-originalist arguments for or against any form of presidential (or judicial) review and whether an ideal constitution would prescribe a different allocation of interpretative authority.

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10. For the best available description of originalist methodology, see Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 550-59 (1994).

I. THE FEDERAL COURTS' POWER OF LAW INTERPRETATION

The national government is a government of limited and enumerated powers that must find affirmative constitutional authorization for any action that it takes.[11] Similarly, each constituent institution of the national government is an institution of limited and enumerated powers. The federal legislative, executive, and judicial departments, and all officers thereof, must find express or implied constitutional authorization for all of their actions, and the scope of those authorizations determines the scope of the relevant powers.

Nothing in the Constitution expressly says that the President has the power to interpret and apply the Constitution. By the same token, however, nothing in the Constitution expressly says that the *federal courts*, including the Supreme Court, have the power to interpret and apply the Constitution.[12] It is therefore instructive to examine briefly the constitutional sources of, and limits on, the law-interpreting powers of the federal courts as a prelude to exploring the constitutional sources of, and limits on, the President's power to interpret the laws.[13]

A. The Federal Courts' Power to Interpret the Laws: Sources

The first section of Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[14] Apart from the Appointments Clause, which empowers "the Courts of Law" to appoint inferior federal officers when Congress so permits,[15] this Vesting Clause is the only provision of the Constitution that grants any power to the federal courts.[16] Other provisions of Article III

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11. For some representative statements to this effect from prominent founding-era Federalists, see Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267, 315-18 (1993).

12. *See* Paulsen, The Most Dangerous Branch, supra note 4, at 241.

13. Although we are ultimately concerned with the ability of various actors to act upon their legal interpretations, for ease of exposition we will henceforth speak only of the power to "interpret" the laws rather than of the power to "interpret and apply" the laws.

14. U.S. Const. art. III, § 1.

15. Id. art. II, § 2, cl. 2 ("[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."). We do not address here the scope of this appointment power, and in particular we do not address whether this clause empowers federal courts, when directed by Congress, to appoint nonjudicial inferior officers. *See* Morrison v. Olson, 487 U.S. 654, 675-76 (1988) (suggesting that courts might not be able to appoint nonjudicial officers "if there [were] some 'incongruity' between the functions normally performed by the courts and the performance of their duty to appoint") (quoting *Ex parte* Siebold, 100 U.S. 371, 398 (1879)).

16. The Chief Justice of the Supreme Court is empowered, and obliged, to preside over presidential impeachment trials in the Senate, U.S. Const. art. I, § 3, cl. 6, but this is a power personally vested in the Chief Justice rather than in the federal courts. One might also say that federal judges are empowered to stay in office during good behavior and to receive salaries that are not to be diminished during their time in office, *see* id. art. III, § 1 ("[T]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good

specify *limitations* on the courts' powers by identifying the classes of disputes to which the judicial power extends[17] and by directing the use of certain procedures in criminal trials,[18] but the Article III Vesting Clause is, in all matters except the appointment of inferior officers, the sole constitutional source of the federal judiciary's power to act.[19]

The judicial power is the power to decide cases or controversies in accordance with governing law. As James Wilson put it, "[t]he judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties interested in them."[20] The power to interpret the laws is an incident to this case- or controversy-deciding function; courts must interpret because they must decide.[21] Accordingly, federal courts obviously

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Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."), but it seems odd to describe a tenure provision as a grant of power.

Professor Michael Froomkin has recently sought to argue that the federal courts are empowered to act by § 2 of Article III, which provides that "[t]he judicial Power shall extend to" nine specified categories of disputes. *See* A. Michael Froomkin, The Imperial Presidency's New Vestments, 88 Nw. U. L. Rev. 1346 (1994). This claim is untenable. Section 2 describes the class of disputes to which a pre-existing judicial power extends; both textually and structurally, it is a limitation on the previously-granted judicial power, not a grant of power in itself. Professor Froomkin's argument is decisively rebutted in Steven G. Calabresi, The Vesting Clauses as Power Grants, 88 Nw. U. L. Rev. 1377 (1994).

17. U.S. Const. art. III, § 2, cls. 1-2.

18. *See* id. art. III, § 2, cl. 3 (specifying the venue for criminal trials); id. art. III, § 3 (defining treason and providing that no conviction for treason is permissible "unless on the Testimony of two Witnesses to the overt Act, or on Confession in open Court"). The Bill of Rights adds additional procedural limitations on the conduct of trials, both civil and criminal, *see* id. amend. V (requiring indictment by grand jury in criminal cases, prohibiting double jeopardy, requiring due process of law for deprivations of life, liberty, and property, and requiring compensation for public takings of property); id. amend. VI (guaranteeing in criminal trials rights to jury trial, confrontation, compulsory process, and counsel); id. amend. VII (preserving the right to jury trial in most civil cases), and it limits the power of federal judges to issue warrants, *see* id. amend. IV ("no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"), and to set bail, levy fines, or impose punishment. *See* id. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

19. *See* Calabresi, supra note 16, at 1379-82; Calabresi & Prakash, supra note 10, at 571. The so-called Necessary and Proper Clause, which was known to the founding generation as the Sweeping Clause, *see* Lawson & Granger, supra note 11, at 270, cannot be used to empower the federal judiciary to act. The clause provides that Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. This clause by its terms only authorizes Congress to pass laws that implement or carry into effect powers that are vested by some other provision(s) of the Constitution. If the Constitution did not elsewhere vest powers in the federal judiciary, Congress could not create those powers through the Sweeping Clause.

20. James Wilson, 1 The Works of James Wilson 296 (Robert G. McCloskey ed., 1967).

21. As John Marshall put it, "[t]hose who apply the rule to particular cases, must of

have the power to interpret the laws, but that power emanates from a specific constitutional source (the Article III Vesting Clause) in a specific set of contexts (resolution of cases or controversies within the courts' jurisdictions).

This constitutional power of law interpretation includes the power to interpret and apply the Constitution. The Constitution declares itself to be a source of positive law for state courts,[22] and Chief Justice John Marshall was surely correct to view it as a source of positive law for the federal courts as well.[23] The interesting question concerning judicial review is not *whether* the federal courts have the power to interpret the Constitution (they do), or *when* that power can be exercised (as an incident to the exercise of the case- or controversy-deciding power), but *how* the Constitution permits or requires that power to be exercised.[24] Should courts exercise their own judgment about the meaning of the Constitution, or should they defer to the constitutional views of legislative or executive actors?[25] After all, to say that federal courts have the power, or duty, to interpret the Constitution is not necessarily to say that they have the power to interpret it *independently* of the views of other governmental actors.

B. The Federal Courts' Power to Interpret the Laws: Limits

When government officials other than federal judges act—for example, by enacting legislation—their actions generally constitute an implicit, and sometimes explicit, construction of the Constitution. It is perfectly possible to say that federal courts have the power to interpret the Constitution, but that such interpretation must be guided, or even determinatively guided, by the interpretations of other actors. Indeed, not only is such a view possible, some variant of this view was probably the dominant understanding of the role of the courts in constitutional adjudication until the last century—at least with regard to judicial review of actions of the federal legislative and executive departments. James Bradley Thayer, in his classic 1893 article on judicial review,[26] described (with approval) the federal courts' practice of not rejecting federal legislation as unconstitutional, and thus not rejecting the legislative or executive

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necessity expound and interpret that rule." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

22. *See* U.S. Const. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

23. *See Marbury*, 5 U.S. (1 Cranch) at 177 (stating that the Constitution is "a superior paramount law").

24. One must also be concerned about how the exercise of that power affects other actors, but for the moment we are addressing only the sources of and limits on the interpretative power of the federal courts.

25. We put aside the question whether courts can or should defer to the views of other courts.

26. James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893).

departments' interpretations of the Constitution, unless "those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."[27] Modern scholarship confirms that this was a frequently expressed position during the founding era,[28] and the position survives today in the presumption of constitutionality that is supposed to accompany federal legislative or executive action.[29] Thus, while almost no one has ever maintained that federal courts are in all cases absolutely bound by the constitutional views of the political departments,[30] many people still hold the view that the federal courts' power of constitutional interpretation is *constrained* by the actions of other departments. According to this position, which we refer to as "Thayerian,"[31] the courts' power of constitutional interpretation is independent in the sense of allowing courts to exercise their own judgment about the meaning of the Constitution, but it is not independent in the sense of allowing courts *freely* to substitute their judgments, de novo, for the constitutional judgments of the political departments. Thayerian review is deferential review.

This Thayerian view of the courts' interpretative power is highly controversial. Powerful arguments can be made that the federal courts' judgments about the meaning of the Constitution can and must be independent in the strong sense of being formally unconstrained by the views of other actors.[32] Although the matter is not free from doubt, on balance we regard the arguments for formal judicial interpretative independence to be stronger than the arguments for a Thayerian interpretative posture.

First, one can infer such interpretative independence from what Professor Michael Stokes Paulsen terms the postulate of coordinacy:[33] the fact that all three departments of the national government are equally created by the Constitution, are "coequal in title and rank as representatives of the People,"[34] and all owe allegiance first and foremost to the

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27. Id. at 144.

28. For an excellent survey of relevant materials, see Sylvia Snowiss, Judicial Review and the Law of the Constitution 13-44 (1990).

29. *See* John F. Manning, Not Proved: Some Lingering Questions About Legislative Succession to the Presidency, 48 Stan. L. Rev. 141, 141 n.5 (1995).

30. Of course, under the so-called political question doctrine, there are contexts in which the courts must accept the constitutional judgments of the political departments as conclusive. These contexts, however, are limited, and the doctrine is controversial. *See* Martin H. Redish, The Federal Courts in the Political Order, 111-36 (1991) (questioning the legitimacy of much of the contemporary political question doctrine).

31. For a thoughtful discussion of Thayerian review in the context of one aspect of the judicial review process, see Michael J. Perry, The Constitution in the Courts: Law or Politics?, 86-95 (1994).

32. "Formally unconstrained" is used because even actors with complete interpretative freedom can choose to follow other persuasive views.

33. Paulsen, The Most Dangerous Branch, supra note 4, at 228.

34. Id. at 229. This Article will not rehearse Professor Paulsen's overwhelming theoretical and historical case for the postulate of coordinacy in the context of American

Constitution that empowers them. A natural inference from this postulate is that each department must follow its own judgment as to the meaning of the Constitution. Such an inference, of course, is not inevitable; as Professor Paulsen points out, institutions can be coordinate without being equal in power.[35] Thus, it does not directly follow from the principle of coordinacy that the courts must have the same quality and degree of law-interpreting power as do the political departments. Nonetheless, the power and duty to interpret the Constitution is not expressly granted to any particular department, but is equally derived by inference for each department. Coordinacy, in the context of this shared power of interpretation, most plausibly entails equality and independence.

Second, one of the purposes of a system of divided government is to ensure that government action generally takes place only when distinct actors with distinct roles and functions all agree that the action is permissible. With this understanding, interpretative independence by the judiciary is a necessary component of a system of checks and balances. Only when the Congress, the President, and the courts all agree on an interpretation can the national government lawfully act on the basis of that interpretation[36]—unless, of course, the Constitution specifically commits the decision in question to fewer than all of the departments. On this view, interpretative independence is an integral part of the separation of powers. Of course, this argument for judicial independence, as with the argument from coordinacy, is not conclusive. It is not self-evident that the constitutional scheme of separated powers requires that each department agree to all actions; a system of checks and balances need not be perfectly symmetrical in order to be effective. Nonetheless, a scheme of judicial interpretative independence seems more consistent with principles of divided government than does a scheme of Thayerian deference to the legislature or the President.

Third, and related to the second point, one of the background principles of Anglo-American law, dating back at least to *Dr. Bonham's Case*,[37] is that a person should not be a judge in his own cause. In the context of the American system of separated and enumerated powers, that means that no department should be allowed ultimately to determine the scope of its own powers. If one department's view of its constitutional powers constrains the interpretative powers of other departments, the first department effectively gets to act as the judge—or at least as the trial judge, subject to only limited appellate review—in its own cause. Moreover, the Constitution on a few occasions specifically and expressly makes certain actors the judges of the scope of their powers. Five clauses in the

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constitutionalism. *See* id.

35. *See* id.

36. *See* Calabresi, supra note 4, at 275; Easterbrook, supra note 4, at 927. *But see* Paulsen, The Most Dangerous Branch, supra note 4, at 296 n.271 (suggesting that this view leads to judicial supremacy).

37. 8 Coke's Rep. 107a, 118a (1610).

Constitution grant power to certain actors while specifically giving those actors discretion to determine the proper occasions for exercise of those powers:[38] the states, until 1808, were granted power to import "such Persons [meaning slaves] as any of the States now existing *shall think proper* to admit";[39] Congress is granted power to permit "such inferior Officers, *as they think proper*" to be appointed without Senate confirmation;[40] the President is empowered to recommend to Congress "such Measures *as he shall judge necessary and expedient*"[41] and, when the two houses of Congress cannot agree on a time of adjournment, to adjourn Congress "to such Time *as he shall think proper*";[42] and Congress is given power to propose amendments to the Constitution "whenever two-thirds of both Houses *shall deem it necessary* . . . ."[43] Each of these provisions expressly gives to the entity to which power is granted discretion to determine the circumstances under which those powers should be exercised. Accordingly, when the Constitution wishes to make actors the judge of the extent of their own powers, it does so expressly.[44]

Fourth, one can argue against Thayerian deference on the ground that officials swear an oath to uphold the Constitution, not the views of the Constitution articulated by other actors.[45] Again, this argument is not conclusive, as it presumes that the Constitution does not itself require deference to the views of other actors,[46] but at a minimum it places the burden of proof on opponents of interpretative independence to show that the Constitution affirmatively requires deference.

Fifth, the positive case for Thayerian, deferential review may not be as strong as it seems at first glance. It is true that many, if not most, descriptions of the power of judicial review during the founding era used the language of Thayerian deference, but those statements are not decisive for several reasons. First, individual expressions, especially post-enactment expressions, cannot prevail over clear textual and structural inferences. Second, people did not always practice what they preached. There were

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38. These provisions are discussed in more detail in Lawson & Granger, supra note 11, at 277-78.

39. U.S. Const. art. I, § 9, cl. 1 (emphasis added).

40. Id. art. II, § 2, cl. 2 (emphasis added).

41. Id. art. II, § 3 (emphasis added).

42. Id. (emphasis added).

43. Id. art. V (emphasis added).

44. And, of course, these provisions only give the relevant actors discretion to determine *when* those powers should be exercised. The Constitution does not expressly empower these actors to define the *content* of their powers. Congress, for example, does not have discretion to determine which officers of the United States are "inferior Officers," though it does have discretion to determine which inferior officers shall be appointed without Senate confirmation.

45. *See* Paulsen, The Most Dangerous Branch, supra note 4, at 257-62 (describing how the oath to uphold the Constitution supports "co-equal independent interpretive power for each branch of government.").

46. *See* Strauss, supra note 4, at 121-22 (noting that the Oath Clause argument begs the question because it fails to answer what the Constitution requires).

relatively few occasions for constitutional judicial review in the founding era, but it is hard to describe all of the examples that did take place as Thayerian.[47] One must, of course, discount the views of judicial power expressed in judicial opinions as self-interested expressions—as determinations in the judges' own cause—but they suggest that the consensus in favor of Thayerian review was not universal. Finally, and most importantly, one must distinguish between *legal* arguments for deference and *pragmatic* or *epistemological* arguments for deference. It is one thing to say that, as a matter of sound practice, judges should give a great deal of consideration to the constitutional views of Congress and the President—especially in a context in which the legislative and executive departments are likely to produce right answers to constitutional questions. Such deference is entirely consistent with a regime in which judges independently search for right answers. It is quite another thing, however, to say that judges are constitutionally *bound* to give deference to the constitutional views of the political departments simply by virtue of the political departments' legal status. This latter kind of deference is *legal* rather than *epistemological* because it does not depend on a contingent judgment that the views of the political departments are, in the specific case at issue, likely to reflect the answer that a thorough, fully-informed independent examination of the issue would yield. It is clear that the founding generation expected that judicial review would generally be Thayerian, but it is not at all clear that this expectation was grounded on a legal rule built into the Constitution via "[t]he judicial Power" rather than on the (reasonable) supposition that the considered views of Congress and the President would often warrant epistemological deference.

This critical distinction between *legal* and *epistemological* deference to the views of other departments is actually a bit more complicated than we have thus far suggested. Epistemological deference can often shade into legal deference. A judge's primary obligation is to decide cases in accordance with governing law. The obligation to *apply* governing law carries with it an obligation to use one's best efforts to *determine* the

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47. Chief Justice Marshall's determination in *Marbury* that it was unconstitutional for Congress to permit the Supreme Court to exercise original jurisdiction in cases beyond those enumerated in Article III does not suggest Thayerian deference. *See generally* Akhil Reed Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 482-83 (1989). Nor does the determination by three circuit courts in 1793 that Congress could not require federal courts to decide pension claims subject to executive or legislative revision. *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410-11 n.* (1793); infra notes 229-35 and accompanying text (discussing *Hayburn's Case*). Nor does the 1803 District of Columbia circuit court decision that Congress could not, under Article III, reduce the salary of a justice of the peace for the District of Columbia. *See* United States v. More, 7 U.S. (3 Cranch) 159, 160 n.* (1805) (reprinting the 1803 opinion of the circuit court); Gary Lawson, Territorial Governments and the Limits of Formalism, 78 Cal. L. Rev. 853, 880-85 (1990) (discussing *More*). The judicial determinations in all of these cases were probably correct, but the determinations do not display a Thayerian attitude of deferring to Congress unless a statute is unconstitutional beyond a reasonable doubt.

governing law that one must apply. Judges thus have an interpretative responsibility to try to get the right answer unless they are told by the Constitution that that responsibility belongs to someone else. Suppose, however, that a judge conscientiously determines that some other actor is better suited than is the judge—by skill, knowledge, temperament, or institutional position—to determine the right answer to a problem. In that circumstance, the judge might well have a legal obligation to defer to the other actor's interpretation, at least to the extent of accepting the other actor's interpretation, unless it is very clearly wrong. Thus, seemingly pragmatic arguments about individual or institutional competence to reach correct constitutional interpretations can translate into *legal* arguments because of judges' primary legal obligation to determine correctly the applicable law.[48] But these considerations do not translate into a case for generalized legal deference to the political departments unless one can say, as seems wholly implausible, that actors in the political departments will *always*, simply by virtue of their status, be in a better position than are judges to determine the right answers to constitutional questions. And Thayerian review clearly contemplates this kind of categorical requirement of deference.

Thus, it is doubtful that the federal courts' interpretative power is limited by other provisions of the Constitution, such as the provisions granting power to other constitutional actors. There is a respectable historical and theoretical case for finding such limits and for concluding that judicial review should therefore be Thayerian, but the best interpretation of "[t]he judicial Power" vested in the federal courts yields a power of constitutional interpretation that is at least presumptively legally independent of the constitutional views of the other departments.[49]

II. THE PRESIDENT'S LAW-INTERPRETING POWERS

The President, unlike the federal courts, is granted a variety of different powers by the Constitution. He[50] is given the power to sign or

48. *See* infra notes 157-61 and accompanying text (discussing legal and epistemological deference).

49. We say "presumptively" because it is possible that some but not all exercises of power by other actors constrain the courts' law interpreting powers, or that some exercises of power constrain more than do others. One could imagine, for example, arguing that courts have a freer interpretative hand in the face of congressional interpretations of the postal power, *see* U.S. Const. art. I, § 8, cl. 7 (granting Congress power "[t]o establish Post Offices and Post Roads"), than they do in the face of presidential interpretations of the commander-in-chief power. *See* U.S. Const. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ."). For a development of this idea of differential deference in the context of individual rights, see Perry, supra note 4 (manuscript at 63-78). We believe, however, that the Constitution accommodates these concerns through the principle of epistemological deference rather than through any principle of legal deference.

50. The Constitution refers to the President by a generic male pronoun. We follow this practice without endorsing it.

veto bills,[51] to be commander in chief of the military,[52] to request opinions in writing from department heads,[53] to grant pardons for federal crimes,[54] to make treaties (with the advice and consent of the Senate),[55] to appoint officers of the United States,[56] to make legislative recommendations to Congress,[57] and to convene or adjourn Congress under certain circumstances.[58] He is also charged with the duties, and presumably granted the correlative powers, to give Congress information on the state of the union,[59] to receive ambassadors,[60] and to commission federal officers.[61] In addition, the first sentence of Article II vests the President with "[t]he executive Power,"[62] and the President is elsewhere charged with the duty to "take Care that the Laws be faithfully executed."[63]

Many of these powers require law interpretation and thus indirectly empower the President, in contexts involving the exercise of those powers, to interpret the laws, including the positive law of the Constitution. The President must, for example, interpret laws, including the Constitution, in deciding whether to sign or veto bills; he must interpret the laws, including the Constitution, in determining whether to grant pardons; and he must interpret the laws, including the Constitution, in making legislative recommendations. As with the interpretative power of courts, however, the President's power in these contexts is not a free-standing power of law interpretation, but is instead tied to the exercise of specific granted powers that carry a power of law interpretation as a necessary implication.

One of the President's most important functions is to execute the civil and criminal laws of the United States. This is the context in which the President's powers of law interpretation are perhaps most frequently invoked, and it is the context in which the debate over executive constitutional review—the President's power *vel non* to make and act upon constitutional judgments independently of the constitutional views of other departments—has primarily taken place. Accordingly, we now explore the sources of and limits on the President's power to execute the laws, with particular attention to the scope of and limits on the interpretative authority that accompanies such power.

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51. U.S. Const. art. I, § 7, cls. 2-3.
52. Id. art. II, § 2, cl. 1.
53. Id.
54. Id.
55. Id. art. II, § 2, cl. 2.
56. U.S. Const. art. II, § 2, cls. 2-3. There are three different modes of appointment (appointment with Senate confirmation, appointment without Senate confirmation, and recess appointment), the details of which are not important here.
57. Id. art. II, § 3.
58. Id.
59. Id.
60. Id.
61. U.S. Const. art. II, § 3.
62. Id. art II, § 1, cl. 1.
63. Id. art. II, § 3.

A. *The Vesting Clause as a Source of Power*

As noted above,[64] Sections 2 and 3 of Article II of the Constitution grant to the President a number of specific powers. In addition to those specific powers, however, Section 1 of Article II provides that "[t]he executive Power shall be vested in a President of the United States of America."[65] As with the other grants of power to the President, this clause grants to the President a specific, enumerated power: "[T]he executive Power." The only difference between this power grant and the President's other power grants in Article II (and Article I[66]) is that "the executive Power" is perhaps less well defined than, for example, the power to grant pardons or to make treaties. But while this difference may present some interesting problems of interpretation, it does not affect the status of the Article II Vesting Clause as a grant of power.

Although a number of scholars have denied that the Article II Vesting Clause is a grant of executive power to the President, insisting instead that the clause is merely a titular designation of the office of the presidency and a declaration that there shall be only one holder of that office at any time,[67] the case for construing the Vesting Clause as a grant of the executive power is simply overwhelming. Many of the arguments for construing the Article II Vesting Clause as a grant of power were recently collected and developed by Professor Steve Calabresi.[68] We briefly outline some of those arguments here.

First, the Vesting Clause does not say that "[t]he *office* of the presidency shall be held by a President of the United States of America." Rather, it says that "[t]he executive *Power* shall be vested in a President of the United States of America."[69] It is very hard to read a clause that speaks of vesting power in a particular actor as doing anything other than vesting power in a particular actor.

Second, as Professor Calabresi has pointed out, the plain meaning of the verb "to vest" involves clothing with power or conferring ownership. This conclusion is confirmed by dictionaries from 1755 to the present.[70]

Third, other clauses of the Constitution that use the term "vest" clearly use the term to describe the granting of power. The Sweeping Clause provides that Congress may pass necessary and proper laws for

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64. *See* supra notes 51-63 and accompanying text.

65. U.S. Const. art. II, § 1, cl. 1.

66. Article I grants to the President the power to sign or veto bills. *See* id. art. I, § 7, cls. 2-3.

67. For lists of modern scholars who have taken such a position, see, e.g., Calabresi, supra note 16, at 1377 n.1; Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1243 n.68 (1994).

68. *See* Calabresi, supra note 16, at 1378-1400 (discussing these arguments); *see also* Calabresi & Prakash, supra note 10, at 570-79 (extending these arguments).

69. U.S. Const. art. II, § 1, cl. 1.

70. *See* Calabresi, supra note 16, at 1380-81 (discussing these various sources).

carrying into execution the powers enumerated in Article I, Section 8 "and all other Powers *vested* by this Constitution in the Government of the United States, or in any Department or Officer thereof."[71] The Sweeping Clause clearly contemplates the vesting of power—real governmental power—in various entities; indeed, the Article II Vesting Clause is one of the obvious candidates for a clause that vests power "in the Government of the United States, or in any Department or Officer thereof." Moreover, the Appointments Clause, after generally requiring presidential nomination and Senate confirmation for the appointment of officers of the United States, declares that "Congress may by Law *vest* the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[72] It is impossible to read this clause as doing anything other than permitting Congress to *empower* certain officials to appoint inferior officers without Senate confirmation.

Fourth, and finally, the Vesting Clause of Article III, which is textually and structurally very similar to the Vesting Clause of Article II,[73] is the only constitutional source of the federal judiciary's power to act.[74] Because the Article III Vesting Clause must be read as a grant of power—the judicial power—to the federal courts, the analogous Article II Vesting Clause should similarly be read as a grant of power—the executive power—to the President.[75]

B. The Contours of the Executive Power

It is not clear why so many respected scholars have sought to deny the obvious: that the Constitution vests a particular kind of power—the executive power—in the President.[76] Perhaps they fear that a general executive power is too indefinite and that presidents might seek to expand their powers tyrannically by, for example, claiming the power to seize steel mills or to impound appropriated funds. Even if such fears are warranted,

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71. U.S. Const. art. I, § 8, cl. 18 (emphasis added).

72. Id. art. II, § 2, cl. 2 (emphasis added).

73. For the classic analysis of the relationship between the Vesting Clauses of Article II and Article III, see generally Calabresi & Rhodes, supra note 6.

74. *See* supra notes 14-25 and accompanying text (discussing why Article III is the source of the federal courts' power to interpret the law).

75. By contrast, the Article I Vesting Clause provides that "[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States . . . ." U.S. Const. art. I, § 1 (emphasis added). The phrase "herein granted" means that Congress does not possess general legislative power, but only those specific legislative powers granted elsewhere in the document. By contrast, the vesting clauses of Articles II and III grant to the President and the federal courts, respectively, the general executive and judicial powers.

76. Hamilton's failure in The Federalist to mention the Vesting Clause when discussing the President's powers presents the strongest argument against reading the clause as a power grant. *See* Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 49 (1994) ("[N]ot even Hamilton described the Vesting Clause as an independent source of substantive executive power, though he was generally quite eager to define a strong executive."). For a response to this argument, see Calabresi & Prakash, supra note 10, at 612.

they would not justify reading out of the Constitution a power that is clearly granted (although it perhaps would justify amending the Constitution or discarding it altogether). But such fears are overstated. A *general* power is not necessarily an *unlimited* power. The federal courts, for example, are granted a general judicial power, but that power is confined by its nature to a power to decide cases and controversies within the courts' limited jurisdictions, in accordance with governing law. Similarly, the Article II Vesting Clause grants to the President the executive power, but *only* the executive power.

Nonetheless, it is true that the scope of the executive power is not as well understood as the scope of many other constitutional powers.[77] In the face of the Constitution's careful enumeration of congressional powers, the grant to the President of the executive power seems uncharacteristically vague. As one nineteenth-century scholar put it:

> The most defective part of the Constitution beyond all question, is that which relates to the Executive Department. It is impossible to read [the Constitution], without being struck with the loose and unguarded terms in which the powers and duties of the President are pointed out. So far as the legislature is concerned, the limitations of the Constitution, are, perhaps, as precise and strict as they could safely have been made; but in regard to the Executive, the Convention appears to have studiously selected such loose and general expressions as would enable the President, by implication and construction either to neglect his duties or to enlarge his powers.[78]

There are at least three possible explanations for the Constitution's failure to define more precisely the scope of the executive power. One possible explanation is that the nature of the executive power was so well understood by those who drafted and ratified the document that further explanation was deemed unnecessary, and that it was understood to be limited enough in its nature so that a precise enumeration of all executive functions was not considered important. The very specific enumerations of the legislative powers granted to Congress, by contrast, manifested real concerns about the potentially limitless character of "the legislative power" in its general form and about the tendency of the legislature to encroach on the other departments.[79]

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77. *See* Antonin J. Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 852 (1989).

78. Abel P. Upshur, A Brief Inquiry into the True Nature and Character of Our Federal Government 116-17 (Da Capo 1971) (Petersburg, Edmund & Julian C. Ruffin eds., 1840).

79. As Chancellor Kent stated:

> The power of making laws is the supreme power in a state, and the department in which it resides will naturally have such a preponderance in the political system, and act with such mighty force upon the public mind, that the line of separation between that and the other branches of the government ought to be marked very distinctly, and with the most careful precision.

1 James Kent, Commentaries 207-10 (1826), *reprinted in* 2 The Founders' Constitution 39 (Philip B. Kurland & Ralph Lerner eds., 1987).

Another possible explanation is that the Constitution deliberately left the executive power loosely defined so that it might acquire definition through the representative process in which the people elect or reject candidates for the presidency partly based on their conceptions of the executive power. The people would thus define the executive power over time through their approval or disapproval of certain actions by the executive department.

A third, and perhaps better, explanation for the broad grant of executive power is a combination of the preceding explanations. That is, there could have been consensus in 1789 about the core of the executive power, dissensus about the margins, and a willingness to let posterity determine the ultimate boundaries. Viewed in this light, the executive power is simultaneously murky and precise; certain areas were well defined in 1789 and others awaited, and perhaps still await, the imprimatur of the people.

We need not, and do not here intend to, define the precise contours of "[t]he executive Power" that is granted to the President by Article II's Vesting Clause.[80] Rather, our primary concern is with a power that is part of the indisputable core of the executive power: the power to execute the laws of the United States.

C. The President's Power to Execute the Laws

The executive power includes the power to execute—to carry into effect—the civil and criminal laws of the United States.[81] The point seems obvious, and we will not belabor it.

First, the President is charged by the Constitution to "take Care that the Laws be faithfully executed."[82] This duty plainly requires some presidential power over, and hence responsibility for, the execution of the laws.[83] More fundamentally, the plain meaning of the words in the Article II Vesting Clause, as explicated both in a dictionary contemporary with the drafting of the Constitution and the most recent Oxford English Dictionary, demonstrates the clause to be a grant of power to carry the

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80. The authors, for example, do not completely agree on the best reading of the available materials. Mr. Moore thinks that a respectable historical case can be made for an inherent presidential power of unilateral action to promote the public good in emergency circumstances in which the coordinate departments have failed to act, *cf.* John Locke, Second Treatise on Civil Government §§ 159-60 (1689), *reprinted in* 3 The Founders' Constitution 488 (Philip B. Kurland & Ralph Lerner eds., 1987), while Professor Lawson is dubious. For a good introduction to the debate, and a thoughtful defense of an executive power that extends only minimally beyond the power to execute the laws, see Henry P. Monaghan, The Protective Power of the Presidency, 93 Colum. L. Rev. 1 (1993).

81. *See* Calabresi & Prakash, supra note 10, at 617.

82. U.S. Const. art. II, § 3.

83. One should not, however, draw too many conclusions about presidential power from the Take Care Clause. The clause is consistent both with a direct presidential power of law execution and with a mere presidential power of supervision over other actors who have direct power to execute the laws.

laws into effect.[84] Finally, it was clear to eighteenth-century scholars of government that the executive power included the power to carry the laws into effect.[85]

The executive power includes both the power to carry into effect federal statutes and the power to carry into effect the judgments of the federal courts. This obvious conclusion is supported by powerful linguistic and historical considerations. Samuel Johnson's Dictionary defined "executive" as "having the power to put into act the laws";[86] "law" in turn was defined as "[a] decree, edict, statute, or custom, publickly established as a rule of justice" and as "[j]udicial process";[87] and "decree" includes "[a] determination of a suit, or litigated cause."[88]

The modern *Oxford English Dictionary* confirms Johnson's analysis: it defines "executive" as, inter alia, "the distinctive epithet of that branch of the government which is concerned or charged with carrying out the laws, decrees, and judicial sentences . . . ."[89] Moreover, Alexander Hamilton, writing in *The Federalist*, made clear that the executive power comprises the power to enforce judgments of the courts:

> The executive not only dispenses the honors, but holds the sword of the community. . . . The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to be to have

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84. Samuel Johnson's 1785 Dictionary defined "executive" as follows:

> Executive. *adj.* [from *execute.*]
>
> 1. Having the quality of executing or performing.
>
> 2. Active; not deliberative; not legislative; having the power to put in act the laws.

Samuel Johnson, A Dictionary of the English Language (7th ed. 1785) (italics in original).

The Oxford English Dictionary defines "executive" as follows:

> A. *adj.*
>
> . . .
>
> 3. a. Pertaining to execution; having the function of executing or carrying into practical effect.
>
> . . .
>
> b. *esp.* as the distinctive epithet of that branch of the government which is concerned or charged with carrying out the laws, decrees, and judicial sentences; opposed to 'judicial' and 'legislative'.
>
> . . .
>
> B. *sb.*
>
> 1. a. That branch of the government which is charged with the execution of the laws.
>
> . . .
>
> b. The person or persons in whom the supreme executive magistracy of a country or state is vested. Chiefly U.S., applied to the President (also called *chief executive*), and to the governors of states.

5 The Oxford English Dictionary 522 (2d ed. 1989).

85. *See* Calabresi & Prakash, supra note 10, at 605-11.

86. Johnson, supra note 84.

87. Id.

88. Id.

89. 5 Oxford English Dictionary, supra note 84, at 522.

> neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[90]

D. The President's Power to Interpret the Laws: Sources

Just as the federal courts' power to resolve cases and controversies within their jurisdiction includes the power to interpret the laws, the President's power to execute the laws necessarily includes the power to interpret them. As Judge Easterbrook has written, "[n]o one would take seriously an assertion that the President may not interpret federal law. After all, the President must carry out the law, and faithful execution is the application of law to facts. Before he can implement he must interpret."[91]

This interpretative process has two stages. First, the President must resolve any ambiguities inherent in the law or decision itself. For example, if a federal court ordered that a criminal defendant forfeit one thousand dollars to the United States, the executive department would have to determine whether the court meant (as it almost certainly did) the forfeited money to be United States dollars rather than, for example, Australian dollars.[92] If Congress passes a statute creating a regulatory scheme and delegating to the President authority to implement it, then the President must interpret the statutory framework in deciding how best to carry the law into effect.[93] The process of exercising the executive power often requires interpretation, as neither the legislature nor the judiciary will always provide sufficient specificity to render such interpretation unnecessary.

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90. The Federalist No. 78, at 522-23 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

91. Easterbrook, supra note 4, at 905; *see also* Miller, supra note 4, at 50 ("The proposition that the president's power to execute the law includes a power of interpretation should be universally accepted.").

92. We are indebted to Professor Thomas W. Merrill for this example.

93. The law in question may be so vague that the President's interpretative power shades into the legislative power. Because the President has only the executive power, with its accompanying power of interpretation, the President cannot constitutionally execute a statute that cannot be interpreted. We do not address here how to draw the boundaries between interpretation and legislation. *Compare* Lawson, supra note 67, at 1239 (arguing that Congress cannot delegate legislative functions and must make "whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them") *with* Martin H. Redish, The Constitution as Political Structure 136 (1995) (arguing that valid statutes must evince "some meaningful level of normative political commitment by the enacting legislators, thus enabling the electorate to judge its representatives") *and* David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation 183 (1993) ("[A] person interested in knowing whether the statute prohibits any given conduct will, in most cases, get a clear answer from the statute that states the law, but may well get no answer, for any particular case, from a statute that delegates"). *See generally* Gary Lawson, Who Legislates?, 1995 Pub. Int'l L. Rev. 147 (reviewing Schoenbrod, supra, and discussing the constitutional sources and contours of the nondelegation principle).

It is also possible that a judicial judgment could be so ambiguous that execution of that judgment would require exercise of judicial rather than executive power and would thus raise delegation concerns.

Once the President has interpreted the law that he has the power to enforce or execute, a second interpretative stage emerges: the President must then determine whether the law is consistent with the Constitution. The President, no less than Congress or the courts, operates under the Constitution as supreme positive law. The prima facie case for executive review—for presidential assessment of whether a law is in conflict with the Constitution and should be given effect in a particular case—is precisely coterminous with the case for judicial review.[94] The need to interpret the Constitution as a source of positive law, and to prefer the Constitution to any other source of law with which it may conflict, is as much a part of "[t]he executive Power" vested in the President as it is part of "[t]he judicial Power" vested in the federal courts. The Constitution is law, and the executive power of law interpretation includes the power and duty to interpret the Constitution.

The interesting question concerning presidential review is not *whether* the President has the power to interpret the Constitution (he does), or *when* that power can be exercised (as an incident to the President's enumerated powers, including the executive power), but *how* the Constitution requires or permits that power to be exercised. Is the President bound, or otherwise constrained, by prior legislative or judicial interpretations of the Constitution? In other words, should presidential review be Thayerian or independent?

The prima facie case for independence in presidential interpretations of the Constitution is analogous to the case for independence in judicial interpretations of the Constitution:[95] the executive department is coordinate with the other departments, presidential review is part of a system of checks and balances, the other departments should not be judges in their own causes, and the President takes a constitutionally-prescribed oath to uphold the Constitution.[96] An analysis of the President's interpretative powers, however, proves to be much more complicated than is a similar analysis of the interpretative powers of the federal courts. The President's interpretative powers arise in many more contexts than do the courts' similar powers, and a number of textual and structural features of the Constitution raise questions about limitations on the power of presidential review that do not apply to the analogous power of judicial review. A comprehensive discussion of the President's interpretative powers

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94. *See* Paulsen, The Most Dangerous Branch, supra note 4, at 267 (noting that the President's duty to interpret the law in order to "take care" that the laws be "faithfully executed" under the Constitution obligates him to refuse to enforce a statute he finds contrary to the Constitution as paramount law).

95. *See* supra notes 26-49 and accompanying text (discussing the degree of independence judicial interpretation should involve).

96. *See* U.S. Const. art. II, § 1, cl. 8 (stating that the President must swear or affirm: "'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'").

must therefore consider separately each context in which that power arises and all the possible limitations that the Constitution might place upon that power.

E. The President's Power to Interpret the Laws: Limits

Although the exercise of any of the President's constitutional powers can give rise to the need for constitutional interpretation,[97] there are four presidential powers that most obviously implicate the President's interpretative power: the power to sign or veto proposed legislation, the power to grant pardons for federal crimes, the power to execute federal statutes, and the power to execute federal court judgments. In each of these cases, the President must act *after* one or more of the other departments (and perhaps one or more presidents) has already acted by proposing legislation, passing a statute, and/or issuing a judgment. Accordingly, each of these contexts raises the question whether the President's interpretative powers are constrained by the interpretations of other actors.[98] We consider in each context whether the presumptive case for independent presidential review can be overcome by textual or structural features of the Constitution.

1. Presentment

a. Congressional Determinations

When Congress sends a bill to the President for signature, Congress will ordinarily have determined, at least implicitly, that the bill would be constitutional if it became a law.[99] If the President thinks the bill is unconstitutional, is he nonetheless bound to sign the bill if he determines that Congress believes the bill to be constitutional?

No serious student of the Constitution thinks—or we believe has ever thought—that the President has no power to veto legislation on constitutional grounds. The founding generation wondered whether the

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97. For example, in exercising the commander-in-chief power, the President must determine when and whether he needs congressional authorization for military action; in exercising the recommendation power, the President must insure that his proposals are constitutional; and in exercising the commission power, the President must determine who is an "Officer[] of the United States" to whom a commission must be given.

98. Professor Paulsen, for similar reasons, focuses on these contexts while acknowledging the need for constitutional interpretation in the exercise of other powers. *See* Paulsen, The Most Dangerous Branch, supra note 4, at 263 n.167 (discussing the legal interpretation of laws by the executive branch).

99. This is not inevitable. Congress may be unsure about the constitutionality of its proposed legislation and may want the President's input in a context in which the decision matters. Congress may know that the bill will be unconstitutional if enacted but may be pandering to the uninformed or impassioned will of voters; or Congress may be deliberately testing the President's mettle. Nonetheless, it is a decent working presumption that congressional legislative action constitutes an implicit, and sometimes explicit, judgment of constitutionality.

President could veto bills on *non*constitutional grounds,[100] and modern scholars wonder whether the President *must* veto bills that contain provisions that he deems unconstitutional,[101] but no one argues that the President is *forbidden* from issuing vetoes on constitutional grounds. The real issue is whether the President can exercise *independent* judgment when assessing the constitutionality of proposed legislation, or must he give deference to the previously-expressed views of Congress? The President, of course, may and should defer to Congress if he determines that Congress is more likely than he to have reached the right answer, but is the President *legally obliged* to give weight to Congress's judgment?

Nothing in the Constitution rebuts the prima facie case for independent presidential review in this context. The Presentment Clauses themselves are silent, and the Article I Vesting Clause, the only other provision of the Constitution that seems to be implicated in this context, does not require deference—indeed it requires it considerably less than it requires judicial deference to legislative judgments in the context of judicial review.[102]

Nor can Congress use its power under the Sweeping Clause to require presidential deference by, for example, passing a statute that forbids presidential vetoes on constitutional grounds or that specifies that presidential vetoes may only be issued on constitutional grounds when Congress has made, in Thayer's terms, an error "so clear that it is not open to rational question."[103] It is true that the Sweeping Clause gives Congress power to pass all laws that are "necessary and proper for carrying into Execution" not only its own powers, but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[104] The veto power is clearly a power vested by the Constitution in a federal "Officer," and the hypothetical statutes under discussion are at least arguably laws "for carrying into Execution" that power. Such laws, however, are not "necessary and proper" for that purpose and therefore exceed Congress's granted powers. It is not clear that such laws meet even a minimal standard of necessity,[105] and it

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100. *See* Easterbrook, supra note 4, at 907-08 (tracing the history of presidential vetoes under Presidents Washington, Madison, and Jackson, which leads to an assumption that the veto should be exercised only on constitutional grounds).

101. For a definitive discussion, see Rappaport, supra note 4, at 771-76.

102. There is no historical evidence which suggests that presidents must defer to Congress in a legislative process. However, there is historical evidence suggesting that courts engaged in judicial review should adopt a deferential stance toward legislation. The case for judicial deference to congressional judgments is much stronger than the case for presidential deference to congressional judgments.

103. Thayer, supra note 26, at 144.

104. U.S. Const. art. II, § 8, cl. 18.

105. The word "necessary" in the Sweeping Clause probably means "helpful"—more or less the way that Chief Justice Marshall defined it in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413-20 (1819). *See* Lawson & Granger, supra note 11, at 286-89 (briefly discussing the meaning of "necessary" in the context of the Sweeping Clause). A statute limiting the grounds

is very clear that they do not satisfy the constitutional requirement of propriety. As Professor Lawson and Patty Granger have elsewhere explained at length, a "proper" law under the Sweeping Clause must respect the jurisdictional boundaries set up by the Constitution, including the boundaries among the three departments of the national government.[106] In other words, legislation under the Sweeping Clause must conform to a "proper" understanding of separation of powers. If we have correctly determined here that a power of independent presidential review is, at least presumptively, part of the Constitution's structure of separated powers,[107] congressional legislation under the Sweeping Clause must conform to that structure. Similarly, if we have correctly concluded that there is a presumptive constitutional case for independent judicial review, Congress could not, in the guise of "carrying into Execution" the judicial power vested in the federal courts, *require* the federal courts to give Thayerian deference to congressional judgments about the constitutionality of legislation.[108] The Sweeping Clause is a vehicle for *implementing* the powers allocated by the Constitution; it is not a vehicle for *changing* the constitutional allocation.

b. Judicial Determinations

Accordingly, there is no congressional power that can overcome the presumptive case for independent presidential review of congressional judgments of constitutionality in the context of the veto power. But what about exercises of the judicial power? Suppose that legislation is presented to the President, who must make a judgment about its constitutionality. Suppose further that the Supreme Court has previously passed on the constitutionality of legislation that everyone in the legal community agrees

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on which the President can issue vetoes, some would argue, is hurtful to the exercise of the President's vested power—as contrasted, for example, with laws that appropriate funds for the purchase of veto pens or for the hiring of legal staff to advise the President on proposed legislation.

106. *See* Lawson & Granger, supra note 11.

107. *See* supra notes 95-96 and accompanying text (describing the role of presidential interpretation).

108. Congress can, of course, control (within limits) the jurisdiction of the federal courts, and can thus control the *occasions* in which the judicial power is exercised, but that is a very different power than the power to control the *manner* in which the judicial power is exercised in cases properly within the courts' jurisdiction. Similarly, because Congress determines whether and when bills will be sent to the President for signature, Congress controls the occasions in which the President's veto power can be exercised, but that does not mean that Congress also has power to control the manner in which the President can exercise that power when the occasion for its exercise arises.

This Article analyzes the limits of Congress's power to regulate the manner in which courts or the President conduct business. The Article does not comment, for example, on such things as congressionally-prescribed quorum requirements for Supreme Court judgments or congressional limitations on judicial remedies. We are grateful to Evan Caminker for these examples of "borderline" congressional regulation of judicial affairs.

is identical in all relevant respects to the bill under consideration, so that by conventional understandings of precedent, the previous decision is squarely on point.[109] May the President—or Congress, in the exercise of its power to propose legislation (or, with a two-thirds majority, to enact it over the President's objections)—nonetheless exercise independent judgment about the legislation's constitutionality?

Although presidents and legislators considering the enactment of legislation have occasionally been criticized for making constitutional judgments that are arguably inconsistent with prior court decisions,[110] there has been little controversy over independent presidential exercises of interpretative power in the legislative process.[111] Nonetheless, there are deep currents in our legal culture that are suspicious of, if not openly hostile to, independent presidential review even in the presentment context. It is well understood that presidents can, and even should, consider the constitutionality of legislation before signing it, but we suspect that the ordinary expectation in much of our legal community is that such constitutional review will consist of a careful study of court decisions on the relevant question—much the same way that courts themselves typically address such questions. In other words, while no one really doubts that Congress and the President, in their legislative capacities, have the power and duty to consider the constitutionality of their actions, "constitutionality" is often taken to mean "consistency with Supreme Court (and perhaps lower federal court) decisions about the Constitution."[112] In particular, we doubt whether the legal community is prepared to swallow whole the idea that, in presidential deliberations about the proper exercise of the presentment power, Supreme Court decisions need not play any larger role than do law review articles or memoranda from staff attorneys in the Justice Department's Office of Legal Counsel.

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109. This annuls the problem of presidential interpretations of precedent—the first step of the two-step process of presidential interpretation. *See* supra notes 91-92 and accompanying text (discussing the "first step" of presidential interpretation). Before one considers the effects of a judicial decision, one needs to know what the decision says.

110. In 1832 Daniel Webster sharply criticized Andrew Jackson's bank bill veto because Jackson did not accept as dispositive Supreme Court decisions upholding Congress's power to charter a national bank, *see* Daniel Webster, Great Speeches and Orations of Daniel Webster 329-31 (Edwin P. Whipple ed., 1879); and in 1985 Daniel Manion, now a judge of the Seventh Circuit Court of Appeals, was attacked during his Senate confirmation hearings for supporting legislation as a state legislator that would have permitted the posting of the Ten Commandments in Indiana schools in a fashion that arguably would have failed the Supreme Court's constitutional test for establishments of religion. *See* Meese, supra note 1, at 987-88 (discussing the attack on Daniel Manion during his Senate confirmation hearing).

111. *See* Easterbrook, supra note 4, at 907 (describing vetoes based on presidential interpretations of the Constitution at variance with prior court interpretations as "uncontroversial"); Paulsen, The *Merryman* Power, supra note 4, at 81 ("It is also widely recognized that the President may veto a bill for any reason or no reason at all, including constitutional reasons previously rejected by the Supreme Court.").

112. *See* Paul Brest, Who Decides?, 58 S. Cal. L. Rev. 661, 670 (1985) ("The belief in judicial exclusivity is so widespread that it is usually assumed rather than argued for.").

Indeed, until very recently, judicial and academic commentary on presidential review largely reflected this expectation that presidential (and presumably congressional) constitutional interpretation would consist primarily of interpretation of court decisions rather than of independent analysis of whether those court decisions represent correct interpretations of the Constitution. The commentators did not, as a rule, specifically deal with the exercise of the presentment power, but rather with presidential refusals to execute statutes or to acquiesce in circuit court interpretations of statutes. As we shall see, these contexts raise concerns about the President's obligations under the Take Care Clause[113] and about the meaning and scope of the finality of judicial judgments that are not implicated by exercises of the presentment power.[114] Nonetheless, many of the arguments against independent presidential review advanced in the nonenforcement or nonacquiescence contexts seem directly pertinent to the question whether presidents may (or must) exercise independent judgment in the exercise of the presentment power. Indeed, precisely because the presentment context involves fewer complications than do other instances of presidential law interpretation, it is a good place to take a first look at the case for judicial supremacy in constitutional interpretation.

The only provision of the Constitution that could conceivably generate a presidential obligation to defer to federal court decisionmaking is the Article III Vesting Clause, which vests "[t]he judicial Power of the United States" in the federal courts.[115] But while the Article III Vesting Clause is strong enough to support a case for independent judicial review in the overall context of the Constitution, it is very hard to see how it can support a case for judicial supremacy in the interpretation of the laws. The judicial power—the power to resolve cases or controversies in accordance with governing law—certainly includes the power of law interpretation, but the powers vested in the President (and Congress) similarly include powers of law interpretation. We are aware of no one who has even attempted to put forth a plausible originalist case for a generalized judicial supremacy in constitutional interpretation.[116] Instead, those who defend judicial supremacy (with anything other than hot air and bluster) have done so on grounds unrelated to the Constitution's original public meaning. We explore here some of the most interesting and sophisticated arguments for

113. *See* U.S. Const. art. II, § 3, cl. 4 (stating that the President "shall take Care that the Laws be faithfully executed").

114. *See* infra notes 211-74 and accompanying text (discussing the Take Care Clause and the finality of judicial judgments).

115. U.S. Const. art. III, § 1, cl. 1. The Sweeping Clause does not help, as Congress can no more order the President to defer to court decisions than it can order the President to defer to congressional decisions. *See* supra notes 102-106 and accompanying text.

116. As we shall see, some people have put forward an originalist case for judicial supremacy in some specific contexts, and we make a modest case for such limited supremacy here. *See* infra notes 242-74 and accompanying text.

judicial supremacy.

Professor Burt Neuborne, for example, has argued for the strong view that "[o]nce article III restrictions are satisfied . . . , the 'law' that is declared by a Supreme Court judicial decision construing the Constitution is not merely a prediction of future judicial conduct, but a binding norm that operates at the level of positive prescription."[117] Under Professor Neuborne's analysis, the President owes an obligation to the Constitution, but the "Constitution" is precisely what the courts construe it to be.[118] Professor Neuborne offers three arguments—which he describes as "functional, jurisprudential, and historical"[119]—in support of this vision of judicial supremacy in the interpretation of the Constitution. None of these arguments are ultimately persuasive, and, more importantly for our purposes, none purport to be based on a sound originalist understanding of the Constitution.

Professor Neuborne's historical argument can be disposed of most quickly. He insists that "courts have repeatedly and explicitly ruled that the government is obliged to comply with settled judicial precedent construing the Constitution or a statute,"[120] invoking in particular the Supreme Court's declaration in *Cooper v. Aaron*[121] that "the federal judiciary is supreme in the exposition of the law of the Constitution"[122] and a raft of recent circuit court decisions advancing the same claim.[123] The argument, of course, clearly begs the question.[124] The pronouncements of the courts can no more settle this question than can the pronouncements of presidents[125]—at least, not unless the judicial supremacist position has

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117. Neuborne, supra note 2, at 998-99; *see also* id. at 993 ("[O]nce the Supreme Court, or a circuit court for that matter, enunciates a settled rule of law, . . . in the context of resolving an article III case or controversy, our system of government obliges executive officials to comply with the law as judicially declared.").

118. Professor Neuborne was writing specifically about presidential enforcement of statutes. It is not at all clear that Professor Neuborne would extend his position to the presentment context, *see* Burt Neuborne, Panel: The Role of the Legislative and Executive Branches in Interpreting the Constitution, 73 Cornell L. Rev. 375, 376-77 (1988), but we think it useful to consider his reasoning in that context.

119. Neuborne, supra note 2, at 994.

120. Id. at 1000.

121. 358 U.S. 1 (1958).

122. Id. at 18; *see also* id. (referring to the Supreme Court's interpretation of the Fourteenth Amendment as "the supreme law of the land" for purposes of the Supremacy Clause).

123. *See* Neuborne, supra note 2, at 1000-01 (discussing the validity of the judiciary's role as the authoritative voice on Constitutional interpretation).

124. The argument has some internal flaws as well. The reasoning of earlier judicial opinions, such as Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), supports a departmentalist approach rather than a judicial supremacist approach, *Cooper* rests on a misstatement of *Marbury*, and modern lower court opinions that reaffirm judicial supremacy rely on *Cooper* and *Cooper's* misreading of *Marbury*. Merrill, supra note 4, at 50-53.

125. For a sample of presidential assertions of independent interpretative authority, see The Federalist Society, supra note 5, at 41-50, 71-73, 77-78, 87-91 (discussing statements by Thomas Jefferson, James Madison, Abraham Lincoln, Ronald Reagan, and George Bush).

already been established by other means.

Professor Neuborne's functional argument is more interesting but sheds no light on the meaning of the Constitution. He complains that permitting each department to act on its own interpretation of the Constitution rather than following one uniform interpretation makes it more difficult for constitutional law to perform its function of guiding behavior[126] and leads to inequality in legal outcomes, because people who have the resources (or good fortune) to pursue their claims through more than one department will have advantages over those who are too poor to challenge initial decisions.[127] These are reasons—although we think wholly unpersuasive ones[128]—for constitution-makers to consider adopting a model of one-department supremacy, but they shed no light on the structure of law interpretation actually contained in the American Constitution.

Professor Neuborne's jurisprudential argument, however, merits serious consideration. Professor Neuborne correctly observes that the constitutional case for departmentalism rests on the idea that the Constitution has an objective, ascertainable meaning that is just as accessible in principle to the President as to a court.[129] But that is not, he argues, a plausible understanding of the Constitution: "[T]here is no such thing as an objectively knowable, 'true' Constitution just waiting to be discovered."[130] Rather, at least in many hard cases,[131] the derivation of constitutional meaning becomes a "complex institutional interplay between an ambiguous text and the institution vested with responsibility to declare

126. Neuborne, supra note 2, at 994-96 (discussing the need for one authoritative voice for interpretation).

127. Id. at 996-97. This argument from inequality is developed at more length in Dan T. Coenen, The Constitutional Case Against Intracircuit Nonacquiescence, 75 Minn. L. Rev. 1339, 1352-55 (1991).

128. If the goal is a uniform interpretation of the Constitution, then the President rather than the courts is the ideal interpreter because the President is a unitary actor. *See* Easterbrook, supra note 4, at 917-18. More fundamentally, however, the possibility of different interpretations by different departments is a strength, not a weakness, of departmentalism, for the same reasons that the division of legislative authority among the state and federal governments, two different federal departments (Congress and the President), and two branches of Congress is a strength, not a weakness, of the constitutional separation of powers. As for the problem of inequality among rich and poor: under a system of pure departmentalism, as under a system of judicial supremacy, all participants in the legal system face the same formal rules for litigating claims. Wealthy litigants certainly have more opportunities to pursue appeals than do less wealthy persons, but that is no more startling or shocking than is the realization that rich people in shopping malls that are formally open to everyone have more opportunities to acquire goods than do poor people.

129. Neuborne, supra note 2, at 997. We say "in principle" because *in practice* some actors may be better situated than others—by knowledge, skill, temperament, or position—to find the answers to certain problems. *See* infra notes 157-61 and accompanying text. But it is implausible to suppose that these contingent factors will, in all contexts and circumstances, point to judges as the interpreters most likely to get the right answer.

130. Neuborne, supra note 2, at 997.

131. *See* Neuborne, supra note 118, at 378-79 (discussing the concept "hard cases").

its meaning."[132] In other words, departmentalism rests on a view in which the correctness of constitutional interpretations is determined by the content of the interpretations rather than by the identity of the interpreters. In Professor Neuborne's view, however, any plausible content-based theory of interpretation will break down in a large number of cases and fail to yield an answer. Because legal systems *require* answers to resolve disputes, one must then look for answers in something other than the content of the interpretation, and that can only be the identity of the interpreter. It is obvious, continues Professor Neuborne, that if we must choose one governmental institution as the authoritative interpreter of the Constitution, that institution should be the federal judiciary, as "[u]nlike the political branches, which are designed to reflect majority sentiment, the judicial branch is insulated from political pressure to permit judges to resolve disputes about the meaning of law in ways that protect the politically weak as well as the strong."[133] Thus, on Professor Neuborne's understanding, an interpretation by the Supreme Court will in many contexts be correct *simply because it is the interpretation of the Supreme Court.* Congress and the President must, of course, interpret the Supreme Court's interpretations, but once one unproblematically understands the Supreme Court's decision, there is no separate question about whether the Court's decision conforms to the Constitution. Accordingly, the President has no power independently to interpret the Constitution in the face of a judicial construction, although he may, on Professor Neuborne's theory, independently interpret the Constitution when the federal courts have not yet spoken on the question at hand.[134]

One might be tempted brusquely to dismiss Professor Neuborne's position as a nihilistic attack on constitutionalism, but that would be a grave mistake. Professor Neuborne has advanced a bona fide theory of constitutional meaning that prescribes a mechanism for identifying right answers to constitutional questions: first, look to the content of the interpretations, and then, if that does not yield an answer, look to the identity of the interpreters. Professor John Harrison, in a panel discussion with Professor Neuborne, aptly summarized the relationship between Professor Neuborne's approach and classical, content-based theories of interpretation:

> As I understand it, his position—which seems to me a different and very interesting form of right answerism—involves a two-stage theory of law. At the first stage, law is relatively clear and definite, but it does not take you all the way to one right answer. Instead, the first step imposes a constraint, it narrows you down from thousands of possible answers to, for example, ten possibilities. The second stage is driven by the need to come up with a right answer, but it is limited by uncertainty and

132. Neuborne, supra note 2, at 999.
133. Id. at 1000.
134. *See* Neuborne, supra note 118, at 375.

> complication: no one of the ten possibilities can be said to be correct just on the basis of its content. So instead of a rule for identifying the right answer based on the content of the answer, at the second stage you have a rule based on the identity of the answerer: what the Supreme Court says is correct by definition. Thus, for Professor Neuborne, the reality of multiple plausible answers combined with the need for one, single rule leads to the conclusion that only one person can have the right answer: from many truths, one view of the truth. My approach, which defines correctness entirely in terms of content and not at all in terms of the identity of the answerer, leads from one truth to multiple permissible views.[135]

Nonetheless, Professor Neuborne's conception of constitutional meaning, while intriguing, does not provide a persuasive argument against departmentalism. Professor Neuborne's argument rests on the claimed indeterminacy (or, rather, underdeterminacy) of content-based theories of constitutional interpretation: he reasons that because (1) any plausible content-based theory of interpretation cannot always provide a clear answer to constitutional questions, and because (2) a legal theory must prescribe clear answers to questions about constitutional meaning in order to resolve constitutional cases, then (3) one must look for meaning in the pronouncements of the Supreme Court as an authoritative interpreter. Propositions (1) and (3) are highly debatable, and proposition (2) is clearly false.[136]

The degree to which a content-based theory of interpretation, such as originalism, can generate clear answers to constitutional questions depends on two considerations: how much certainty about constitutional meaning originalism can produce and—although this point is often overlooked—how much certainty is required before an answer can be pronounced "clear." If, for example, the meaning of a constitutional provision in a given context cannot be said to be "clear" unless that meaning has been established beyond a reasonable doubt, then there might indeed be many questions for which even the most rigorously defined and rigorously applied originalism cannot provide a "clear" answer. Given a standard of proof that requires proof of constitutional meaning beyond a reasonable doubt, even a very small amount of *uncertainty* is enough to generate a lot of *indeterminacy*. But if all we mean by a "clear" answer is an answer that is *better* than any available alternative answer, then originalism could easily have a very high degree of *determinacy*

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135. John Harrison et al., Panel: The Role of the Legislative and Executive Branches in Interpreting the Constitution, 73 Cornell L. Rev. 371, 399 (1988).

136. Obviously, a full treatment of the interesting jurisprudential implications of Professor Neuborne's position would require a separate article. Fortunately, one of the authors has already written it. *See* Gary Lawson, Legal Indeterminacy: Its Cause and Cure, 19 Harv. J.L. & Pub. Pol'y 411 (1996). Our aim here is simply to offer enough preliminary considerations to demonstrate that departmentalists need not be threatened by Professor Neuborne's challenge.

even if one is not always *certain* about what the evidence of original meaning shows.[137] Accordingly, even if Professor Neuborne is right that originalism necessarily yields a high degree of *uncertainty* about constitutional meaning (and we are not at all prepared to concede that point),[138] one cannot know whether *uncertainty* translates into *indeterminacy* unless one knows the applicable standard of proof for originalist claims about constitutional meaning. Suffice it to say that it is conceivable that Professor Neuborne is right about the degree of indeterminacy that originalism necessarily produces, but the point is far more complex than he acknowledges.[139]

Assume, however, that originalism generates some or even considerable indeterminacy. It does not follow, as Professor Neuborne's second proposition would have it, that originalism therefore cannot prescribe the outcome of all constitutional cases, because *one does not need determinacy of legal meaning to decide cases.* If one can determinately know how the Constitution allocates the *burden of proof* on questions of constitutional meaning, one can always resolve constitutional cases no matter how much other indeterminacy about constitutional meaning there may be, because whenever there is indeterminacy, the party that has the burden of proof with respect to the indeterminate proposition loses. Professor Lawson has elsewhere explained this point at length and has demonstrated that originalism can indeed yield a determinate allocation of the burden of proof for all questions of constitutional meaning.[140] Accordingly, the need to resolve disputes does not require a legal system to go beyond originalism, even if originalism does not always (or even often) yield determinate answers to questions of constitutional meaning.

Finally, even if one were inclined to look for an authoritative interpreter of the Constitution whenever the search for objective legal meaning breaks down, it is hardly obvious that the federal courts are the

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137. Exactly how high a degree of determinacy could be achieved would depend, inter alia, on the standard of proof that one applies to the determination of whether an answer is better than its competitors. Does it need to be clear beyond a reasonable doubt that one answer is better than its competitors? Is it enough that the best available conclusion is that one answer is the best available conclusion about constitutional meaning, or should we apply some intermediate standard of proof, such as a preponderance-of-the-evidence or a clear-and-convincing-evidence standard?

138. *See, e.g.*, Thomas B. McAffee, Originalism and Indeterminacy, 19 Harv. J.L. & Pub. Pol'y 429, 429 (1996) (arguing that originalism's indeterminacy is often overstated).

139. One of us has devoted a good portion of his professional life to exploring standards of proof for legal claims and the relationship between uncertainty and indeterminacy in the law, and we are not going to do more than raise the issue here. *See generally* Lawson, supra note 136; Gary Lawson, Proving Ownership, 11 Soc. Phil. & Pol'y 139 (1994); Gary Lawson, Proving the Law, 86 Nw. U. L. Rev. 859 (1992).

140. *See* Lawson, supra note 136, at 425-28 (stating that the federal government bears the initial burden of affirmatively showing that it has the enumerated power to act, while challengers of state action or of federal action within the national government's enumerated powers bear the burden of showing that the Constitution affirmatively prohibits the action in question).

logical choice. Professor Neuborne emphasizes the judiciary's relative insulation from political pressure, which permits judges "to resolve disputes about the meaning of law in ways that protect the politically weak as well as the strong."[141] Such insulation might well facilitate a search for an objective legal meaning, but the whole thrust of Professor Neuborne's argument is that we must often search for an authoritative interpreter *because the search for objective legal meaning often breaks down.* On Professor Neuborne's analysis, the cases in which we are interested are not cases that lend themselves to detached, dispassionate, technical legal analysis. They are cases in which "legal meaning" results from the process of interpretation itself, and they call for political-moral judgment. It is not at all clear that insulation from the political process is a virtue in this context. If one believes that political-moral decisionmaking ideally involves detached, dispassionate, technical analysis, then perhaps the judiciary's insulation from political pressure would give it a comparative advantage over other departments. But it is very hard to say with a straight face that political-moral reasoning is *more* detached, dispassionate, and technical, and leads to *more* determinacy than, originalist constitutional interpretation.

A different, and more nuanced, case for judicial supremacy is offered by Professor David Strauss. Professor Strauss, in a complex and subtle argument, suggests that the President should *presumptively* treat Supreme Court precedents in essentially the same fashion as does the Supreme Court itself: precedents can be rejected, but only for very good reasons that usually go beyond the perceived incorrectness of the original decision.[142] Because there are important and complex institutional differences between the courts and the presidency, Professor Strauss argues that one cannot maintain a precise equivalence between the President's and the Court's treatment of Court precedents.[143] But in a wide range of circumstances, Professor Strauss would maintain that the President's interpretative authority is constrained, often severely, by the Supreme Court's constitutional interpretations.

Professor Strauss's position might best be described as moderate departmentalism: in his view, even when the President's interpretative power is constrained by court decisions, the constraint is not absolute; it extends only as far as the constraints of precedent ever go.[144] In order to reach this conclusion, however, Professor Strauss must reject a strong form of departmentalism in which the President's interpretative authority is

141. Neuborne, supra note 2, at 1000.

142. Strauss, supra note 4, at 127-28.

143. Id. at 127-34.

144. Id. An interesting question under Professor Strauss's analysis is whether the constraints of precedent are determined by the actual practice of the Supreme Court or by some external theory of precedent. If, for example, the Court were to follow a practice of absolutely abiding by precedent in all circumstances, would Professor Strauss maintain that the President is bound to follow the same practice rather than the more flexible approach to precedent that has thus far characterized American constitutional law?

presumptively (or conclusively) independent of court decisions. His case against a strong form of departmentalism is essentially coherentist: full-blown departmentalism entails certain consequences that most departmentalists do not accept.[145] Professor Strauss, however, misjudges both departmentalism and many departmentalists.

First, Professor Strauss insists that executive interpretative autonomy is inconsistent with the law of qualified immunity, under which executive officials are liable in damages for violation of "clearly established" constitutional rights, where "clearly established" is determined by reference to court decisions.[146] According to Professor Strauss, consistent departmentalists must object to this aspect of qualified immunity doctrine, and none have done so. As Tom Merrill has pointed out, however, the fact that *courts* regard judicial decisions as the touchstone of "clearly established law" says nothing about whether executive officials have a legal (rather than practical) obligation to go along with them.[147] In any event, to the extent that official immunity doctrine reflects a claim of judicial supremacy, we are confident that all departmentalists would object to the judiciary's arrogation of interpretative power in this context as much as in any other context.

Second, Professor Strauss points out that virtually all insist that the President has a binding legal obligation to enforce court judgments rendered in specific cases.[148] This insistence seems to be inconsistent with the claim of executive interpretative autonomy, and no departmentalist has yet explained why court *judgments* are different from court *precedents* with anything more powerful than the mere assertion that "[t]he judicial Power" must be read to bind the executive to enforce judgments.[149] In order to be consistent, says Professor Strauss, departmentalists either must accept the view that presidents are not legally bound to enforce court judgments or must explain why judgments in specific cases are constitutionally different from all other legal entities in this respect. Professor Strauss's two main points are correct: a prima facie case for executive interpretative autonomy does extend to court judgments in specific cases, and no departmentalist has yet carefully explored the meaning of "[t]he judicial Power" to see if the prima facie case for executive autonomy can be rebutted in the context of enforcement of judgments. One of our goals in this Article is to examine these issues in some depth and to provide a sound originalist case for treating court judgments differently than other legal entities.

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145. Id. at 120-27.

146. Id. at 123.

147. Merrill, supra note 4, at 72 n.131.

148. Strauss, supra note 4, at 123-25. Professor Strauss notes that, among departmentalists, Professor Michael Stokes Paulsen presents a notable exception of a departmentalist who does not believe that the President is legally bound to enforce court judgments in specific cases. Id.

149. *See* id. at 124 (discussing the idea that the executive as a coordinate branch, should have symmetrical power to deny enforcement of a judicial decision).

Third, Professor Strauss argues that full executive autonomy is inconsistent with the widely-accepted practice of having courts on some occasions defer to the President and Congress on legal issues—for example, on matters pertaining to military or foreign affairs. If the President is always free to ignore the courts, why aren't the courts always free to ignore the President (and Congress)?[150] The departmentalist answer is that, unless the Constitution commits interpretative discretion to another actor,[151] the courts *are* formally free to exercise independent judgment. Such independent judgment can, of course, lead to the conclusion that the President is in a better position than the judge to reach the right answer. In this case, the judge who is conscientiously searching for the right answer should defer to the President's views. A judge, however, has an obligation to defer to the constitutional views of other actors if, but only if, those other actors are more likely than the judge to discover the correct answer. In our now-familiar lingo, presidential expertise on some matters may call for *epistemological* deference by courts but not necessarily for *legal* deference. Similarly, the President is epistemologically obliged to defer to a court decision if the court's answer is more likely to be correct than the President's answer—not because there is a generalized legal obligation to defer to courts, but because in some circumstances a court decision, like a staff memorandum, a law review article, or a political tract written by Publius in 1787, can be good evidence of the true meaning of the Constitution.

Finally, Professor Strauss insists that departmentalists cannot explain "why the courts themselves should follow precedent."[152] If the President should not defer to court decisions, but instead should unconditionally search for the true meaning of the Constitution, shouldn't courts do the same? Yet, says Professor Strauss, "no one, so far as I know, has ever said that the Court has no obligation of any kind to follow precedent."[153] Shortly after Professor Strauss made this statement, one of us argued (without knowing of Professor Strauss's claim) on the basis of the same considerations that give rise to departmentalism that, in constitutional cases, the federal courts' practice of following the precedents of courts at the same level of the judicial hierarchy is constitutionally suspect.[154] At least one prominent departmentalist agrees with this position.[155] Although that earlier argument was preliminary and needs to be refined

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150. *See* Strauss, supra note 4, at 126-27.

151. *See* supra notes 64-74 and accompanying text (discussing clauses that arguably confer such discretion on other actors).

152. Strauss, supra note 4, at 127.

153. Id.

154. Gary Lawson, The Constitutional Case Against Precedent, 17 Harv. J.L. & Pub. Pol'y 23, 24-25 (1994).

155. *See* Paulsen, The Most Dangerous Branch, supra note 4, at 319 n.349 (arguing that judges should prefer their own interpretation of the Constitution rather than rely on bad precedent). Several others have expressed agreement, but not for attribution.

and corrected in some important respects (a few of which are foreshadowed in this Article), we adhere to its principal thesis. If the Supreme Court sincerely believes that one of its past decisions is wrong, after giving due respect to the possibility that prior courts may have been more capable of identifying the true meaning of the Constitution than the current Court, the Court is constitutionally *obliged* to disregard the precedent.[156]

Professor Strauss's coherentist attack on strong departmentalism fails. To the extent that departmentalism has the consequences attributed to it by Professor Strauss, departmentalists should have no trouble accepting those consequences.

Another highly sophisticated, nuanced criticism of strong departmentalism is offered by Professor Chris Eisgruber. Professor Eisgruber agrees with much of the departmentalist critique of judicial interpretative supremacy,[157] but insists that departmentalists often carry their critique too far. Professor Eisgruber endorses a principle of

> *comparative institutional competence*, pursuant to which each institution must interpret the Constitution in order to decide how much deference to give to specific decisions by other institutions. Under this middle principle, no institution deserves the blind deference of other branches, and no institution enjoys unqualified supremacy with respect to all controversies, but, nevertheless, each institution will sometimes owe a constitutional duty of deference to the decisions (including *erroneous* decisions) of another branch. The principle of comparative institutional competence will permit us to justify much, though not all, of the respect conventionally paid to judicial supremacy.[158]

On the surface, Professor Eisgruber's approach seems similar to the epistemological argument for deference advanced at various points in this Article. We have argued that actors who have an obligation independently to determine the right answer to constitutional questions will sometimes have an obligation to defer to the decisions of others when those others are more likely than is the actor to have found the right answer. There may be times, in other words, when the fact that a particular person or institution has reached a conclusion is powerful evidence, and perhaps even the best available evidence, that the conclusion is correct. Our epistemological principle of deference differs from Professor Eisgruber's principle of institutional competence, however, in that Professor Eisgruber is prepared to make a categorical judgment that, across a wide range of constitutional questions, the federal judiciary is per se better suited to the interpretative task than is the President or Congress.[159] Professor

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156. We must leave for a later work such questions as how the distinction between legal and epistemological deference plays out in the context of precedent and whether the lower federal courts have different obligations with respect to Supreme Court decisions than does the Supreme Court itself.

157. *See* Eisgruber, supra note 4, at 348.

158. Id. For a similar approach, see Conkle, supra note 3, at 15-16.

159. *See* Eisgruber, supra note 4, at 351-52 (arguing that trust in the judiciary to discern

Eisgruber derives from this judgment about competence a *constitutional* rule allocating interpretative supremacy in the general run of cases to the judiciary.[160] As he puts it, "[e]ach branch must interpret the Constitution for itself (and so too must every citizen), but sometimes the best interpretation of the Constitution will produce a bright-line rule requiring respect for even erroneous decisions by other constitutional actors."[161] We do not agree that the Constitution yields a bright-line rule on deference. If the Constitution is truly supreme law, the only justification for deference (where the Constitution does not directly command it) is that some actor or institution is more likely to have reached the right answer. This is necessarily a contingent inquiry, dependent not only upon an actor's institutional role (although that can certainly be one important factor), but also upon that actor's skill, knowledge, good faith, and commitment to an interpretative methodology that is well suited to reaching right answers. All judges—or presidents or congresses—are not equally capable or reliable interpreters.

Thus, the President may freely veto legislation based on constitutional understandings that contradict understandings implicit in prior court judgments. As a practical matter, of course, those prior judicial understandings may provide good information about how courts will rule in the future, but those understandings do not *legally* constrain the President's ability to sign or veto bills or Congress's ability to propose or enact legislation over the President's veto.

2. *Pardons*

In discussions of presidential law interpretation, the granting of pardons tends to be lumped together with the issuing of vetoes: everyone seems to agree that, at least in these areas, the President is free (and perhaps obliged) to interpret the Constitution independently of the views of the other departments.[162] But pardons and vetoes present very different issues in analysis. When the President considers granting a pardon, there will ordinarily be a prior conviction under a federal criminal statute. This means that Congress (with or without the President) must have enacted the statute, the presidential power enforced the statute in a prosecution, and the courts upheld the conviction, perhaps after direct

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the law in other contexts justifies trust in the judiciary's constitutional interpretations given judges' training and experience). Professor Paulsen has also noted and taken issue with this feature of Professor Eisgruber's argument. *See* Paulsen, Reply, supra note 4, at 390-91 (arguing that the Constitution does not enumerate the task of legal interpretation on a particular branch and requires legal interpretation to be exercised by all three branches as "incidental to their designated powers.").

160. This allocation has important exceptions, which Professor Eisgruber discusses at length. *See* Eisgruber, supra note 4, at 355-62.

161. Id. at 371.

162. *See* Easterbrook, supra note 4, at 907-09; Paulsen, The Most Dangerous Branch, supra note 4, at 264-65.

constitutional challenges. Accordingly, a pardon on constitutional grounds challenges either the constitutionality of a *statute* and not merely a bill, the constitutionality of the procedure used to secure a conviction, or both. In the first case, the President is challenging a definitive exercise of the legislative power, and in the second and third cases the President is at least potentially challenging a judicial interpretation *embodied in a specific judgment.* For the President to disagree with the courts following a criminal conviction is not merely to disagree with the extension of an arguably-applicable judicial precedent; it is to disagree with a final judicial judgment in a specific case.[163]

Nonetheless, the peculiar context of the pardon power clearly generates a rule of independent review. While there are many serious legal questions that can arise concerning the *scope* of the pardon power,[164] the history and nature of the pardon power support the universal judgment that there are no legal constraints on the *grounds for exercise* of the power. Accordingly, even if there was a general constitutional principle of judicial supremacy, the pardon power would constitute an exception to that principle.

3. Execution of Statutes

Most of the controversy concerning presidential constitutional interpretation has arisen in the context of presidential nonenforcement of statutes. Suppose that the President determines that a statute is unconstitutional, even though Congress, the courts, and prior presidents (or even the same president at a prior time) all determined that it was constitutional. Must the President refuse to enforce that statute? Modern departmentalists have uniformly answered "Yes," and they are right. Moreover, although it is an arguable question, such presidential review should be independent rather than Thayerian, as it must be in the context of the presentment and pardon powers. In order to reach those conclusions, however, one must work through the effects of two provisions of the Constitution that do not raise issues about the President's interpretative power in the presentment or pardon context: the presentment power itself and the Take Care Clause.

a. The Presentment Power

The Constitution gives the President a specific role in the legislative process. All bills must be presented to the President before they become law. If the President vetoes the bill, it goes back to the House and Senate for reconsideration, and it becomes a law only if is repassed by a two-thirds

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163. *See* infra notes 223-74 and accompanying text (discussing the constitutional significance of court judgments in specific cases).

164. *See* Edward S. Corwin, The President: Office and Powers 1787-1984, 180-90 (5th ed. 1984); Rappaport, supra note 4, at 776-79.

majority in each house.[165]

i. Vetoes and Suspension

There is a good argument that the veto is the exclusive mechanism through which a President can express his constitutional views of legislation. Through the presentment requirement, the Constitution goes out of its way to specify a method by which the President's interpretation of the Constitution can affect the legislative process. A power of nonenforcement seems to give the President two bites at the apple.

A particular president gets two bites, however, only if he is the president to whom the enacted bill was presented. If a past president signed the bill into law, or if it was enacted over a presidential veto, then nonenforcement is the President's first, not second, constitutional bite at the law. Moreover, even if the same president who is claiming a power of nonenforcement previously consented to the legislation, it is hard to see why the President should not be able to change his mind. As Judge Easterbrook has put it, "[n]o one may consent to violate the Constitution, or bind his successor to do so."[166]

Sophisticated critics of departmentalism, however, focus not on the "two bites" aspect of nonenforcement, but on the formal requirements and history of the veto. They argue that the Constitution reflects a deliberate decision to grant the President only a qualified rather than an absolute veto.[167] If the President vetoes a bill on constitutional grounds, Congress is free to express its disagreement with the President's constitutional judgment by overriding the veto. But if the President "vetoes" a law by refusing to enforce it, Congress has no opportunity to "override" that veto. Accordingly, it would disrupt the careful constitutional balance established by the veto to infer a presidential power to refuse to enforce unconstitutional statutes. This argument is bolstered by the Take Care Clause, which imposes on the President a duty to "take Care that the Laws be faithfully executed." The framers were obviously concerned about the ability of presidents to kill legislation through nonenforcement, and they appear to have flatly prohibited the practice through a constitutional requirement of faithful execution.

Two scholars in particular have made this kind of argument with great care and sophistication. Professor Christopher May canvassed the history of executive nonenforcement from the English monarch's claimed royal prerogative to suspend the laws through the debates over the veto power during the drafting and ratification of the Constitution to assertions of nonenforcement authority by American presidents over the past two

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165. U.S. Const. art. I, § 7, cl. 2.

166. Easterbrook, supra note 4, at 917.

167. *See* May, supra note 4, at 876-81 (providing a historical based analysis on a qualified veto power).

centuries. He convincingly demonstrates that the Constitution should be read against the backdrop of the Glorious Revolution of 1688, in which, inter alia, the royal prerogative of suspension was essentially rejected.[168] Professor May argues that the Take Care Clause can be read as a textual rejection by the framers of the various royal devices for avoiding executive implementation of the laws[169] and that nothing in the history behind the grant of "[t]he executive Power" calls this conclusion into question.[170] Finally, he finds in the debates over the veto, and the rejection of an absolute veto, strong evidence that the framers did not expect the President to be able to suspend laws once they are enacted.[171] He concludes that these sources "all point to one verdict: the Constitution does not give the President a suspending power, not even where the Chief Executive may think that a particular law is unconstitutional."[172]

Erik Dyhrkopp has carried this historical analysis one step further.[173] Based on an examination of the positions taken on executive power by each state delegation at the constitutional convention, Mr. Dyhrkopp concludes that a majority of the states either did or clearly would have rejected a presidential power of suspension.[174] Moreover, he provides a theoretical reason why a suspension power is inconsistent with the Constitution's design. The structure of Congress represents a compromise between the large and small states: the large states are for the most part proportionally represented in the House, while the small states get equal representation in the Senate. Because both the House and Senate must consent to legislation, the small states are assured some measure of protection for their interests. Through the operation of the electoral college, however, the President was expected by the framers to be primarily a representative of the larger states. If the President had a power of suspension, he might be able to disregard those portions of laws that were favorable to small states and thereby "unbundle" legislative compromises forged by the small states through their power in the Senate. A presidential suspension power is therefore inconsistent with the careful compromises between the large and small states that consumed so much of the convention's energy.[175]

Professor May and Mr. Dyhrkopp have perhaps irrefutably demonstrated that there is no good textual, structural, or historical case for

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168. *See* id. at 869-73 (describing the historical circumstances surrounding the English crown during the fourteenth to seventeenth century which vitiated the king's suspending power).

169. Id. at 873-74.

170. Id. at 881-85.

171. Id. at 876-81; *see also* id. at 885-89 (noting the lack of evidence in the debates over the Bill of Rights that indicates any awareness that the President might have a suspension power).

172. May, supra note 4, at 894.

173. Erik F. Dyhrkopp, Executive Nonenforcement and the Philadelphia Convention (June 1990) (manuscript on file with Iowa Law Review).

174. Id. at 22-27, 45-50.

175. Id. at 27-45.

a general presidential power to revise or refuse to enforce enacted laws. The Constitution's text (the Take Care Clause), structure (the presentment process and the bicameral legislature), and history (the Glorious Revolution and the views on executive power expressed during the ratification debates) all point to constraints on the power of the President to suspend the operation of laws with which he disagrees.[176]

As Professor May recognizes, however, the existence *vel non* of a general power of suspension is not the issue.[177] We are not aware of any serious scholar who has argued that the President has complete power to disregard enacted laws—no more than anyone has argued that federal courts, in the exercise of their "judicial Power" to resolve disputes in accordance with governing law, can simply choose to ignore applicable federal statutes with which they disagree. The issue, rather, is whether the President has the power or duty to refuse to give effect to *unconstitutional* laws. As we have seen, the same considerations that give rise to a power of judicial review—a power and obligation to disregard unconstitutional laws in the exercise of the judiciary's constitutional functions—also give rise to a power of presidential review.[178] The existence and structure of the presentment power, alone or in combination with the Take Care Clause, does not overcome the prima facie case for presidential review.

Nor does a power of presidential review render the veto superfluous. A power of nonenforcement of unconstitutional laws and the veto power have different spheres of application and are subject to different constraints.

First, a power of presidential review does not entitle the President to disregard laws simply because he thinks they are bad policy; the power extends only to laws the President deems unconstitutional. The veto, by contrast, can be exercised for any reason at all.

Second, a veto, unless overridden, prevents a bill from becoming a law. A refusal to enforce, however, leaves the statute on the books—just as judicial review is not a power to erase statutes from the United States Code but simply a power to refuse to give them effect in specific cases. Professor May notes and discounts this difference between the veto and a nonenforcement power,[179] but he does not acknowledge its real significance. The potential consequences of a veto of a bill and a refusal to enforce an enacted law are very different. Congress's ability to override a presidential veto is not the only formal mechanism by which Congress can disagree with the President's constitutional judgments. The Constitution grants to Congress another very important, although often overlooked, power: the power of impeachment.

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176. We do not attempt to draw the line between impermissible refusals to enforce and permissible exercises of prosecutorial discretion.

177. *See* May, supra note 4, at 1011 n.32.

178. *See* infra notes 263-68 and accompanying text (summarizing Professor Paulsen's arguments favoring a presidential power of judicial review).

179. *See* May, supra note 4, at 877 n.48.

ii. Nonenforcement and Impeachment

The Constitution takes the impeachment process very seriously. No fewer than six provisions of the Constitution deal with impeachment, and they set out the impeachment process in some detail: the House is given "the sole Power of Impeachment";[180] the Senate is given "the sole Power to try all Impeachments,"[181] which it must exercise under oath;[182] a two-thirds majority of the Senate is required for conviction;[183] the sole consequence of conviction is removal from office and disqualification from holding further offices (although conviction does not preclude prosecution under criminal laws);[184] all civil officers, including the President and Vice President, are subject to removal upon impeachment for and conviction of "Treason, Bribery, or other high Crimes and Misdemeanors";[185] the President's pardon power does not extend to impeachments;[186] the Chief Justice shall preside over impeachment trials in the Senate when the President is tried;[187] and trial by jury does not extend to impeachment.[188] Impeachment is obviously an important part of the structural Constitution.

The President, like other civil officers, can be impeached and removed for "Treason, Bribery, or other high Crimes and Misdemeanors." The Constitution does not define the key phrase "high Crimes and Misdemeanors,"[189] and we do not intend to provide a comprehensive discussion of the phrase's meaning.[190] It is enough for our purposes to establish some broad outlines of the scope of the impeachment power.

The evidence is overwhelming that "high Crimes and Misdemeanors" need not be offenses that are indictable as ordinary crimes. Indeed, we know of no modern scholar of impeachment who believes that impeachment and removal must be predicated on an indictable crime.[191]

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180. U.S. Const. art. I, § 2, cl. 5.
181. Id. art. I, § 3, cl. 6.
182. Id.
183. Id.
184. Id. art. I, § 3, cl. 7.
185. U.S. Const. art. II, § 4.
186. Id. art. II, § 2, cl. 1.
187. Id. art. I, § 3, cl. 6.
188. Id. art. III, § 2, cl. 3.
189. Id. art. II, § 4. The Constitution specifies that "Treason against the United States, shall consist only in levying War against them, or, in adhering to the Enemies, giving them Aid and Comfort." Id. art. III, § 3, cl. 1. Bribery presumably has its traditional meaning.
190. For some excellent studies of the meaning of "high Crimes and Misdemeanors," that all reach essentially the same conclusions, see Raoul Berger, Impeachment: The Constitutional Problems 53-103 (1973); Charles L. Black, Jr., Impeachment: A Handbook 27-41 (1974); Michael J. Gerhardt, The Constitutional Limits to Impeachment and Its Alternatives, 68 Tex. L. Rev. 1, 82-89 (1989); Ronald D. Rotunda, An Essay on the Constitutional Parameters of Federal Impeachment, 76 Ky. L.J. 707, 721-28 (1987-88).
191. *See, e.g.*, Berger, supra note 190, at 62-67, 73-78; Black, supra note 190, at 37-41; John

Rather, a "high" offense is an offense, whether or not technically criminal, committed by a public official against the interest or dignity of the state. As Hamilton explained in *The Federalist*, impeachment concerns "those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated *political*, as they relate chiefly to injuries done immediately to the society itself."[192] Such offenses might, of course, also constitute indictable crimes, but there is no affirmative requirement that such offenses be independently criminal.

On the other hand, it seems unlikely that then-Representative Gerald Ford was correct in 1970 when, in the context of pending impeachment proceedings against Justice William O. Douglas, he declared that "an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses the [Senate] considers to be sufficiently serious to require removal of the accused from office."[193] Whether or not impeachment decisions are subject to judicial review,[194] the Constitution specifies criteria for impeachment that the House and Senate are obliged to discover and follow. Impeachment and removal can occur only for "Treason, Bribery, or other high Crimes and Misdemeanors," not for "Treason, Bribery, or such other acts as Congress may deem to be high Crimes and Misdemeanors."

Important guidance on the meaning of "high Crimes and Misdemeanors" can be found in English history and in the debates concerning the drafting and ratification of the Constitution.[195] According to William Blackstone, a high misdemeanor in eighteenth-century English usage included "mal-administration of such high officers, as are in public trust and employment."[196] And although impeachment proceedings often

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R. Labovitz, Presidential Impeachment 126 (1978); Gerhardt, supra note 190, at 82; Rotunda, supra note 190, at 721-25. *But see* Labovitz, supra, at 93-100 (describing debates during President Nixon's impeachment proceedings on whether impeachment requires an indictable crime).

192. The Federalist No. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton's views on this subject were fully representative of the thinking of the founding generation. For a thorough discussion, see Rotunda, supra note 190, at 721-25.

193. 116 Cong. Rec. 11,913 (1970).

194. We take no view on this question. *See* Nixon v. United States, 506 U.S. 224, 228-38 (1993) (holding nonjusticiable a challenge to trial before a Senate committee rather than the full Senate); Berger, supra note 190, at 103-21 (urging judicial review of impeachment decisions); Michael J. Gerhardt, Rediscovering Nonjusticiability: Judicial Review of Impeachments after *Nixon*, 44 Duke L.J. 231, 253 (1994) (defending a broad conception of nonjusticiability for impeachments).

195. Needless to say, we emphasize only a few highlights from these materials. For an exhaustive discussion of the English history of impeachment, see Berger, supra note 190, at 53-103; and for an illuminating discussion of the convention and ratification debates, see Rotunda, supra note 190, at 722-25.

196. 4 William Blackstone, Commentaries on the Law of England 121 (1757) *quoted in* Berger, supra note 190, at 62.

involved charges of corruption, some pre-eighteenth-century English impeachments concerned such matters as abuse of official power or neglect of duty.[197]

George Mason invoked something akin to Blackstone's conception of an impeachable offense during the drafting of the impeachment provisions at the Constitutional Convention. Until September 8, 1787, just nine days before the Constitution was completed, the only stated grounds in the Constitution for impeachment were treason and bribery. Mason, James Madison, and Gouverneur Morris then engaged in a brief colloquy:

> Col. Mason. Why is the provision restrained to Treason & bribery only? Treason as defined in the Constitution will not reach many great and dangerous offenses . . . . Attempts to subvert the Constitution may not be Treason as above defined . . . . He movd. to add after "bribery" "or maladministration" . . . .
>
> Mr. Madison. So vague a term will be equivalent to a tenure during pleasure of the Senate.
>
> Mr. Govr Morris, it will not be put in force & can do no harm—An election of every four years will prevent maladministration.
>
> Col. Mason withdrew "maladministration" & substitutes "other high crimes & misdemeanors" [agst. the State"].[198]

Note that Madison's objection to the term "maladministration" was directed to its vagueness, not to its extension of the range of impeachable offenses beyond treason and bribery to include, in particular, "[a]ttempts to subvert the Constitution." Comments during the ratification debates confirm that the original understanding of the phrase "high Crimes and Misdemeanors" permitted impeachment and removal of a President if he "deviates from his duty"[199] or "dare[s] to abuse the powers vested in him by the people."[200] On the other hand, the concern that the President not be reduced to serving at the pleasure of the Congress indicates that mere congressional disagreements with the President's policies do not rise to the level of "high Crimes and Misdemeanors."

Impeachment is thus not a meaningful check on the President's veto power. The Constitution contains no legal constraints on the President's veto power; the President can veto a bill for any reason. Accordingly, absent extraordinary circumstances, it would be an unconstitutional abuse of the impeachment process for Congress to impeach and remove the

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197. *See* Berger, supra note 190, at 67-71.

198. 2 The Records of the Federal Convention of 1787 550 (Max Farrand ed., 1911). The substitution was accepted by an 8-3 vote.

199. *See* 4 Debates in the Several State Conventions on the Adoption of the Federal Constitution 47 (Jonathan Elliott ed., 2d ed. 1836) (discussing the statement of Archibald MacLaine at the North Carolina convention).

200. *See* 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 169 (discussing the statement of Samuel Stillman at the Massachusetts convention).

President for exercising the veto power in a particular way; for example, by vetoing a bill on constitutional grounds with which Congress strongly disagrees.[201]

The situation is very different when the President refuses to enforce a law on the ground that it is unconstitutional. The President has a constitutional obligation to "take Care that the Laws be faithfully executed."[202] Nonenforcement by definition extends beyond the ordinary executive prerogative of prosecutorial discretion and constitutes a deliberate, unfaithful failure to execute. Such action, if sufficiently serious,[203] seems to fall squarely within the scope of abuses that are encompassed by the original meaning of the phrase "high Crimes and Misdemeanors": "Attempts to subvert the Constitution" and "[deviations] from his duty." Accordingly, if the President refuses to enforce a law because his judgment is that the law is unconstitutional, the President generates the very real possibility that Congress could express its own, contrary constitutional judgment through an impeachment proceeding.[204]

Is it possible, however, that a President's good-faith belief that a law is unconstitutional—a good-faith exercise of the constitutionally-granted executive power of presidential review—can form the basis for an impeachment proceeding? Certainly it can. Until very recently, good faith was not a defense available to executive officials in private damages actions. At the time of the founding, even military officials who acted on the direct instructions of the President in matters involving foreign affairs could be liable in damages if their actions were in fact unlawful and interfered with private rights.[205] Although modern law confers on the President absolute immunity from damages actions arising out of his official acts as President,[206] the founding generation was much more willing than we are

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201. We say "absent extraordinary circumstances" in order to accommodate the possibility that use of the veto could rise to a level of presidential irresponsibility sufficient to warrant impeachment. Charles Black suggests that impeachment can similarly check, in extraordinary circumstances, use of the President's legally-unlimited pardon power:

> Suppose a president were to announce and follow a policy of granting full pardons, in advance of indictment or trial, to all federal agents or police who killed anybody in line of duty, in the District of Columbia, whatever the circumstances and however unnecessary the killing. This would not be a crime, and probably could not be made a crime under the Constitution. But could anybody doubt that such conduct would be impeachable?

Black, supra note 190, at 34.

202. U.S. Const. art. II, § 3.

203. A number of scholars read the historical materials to suggest some threshold of concrete harm to the Republic before impeachment is legally warranted. *See, e.g.*, Black, supra note 190, at 37; Labovitz, supra note 191, at 127. It is possible to argue, of course, that every refusal to enforce a congressional statute is "serious" enough to constitute potential grounds for impeachment.

204. *See* Paulsen, The Most Dangerous Branch, supra note 4, at 322-23.

205. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) (holding that commanders of vessels who seized American vessels coming from French parts were liable for damages even though they were following presidential orders).

206. *See* Nixon v. Fitzgerald, 457 U.S. 731, 757-58 (1982). We express no view on whether

to make government officials bear the consequences of their innocent mistakes. The President is constitutionally free to express and act upon his judgment regarding the constitutionality of enacted legislation, and Congress is constitutionally free to express its contrary judgment.[207]

The specter of Congress routinely attempting to impeach the President for failure to enforce the laws may suggest to some that presidential review should at least be Thayerian rather than independent, reserved for cases in which the President not only believes that a statute is unconstitutional, but believes it with a very high degree of confidence. After all, if the President believes that the conditions for presidential review are satisfied, he has both the power and the duty to refuse to enforce the unconstitutional law.[208] The President cannot shirk that duty simply out of fear of impeachment—no more than he can shirk it out of fear of losing the next election. Could the framers possibly have contemplated this kind of ongoing constitutional brinksmanship?

We discuss briefly in Part III why the answer to this question must be "Yes." For the moment, we simply note that if the structure of the impeachment process is enough to overcome the prima facie case for presidential review, or at least for independent presidential review, it must similarly overcome the prima facie case for judicial, or at least for independent judicial, review. Judges as well as the President are "civil Officers" subject to impeachment; their constitutionally-guaranteed tenure "during good Behaviour" does not prevent their removal for "high Crimes and Misdemeanors." The grant to federal judges of "[t]he judicial Power" confers on them the duty to decide cases or controversies within their jurisdiction in accordance with governing law. A failure to decide cases in accordance with law amounts to a breach of this constitutional duty. Accordingly, a judge who decides cases based on a coin toss, the race or

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Fitzgerald was correctly decided.

207. It is important to bear in mind that, in the scenario under discussion, the President is not being impeached for incorrectly interpreting the Constitution. Rather, the President is being impeached for failing to carry out his constitutionally-prescribed duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The President's *reason* for refusing to enforce the law in question—his belief that the law in question is unconstitutional—does not alter the act of nonenforcement itself. If the President is objectively correct that the law in question is unconstitutional, then the President's action is justified and Congress would be wrong to impeach and convict him even though it has the power to do so. If, however, the President's constitutional judgment is objectively wrong, then impeachment and removal could be appropriate. The question is whether the President or Congress acting in its capacity as an impeachment tribunal (or, conceivably, the Supreme Court) has the legally-binding final word on the correctness of the President's interpretation.

208. The nonenforcement power thus differs in this respect from the pardon power. The pardon power is discretionary; the President need not exercise the pardon power in every case of conviction under an unconstitutional statute. *See* Rappaport, supra note 4, at 777-79 (providing a detailed analysis of how a presidential pardon is a privilege and not a right and justifying why it is discretionary). Similarly, the impeachment power is discretionary. Congress is not constitutionally obliged to exercise its impeachment power whenever it believes that the constitutional bases for impeachment have been satisfied.

religion of the parties, or some other arbitrary basis, would clearly be subject to impeachment and removal. Similarly, a judge who refuses to give effect to—refuses to enforce—a congressional statute on the ground that the statute is bad public policy would be subject to impeachment for deviation from duty and abuse of office. Nothing changes analytically if a judge refuses to give effect to a statute on the ground that it is unconstitutional. The exercise of the power of judicial review, no less than the exercise of the power of presidential review, presents a potential occasion for Congress to express its constitutional disagreement with another department through the impeachment process.[209] If the threat of impeachment is enough to require Thayerian deference on the part of the President when challenging the constitutionality of enacted laws, it should also be enough to require Thayerian deference by federal judges.

In sum, the existence of the veto power is not inconsistent with a power of independent presidential review. The two powers have different functions and different consequences. They may, and do, peacefully coexist.[210]

b. The Take Care Clause

The Presentment Clause is not the only clause of the Constitution that potentially bears on the President's power of interpretation with respect to enacted statutes. One must also consider the implications of the constitutional requirement that the President "take Care that the Laws be faithfully executed."[211]

We have already seen that the Take Care Clause does not exclude a power of presidential review.[212] The President must "take Care that the

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209. Objections to this conclusion on the ground that it violates "judicial independence" beg the question. Judges are clearly "independent" in one important constitutional sense: they have tenure "during good Behaviour." U.S. Const. art. III, § 1. Accordingly, judges are not subject to at-will removal by the President, and Congress cannot give them limited terms of office. They are also "independent" in the sense that they are not legally bound to give deference to the constitutional views of Congress or the President. Judges are, however, subject to removal through impeachment, and we see no escape from the conclusion that Congress has the power to impeach and remove judges who do not, in the ultimate judgment of Congress, decide cases in accordance with governing law.

We leave for another time the interesting question whether "bad" judicial decisions must generate some threshold of harm to the nation before they can be sufficient grounds for impeachment. We also leave for another day the question whether a congressional determination that a particular brand of judicial decisionmaking constitutes a "high Crime[]" or "Misdemeanor" is subject to judicial review.

210. A second, related argument against presidential review based on the veto power maintains that a nonenforcement power functions much like a line-item veto, for which the Constitution does not provide. As Professor Rappaport has pointed out, however, nonenforcement functions very differently from a line-item veto, Rappaport, supra note 4, at 770-71, just as nonenforcement functions differently from, and has different consequences than, a true constitutional veto.

211. U.S. Const. art. II, § 3.

212. *See* supra notes 81-90 and accompanying text (discussing the President's executive

Laws be faithfully executed," but that is not a requirement or a license to ignore the Constitution—no more than is the judiciary's power and duty to decide cases in accordance with applicable statutes. But one must still ask whether the Take Care Clause affects the *standard of review* that the President should apply when exercising the power of presidential review.[213] As Professor David Strauss elegantly stated:

> [I]t is . . . theoretically possible that the Take Care Clause, properly interpreted, requires the President to comply with all acts of Congress that are not utterly indefensible. Or it is possible (indeed, quite likely) that the Take Care Clause, properly understood, requires some lesser, but still substantial, degree of deference to the constitutional judgments implicit in Congress's decision to enact a law.[214]

The Take Care Clause, in other words, could be read to require that executive review be to some degree Thayerian rather than independent.

There is remarkably little evidence about the meaning of the Take Care Clause.[215] We can be confident, however, of two points. First, the Take Care Clause is not a grant of power to the President; it is a limitation on the President's power.[216] The clause is worded as a duty: the President "*shall* take Care that the Laws be faithfully executed." The Take Care Clause is thus best read to limit the grant of "[t]he executive Power" to the President. Second, Professor May and the scholars on whom he relies[217] are surely correct that the most important, if not the sole, aspect of this limitation is to make clear that "[t]he executive Power" does not include a power analogous to a royal prerogative of suspension.

None of this, however, tells us much about presidential review. Accordingly, we must resort to first principles, which establish a prima facie case for independent presidential review. Perhaps there are reasons why presidential review of statutes should generally be Thayerian. But the Take Care Clause, which seems narrowly targeted at the dreaded royal suspension power, appears to be a neutral player in that dispute.

4. Execution of Court Judgments

With the notable exception of Professor Michael Stokes Paulsen,[218] every modern departmentalist scholar has maintained that the President has an obligation to enforce specific judgments rendered by federal

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power).

213. *See* Strauss, supra note 4, at 117 ("[A]nswering the question about executive autonomy does not automatically answer the question about the Take Care Clause.").

214. Id. at 118.

215. *See* Labovitz, supra note 191, at 133-34.

216. *See* Lawson, supra note 67, at 1242 (noting that the Take Care Clause limits presidential power to execute laws).

217. *See, e.g.*, Robert J. Reinstein, An Early View of Executive Powers and Privilege: The Trial of Smith and Ogden, 2 Hastings. Const. L.Q. 309, 320-21 (1975).

218. *See* Paulsen, The *Merryman* Power, supra note 4, at 81; Paulsen, The Most Dangerous Branch, supra note 4, at 212.

courts,[219] even when the President believes that the judgments rest on erroneous constitutional reasoning. These scholars, who have included one of this Article's authors, have insisted that "[t]he judicial Power" means the power to decide cases *with finality*, so that judgments must by their nature bind the executive (and Congress) to enforcement.[220] Professor Paulsen and Professor Strauss have both correctly noted that this claim has never been defended in a convincing fashion.[221] No one as yet seems to have determined whether the original meaning of "[t]he judicial Power" contains a specific conception of the finality of judgments.[222] We take up that issue here. Although the question is not free from doubt, we conclude that the President ordinarily must comply with judgments rendered in specific cases by federal courts. In some limited circumstances, however, the power of presidential review can extend to judgments rendered in specific cases by federal courts, although such presidential review must be strongly Thayerian.

a. The Executive Power and the Enforcement of Judgments

The "executive Power" vested in the President includes the power to carry into execution federal statutes and federal court judgments. This power, however, is hemmed in by certain duties. The Take Care Clause, by specifying that the President "shall take Care that the Laws be faithfully executed," makes clear that the President does not have a general power to suspend the operation of statutes.[223] It seems clear that the Take Care

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219. By "judgments" we mean the concrete dispositions of cases, including where applicable the prescription of a remedy (or imposition of a sentence). The *judgment*—the disposition of the case—must be distinguished from the *opinion* (if any)—the court's explanation for its judgment.

220. *See, e.g.*, Easterbrook, supra note 4, at 926; Engdahl, John Marshall's "Jeffersonian" Concept, supra note 4, at 312; Harrison, supra note 135, at 372; Lawson, supra note 154, at 30.

221. *See* Paulsen, The Most Dangerous Branch, supra note 4, at 294-98; Strauss, supra note 4, at 124. Professor Strauss concludes from this that departmentalists are not, and cannot be, really serious about departmentalism, id. at 124-25, while Professor Paulsen concludes that the President has no legally binding obligation to enforce judgments, Paulsen, The Most Dangerous Branch, supra note 4, at 343-45.

222. This failure may be a function of curricular specialization in the legal academy. Although the nature of court judgments has important ramifications for constitutional theory, the subject of judgments and their finality is normally the province of texts and treatises on civil procedure. *See, e.g.*, Fleming James, Jr., Civil Procedure §§ 11.1-11.35, at 517-603 (1965); Richard L. Marcus et al., Civil Procedure: A Modern Approach 947-1024 (1989). Accordingly, constitutional commentators do not ordinarily grapple with the implications of the original understanding of judicial finality for constitutional theory. For a rare exception, see Engdahl, John Marshall's "Jeffersonian" Concept, supra note 4, at 312-13.

On the other hand, it may simply be a function of the dearth of materials. The debates surrounding the drafting and ratification of the Constitution say remarkably little about the content of "[t]he judicial Power."

223. *See* supra notes 215-17 and accompanying text (discussing limits on presidential power to execute laws).

Clause, by its terms, applies only to statutes and not to court decisions. Although there is a good linguistic argument for regarding court judgments as laws,[224] in almost every other place where the Constitution speaks of "law" or "the laws," it clearly means "statutes."[225]

Nonetheless, it seems clear that the President does not have a general power to suspend the execution of court judgments. The fact that the Take Care Clause refers only to an obligation to enforce statutes is not dispositive of this question. There was, at the time of the founding, a very real historical danger of presidents claiming a power to suspend the operation of statutes. The framers had to consider the example of the English monarchs and the declaration of John Locke that the executive power included a prerogative "to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even

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224. Samuel Johnson's Dictionary includes among its definitions of a law, "a decree, edict, statute, or custom, publickly established as a rule of justice," "a decree authoritatively annexing rewards or punishments to certain actions," and "Judicial process." Johnson, supra note 84. A "decree," in turn, is defined in part as "A determination of a suit, or litigated cause." Id.

225. *See* U.S. Const. art. I, § 2, cl. 3 (stating that a census shall take place in such manner as Congress "shall by Law direct"); id. art. I, § 4, cl. 1 (Congress may "by Law" change the time, place, and manner of holding election to the House); id. art. I, § 4, cl. 2 (sessions of Congress shall begin on a constitutionally specified date unless Congress "shall by Law" specify a different date); id. art. I, § 6, cl. 1 (the pay of members of Congress is to be "ascertained by Law"); id. art. I, § 7, cl. 2 (specifying the procedure whereby a bill becomes "a Law"); art. I, § 8, cl. 15 (Congress has power to call the militia "to execute the Laws of the Union"); id. art. I, § 8, cl. 18 (Congress can make "all Laws" which are necessary and proper for carrying into execution federal powers); id. art. I, § 9, cl. 3 (no "ex post facto Law shall be passed" by Congress); id. art. I, § 9, cl. 7 (treasury funds can be withdrawn only "in Consequence of Appropriations made by Law"); id. art. I, § 10, cl. 1 (no state shall pass any "ex post facto Law, or Law impairing the obligation of contracts"); id. art. I, § 10, cl. 2 (states can levy imposts or duties only if they are necessary for executing "inspection Laws," and "all such Laws" are subject to congressional control); id. art. II, § 2, cl. 2 (federal offices may be "established by Law," and Congress may "by Law" allow inferior officers to be appointed by the President or other officers without Senate confirmation"); id. art. III, § 2, cl. 1 (the judicial power shall extend to all Cases arising under "the Laws of the United States"); id. art. IV, § 1 (Congress may "by general Laws" implement the Full Faith and Credit Clause); id. art. VI, cl. 2 (the Constitution "and the Laws of the United States which shall be made in Pursuance thereof" are the supreme law of the land); *cf.* id. art. I, § 8, cl. 10 (mentioning "the Law of Nations"); id. art. II, § 2, cl. 2 (referring to "the Courts of Law"); id. art. III, § 2, cl. 1 (distinguishing between "Law and Equity"); id. art. III, § 2, cl. 2 (distinguishing between "Law and Fact").

There may be two exceptions. First, the Constitution specifies that the penalty for impeachment is removal from and disqualification for federal office, but that conviction does not prevent further criminal prosecution and punishment "according to Law." Id. art. I, § 3, cl. 7. If all crimes must be statutory, then this is a clear reference to statutory "Law." If, however, there can be a federal common law of crimes, one can argue that this reference includes judicial decisions. For a spirited defense of a federal common law of crimes, see Stephen B. Presser, The Original Misunderstanding 67-99 (1991). Second, the Fugitive Slave Clause dealt with persons "held to Service of Labour in one State, under the Laws thereof" who are purportedly discharged from slavery "in Consequence of any Law or Regulation" of another state. Id. art. IV, § 2, cl. 3. One can imagine an argument that slavery, or its abolition, is a product of the common law rather than statute.

against it . . . ."[226] In all likelihood, no one thought it necessary to include a specific prohibition on suspension of court judgments. Moreover, the available evidence points strongly away from a presidential power to suspend or revise judicial judgments.

Justice Scalia, writing for a majority of the Court, recently canvassed the historical materials concerning legislative revision or reopening of final judgments.[227] He concluded that:

> The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments."[228]

A brief look at a few of the sources from the historical record confirms Justice Scalia's conclusions.

The issue of judicial finality arose in *Hayburn's Case*.[229] A 1792 statute allowed war veterans seeking pensions to file claims with a circuit court, which would make findings of eligibility and certify those findings to the Secretary at War.[230] In any given case, the Secretary could either accept the court's findings and place the applicant's name on the list of pensioners or could refuse to place the applicant on the list if the Secretary had "cause to suspect imposition or mistake."[231] Three circuit courts—two of them in the context of specific applications—indicated that they regarded the law as unconstitutional because it subjected their decisions to revision or suspension by the executive. The Pennsylvania circuit court that received William Hayburn's application, which included Supreme Court Justices Wilson and Blair, explained in a letter to President Washington that the federal courts were vested only with judicial power and that the judicial power, by its nature, must be final as against the legislature and executive.[232] The Court declared:

> Upon due consideration, we have been unanimously of opinion, that, under this act, the Circuit court held for the Pennsylvania district could not proceed;
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> 1st. Because the business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States; the Circuit court must, consequently, have proceeded *without* constitutional

226. Locke, supra note 80, § 160.

227. Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1452-63 (1995). We confine our discussion, as did Justice Scalia, to judgments that are no longer subject to appeal within the federal judicial hierarchy.

228. Id. at 1453 (quoting Easterbrook, supra note 4, at 926).

229. 2 U.S. (2 Dall.) 409 (1792).

230. Act of Mar. 23, 1792, ch. 11, § 2, 1 Stat. 243, 244.

231. Id. § 4, 1 Stat. at 244.

232. *See Hayburn's Case* 2 U.S. (2. Dall.) at 411 n.*.

authority.

2d. Because, if, upon that business, the court had proceeded, its *judgments* (for its *opinions* are its judgments) might, under the same act, have been revised and controuled by the legislature, and by an officer in the executive department. Such revision and controul we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and, consequently, with that important principle which is so strictly observed by the Constitution of the United States.[233]

The New York circuit court, which included Justices Jay and Cushing, had earlier reached the same conclusion concerning executive (and legislative) review of court judgments, explaining:

> That neither the *legislative* nor the *executive* branches, can constitutionally assign to the *judicial* any duties, but such as are properly judicial, and to be performed in a judicial manner.
>
> That the duties assigned to the circuit, by this act, are not of that description, and that the act itself does not appear to contemplate them as such; in as much as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the secretary at war, and then to the revision of the legislature; whereas by the constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.[234]

The North Carolina circuit court, which included Justice Iredell, similarly said in a letter to President Washington:

> That whatever doubt may be suggested, whether the power in question is properly of a judicial nature, yet inasmuch as the decision of the court is not made final, but may be at least suspended in its operation by the secretary at war, if he shall have cause to suspect imposition or mistake; this subjects the decision of the court to a mode of revision which we consider to be unwarranted by the constitution; for though congress may certainly establish, in instances not yet provided for, courts of appellate jurisdiction, yet such courts must consist of judges appointed in the manner the constitution requires, and holding their offices by no other tenure than that of their good behaviour, by which tenure the office of secretary at war is not held. And we beg leave to add, with all due deference, that no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the constitution, be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.[235]

One can persuasively argue, of course, that Congress and the President

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233. Id. (emphasis added).
234. Id. at 410 n.(a) (emphasis added).
235. Id. at 413 n.*.

expressed very different constitutional judgments by enacting the law in question, and that one cannot draw significant conclusions from the self-interested pronouncements of the judiciary. In 1793, however, Congress changed the procedures for pension applications, which mooted the constitutional problem seen by the courts.[236] Accordingly, it is possible that upon mature consideration of the matter, all three departments agreed in 1793 that it was improper to allow the legislative or executive departments to revise or suspend judicial judgments.

Hamilton similarly argued against a congressional suspension power in *The Federalist*, when he wrote that "[a] legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases."[237] The judges in *Calder v. Bull*[238] in 1798 adopted the same view of the nature of legislative power. The Connecticut legislature had passed a statute setting aside a state court's testamentary decree and ordering a new trial. The judges acknowledged that Connecticut's constitution—which at that time was still its colonial charter of 1662—evidently permitted this practice.[239] The judges indicated, however, that this legislative power of revision flew in the face of then-contemporary understandings of the status of judicial judgments. Justice Paterson indicated that "the awarding of new trials falls properly within the province of the judiciary,"[240] and Justice Iredell agreed.[241]

These sources all focus on attempts by the legislature to suspend or revise judicial judgments, but the principles they contain apply equally well to executive suspension and revision. One can fairly conclude that, under the constitutional separation of powers, neither the President nor Congress has a general power to revise or suspend judicial judgments. Notwithstanding the limited scope of the Take Care Clause, the President must ensure that federal court judgments are faithfully executed.

But just as the Take Care Clause does not settle the question whether the President must execute statutes that he regards as unconstitutional, the implicit take-care requirement for judgments that stems from the Article II and Article III Vesting Clauses does not settle the question whether the

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236. *See* Act of Feb. 29, 1793, ch. 17, 1 Stat. 324 (regulating the claims to invalid pensions).

237. The Federalist No. 81, at 484 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

238. 3 U.S. (3 Dall.) 385 (1798).

239. *See* id. at 395 (opinion of Paterson, J.); id. at 398 (opinion of Iredell, J.).

240. Id. at 395 (opinion of Paterson, J.). Justice Paterson's use of the word "properly" is especially noteworthy, as the term was commonly used in the founding generation to describe jurisdictional lines between governmental departments. *See* Lawson & Granger, supra note 11, at 291-97 (discussing the context in which "properly" was often used during the founding era).

241. *See Calder*, 3 U.S. (3 Dall.) at 398 (opinion of Iredell, J.) ("It may, indeed, appear strange . . . that . . . there should exist a power to grant . . . new rights of trial . . . . The power . . . is judicial in its nature; and whenever it is exercised . . . it is an exercise of judicial, not of legislative, authority.").

President must execute court judgments that rest on what the President regards as erroneous interpretations of the Constitution. In order to overcome the prima facie case for independent presidential review, one must find in the grant of "[t]he judicial Power" an even stronger conception of the finality of judgments that establishes a presidential duty of execution.

We think that such a conception of the finality of judgments can be found, although it generates a weaker presidential duty of obedience than is commonly supposed. The best way to illustrate the considerations that lead us to find an affirmative but less-than-absolute presidential duty to enforce court judgments is to present, in point-counterpoint fashion, the best arguments we can muster in favor of two polar positions: that the President has an absolute duty to enforce court judgments and that the President has no legally binding duty to enforce judgments that he conscientiously believes rest on constitutional error. We structure these arguments like briefs and do not mean at this juncture to take sides. After setting forth the various arguments for each polar position, we then evaluate the competing considerations and reach a conclusion.

b. Point: The Case for Absolute Judicial Finality

One possible answer to the problem of presidential review of court judgments is to say that "[t]he judicial Power" by its nature is the power to resolve disputes with absolute finality, so that a judgment that is no longer subject to appeal within the judicial system is, with respect to the legislative and executive departments, final by definition. The President, on this view, has an absolute obligation to obey and enforce judgments issued by the federal courts. This view is so much taken for granted in our legal culture that we are aware of no sustained argument in favor of it. A sophisticated proponent of this position, however, would likely invoke the following considerations.

First, the available historical materials, as surveyed above, at least suggest that judgments are absolutely binding. Whatever may have been the traditional rule of finality *within* the judicial department,[242] judgments have always been thought of as final *between* the judicial department and the political departments. Moreover, none of the available materials on judicial finality suggest an exception for judgments based on constitutional errors. Finality means finality.

Second, there is a long tradition of presidential obedience to court judgments. The only clear example of presidential defiance of a court judgment is *Ex parte Merryman*,[243] decided during a time of national crisis.

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242. *See* infra notes 249-62 and accompanying text (discussing how the finality of judicial judgments may not be absolute).

243. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). The State of Georgia effectively defied the Supreme Court's judgment in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), that the

This too suggests that judgments have long been understood to be absolutely binding on the executive department. Moreover, if the President in fact has the *power* to refuse to enforce unconstitutional judgments, he also has the *duty* to refuse to enforce them—just as judges have both the power and the duty to refuse to give effect to unconstitutional statutes. Unless the courts are considerably less fallible than common sense would suggest, there have been numerous occasions for the exercise of presidential review. The dearth of examples of presidential review of judgments indicates that no such presidential power has ever existed.

Third, the principle of coordinacy,[244] which helps give rise to the inference of a power of presidential review, may also serve to limit that power. The federal judiciary is a coordinate department of the national government. If judgments of the courts are not legally binding on the legislative and executive departments, it is hard to understand in what sense the judiciary could be coordinate. If the President is free to disregard court judgments, then the judiciary is reduced to issuing advisory opinions, which may or may not have the force of law, depending on the determinations of the executive department. As both *Hayburn's Case*[245] and the *Correspondence of the Justices*[246] illustrate, founding-era understandings of "[t]he judicial Power" counsel against reducing the judiciary to an advisory institution. The principle of coordinacy can thus be a two-edged sword for executive review: it helps establish the power, but it also cuts in favor of a legally-binding role for judicial judgments.

Fourth, the ultimate consequences of a presidential ability to ignore court judgments seem unthinkable. The President is the constitutional actor most immediately in control of the military—a fact of which at least some members of the founding generation were acutely conscious.[247] Accordingly, the President must be subject to some form of legal control while in office. If the President can ignore court judgments that rest on perceived constitutional errors, there is no evident reason why he cannot

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State had no jurisdiction over Indian lands. According to one nineteenth-century historian, President Andrew Jackson, upon hearing of the Court's decision, declared "Well: John Marshall has made his decision: *now let him enforce it!*" 1 Horace Greeley, The American Conflict: A History of the Great Rebellion in the United States of America, 1860-64 106 (1865). The story is probably apocryphal and Jackson's resolve on this issue was never tested. *See* 2 Robert V. Remini, Andrew Jackson and the Course of American Freedom, 1822-1832 276-77 (1981).

244. *See* supra notes 33-35 and accompanying text (discussing the "principle of coordinacy").

245. 2 U.S. (2 Dall.) at 410.

246. 3 Henry P. Johnston, The Correspondence and Public Papers of John Jay 1763-1826 486-89 (1971).

247. George Mason urged that, in the event of impeachment, the President should be suspended from office. Otherwise, Mason argued, "[w]hen he is arraigned for treason, he has the command of the army and navy, and may surround the Senate with thirty thousand troops." 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 494 (Jonathan Elliot ed., 2d ed. 1836) (*quoted in* Labovitz, supra note 191, at 22 n.54).

also ignore senatorial judgments in impeachment proceedings if he believes that, for example, he has in fact committed no high crimes or misdemeanors. It seems unlikely that the Constitution creates a President who is legally bound by nothing but his conscience.

c. *Counterpoint: The Case for Independent Presidential Review*

Another possible answer to the problem of presidential review is to maintain that the President has the same power with respect to federal court judgments as he has with respect to statutes: there is no general power of suspension or revision, but there is always a power of independent review for constitutional error.[248] Several persuasive considerations support this position.

First, judicial judgments have never been regarded as absolutely final by the courts themselves. Judgments have always (and more so in the eighteenth century than today) been subject to challenge on a number of grounds. The policy of finality of judicial decisions has long been at war with the policies of securing justice and ensuring that judicial tribunals do not exceed the proper scope of their powers.[249] Twentieth-century jurisprudence has increasingly given weight to the finality aspect of this balance,[250] but even today, judgments are not beyond challenge in subsequent judicial proceedings.[251] The Federal Rules of Civil Procedure permit judgments to be avoided in some circumstances because of, inter alia, clerical errors, mistake, newly discovered evidence, fraud, and voidness.[252] The *Restatement (Second) of Judgments* specifies as grounds for avoiding a judgment a lack of subject matter jurisdiction in the tribunal that issued the judgments,[253] corruption or duress,[254] fraud,[255]

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248. Constitutional error can take several forms. The court's decision might be grounded on an incorrect interpretation of the Constitution or the court's remedy might violate the Constitution.

249. *See* 1 Restatement (Second) of Judgments §§ 10-12 (1982) (detailing the rules contesting different types of jurisdiction); Karen N. Moore, Collateral Attack on Subject Matter Jurisdiction: A Critique of the *Restatement (Second) of Judgments*, 66 Cornell L. Rev. 534, 534-35 (1981) (discussing the antinomy between the policies of finality, justice, and the abuse of power); Edward P. Krugman, Note, Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments, 87 Yale L.J. 164, 164 (1977) (noting the legal system's need to balance its goal of resolving disputes quickly and finally with its goal of achieving equality); Developments in the Law: Res Judicata, 65 Harv. L. Rev. 818, 820 (1952) (explaining that "the conclusiveness of prior judgments may free overzealous litigation, perpetuate erroneous decisions and hamper the flexibility of the courts").

250. *See* Moore, supra note 249, at 537-43.

251. We focus on challenges to judgments in subsequent proceedings sometimes called collateral attack on a judgment. *See* 2 Restatement (Second) of Judgments § 64, at 141 (introductory note) (1982). This focus presents most clearly the problem we seek to address: the extent to which the judgment of one tribunal can bind another legal actor, such as a subsequent court or the executive official charged with enforcement of judgments.

252. Fed. R. Civ. P. 60.

253. Restatement (Second) of Judgments, supra note 249, §§ 12, 65, 69.

254. Id. §§ 68(1), 70(1)(a).

changed conditions,[256] lack of notice,[257] and, in rare cases, mistake of fact or law.[258] At the time of the Constitution's framing, the policy of finality in judgments was even weaker. Judgments issued by tribunals that lacked subject matter jurisdiction were generally regarded as void.[259] Moreover, equity courts would on some occasions prevent enforcement of judgments at law.[260] The nineteenth and twentieth centuries saw increasing emphasis placed on the importance of finality in judicial decisions,[261] but if one is seeking the original meaning of "[t]he judicial Power" and the conception of finality that it entails, one should at least start with eighteenth-century practice. The upshot is that finality has always involved a balancing act, with the eighteenth-century balance tilting somewhat farther away from the finality of judgments than modern sensibilities might prefer. Although conceptions of finality within the judicial department do not necessarily tell us anything about conceptions of finality across departments,[262] the judiciary's traditional treatment of finality as a *policy* rather than as a firm *legal rule* at least suggests that an absolute rule of finality across departments ought to be accepted only with considerable hesitation. And if considerations of policy are going to enter the picture, the policy of assuring fidelity to the Constitution surely counts as a strong one—perhaps strong enough to warrant a "constitutional error" exception to the otherwise dominant principle of interdepartmental finality.

Second, as Professor Michael Stokes Paulsen has strongly emphasized in his recent defense of presidential power to review court judgments,[263] President Lincoln's assertion of the power to refuse to enforce judgments in the *Merryman* case shows that the power has long been understood to lurk in the background. Hamilton seems also to have anticipated the power in *The Federalist* when he remarked that the federal judiciary should not be viewed as threatening because, inter alia, it "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments"[264]—although this statement is admittedly too cryptic to count for

255. Id. §§ 68(2), 70(1)(b).

256. Id. §§ 68(5), 73.

257. Id. § 66.

258. Restatement (Second) of Judgments, supra note 249, §§ 68(3), 71.

259. *See* Moore, supra note 249, at 537; Krugman, supra note 249, at 164-71.

260. *See* Krugman, supra note 249, at 170.

261. *See* Moore, supra note 249, at 537-43; Krugman, supra note 249, at 171-81.

262. There is no logical requirement that the legislative, executive, and judicial departments all treat judicial judgments in precisely the same fashion. One can imagine a regime in which the President, for example, accords either more or less finality to judicial judgments than does the judiciary itself. "The judicial Power" could, in principle, entail an absolute requirement of finality as against the political departments but only a limited notion of finality as against the judiciary itself.

263. *See* Paulsen, The *Merryman* Power, supra note 4, at 88-99; Paulsen, The Most Dangerous Branch, supra note 4, at 278-83.

264. The Federalist No. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

very much. The fact that we have not seen more instances of presidential review of judgments is not decisive, even if one agrees that the power of presidential review implies a duty to exercise it. Presidents may simply have failed to recognize the nondiscretionary nature of their nonenforcement power—just as they have consistently failed to recognize the nondiscretionary nature of their obligation to veto legislation they regard as unconstitutional.

Third, as Professor Paulsen has again emphasized,[265] the principle of coordinacy can be cast to support an absolute power of presidential review. The whole point of coordinacy is that no department can dictate to another how to conduct its constitutionally-assigned affairs. The President cannot tell the courts how to decide cases, and the courts cannot tell the President how, when, and whether to execute judgments. If judgments bind the President, the executive department is subordinate to, rather than coordinate with, the judicial department. A contrary view of coordinacy, which sees a rule of absolute obedience to judgments as necessary to avoid reducing the judicial department to an advisory institution, either misunderstands the arguments against advisory opinions or carries them too far. There are two separate strands to the advisory opinion doctrine. The first strand, reflected in the *Correspondence of the Justices*, states that courts can only formally engage in legal interpretation in the context of a case or controversy properly within their jurisdiction. This principle, even if sound, has no implications for departmentalism. It deals solely with the proper occasions for the exercise of the judicial power, not with the consequences of such exercise. The second strand, reflected in *Hayburn's Case*, can indeed be read to require that court judgments be binding on executive and legislative actors. But the principle of judicial independence reflected in this strand need not, and should not, be taken to imply a presidential duty of obedience to judgments. As Professor Paulsen has argued at length, the judicial power can mean the power of independent judgment—the power to decide without having to give conclusive weight to the views of Congress or the President—without meaning also the power to coerce acceptance of those decisions by the other departments. As Professor Paulsen explains:

> The importance of independent judgment should not be downplayed. The power of independent legal judgment on matters of constitutional and statutory law, rendered by an elite body of specialists no longer accountable to party or prejudice, is a formidable moral and political power in a constitutional republic—whether or not those judgments are backed by coercive force. The moral force of persuasive, independent judgment on matters of constitutional and statutory law by the least dangerous branch makes it, politically, extremely difficult for the executive to act in a manner inconsistent with that judgment . . . .
>
> Crucially, executive review does not swallow this judicial

265. *See* Paulsen, The Most Dangerous Branch, supra note 4, at 228-40.

> power of independent judgment.... Co-equal executive interpretive authority does not mean supreme executive interpretive authority because it does not compromise the judiciary's power of independent judgment within its sphere. The President may not tell the courts how to decide a case.... The judiciary gets its say—the power, within its province, to say what the law is—even though it cannot legally bind the executive with its opinion. The power to speak is not a cipher.[266]

Fourth, as Professor Paulsen has argued in perhaps his most intriguing contribution to this debate,[267] the ultimate consequences of an absolute presidential duty to obey court judgments seem unthinkable. Suppose, for example, that a case is brought challenging an exercise of the President's veto power, and the Supreme Court affirms a permanent injunction against any further use of the veto (perhaps with a permanent injunction against ever seeking reconsideration of the Court's decision). Is the President truly bound by that judgment? Would Congress be bound by a judgment issuing a permanent injunction against any further exercises of the lawmaking power? If judgments are truly and absolutely binding, then the federal courts, through the issuance of judgments, can take command of all aspects of the government.[268] It seems unlikely that the Constitution creates an unelected Supreme Court which is bound by nothing but its conscience.

d. Finality and Enforcement: The Middle Ground

We find neither polar position entirely convincing. As Professor Paulsen persuasively argues, an absolute obligation to obey judgments seems hard to square with the Constitution's incessant focus on keeping absolute power out of the hands of any one institution. Moreover, the affirmative case for judicial supremacy is weak. Historically, the finality of judgments has been a policy and not a postulate of the judicial system; the paramount policy of fidelity to the Constitution amply sustains a power of presidential review for constitutional error. And for the reasons stated in the counterpoint above, presidential practice in this regard is neither uniform nor dispositive, the principle of coordinacy seems strongly to support presidential review, and the potential consequences of judicial supremacy are at least as unthinkable as the potential consequences of presidential review. Accordingly, we reject the view that the President is absolutely bound to enforce court judgments.

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266. Id. at 301-02.

267. Id. at 284-87.

268. Congress could not control the Court through impeachments or restrictions on jurisdiction. The Court could simply declare in a judgment that it has jurisdiction notwithstanding the content of any congressional statutes and that judgment would be absolutely binding. The Court could issue a judgment declaring that the Justices are not subject to impeachment, and such a judgment would be absolutely binding.

Neither, however, can we accept Professor Paulsen's legally unlimited power of presidential review of court judgments. Quite simply, a view that does not give court judgments some legal effect on the other departments does not adequately account for the existence of the judicial *power*. Professor Paulsen's attempt to define the judicial power as a noncoercive power of independent judgment does not succeed. According to Professor Paulsen, a judgment issued by an independent court "is a formidable moral and political force . . . ."[269] The same could be said, however, of statements made by such a court in explanation of its judgments, of dicta authored by such a court, of statements made by learned judges in a nonjudicial forum, and even of statements by respected scholars. On this analysis, there is nothing distinctive or significant about a judicial judgment. This is the step in the argument that we cannot accept. Although there is surprisingly little guidance from the founding era on the meaning of "[t]he judicial Power," the context of the Constitution—which, after all, is a legal document that seeks to allocate governmental *power*—suggests that in order to be a bona fide "Power," the judicial power must have some form of legal, and not merely moral or political, effect. We cannot solidly prove the point, but we believe that the founding generation would have viewed the issuance of a judgment as an event qualitatively different from the expression of dicta or the giving of a speech.

Is there a way of giving legal effect to court judgments without falling headfirst into judicial supremacy? The answer is yes. Court judgments can have real but less-than-absolute legal effect if they impose on the President and Congress an obligation of *legal* (rather than merely *epistemological*) deference. With this understanding, the President may legally refuse to enforce a court judgment, but only if the President concludes, in accordance with an appropriately demanding standard of proof, that the judgment was constitutionally erroneous. How clear must it be that a court judgment is incorrect in order to overcome the legal deference due a court judgment? There is no scientific way to answer this question. One candidate is Thayer's contention that one must find error "so clear that it is not open to rational question." It is true that Thayer was describing the deference that unelected courts should give to a democratically accountable legislature (and presumably to a democratically accountable president as well) rather than vice versa, but his formulation seems to fit nicely with what little we know from the founding era concerning the status of court judgments. In any event, it is the best that we can do at this point; we welcome further refinements about the appropriate standard of legal deference due to court judgments.

Thus, although we do not have supreme confidence in our answer, we conclude that the best understanding of the role of judgments in the constitutional scheme is that the President and Congress can refuse to enforce a judgment only in extreme circumstances: only for constitutional

269. Paulsen, The Most Dangerous Branch, supra note 4, at 301.

error, and only when that error is "so clear that it is not open to rational question."[270] Moreover, the principle of constitutional review of judgments is subject to one further qualification: where private rights are at stake, the President can engage in executive review of judgments only when such review results in nonenforcement of a judgment of liability. As we explain in the following section, the President cannot affirmatively act to infringe private rights in the face of a judgment of no liability.

e. Due Process and the Liability/Nonliability Distinction

The problem of nonenforcement of judgments is really an issue only in civil cases. The President can always refuse to enforce a judgment of conviction in a criminal case by granting a pardon. With respect to judgments of acquittal in criminal cases, even Professor Paulsen, who has staunchly defended the President's power to refuse to enforce court judgments, finds in the Constitution's provisions for jury trial a textual requirement that judgments of acquittal be respected.[271] One can reach the same conclusion more straightforwardly by invoking considerations of due process. The Due Process Clause specifies that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."[272] One important aspect of due process is the *principle of legality*, which prohibits executive deprivations of life, liberty, or property that are not supported by positive law embodied in valid statutes and court judgments.[273] Accordingly, the President cannot lawfully jail someone whom a grand jury has refused to indict or whom a petit jury (or judge in a bench trial) has refused to convict–even if those actors rested their decisions on erroneous constitutional grounds.

The requirements of due process also establish that, in civil cases, there is an important difference between refusing to enforce a judgment of liability and taking action in the face of a judgment of nonliability. If a court issues a judgment holding a party not liable–even an erroneous judgment based on clear constitutional error—it would violate the principle of legality embodied in the concept of due process for a President to use the national law enforcement machinery to implement the President's view of justice. On the other hand, a refusal to enforce a civil judgment of liability does not constitute a deprivation of life, liberty, or property. Although the judgment itself is a species of property, a refusal to enforce the judgment does not deprive its holder of anything—unless one, in question-begging fashion, regards an unconditional executive obligation to enforce as part of the judgment. A failure to enforce does not

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270. Thayer, supra note 26, at 144. Of course, presidential refusals to enforce court judgments can be grounds for impeachment.

271. Paulsen, The Most Dangerous Branch, supra note 4, at 288-92.

272. U.S. Const. amend. V.

273. *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856).

extinguish the judgment; a subsequent president, or even the same president at a different time, can always choose to enforce it.[274]

f. Judgments versus Opinions

The President's ordinary obligation to enforce a judgment extends only to the raw judgment itself: the finding of liability or nonliability and the specification of the remedy. That duty does not impose on the President any requirement in future cases to follow the reasoning that led to the court's judgment or to extend the principles of that judgment beyond the issues and parties encompassed by it.

Finality in the judicial system is determined by the twin doctrines of res judicata and collateral estoppel. A brief look at the origins of those doctrines illustrates the narrow scope in which the finality of the judicial power operates.

The Roman system of civil law gave birth to the principle of res judicata—literally translated as "a thing or matter settled by judgment."[275] Defendants in actions before the praetors were allowed to counter the plaintiffs' claims by arguing facts that either defeated the cause of action or convinced the praetor of the availability of a defense, or *exception*.[276] The plea of *rei judicatae* was one such defense, and Ulpian wrote in Book 15 of his Edict that "a defense of *res judicata* will avail whenever the same issue is raised again between the same persons . . . ."[277] Only a claim or issue decided by a judge in the course of a prior adjudication could carry the force of res judicata, and this adjudication was binding upon the parties to that original adjudication providing the issues, parties, and things in dispute were identical.[278] The claim for relief might be different but the substance of the cause of action must be the same: "And, generally, as stated by Julian, the defense of *res judicata* avails whenever the same

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274. A distinction between refusing to enforce a judgment of liability and refusing to abide by a judgment of nonliability may also be implicit in the concept of departmentalism. One of the guiding principles of departmentalism is that all relevant governmental actors must agree on the constitutionality of an action before it takes place. If this principle is a *defining property* of departmentalism, rather than merely a *frequent (though not essential) consequence* of departmentalism, then it can be permissible for a President to refuse to carry out a levy of execution on a defendant's property when a court has rendered a verdict of liability but impermissible for the President to initiate a levy of execution in the face of a judgment of nonliability. Presidential review of judgments, on this understanding, can be used only as a passive rather than as an active force.

275. Black's Law Dictionary 1305 (6th ed. 1990).

276. 2 Henry C. Black, A Treatise on the Law of Judgments § 501, at 601 (1891).

277. IV The Digest of Justinian 623 (Theodor Mommsen et al. eds., 1985).

278. Justinian also noted in his *Digests* that:

> When the question is asked whether this defense avails or not, an inquiry must be made as to whether it is the same property, the same amount, the same right, and the same ground for claiming and the same parties; unless all these exist together, it is a different issue.

Id. at 12-14.

issue is raised again between the same persons, albeit in a different kind of action."[279] The Roman law also recognized the applicability of res judicata to parties in privity with the original party.[280]

The doctrine of collateral estoppel is closely related to the doctrine of res judicata, but emerged from the Germanic rather than Roman legal system.[281] Res judicata differs from collateral estoppel in that it bars relitigation of the same cause of action between the same parties; collateral estoppel bars relitigation of a particular issue or fact. In a second case or controversy upon a different cause of action, the former adjudication "operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict is rendered."[282]

In either case, however, the doctrines of finality operate only upon the parties to and claims in the original action. In particular, nonparties (or nonprivies) to the original action are not subject to either res judicata or collateral estoppel with respect to legal conclusions reached by the judge in the original action. Instead, the legal conclusions in the original action affects subsequent actions involving different parties, different claims, or (where res judicata does not apply) different issues only through the doctrine of stare decisis, or precedent.

The judicial doctrine of stare decisis does not legally bind the President—not even to give Thayerian deference to the judicial reasoning behind a judgment. Judgments are often accompanied by opinions, which express the reasons that lie behind the judgment. But the issuance of opinions is not an essential aspect of the judicial power.[283] Juries do not give reasons for their decisions (and their decisions have no precedential weight), and neither do judges in most instances. The vast majority of legal rulings at trial are made without a statement of reasons (*e.g.*, "overruled," "admitted"). Even on appeal, it is increasingly common for courts to enter summary dispositions without opinions. A judgment is no less a judgment, and no less final, if it is unaccompanied by a statement of reasons.[284]

It is thus difficult to see how a court can *expand* the effect of its judgment by the issuance of an opinion or statement of reasons. Such statements have the power to influence through their power to persuade, they may be good indicators of how future cases are likely to be decided,[285] and they may have some binding force on other courts via the doctrine of stare decisis, but they do not legally bind nonparties. The

279. Id. at cl. 7, 4.

280. *See* id. at cl. 28.

281. *See* Robert W. Millar, The Historical Relation of Estoppel By Record to Res Judicata, 35 U. Ill. L. Rev. 41, 44 (1940) (discussing the emergence of collateral estoppel in America).

282. Cromwell v. County of Sac., 94 U.S. 351, 353 (1876).

283. *But see* Eisgruber, supra note 4, at 350.

284. Federal statutory requirements that judges give reasons for their conclusions, in the form of findings of fact and conclusions of law, are therefore constitutionally questionable.

285. *See* Merrill, supra note 4, at 77-78 (emphasizing this feature of judicial opinions).

President, like all other potential litigants, will be interested in the statements of courts for what they indicate about likely outcomes in future cases, but the President is not bound to "enforce" those statements. The obligation to enforce ends with the four corners of the judgment.[286]

III. PRESIDENTIAL REVIEW IN PERSPECTIVE

Departmentalism is often thought to lead to chaos and conflict: if every department interprets the Constitution for itself, it is hard to plan one's conduct, and the various departments will constantly be at each others' throats. This Article no doubt adds fuel to the fire for some readers, as it raises the specter of an unending series of impeachment crises as Congress tries to assert its will over the other departments. Surely, one might think, this cannot be the scheme bequeathed to us by the practical members of the founding generation.

Many of these criticisms of departmentalism, however, can also be raised against a system of separation of powers. Dividing power across jurisdictions and among institutions is a recipe for uncertainty and conflict. One cannot be sure that a bill that passes one house will pass another, that a bill that passes Congress will be signed by the President, that legislation once enacted will be enforced in a particular or predictable way, or that enacted and enforced legislation will be interpreted and applied by the courts in a particular or predictable way. Moreover, the division of powers is consciously designed to place the government in an ongoing state of tension, with each institution in a constant struggle with the others for power and prestige; such is the clear message of Madison's brilliant essay on governmental structure in *The Federalist*.[287] All of this chaos and conflict was deliberately left to us by the founders because they deemed it necessary to preserve liberty.

Departmentalism is simply one aspect of the separation of powers. The power to interpret and apply the Constitution is a great and awesome power—just as is the power to govern through legislation. The same considerations that made the founding generation leery, and that ought to make the present generation leery, of placing all legislative powers in the hands of one institution also counsel in favor of dividing the power of interpretation among many different actors, with no one holding absolute

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286. It is not always easy to identify the "four corners" of the judgment. It is often difficult to determine exactly which matters were definitively concluded by the judgment and hence are subject to its final disposition. The Restatement notes that a valid and final judgment that extinguishes a plaintiff's claim bars further claims "with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose," but noting that "[w]hat factual grouping constitutes a 'transaction,' and what groupings constitute a 'series,' are to be determined pragmatically," based on such matters as "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." 1 Restatement (Second) of Judgments § 24 (1982).

287. *See* The Federalist No. 51 (James Madison) (J. Cooke ed., 1961).

sway over the others.[288] If the result is some chaos and conflict, that, along with eternal vigilance, is the price of liberty.

The framers may have been wrong (although we do not think so) about the virtues of a system of separated and divided powers. But it is the system that they created. When viewed through the lens of this system, a power of independent presidential review does not seem so strange or threatening.

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288. *See* Paulsen, The Most Dangerous Branch, supra note 4, at 329-30 (arguing that the framers intended each branch to share in the role of interpreter of the Constitution).