

# University of St. Thomas Law Journal

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Volume 14

Issue 3 *Presidential Executive Power Under the  
Constitution: Uses, Abuses, and Prospects for the  
Future*

Article 4

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2018

## The President and the Myth of Judicial Supremacy

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### Bluebook Citation

Michael Stokes Paulsen, *The President and the Myth of Judicial Supremacy*, 14 U. St. Thomas L.J. 602 (2018).

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## ARTICLE

# THE PRESIDENT AND THE MYTH OF JUDICIAL SUPREMACY

MICHAEL STOKES PAULSEN\*

### INTRODUCTION

I am delighted to have the opportunity to debate, in print, my old friend—the charming and brilliant Dean Vikram Amar of the University of Illinois College of Law—as part of the *University of St. Thomas Law Journal*'s 2017 symposium on *Presidential Executive Power Under the Constitution*. I first met Vik when he was a brand-new first-year law student in the fall of 1986, while visiting his older brother, my former law school roommate, Akhil Amar. Vik and I became, first, acquaintances and, over the years, friends—as well as occasional sparring partners on great questions of constitutional law.

This essay is an attempt to recreate, in writing, my side of the extemporaneous lunchtime debate between Vik and me on a provocative cluster of questions posed by the symposium editors: Does the president possess the constitutional power—and perhaps even the duty—to decline to execute statutes *on constitutional grounds*? Is such a power and duty of the president *independent* of the courts' exercise of their similar duty? That is, may the president refuse to execute statutes on constitutional grounds *rejected* by the courts? Or is the president bound in the exercise of any constitutional interpretive authority he possesses by judicial precedents of the Supreme Court (and other federal and state courts)? Finally, pressing the issue to its logical extreme: If the president may decline to follow judicial precedents as law in matters other than the case decided, may he likewise decline to follow a judicial decision in a decided case? Put differently: Does the president possess the constitutional power—and perhaps even the duty—to decline to execute *judicial decrees and judgments* that he concludes are contrary to the Constitution or other governing federal law?

I call our respective position a “debate,” but I use the term gently. Not only are Vik and I friends—which tends to give our disagreements more the

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character of friendly discussion than fevered argument—but we share (to a degree) much the same starting point. We agree that the independence and separation of the three branches of the federal government, together with the fundamental axiom of *constitutional* supremacy, implies that each of the branches possesses a measure of independence from the others in the interpretation and enforcement of the Constitution. We simply follow these premises to different stopping points. Neither of us subscribes whole-hog to the myth of judicial supremacy—the virulent error that misreads (or misrepresents) *Marbury v. Madison* as if it stood for the proposition that the province of constitutional interpretation is reserved entirely for the judiciary, with the other branches of government reduced to ciphers possessing no truly independent role or voice on constitutional questions. The Myth of *Marbury* is precisely that—a myth.<sup>1</sup> The right starting point is that each of the branches of the national government possesses a legitimate and (in the main) independent province of constitutional interpretation. Vik Amar and I agree on that much, I think. I simply go a step or two further than Vik does in following first premises to what I believe are their logical and necessary conclusion.

My thesis—one that I have advanced in other writing<sup>2</sup>—is that the president has a fully coequal and independent power and duty of faithful

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1. Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706 (2003).

2. I apologize for the obligatory string citation of my own prior work, but it's the simplest way of giving the reader the necessary references (and acknowledging a good bit of self-plagiarism): For the most complete exposition of my view, including an exhaustive description of the textual, structural, and historical evidence in support of complete independent presidential interpretive parity with the courts and Congress, see 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*]. For a further defense, and responses to certain objections and inquiries, see Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385 (1994) [hereinafter Paulsen, *Protestantism and Comparative Competence*]. For a reprise, response to certain objections, and elaboration of structural and historical arguments for “executive review” in the context of discussion of a famous case, see Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337 (1999) [hereinafter Paulsen, *Nixon Now*]. For a somewhat earlier, briefer, wittier presentation of the essential dilemma posed by the colliding premises of the coordinacy and coequality of the branches (on the one hand) and the idea of judicial supremacy over the other branches in the sense of the assumed obligation of the executive to enforce specific judicial judgments or decrees (on the other), see 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*]. For a discussion of Abraham Lincoln's stance and its progression in the direction of an increasingly complete view of independent presidential interpretive power, see Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227 (2008). For a general discussion that the constitutional argument and premises of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) yields the conclusion not of judicial supremacy (as is widely but incorrectly believed) but of constitutional supremacy and the coequal interpretive authority of multiple actors within our constitutional system, see Paulsen, *supra* note 1.

I should acknowledge that some of the specific formulations in the text are ones that I have used in developing this family of arguments in online articles and blog posts. Michael Stokes Paulsen, A “Judicial Supremacy” Test Question, NAT'L REV. (June 9, 2015), <http://www.national>

constitutional interpretation, which may be exercised in ways at variance with judicial interpretations of the Constitution. This power, I submit, extends to and applies with respect to the exercise of *all* of the president's constitutional powers—the qualified veto power over bills passed by Congress, the pardon power, appointments, military Commander-in-Chief, and law-execution generally, including the execution of judicial decrees.

Vik Amar goes some of this distance—a good bit of the way, in fact—but alas turns back, chicken-heartedly, when crossing the road gets a little scary.<sup>3</sup> My stance in this colloquy is that there is no good *principled* justification for turning tail and running away from the full logical implications of the principle of coordinate, coequal presidential interpretive power.

In Part I, I begin by briefly setting forth what seems to be the general academic consensus on this issue and argue that that consensus is incoherent and unprincipled. In Part II, I develop one of my favorite hypotheticals driving this point home—an imaginary (but not entirely unprecedented) modern “Sedition Act” that is flagrantly unconstitutional but nonetheless enacted by Congress and upheld by courts. A picture is worth a thousand words and my hypothetical “story problem” illustrates my position perfectly. In Part III, I apply the principle of coordinate, coequal interpretive power to reach the straightforward conclusion that *the president has both the power and duty not to enforce or execute unconstitutional laws, whether or not the judiciary agrees with the president's good faith constitutional judgment*. That power extends to vetoes, pardons, and law-execution alike. Finally, in Part IV, I argue that the same premises and the same logic yield the bracing and unconventional conclusion that *the president has both the power and duty not to enforce unconstitutional judicial decisions*—judgments in the specific case rendered, that the president in good faith judges to be contrary to controlling law.

My position is not without its problems and is vulnerable to certain obvious objections. But I believe it is superior to the contrary position, which suffers from serious logical flaws and tends to collapse into complete judicial supremacy—a position utterly at odds with first constitutional prin-

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review.com/bench-memos/419516/judicial-supremacy-test-question-michael-stokes-paulsen; Michael Stokes Paulsen, *A Model Answer to the “Judicial Supremacy” Test Question, Part 1*, NAT'L REV. (June 11, 2015), <http://www.nationalreview.com/bench-memos/419615/model-answer-judicial-supremacy-test-question-part-1-michael-stokes-paulsen>; Michael Stokes Paulsen, *A Model Answer to the “Judicial Supremacy” Test Question, Part 2*, NAT'L REV. (June 11, 2015), <http://www.nationalreview.com/bench-memos/419658/model-answer-judicial-supremacy-test-question-part-2-michael-stokes-paulsen>; Michael Stokes Paulsen, “*Model Answer, Part 3: May Juries Properly Disregard Erroneous Judicial Legal Instructions?*,” NAT'L REV. (June 11, 2015), <http://www.nationalreview.com/bench-memos/419668/model-answer-part-3-may-juries-properly-disregard-erroneous-judicial-legal>; Michael Stokes Paulsen, *Model Answer, Part 4: May the President Decline to Execute Judicial Decrees on Constitutional Grounds?*, NAT'L REV. (June 12, 2015), <http://www.nationalreview.com/bench-memos/419687/model-answer-part-4-may-president-decline-execute-judicial-decrees-constitutional>.

3. The reader at this point of course should interpolate into the text a stage wink and smile.

ciples of separation of powers. The chief problems with my view are two: it is inconsistent with much modern practice; and, taken seriously, it is susceptible to abuse by an abusive president. Both points are true. Completely coequal interpretive power is *not* our current operating paradigm; it is precisely the burden of my argument that our current practice of de facto judicial supremacy is contrary to first principles of our written constitution. And coequal presidential interpretive power *can* be abused. (As I write, the presidency is held by a person who appears uniquely unqualified by character, temperament, and experience to exercise presidential power, of this or any other type, properly and in good faith.) But the potential abuse of a power is not a constitutional argument against its existence. It is, rather, an argument that such power should be effectively checked by the independent exercise of the coequal interpretive power of the other branches (and vested in fit executive hands in the first place—a matter of politics and a responsible public). *Wherever* interpretive power exists, it can be abused. That, indeed, is why the framers devised a constitutional structure of separation of powers, with independent branches armed with some autonomous and some intersecting powers, creating the possibility of meaningful checks and balances. The prospect of abuse of interpretive power, and thus the desirability of checks on its exercise, is precisely why the most wrong answer is to claim that one branch has complete (or practical) interpretive supremacy over the others.

### I. THE INCOHERENT CONSENSUS

I begin with a brief summary of the general consensus: Nearly everyone, it seems, defends at least some version of the view that the federal judiciary's final judgments in cases or controversies actually decided by the courts are conclusive and binding on the other branches of the national government and on state government actors. Some go further than that, to varying degrees embracing some version or another of the myth of judicial supremacy and giving binding effect to a judicial judgment even beyond the parameters of the specific case decided.<sup>4</sup> But (almost) everyone agrees that, at the very least, a court's final resolution of a specific case is binding on the parties, on the executive, and on the legislature.<sup>5</sup>

At the same time, nearly everyone, it seems, defends at least some limited version of the rather different proposition—in considerable tension with the first—that the *other* branches possess a sphere of autonomy and independence in constitutional interpretation. That is, Congress, the president, and perhaps others possess a “coequal” prerogative of constitutional interpretation—at least to some extent.<sup>6</sup>

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4. See Paulsen, *supra* note 1, at 2706–2710.

5. See generally Paulsen, *The Merryman Power*, *supra* note 2, at 81–82.

6. *Id.*

With deep respect for all involved in this discussion—including Dean Amar—I believe that to hold both propositions simultaneously is analytically incoherent. Genuinely “coequal” interpretive authority and “judicial supremacy” (to any degree) are fundamentally inconsistent with one another. One of the two propositions inevitably swallows up the other. Consider them one at a time.

If the specific judgments of the judiciary are supreme and binding on everyone else, and if the judiciary is likewise supreme in deciding the scope and content of such judgments as well as its own jurisdiction and authority to enter them, there is no genuine sphere of independent interpretive authority in the other branches. Any such asserted sphere of “independent” interpretive authority by others is illusory; it exists solely as a matter of judicial grace. The power to render judgments that bind the actions of other branches swallows up any pretense of coequal interpretive power, for the assumed judicial power to bind always could be leveraged into a power to direct compliance with the judiciary’s views in all respects and in all exercises of power by the other branches. This renders any claim that such a judicial power is itself merely a “coequal” interpretive power a complete misnomer. As Orwell might have put it: all branches possess coequal interpretive power, but the judiciary’s coequal interpretive power is more coequal than everybody else’s!<sup>7</sup>

On the other hand, if the power to interpret the Constitution is truly a co-equal power, shared in common by all governmental actors incidental to their other assigned powers and functions, and not authoritatively assigned

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7. GEORGE ORWELL, *ANIMAL FARM* 104 (Akasha Publ’g 2008) (1945).

An attractive but unsuccessful attempt to evade being gored by this horn of the dilemma is the argument that “each branch can say no” and that every such “no” is an absolute “stop sign” (or “red light”) that no other branch can breach. The judiciary’s “stop” command simply comes last, giving the judges functionally the last word on constitutionality. Ah, but here’s the rub: all legal questions present interests on opposing sides; a “stop” in one direction is a “go” in the other, and there is no intrinsic right assignment of what constitutes “stopping” another branch’s actions as opposed to ordering another branch to engage in action. Similarly, “rights” do not come with nonarbitrary labels. Take *Dred Scott* (please): Is a judicial holding invalidating the Missouri Compromise’s prohibition of slavery in a federal territory a “stop” sign protecting individual “rights” from government intrusion (in the form of the legal property rights of slaveholders), and thus binding on the other branches of government (because the judiciary spoke last)? Or is it an affirmative order to return an individual to slavery, eviscerating his rights, and affirmatively coercing the other branches to obey? Likewise: Is the holding in *Roe v. Wade* protective of individual rights to reproductive freedom or destructive of individual rights to life? Is it a “stop sign” with respect to government interference with pregnant women’s freedom of action or a “compulsion sign” that orders government *not* to protect individual rights—that government may not protect individual rights of unborn human beings to life? In each such instance, *everything*—including of course the characterization of the decision as a “stop” or a “go” and the result as favoring or opposing individual rights—*turns on the substantive resolution of the underlying constitutional question*. To say that each branch has a “stop” that prevents the others’ “go” is to beg entirely the question of the merits of the asserted legal rights on each side of the question. Likewise, to assert that each branch has a constitutional “veto” on the acts of the other—but that the judiciary’s veto forbids everybody else’s action—begs the substantive question of the true character of the supposed “veto.”

to any of them, no governmental actors are bound in *any* of their actions by the views of any one of the others. (This is my position.) On such a view, it is hard to carve out, legitimately, an *exception* for the supremacy of judicial judgments that does not end up defeating the general rule. The exception is either a spurious one—it exists by the grace of the other actors who willingly accede to wrong judgments, not because the Constitution commands such a result, but because they have chosen to allow it—or the exception, if constitutionally mandated, turns around and devours the supposed coordinate-and-coequal-interpretive-power general rule.

This was essentially the position I took in one of the first articles I wrote as a young law professor, back before the invention of the typewriter. In *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, I argued that the consensus view made no logical sense:

The premises of executive branch interpretive autonomy and of judicial supremacy are, in principle, irreconcilable. Either the executive branch possesses the prerogative of autonomous legal interpretation within the sphere of its powers or it is subordinate to the judiciary; the two propositions cannot peacefully coexist. The premises supporting the two polar positions pose a sharp dilemma, forcing the principled interpreter down one slippery slope or the other. In the one case, one series of conclusions inexorably follows from the premise. In the other case, a different series of conclusions necessarily follows—irreconcilable with the first set. One or the other of the polar-case concessions making up the prevailing consensus must be wrong in principle, according to the premises that make the other polar-case *right* in principle.<sup>8</sup>

If one starts with the idea of judicial supremacy as to judgments, but then asserts that presidential pardons and vetoes on constitutional grounds rejected by the courts are permissible, one has a particular set of problems. For openers, if Supreme Court precedents are, as to judgments, “supreme” statements of the law, then presidential vetoes and pardons premised on a contrary view are simply the (hypothetically unreviewable) lawless actions of the executive branch, conveniently immune from judicial interference because matters of exclusive executive prerogative under the Constitution. That doesn’t make Jefferson’s Sedition Act of 1798 pardons (and nullifications of pending prosecutions) and Jackson’s bank re-charter veto acts of salutary independent constitutional interpretation, but acts of lawless constitutional impudence beyond the reach of the law (i.e., the courts). That is hardly a satisfying rationale for the validity of those acts. It also bears no resemblance at all to the constitutional justifications Jefferson and Jackson offered for them.<sup>9</sup>

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8. Paulsen, *The Merryman Power*, *supra* note 2, at 83.

9. For more on these actions of presidential constitutional interpretation, see *infra* Part III.

But that leads to the second problem with this judicial-supremacy-with-exceptions view: *Who determines which presidential actions are “exceptions” to judicial supremacy?* As I put it nearly a quarter century ago:

Who determines what areas of executive authority and exercises of executive power are “exclusive” or “unreviewable” in the first place? The courts? The President? The judicial-supremacy-with-exceptions approach only *relocates* the central dilemma of who has final interpretive power. Pardons and vetoes are deceptively easy-seeming cases; they are easy only because it has become well-accepted that the President has essentially unbridled discretion as to their use. But the scope of permissible exercise of the pardon and veto powers is, after all, a question of constitutional interpretation. If such questions are committed to the judiciary’s supreme determination, then the notion of unreviewable executive powers is illusory: The President is permitted to exercise such powers “without judicial interference” only because the judiciary has first decided to allow him such discretion. . . .

In sum, the “exclusive executive sphere” theory, if allowed, is either an unprincipled exception that contradicts the very premise of the judicial supremacy rule, or a grand illusion under which a sphere of executive interpretive autonomy exists only because the judiciary says it does.<sup>10</sup>

Similarly, if one starts with the idea of executive branch coequal interpretive authority, but then asserts an exception in favor of the judiciary’s supremacy as to final judicial judgments, one inevitably slides down the opposite slippery slope. If judgments are binding *as law*, why isn’t the president bound to follow them *as law* outside the judgment context? Why isn’t disobedience to the judiciary’s legal reasoning in support of a judgment (on this view) an act of executive bad faith, every bit as much as disobedience to a judgment itself? And, if the judiciary has the last word as to judgments, why can’t the judiciary simply order executive compliance with its judgments’ reasoning, prospectively and generally, as an aspect of its judgment? Again, as I said in 1993:

The theoretical power of the courts to have the last word any time they assert it means that the executive acts in bad faith by not according “the law” as declared by courts the same generality of application as statutory law.

Moreover, if the President does not conform his conduct to judicially-declared law in the form of precedents, the judiciary theoretically can order him to do so. The Supreme Court could declare in any case that its ruling must be given general effect. (Indeed, that is precisely what it purported to say with respect to *all* of its pronouncements in *Cooper v. Aaron*.) . . . Taken seriously, the

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10. Paulsen, *The Merryman Power*, *supra* note 2, at 101, 103.



exception swallows the rule. If the executive branch *must* honor and enforce court judgments, then it has no genuine sphere of interpretive autonomy.<sup>11</sup>

The same problem inheres in the judgment-supremacy view no matter how one tries to tame it—as Professor Will Baude attempts to do, for example, by limiting judgment supremacy to true “cases” and controversies within the scope of a court’s proper “jurisdiction.”<sup>12</sup> It’s almost too easy to point out the problems with such an attempted taming: Who ultimately decides what constitutes a “case”? Who ultimately decides what does or does not fall within the scope of a court’s “jurisdiction”? Does a judicial decision outside its “jurisdiction” include *ultra vires* judicial action of only some kinds and not others? Or is “jurisdiction” a general principle limiting the power of courts to deciding cases in accordance with governing law? (And who answers these questions?) While we’re at it: Who decides what is the proper scope of a “judgment” and whether that scope includes judicial orders compelling prospective compliance with the judiciary’s view of the Constitution?

If the courts decide all these things, the “Judgment Power” exception is no exception at all, but the whole ball game. The judiciary decides the scope of judicial power, the scope of a case, the scope of its jurisdiction, the scope of its legitimate authority, and the scope of the obligation of all others to obey its supreme commands.<sup>13</sup>

On the other hand, if the executive can decide some or all of these things independently of the views of courts—then the judgment exception begins to collapse into executive co-ordinate interpretive power as a general proposition. That is, it becomes my position: the executive properly can judge for himself, independently, whether the judiciary has acted within its lawful constitutional authority; if not, the executive must decline to give effect to the judiciary’s unlawful action. The judgment-within-its-jurisdiction exception simply adds a step to the analysis. We’ve just taken an en-

11. *Id.* at 104–105.

12. See generally William Baude, *The Judgment Power*, 96 GEO. L.J. 1807 (2008).

13. That of course is precisely what the Court purported to do in its (in)famous dictum in *Cooper v. Aaron*, 358 U.S. 1 (1958). See generally MICHAEL STOKES PAULSEN & LUKE PAULSEN, *THE CONSTITUTION: AN INTRODUCTION* 255–258 (2015).

I can hear the answer now: No, *that* type of judicial judgment—a judicial decision leveraging forward the judgment power into a rule that judicial decisions state binding, prospective rules for all other actors in all other situations—would be an *improper, invalid “judgment”*! I quite agree. But then we are dealing with an understanding of “beyond jurisdiction” close to the broader notion of an *ultra vires judicial act* of any description. If so, that is the essence of my position; on such an understanding, there is no real difference (other than clarity) between the judgment-within-its-jurisdiction “exception” and my more straightforward proposition of completely coordinate constitutional review. (The only remaining question then is *who decides* whether the judiciary has acted within its *proper constitutional authority*? I take up that point next in the text: obviously it cannot be the judiciary or we are right back where we started.)

tirely unnecessary extra lap around the block in order to arrive at the same place we started.<sup>14</sup>

Middle positions don't work. Either one believes in executive branch coequal interpretive authority, independent of the decisions of the courts, or one believes in judicial supremacy before which every knee ultimately can be forced to bend and every head required to bow. For reasons detailed at exhaustive length in prior writing,<sup>15</sup> I believe that the premises of constitutional supremacy and separation of powers vested in independent, coordinate, coequal branches of government supports the former conclusion—complete coordinacy—as disturbing as it might be in some of its applications, and as unsettling as it might be for current practice.

In my experience, folks conditioned by the myth of judicial supremacy have trouble accepting this conclusion. But presented with a simple test-case hypothetical, they sometimes start to yield just a little bit: where logic and first principles do not convince (even though they should), perhaps a fractured fairy tale—a story—will provide an assist.

## II. A HYPOTHETICAL: THE SEDITION ACT OF 2017

Here's my hypothetical:

Congress passes (either with a predecessor president's signature or over the incumbent president's veto) the "Sedition Act of 2017," which makes it a crime to criticize the government of the United States. Such a crime is designated as high treason and is punishable by death by slow torture. The president is stripped of any discretion whether to bring prosecutions and also of the power to grant pardons to offenders. Certain offenders are singled out by name—including one infamous law professor Michael Stokes Paulsen—based on past conduct (in the form of expression of views and opinions). The offenders are entitled to neither jury trial nor due process nor judicial consideration of legal objections of any kind. The president is, in fact, directed to carry out the executions immediately—the same day if possible. (Of course, the "slow torture" provision will extend the period of gradual death for some time; the whole process may last more than twenty-four hours.) Finally, under this Sedition Act, the conviction of the named offenders works a forfeiture of all assets and the corruption of blood for the next six generations of direct lineal descendants of the guilty party.

Is the described statute unconstitutional? (Please read a sinister stage-smirk into this question.) Of course, it is! Obviously, yes, the Sedition Act

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14. See Paulsen, *The Merryman Power*, *supra* note 2, at 105 (noting that the "cases" or "jurisdiction" position "only relocates the problem" and collapses into either complete judicial supremacy or complete executive coordinacy). For a more extended refutation of the Will Baude "Judgment Power" exception, see Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J.L. & LIBERTY 18, 106–113 (2016).

15. See generally sources cited *supra* note 2.

is unconstitutional about a half-dozen ways: It violates the First Amendment freedoms of speech and press. It violates Article III's definition of treason. It unconstitutionally interferes with both the executive power and pardon power of the president under Article II. It violates both due process guarantees and jury-trial rights, and unconstitutionally interferes with the Article III judicial power. It is both a bill of attainder and an ex post facto law—as pure an illustration of each as one can imagine. Slow torture almost certainly violates the Eighth Amendment. And the Sedition Act even violates the Constitution's prohibition of penalties extending beyond the life of the convicted and imposing a “corruption of blood.”

The point is that the statute is *objectively, incontrovertibly unconstitutional*—as everyone (I hope) would agree. Can we all agree on this as a starting point for all further discussion?

Pause and reflect on this for a moment. A necessary premise of what follows is that there are such things as objectively correct answers to at least some constitutional questions. We may sometimes disagree as to what those answers are—and sometimes the “correct” answer may be that the Constitution permits a range of legitimate answers on a particular question or issue. But not for this hypothetical, surely: the whole point of the hypothetical is to factor-out of the equation any dispute as to the merits of the underlying constitutional question, so as to focus on the question of judicial supremacy in constitutional interpretation as a matter of pure principle. For if the proposition is that the Supreme Court's judgments are, in some or all respects, absolutely binding on other constitutional actors, irrespective of their correctness, then the way to test that proposition is to think about a situation where we can all agree that the Supreme Court's judgment is wrong.

That's fair, isn't it? If the obligation to abide by Supreme Court decisions does not exist where the Supreme Court has decided a case incorrectly, then there is very little to the notion of judicial supremacy. If the obligation to abide by a decision is in fact dependent, at some level, on the correctness or incorrectness of the decision, then we're not arguing about judicial power and the absolute duty to obey judgments and conform to judicial precedents; we're arguing about the correctness or incorrectness of the specific decision. That's why I like to present the issue uncluttered by disagreement over the correctness of the underlying decision. The issue is best framed in a setting where we can all agree that the judicial decision is *wrong*.<sup>16</sup>

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16. But the Supreme Court would never, ever uphold such a statute! The Supreme Court would never get such a constitutional decision so terribly wrong! Oh? The litany of atrocious, almost unthinkable Supreme Court decisions is long and impressive: *Dred Scott v. Sandford*, 60 U.S. 393 (1857), *Bradwell v. Illinois*, 83 U.S. 130 (1873), *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Lochner v. New York*, 198 U.S. 45 (1905), *Korematsu v. United States*, 323 U.S. 214 (1944), *Roe v. Wade*, 410 U.S. 113 (1973), and many, many more. For an argumentative catalog, see Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003). Stop yourself, gentle reader, if you are starting to argue the legitimacy of one or

I'm finally getting to the hypothetical question (or, rather, a series of them). The final prop of the hypothetical is that *you are the president*. My questions concern your constitutional powers and duties. Think about them one by one, each in turn. (Really, scribble down your answers as we go. This is a test!)

First, assume the Sedition Act bill is passed and presented to you for your signature before becoming law. May you—*must* you—*veto* it, on constitutional grounds? Is your decision, and the legitimacy of your contemplated veto, affected by whether or not you think the courts, and specifically the U.S. Supreme Court, would agree with your constitutional judgment?

Second, assuming the law was enacted over your veto (or signed by a predecessor), is it constitutionally proper for you to *pardon* Professor Paulsen—notwithstanding the prohibition of such pardons in the Act? Again, is your decision affected by whether or not you think the Supreme Court would agree? Would you pardon Paulsen if the Supreme Court had already specifically upheld the provision of the Sedition Act abrogating the presidential pardon power? (This is actually a variation of the next question in the series.)

Third, more generally, may you *refuse to execute* the statute (or any of its provisions) on constitutional grounds, based on your own independent constitutional judgment? May you do so *before* the courts have spoken? May you refuse to execute the statute *after* a test case has upheld the constitutionality of the Sedition Act of 2017?

To extend the hypothetical: Suppose that, notwithstanding the provisions of the statute barring judicial review and due process, Mr. Paulsen is somehow able to get a test case heard and make his way to the Supreme Court, which—somewhat astonishingly—rules against all of his constitutional objections by a 5–4 vote. (You can make it 9–0 if you like. Nothing really turns on the vote count, does it?) The case of *Paulsen v. United States* has thus rejected each of Paulsen's constitutional defenses. Returning to the questions for you, the president, fleshed out by this further description: May you decline to execute the statute *in a subsequent case*, involving another alleged malefactor/violator—let's call him Dean Vikram Amar—likewise singled out by name in the Sedition Act as guilty of high treason? Or may you refuse to honor the (wrong) *Paulsen* precedent in a subsequent case?

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more of these decisions: that's not the point; the point is that the Supreme Court can and does err, sometimes grotesquely. Surely no one disputes *that*. At all events, the whole point of the exercise is to first stipulate the existence of a clearly erroneous, harmful Supreme Court decision in order to frame the question of whether other branches are bound to accede to the Supreme Court's decisions *no matter what*. The simplest way of thinking about this is to ask what should have been the binding force of the Supreme Court's decision in *Dred Scott* on the actions of nonjudicial government officials. That is the way I frame the question in Paulsen, *Lincoln and Judicial Authority*, *supra* note 2, at 1228–1230.

Fourth, must you obey and execute the judgment in *Paulsen v. United States* itself—and execute Paulsen—because of the Supreme Court’s judgment in the specific case decided? (Let us assume a “so ordered” at the end of the decision directing you, the president, to execute this impudent litigant.) Or may you *decline to execute the specific judgment in the specific case*, on the ground that it *wrongly* upheld the constitutionality of the Sedition Act of 2017?

My answers—the right answers!—are that you should veto the Sedition Act of 2017, pardon any and all offenders convicted under it, refuse to bring prosecutions pursuant to it, and decline to “execute” any of its unconstitutional provisions against any person, whether the courts have spoken or not, whether the courts have upheld the Act’s provisions or not, and whether the matter at hand involves the judgment in the specific case decided or a different, factually indistinguishable one. Constitutionally, it is not only your *power* but also your *duty* not to carry out the provisions of this flagrantly unconstitutional act, irrespective of what the judiciary has said.

The Sedition Act of 2017—which we all agreed was objectively, incontrovertibly unconstitutional—is *still* objectively, incontrovertibly unconstitutional. The Supreme Court’s decision saying it ain’t so does not change objective constitutional reality or consequent constitutional duty. The Supreme Court’s decision in *Paulsen* is, in a word, wrong. As such, it has no claim to legal validity in any respect. The answer to the final question of the hypothetical is the same as the answers to all the others. You (*of course!*) should not execute the specific judgment in the case of *Paulsen v. United States*. You are constitutionally authorized, empowered, and obligated to let me go, alive and free.

Is there any real doubt about this?

### III. THE POWER AND DUTY OF THE PRESIDENT NOT TO ENFORCE UNCONSTITUTIONAL LAWS

The president has the independent province of constitutional interpretation in connection with the exercise of all of the president’s constitutional powers. *Marbury* stands for the proposition of constitutional supremacy—not judicial supremacy—and the independence of each of the branches of the national government in the exercise of the duty to adhere faithfully to the Constitution. (So too do other early defenses of the idea of constitutional legal review, notably including *The Federalist* No. 78, stand for constitutional supremacy and not any notion of judicial superiority over the other branches of government.) The president swears an oath to “preserve, protect, and defend” the Constitution, and pledges to faithfully execute the laws of the United States, including the Constitution as supreme law. The president thus has not only the constitutional power but also the duty not to

enforce or defend unconstitutional laws. That duty applies in the carrying out his legislative (veto), pardon, and executive powers.

The president's duty is of course one of *responsible, faithful*, independent constitutional interpretation. (Interpretive power does not equal interpretive license.) The president may not simply do *whatever he wants* in the name of the Constitution—just as the courts are not properly empowered to do so. And there may be honest disagreements about what the Constitution actually requires or permits. That too is to be expected; the branches' checking and attempting to counter each others' interpretations and actions is fully part of the constitutional design. But in principle the interpretive powers of the respective branches are almost precisely parallel.

In this section, I will sketch—rapidly—the president's power and duty not to enforce unconstitutional laws. In the next section, I will sketch the correlative presidential power and duty not to enforce unconstitutional judicial judgments or orders.

#### A. *The President's Independent Province of Constitutional Interpretation*

The president's power of independent constitutional interpretation closely tracks that of the courts and is justified by essentially identical postulates, premises, and reasoning. As I have developed at length elsewhere,<sup>17</sup> *Marbury's* argument for the power of *judicial* constitutional review rests on three core premises: (1) constitutional supremacy (as distinguished from judicial supremacy, which finds no support in the text, structure, history, or logic of the Constitution); (2) the structural independence of the branches as an aspect of separation of powers and each branch's separate responsibility of adherence to the Constitution in the course of performing its specific assigned constitutional responsibilities (in the case of the judiciary, deciding cases in accordance with governing law, including the Constitution as supreme law); and (3) the independent obligation of the oath of fidelity to the Constitution, which requires each actor to adhere in good faith to the Constitution, irrespective of the decisions of others that might depart from it.

Each of these premises applies to the president the same as to the judiciary. The Constitution is supreme law of superior obligation to every other source of law and the president is charged with assuring the faithful execution of the laws. The president is specifically commanded to "take Care that the laws be faithfully executed"<sup>18</sup> and, to quote *Marbury*, the Constitution is the "paramount law of the nation."<sup>19</sup> Finally, the president swears an oath to

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17. Paulsen, *supra* note 1; Paulsen, *The Most Dangerous Branch*, *supra* note 2, at 244. See also Paulsen, *Nixon Now*, *supra* note 2.

18. U.S. CONST. art. II, § 3.

19. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

support the Constitution—indeed, a unique and singular one, prescribed by Article II itself, to preserve, protect, and defend the Constitution.<sup>20</sup>

The president is thus, by the logic of the argument of *Marbury*, bound to adhere to the Constitution in his execution of the laws and in the performance of all of his constitutional duties and powers. Just as it is “emphatically the province and duty of the judiciary to say what the law is” in the course of performing judicial duties (deciding cases and controversies), it is “empathically the province and duty” of the executive “to say what the law is” in the course of performing executive duties (of law-execution and other kinds). In each situation—judicial case-decision or executive law-execution—it is equally true that “[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule.”<sup>21</sup>

So too is the president *independent* of the judiciary. Just as *Marbury* held that the judiciary could not simply go along with whatever Congress says on questions of constitutionality, but must employ its own good faith judgment—otherwise it would be giving “a practical and real omnipotence”<sup>22</sup> to the deferred-to branch—the president cannot simply go along with whatever another branch says. By the same reasoning that holds that courts must refuse to apply unconstitutional statutes, the president likewise must refuse to apply unconstitutional statutes. The president is no more bound by Congress’s unconstitutional statutes than the courts are. And by precisely the same reasoning, the president is no more bound by the Court’s decisions misinterpreting the Constitution than the courts or president are bound by Congress’s misinterpretations of the Constitution. Independence is independence. In the hypothetical Sedition Act situation above, *Paulsen* is simply wrong (the decision, that is, not the professor). For the president to be bound by a judicial act contrary to the Constitution makes no more sense than for the Court to be bound by a congressional act contrary to the Constitution. A faithless misinterpretation of the Constitution is not binding on another branch of government. Each actor is oath-bound to enforce the Constitution and not the faithless departures from it by other governmental actors.

The conclusion is inescapable. Under core principles of the separation of powers, and under the reasoning of *Marbury*, no branch of the government can be bound to accede to another’s violations of, or failures to abide by, the Constitution. As I have summarized the point elsewhere:

The fundamental premise of the Constitution’s separation of powers into three great Departments is that they are all independent of and co-equal with each other. None has a superordinate power over any of the others—that is, a peremptory constitutional power

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20. For elaboration on the presidential oath, see Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1260–1267 (2004).

21. *Marbury*, 5 U.S. (1 Cranch) at 177.

22. *Id.* at 178.

to tell another branch what it must do or must not do. The intersection and interaction of the three Departments' respective powers provide the means for mutual checking of one another; but they are checks only, not trumps. The Constitution gives no branch, including the judiciary, an ultimate trump power over the others.<sup>23</sup>

The framers could not possibly have been any clearer on this score. As James Madison put it in *The Federalist* No. 49: "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."<sup>24</sup> That is as categorical a rejection of one-branch interpretive supremacy, and as unequivocal an embrace of interpretive coordinacy, as it is possible to imagine. It entails a rejection of judicial supremacy every bit as much as a rejection of congressional supremacy or executive supremacy in constitutional interpretation.<sup>25</sup>

### B. *The President's Duty Not to Enact, Enforce, or Defend Unconstitutional Laws*

Applying these principles, it is not hard to see how the president possesses an independent duty of faithful constitutional interpretation and how that duty applies to all of the office's constitutional powers. The president of the United States, by virtue of his or her "common commission," by virtue of the separation of powers, and by virtue of the oath to preserve, protect, and defend the Constitution, possesses an independent power and duty of (responsible) constitutional interpretation. In the exercise of the power to issue vetoes and grant pardons; in the exercise of the power and duty to faithfully execute the laws; and in the exercise of the power and duty to execute (lawful) judicial decrees, *the president rightfully may interpret the Constitution independently of the views of both Congress and the courts, and act to check what he or she, in good faith, concludes are the unconstitutional or unlawful actions of these other branches.*

Run down the list: It follows from these general principles that the president may issue vetoes and grant pardons on constitutional grounds, independently of the views of the courts on the same underlying substantive issues. Andrew Jackson did this in vetoing the bill re-chartering of the Second Bank of the United States, invoking constitutional objections rejected in their core premises by the Supreme Court's decision in *McCulloch v. Maryland*.<sup>26</sup> Thomas Jefferson did this in pardoning persons convicted

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23. Paulsen, *Nixon Now*, *supra* note 2, at 1351.

24. THE FEDERALIST NO. 49, at 313 (James Madison) (Isaac Kramnick ed., 1987).

25. Paulsen, *Nixon Now*, *supra* note 2, at 1349-1358.

26. See Paulsen, *The Most Dangerous Branch*, *supra* note 2, at 257-260 (discussing the Jackson Bank veto).



under the (actual!) Sedition Act of 1798 and whose convictions had been upheld against legal challenge by the final federal courts with jurisdiction over such federal criminal prosecutions. Both presidents invoked the independence of the interpretive powers of the president in justifying their actions.

“You seem to think,” Jefferson wrote to his challenging friend Abigail Adams,

it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. *Both magistracies are equally independent in the sphere of action assigned to them.* The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because the power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power has been confided to them by the Constitution. That instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch.<sup>27</sup>

Likewise Andrew Jackson (who invoked his oath as establishing an independent, personal duty of faithful constitutional interpretation):

Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.<sup>28</sup>

Jefferson and Jackson had it right. Their actions were not in defiance of the Constitution, but in the exercise of their rightful, independent author-

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27. Letter from Thomas Jefferson to Abigail Smith Adams (Sept. 11, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 49, 50–51 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) (emphasis added).

28. Andrew Jackson, Veto Message (July 10, 1832), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1145 (James D. Richardson ed., 1911). Jefferson likewise invoked the oath in support of his pardons for violations of the Sedition Act (and also for his refusals to execute the act in pending prosecutions), noting in his letter to Abigail Adams that his duty to do so flowed from his “obligation[s] of an oath to protect the Constitution, violated by an unauthorized act of Congress.” Letter from Thomas Jefferson to Abigail Smith Adams (July 22, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 42, 44 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904). For more on the Jefferson pardons and Jackson veto, see Paulsen, *The Most Dangerous Branch*, *supra* note 2, at 255–267.

ity as a coequal branch of government to interpret the Constitution differently from the courts.

Consider next the case of non-execution of statutes on constitutional grounds, including grounds rejected by the judiciary. Jefferson's actions with respect to the Sedition Act of 1798 illustrate this aspect of presidential independent interpretive power as well. Upon becoming president, Jefferson not only pardoned persons previously convicted under the Act, but directed that pending prosecutions be ceased on the ground that the Act was unconstitutional and therefore a legal nullity. The unconstitutionality of the Sedition Act controlled *all* his actions as president with respect to that Act. As he explained in a letter to William Duane soon after issuing his directive, "whenever in the line of my functions I should be met by the Sedition law, I should treat it as a nullity."<sup>29</sup> Or, again, in Jefferson's famous letter to Abigail Adams:

I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image; and that it was as much my duty to arrest its execution in every stage, as it would have been to have rescued from the fiery furnace those who should have been cast into it for refusing to worship the image.<sup>30</sup>

Jefferson was hardly a loner in this regard. Literally dozens of presidents, from Washington to Obama, have declined to execute statutes, or parts of statutes, on constitutional grounds. Sometimes, those grounds have been based on prior or expected judicial interpretations of the Constitution, and sometimes not. Sometimes—as with Jefferson's actions—those grounds have flown in the face of judicial doctrine.<sup>31</sup> Sometimes, such presidential actions have come in the somewhat more timid form of "signing statements" accompanying presidential signature of a bill into law, indicating that the president will "construe" the law in such a way as not to generate unconstitutional applications, or (a more forthright formulation) that the president will not enforce aspects of an enacted law where doing so would be unconstitutional.<sup>32</sup> (There is an interesting side-debate over whether the president is constitutionally obliged to veto a bill with unconstitutional as-

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29. Letter from Thomas Jefferson to William Duane (May 23, 1801), in 34 THE PAPERS OF THOMAS JEFFERSON 169 (Barbara S. Oberg ed., 2007).

30. Letter from Thomas Jefferson to Abigail Smith Adams (July 22, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 42, 43–44 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904).

31. For partial compendia, see Paulsen, *The Most Dangerous Branch*, *supra* note 2, at 255–257; SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 307–309 nn.45–69 (2015); J. Randy Beck, 16 CONST. COMMENT. 419 (1999) (reviewing CHRISTOPHER N. MAY, *PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAW: REVIVING THE ROYAL PREROGATIVE* (1998)).

32. For a good general treatment of this question, see Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307 (2006).

pects or provisions, or may sign the bill and “sever” its unconstitutional applications by declaring that he will not enforce them.)<sup>33</sup> Sometimes, such presidential actions have come in the weak—and unprincipled—form of actually *enforcing* a statute believed unconstitutional but then *declining to defend* its constitutionality in judicial proceedings challenging its validity.<sup>34</sup>

The logic of the argument for presidential non-execution of unconstitutional statutes is hard to assail: if the Constitution says one thing, and a statute commands another, the president must give effect to the Constitution and not to the faithless legislative act. That same logic applies even if the judiciary (mistakenly) concludes that the statute is *not* unconstitutional—as with my hypothetical Sedition Act of 2017, and as was actually the case with judicial decisions sustaining the Sedition Act of 1798. Unless the Constitution embraces a rule of judicial supremacy in constitutional interpretation (which it does not), or otherwise makes the president wholly subordinate to the judiciary’s interpretations (which it does not), the president has a plain constitutional obligation to refuse to give effect to any statute he or she in good faith concludes is unconstitutional.<sup>35</sup>

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33. Professor Prakash embraces a strict duty on the part of presidents to veto laws containing unconstitutional provisions. See PRAKASH, *supra* note 31, at 304–306. This absolute duty turns out to be less than absolute, however, as Prakash concedes that presidents need not always insist on constitutional principle when it appears pointless or futile to do so. *Id.* at 315. I am not entirely convinced by the argument that a president must veto a law containing unconstitutional provisions, though I am certainly sympathetic to Prakash’s position. First, if a president is able to decline to give legal effect to an unconstitutional provision *through a different method*—refusal to execute that provision, on the ground that it is unconstitutional—it is not clear that he has to use the veto-power method in order to fulfill his constitutional oath. Second, since unconstitutional provisions frequently come packaged with other important substantive provisions of a bill passed by Congress and presented to the president—there is no prohibition on a bill embracing multiple subjects or items—the mandatory veto position would be somewhat analogous to arguing that whenever the judiciary finds a provision of enacted law unconstitutional, it must enjoin enforcement of the entire law as enacted, regardless of whether the unconstitutional provision is logically severable from the remainder. This seems an extreme view. The president should be permitted to declare unconstitutional and thus inoperative provisions within laws, just as the judiciary does, without having to veto an entire bill; the president may, in effect, “sever” the unconstitutional features from the constitutional ones and proclaim that the enacted law only contains the latter.

34. President Obama did this with respect to the Defense of Marriage Act in the actions that eventually produced the judicial challenge culminating in *United States v. Windsor*, 570 U.S. 744 (2013). This produces loads of problems. First, if a president in good faith believes a statute is unconstitutional, it would appear to violate his oath for him to *enforce* that which he believes is unconstitutional. Second, it seems especially indefensible to enforce an unconstitutional statute to the deliberate injury of a private party. Third, it seems—all at once—absurdly deferential to judicial supremacy, inconsistent with the proper bounds of judicial power as limited to genuine disputes, and transparently hypocritical (and perhaps legally unethical) for a president to *enforce* a believed unconstitutional statute in order to generate a contrived “test case” for judicial decision. When the party nominally “defending” the unconstitutional statute does not in fact dispute the position of those challenging it, the *defense* would seem to be a *pretense* and not a good faith adversary proceeding. Some aspects of these problems were explored in Justice Scalia’s dissenting opinion in *Windsor*. *Id.* at 780–783 (Scalia, J., dissenting).

35. Does the president likewise have a duty to *give effect* to statutes he believes constitutional but the judiciary believes *not* constitutional? This seems at first a more disturbing proposition. But I believe that the principle is actually the same, with a few qualifications I note presently. The

C. *The Duty of Responsible, Faithful, Independent Constitutional Interpretation*

What rightly bothers sensible people about recognizing the president's power of independent constitutional interpretation is the prospect that the power could be abused by an abusive (or incompetent) president. Indeed, it could; this is undeniable. Moreover, to frame the objection as strongly as possible, the specter of such abuse seems especially realistic when the office is occupied by a president who lacks the qualities of character, judgment, and intellectual discipline needed to perform the task of constitutional interpretation faithfully and well. As of the time of this writing, the prospect of abuse is not an unrealistic scenario.<sup>36</sup>

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president's obligation is to act in conformity with his or her best understanding of the correct interpretation of the law, independently of the views of the judiciary. This means that the president ordinarily will have a duty to execute constitutionally valid laws, irrespective of the judiciary's contrary views. As noted above, there is little or no intrinsic difference between an incorrect judicial interpretation holding a law unconstitutional and one holding a law constitutional. *See supra* note 7. The form that a judicial decision takes depends on the characterization of the legal rights or interests in question and the merits of the claims made with respect to such legal rights or interests. In many cases, an injury to legal rights or interests occurs regardless of the "direction" of the holding. *Dred Scott* held unconstitutional the Missouri Compromise's prohibition of slavery in the territories, a decision that equally could be characterized as protecting constitutional interests—the constitutional property and substantive due process equal-status rights of slaveholders—or defeating constitutional interests—the statutory right to freedom of Scott and his family under a constitutionally valid federal law. *Roe v. Wade* held unconstitutional state laws restricting abortion, a decision that equally could be characterized as protecting constitutional interests—the substantive due process liberty to abort the life of a human fetus—or defeating constitutional interests—the statutory (and arguably constitutional) right to life, protected by government from private violence by constitutionally valid state or federal law. *Cf.* Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13 (2012) (setting forth the plausible constitutional argument for the legal personhood of the human fetus and the consequence that such persons may possess legal rights to equal protection of the laws and due process of law).

An important caveat: The power (and duty) of the president affirmatively to execute constitutionally valid laws, irrespective of an erroneous judicial decision of invalidity, is qualified in two ways. First, *as to power*: the Fifth, Sixth, and Seventh Amendment jury rights of persons are best understood as specific limitations on the power of the executive to execute the criminal laws (and to some extent civil laws) against individuals. The trump-everyone interpretive province of the jury—and perhaps certain further implications of such *jury supremacy* for judicial process generally—operates as a specific limitation on the independent interpretive power of the executive (and for that matter, judges). For a more detailed discussion, see Paulsen, *The Most Dangerous Branch*, *supra* note 2, at 288–292; *cf. id.* at 283 n.240. Second, *as to duty*: a case can be made that the Constitution's separation of powers, the consequent independent power and province of *other* branches to check the president's interpretations (and acts) with the powers at *their* disposal, and the inevitable or probable practical operation of the constitutional system, given the allocation of specific powers, legitimately may counsel presidential deference to, or accommodation of, the positions of such other constitutional actors. *See id.* at 321–340 (discussing checks on executive interpretive power, and the case for presidential deference and accommodation given the structure and realities of the overall constitutional system).

36. This is not to say that presidents need to be sophisticated, law-school-educated high-theory constitutional-law aficionados in order to exercise responsibly the power of independent presidential constitutional interpretation. The prerogative of constitutional interpretation is a function of the office, not the skills of the officeholder. Indeed, sometimes an "unschooled," intuitive, common sense, plain reading of the Constitution's text may have a stronger claim to methodologi-

There are reasonable responses to this entirely reasonable objection. First, in discussing whether independent interpretive power is correct *in principle*, we should assume the faithful and responsible exercise of interpretive power. This is only fair, if we are examining the correctness of the proposition of interpretive coordinacy as a matter of principle. As noted above, interpretive power does not properly equal interpretive license—a point often forgotten, perhaps because of our experience with obvious judicial abuse of (functional) judicial supremacy. Just as the judicial power “to say what the law is” does *not* properly imply that “the law is what the Court says it is,”<sup>37</sup> the coequal presidential power to interpret the law does not mean that a president rightfully may do whatever he or she wants by way of constitutional interpretation. In both cases—with respect to the judiciary and with respect to the executive—we should assume an equally thoughtful, restrained, responsible exercise of interpretive power, at least for purposes of judging whether the model of coequal interpretive power is correct as a matter of principle.

Second, the possibility of the abuse of a power does not disprove the *existence* of a power. What it proves instead is that we, the people, should take care to vest interpretive power (or any government power, for that matter) in officeholders, be they presidents or judges, who reasonably can be expected to exercise such important power responsibly. (It may also tend to prove that, wherever interpretive power is exercised, its exercise should be constrained and justified by a proper interpretive method.)<sup>38</sup> The prospect of abuse of interpretive power does not refute the legitimacy and existence of such power as a matter of constitutional text and structure. It goes to the propriety of its use in any particular instance—which is a different question.

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cal correctness than certain pseudo-sophisticated “academic” or “intellectual” approaches to constitutional interpretation. Cf. Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALBANY L. REV. 671, 674–676 (1996). Finally, other specific skills, experiences, and aptitudes are probably far more important for presidents than training in constitutional law. On all these points, see generally Paulsen, *Protestantism and Comparative Competence*, *supra* note 2, at 388–392; cf. Paulsen, *The Most Dangerous Branch*, *supra* note 2, at 321–343. On proper interpretive method, see Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857 (2009) (defending original-public-meaning textualism as the proper approach to constitutional interpretation).

It is perhaps fair to observe that some of our most lawyerly presidents—including some who have been constitutional law professors—have not always been especially competent presidential constitutional interpreters. See, e.g., Michael Stokes Paulsen, *How to Avoid an Unconstitutional War: A Beginner’s Guide for Presidents and Congresses*, PUB. DISCOURSE (Sept. 9, 2013), <http://www.thepublicdiscourse.com/2013/09/10877/>; Michael Stokes Paulsen, *The Unprecedented, Extraordinary, Anti-Democratic, Activist Power of Judicial Review*, PUB. DISCOURSE (Apr. 23, 2012), <http://www.thepublicdiscourse.com/2012/04/5246/>.

37. See Paulsen, *supra* note 1, at 2741 (collecting references).

38. See Paulsen, *The Most Dangerous Branch*, *supra* note 2, at 340–342; cf. Paulsen, *supra* note 1, at 2739–2742.

Third, the possibility of abuse of interpretive power of course exists *wherever* it is vested. It is almost too obvious for argument that the courts have, on more than a few occasions, engaged in abusive misinterpretation of the Constitution, to the great harm of individuals, the nation, and the Constitution.<sup>39</sup> Lawyers, conditioned from law school to love courts and disdain politicians, have a perhaps exaggerated fear of what presidential (mis)interpreters might do and an unduly suppressed alertness to what judicial (mis)interpreters might do and have often done.

Fourth, and related to the previous point, if one fears abuse of interpretive power—which is a possibility wherever it exists—the appropriate remedy is surely not to *concentrate* such interpretive power in a single set of hands and make its exercise (largely) immune to checks and correction by other, competing interpretive power centers. That is the fundamentally flawed political premise of the judicial supremacist view. Rather, the correct remedy is to affirm the division and separation of interpretive power among competing institutions, each with the power and incentives to check abuses by the other branches.<sup>40</sup> The courts and Congress possess real, quite potent checks on presidential constitutional misinterpretation. The power of independent judicial judgment, while not properly a power to command the other branches, still has real moral force. Even if the courts command no troops, persuasive, principled independent judgment can command public respect and acceptance—which in our political culture counts for a great deal. Congress's impeachment power—including the power to impeach officers for what Congress judges to be violations of the Constitution and an officer's oath to uphold it—is, or should be, a serious constitutional check.<sup>41</sup> Thus, while there may be dangers to the view of coequal interpretive power, these dangers are largely answered by the checks that *every other* actor has on the errant interpretations of any particular faithless constitutional interpreter.

In the end, that is the only answer consistent with the Framers' design of a Constitution whose core structural features are written constitutionalism, constitutional supremacy, the separation of powers, and federalism. It makes no sense as a matter of our Constitution's first principles to say that, because a power is capable of being abused, it therefore must be vested in a single branch that has supremacy over all others with respect to that power.

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39. See Paulsen, *The Worst Constitutional Decision of All Time*, *supra* note 16 (collecting notorious examples).

40. See Paulsen, *supra* note 1, at 2742.

41. See Paulsen, *Checking the Court*, *supra* note 14, at 67–90; Paulsen, *supra* note 1, at 2729 (discussing Congress's power to impeach presidents and judges for believed violations of constitutional faithfulness and duty).

IV. THE POWER AND DUTY OF THE PRESIDENT NOT TO ENFORCE  
UNCONSTITUTIONAL JUDICIAL DECISIONS

The final step is, for many, the hardest to take. But it follows logically from the others: if the president possesses a truly coequal interpretive power with the courts; if the president is not bound by what he concludes, in good faith, are the errant interpretations of the judiciary, with respect to the exercise of his constitutional powers of the veto, the pardon, and law-execution generally, then—absent some other contradicting constitutional command—the president likewise has the power and duty not to execute a case-specific *judicial judgment* that is contrary to law.

There is no such contradicting constitutional command with respect to judgments.<sup>42</sup> As noted above (in Part I of this essay), it is impossible in principle to distinguish, in a way that holds up, a discrete “judgment power” from the position of judicial supremacy, generally. In addition, returning to the hypothetical Sedition Act of 2017, it seems difficult to conclude that, as President of the United States, you have a constitutional duty *not* to follow *Paulsen v. United States* in a subsequent case (and thus must not execute Dean Vik Amar) but that you have a duty *to* follow and execute the specific judgment in *Paulsen* itself, and therefore must execute Paulsen. If the Sedition Act of 2017 is objectively, incontrovertibly unconstitutional—as we all agree it is—it remains objectively, incontrovertibly unconstitutional notwithstanding a judicial decision to the contrary.

Recall again the straightforward syllogism of *Marbury*. If the Constitution says one thing, and an act of a subordinate authority says something to the contrary, the obligation of all who swear an oath to uphold and are vested with authority under the Constitution is to follow the Constitution and not the faithless act of the subordinate authority. Each branch is independent of the others. The president is as independent of the courts as he or she is independent of Congress. The president, by the logic of the argument of *Marbury* (and *The Federalist* No. 78) must give effect to the proper meaning of the Constitution rather than the faithless departure from it by another branch, whether that branch is Congress or the Court. It follows that, under the Sedition Act hypothetical, you—as President of the United States—must not execute the unconstitutional, unlawful judicial judgment in *Paulsen*, the same as you must not execute the unconstitutional statute in the first place, against *any* person.

The power and duty of the president not to execute unlawful judicial judgments does not require acceptance of any premises beyond those that justify non-execution of statutes on constitutional grounds not yet accepted or previously rejected by the courts. It merely requires following those same premises to their natural conclusion rather than arbitrarily cutting off logic when the results it produces are uncomfortable or unfamiliar.

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42. For elaboration, see Paulsen, *Checking the Court*, *supra* note 14, at 100–115.

In both situations, the president's power to decline to execute the action of another branch (Congress, with respect to unconstitutional statutes; the judiciary, with respect to unconstitutional judgments) flows from: (1) the supremacy of the Constitution itself, and the Oath to adhere to *the Constitution* and not to the actions of another branch departing from it; (2) the structural independence of the branches each from the others; and (3) the reinforcing logic of the Take Care Clause of Article II. When an unconstitutional statute, to be carried into effect, requires the exercise by the president of his or her constitutional powers—the power to execute the laws faithfully—the president must refuse to abet the constitutional violation. When an unlawful or unconstitutional judicial decision, to be carried into effect, requires the exercise by the president of his or her constitutional powers—the same law-executing power, but with specific reference to the execution of judicial judgments—the president must refuse to abet the constitutional violation.

To be sure, there has not been an extensive history of such presidential refusal to execute judicial decrees on constitutional grounds in the same way that there has been an extensive history of presidential precedents for non-execution of statutes on constitutional grounds. My prior research and writing has identified only one true example of the non-execution power with respect to judgments actually being used by a president: President Abraham Lincoln's refusal to carry into effect Chief Justice Taney's decision as a circuit justice holding unconstitutional Lincoln's suspension of the privilege of the writ of habeas corpus at the outbreak of the Civil War.<sup>43</sup> But rarity of exercise is not dispositive as to constitutional propriety: there may have been relatively few clear occasions for the power's legitimate and justifiable exercise; there may have been many instances in which practical considerations prevented exercise of the power, or where the issue washed out in the give-and-take of practical and political interplay of the branches; and there indeed may have been instances in which the power ought to have been employed and wrongfully was not.

To the extent specific historical support for a power to refuse execution of judgments is thought necessary, it comes from an especially interesting and persuasive-evidence-of-original-meaning source: Alexander Hamilton, writing on the proper understanding of the judicial power in *The Federalist* No. 78. That paper is Hamilton's famous exposition of judicial power: why the judicial task entailed a logical power to constitutional legal review; why the judicial power was in principle the "least dangerous" and "beyond comparison the weakest of the three departments of power"; why the judiciary could "never attack with success either of the other two" and

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43. See Paulsen, *The Merryman Power*, *supra* note 2, at 88–91; see also Paulsen, *The Most Dangerous Branch*, *supra* note 2, at 276–284; Paulsen, *Lincoln and Judicial Authority*, *supra* note 2.



therefore needed the fortification of life tenure to protect it from being overpowered by the others; and, crucially, why the judicial power was not to be feared in a system of rigorous separation of powers. In a clinching and important phrase at the conclusion of his famous “neither FORCE nor WILL but merely judgment” passage, Hamilton noted, almost as a matter of fact observation, the power of executive review of judicial judgments as an implicit check on judicial power: the judicial branch, Hamilton wrote, “must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”<sup>44</sup>

In the same vein, more than 235 years later, the power of the president to decline enforcement to judgments exceeding judicial power was seemingly recognized by the late Justice Antonin Scalia in his dissent in *Obergefell v. Hodges* in 2015—one of Justice Scalia’s last great impassioned dissents. Scalia concluded his dissent with an appeal to the ultimate weakness of the judiciary, noting the constitutional power of the other branches of government to counteract judicial decisions that abused the courts’ proper constitutional authority. Scalia turned to the same famous statement of Hamilton as quoted above: “The Judiciary is the ‘least dangerous’ of the federal branches because it has ‘neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm,’ and the States, ‘even for the efficacy of its judgments.’”<sup>45</sup>

Hamilton, Lincoln, and Scalia had it right. The president’s independent province of constitutional interpretation extends, in principle, to the exercise even of the power not to execute judicial judgments in specific cases, where the court’s decision is contrary to the Constitution or other controlling law. Much to my personal relief, in the hypothetical situation involving the Sedition Act of 2017, it is clear that your constitutional duty is to *not* execute the Supreme Court’s flatly wrong decision in *Paulsen*—and to not execute me!

#### CONCLUSION

I conclude, as I did the live debate, with a challenge to Dean Amar: Is there really any plausible argument that the president is constitutionally bound by the judiciary’s views as to questions of constitutionality, in the exercise of the president’s powers, where the president concludes in good faith that the judiciary’s decision is simply wrong? Must the president decline to veto the Sedition Act of 2017? If enacted, must the president decline to grant pardons to persons “convicted” of violating it (or, rather, declared to have violated it)? Must the president execute the statute, not-

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44. THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Isaac Kramnick ed., 1987). For further discussion of the force of this passage, and other confirming references in Hamilton’s other *Federalist* papers on the judiciary, see Paulsen, *Checking the Court*, *supra* note 14, at 100–104.

45. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2631 (2015) (Scalia, J., dissenting) (citation omitted).

withstanding its manifest unconstitutionality? Must the president do so if the judiciary has held the statute to be constitutional (notwithstanding its manifest unconstitutionality)? Must the president do so in the specific case so holding? Is there really any truly principled constitutional distinction among any of these different cases of the exercise of presidential power under the Constitution?