

ARTICLES

The Judgment Power

WILLIAM BAUDE*

When an Article III court decides a case, and the President disagrees with the outcome, what can he do about it? Existing scholarship generally takes two views. Some scholars argue that the President has general authority to review these judgments on their merits and decide whether to enforce them. Others believe that the President has an unqualified duty to obey court judgments no matter what. This Article challenges both of those views. Drawing on conventional constitutional history as well as the private law of judgments, this Article defends a new view of the Judiciary’s “Judgment Power.” Judgments are binding on the President, who must enforce them even if he disagrees with them. However, the President is entitled to ignore a judgment if the issuing court lacked jurisdiction over the case in question. This thesis also has implications for the role of the Judiciary in the constitutional structure, and for evaluating President Lincoln’s conduct in Ex parte Merryman.

TABLE OF CONTENTS

INTRODUCTION	1808
I. JUDGMENTS AND THE CONSTITUTION	1814
A. “THE JUDICIAL POWER”	1815
1. Theory	1815
2. Practice	1818
B. THE LAW OF JUDGMENTS	1826
C. ILLEGAL JUDGMENTS	1831
1. Legislative Power and Judicial Power	1832
2. “Merely Judgment”	1833
D. ENFORCING JUDGMENTS	1834

* Law clerk to Judge Michael McConnell, Tenth Circuit Court of Appeals, 2007–08; Yale Law School, J.D. 2007; University of Chicago, B.S. 2004. © 2008, William Baude. The author and the Article owe a debt of thanks to Akhil Amar, Patrick Baude, Samuel Bray, Josh Chafetz, Morris Cohen, Chad Flanders, Heather Gerken, Ashley Keller, Nicole Johnson, Gary Lawson, Marty Lederman, Irina Manta, John Nann, David Pozen, Sai Prakash, Jaynie Randall, Richard Re, Stephen Sachs, Mark Shawhan, Seth Barrett Tillman, and Hanah Volokh.

E.	FURTHER EVIDENCE	1836
1.	Good-Behavior Tenure	1836
2.	English Practice	1837
II.	COMPETING THEORIES OF THE JUDGMENT POWER	1841
A.	PAULSEN	1841
B.	LAWSON AND MOORE	1843
C.	ALEXANDER AND SCHAUER	1844
III.	IMPLICATIONS FOR FEDERAL JURISDICTION	1846
A.	JURISDICTIONAL BOOTSTRAPPING	1846
B.	JURISDICTIONAL AND MANDATORY RULES	1850
1.	Modern Doctrine	1850
2.	<i>Ex parte Merryman</i>	1853
	CONCLUSION	1861

INTRODUCTION

Judgments matter. When two parties submit to the jurisdiction of, or are properly haled before, a court that exercises the judicial power of the United States, the court has the power to issue a judgment resolving their legal dispute. Because judges are human, that judgment may be wrong, either misinterpreting law or misapplying fact. Therefore, we have erected constitutional and statutory procedures designed to reduce that possibility of error and its costs, and have vested many judicial proceedings with rules of reconsideration and appellate review, so that more judges review a judgment before the Judicial Branch makes it final.

But at some point, a judgment does become final, and at that point it has a peculiar characteristic. It is legally binding, even if it rests on erroneous law or fictional fact. This is unusual in our system of government. For the most part, the branches of government have the power to correct one another's legal errors. If Congress passes and the President signs a law, its constitutionality is not beyond question.¹ If an officer incorrectly exercises his statutory powers, he can be sued.² If the President commits a high crime or misdemeanor, he can be impeached.³ So can judges.⁴

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

2. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170 (1804).

3. U.S. CONST. art. II, § 4.

4. *Id.*; 135 CONG. REC. H1811 (1989).

Judgments are different, because they wall off certain legal errors, creating a time and procedure after which those errors are taken to be better left alone than corrected. Although such doctrines of constitutional repose are rare, judgments are not the only example. The *de-facto-government* doctrine provides that the actions of powerful state-like groups should sometimes be treated as if they were government actions, even if it is later discovered that as a formal matter, those groups were not governments.⁵ The *enrolled-bill* doctrine provides that certain procedural questions about the enactment of a bill cannot be used to attack the bill once it has been enrolled.⁶ That is, the decisions by the House and Senate to pass and the President to sign a bill conclusively settle the question of whether the bill was passed or originated in the proper way.

That judgments are constitutionally final has recently been reaffirmed by the Supreme Court in *Plaut v. Spendthrift Farm*.⁷ But the implications of the finality of judgments remain a live legal issue. A few years after *Plaut*, the Court held that the finality of judgments did not stop Congress from changing the prospective effect of a prison-reform injunction, even if Congress was powerless to disturb the underlying judgment that produced the injunction.⁸ To figure out the answers to this and other thorny questions of judicial finality, it is essential to understand the historical roots of the judgment power—to understand why the judicial power is the power to issue binding judgments. Such scholarly inquiry is not merely academic. In *Plaut*, the Court relied extensively on its view of the original history and practice of judicial finality,⁹ and that will not be the end of the debate. For example, when deciding whether to comply with recent judicial decisions about the scope of habeas corpus jurisdiction over Guantanamo Bay¹⁰ and Iraq,¹¹ the Executive Branch may be faced with an inquiry similar to the one Abraham Lincoln faced during the Civil War. This Article hopes to contribute to that inquiry (although it does not purport to resolve it entirely) by examining the textual and historical case for binding judgments.

My thesis is that the judicial power vested in Article III courts allows them to render binding judgments that must be enforced by the Executive Branch so long as those courts have jurisdiction over the case. In a typical case, one party asserts that positive law gives him some entitlement or right against another.

5. GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY* 160–66 (2004); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 438 (2001).

6. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892) (“The signing by the [S]peaker of the [H]ouse of [R]epresentatives, and by the [P]resident of the [S]enate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed [C]ongress. . . . The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed [C]ongress, all bills authenticated in the manner stated.”).

7. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

8. *Miller v. French*, 530 U.S. 327 (2000).

9. *Plaut*, 514 U.S. at 219–25.

10. *Boumediene v. Bush*, *cert. granted*, 127 S. Ct. 3078 (2007).

11. *Munaf v. Geren*, *cert. granted*, 128 S. Ct. 741 (2007); *Omar v. Geren*, *cert. granted*, 128 S. Ct. 741 (2007).

The other party denies the existence of this right, either because he contests the plaintiff's interpretation of the law, or argues that the facts are not what the plaintiff contends them to be. The court, through judge and perhaps jury, issues a judgment sustaining the plaintiff's claim or not, and issues any appropriate remedy.

The legal force of this judgment has nothing to do with whether the judge has correctly named the winner and the loser. Judges are of course bound by their oaths to decide cases according to the law, as best as they can find it. But if one party thinks that the judge has failed, he cannot simply ignore the judgment on the ground that it is legally wrong.

Just as the loser cannot respond to a judgment on the merits by saying "but the law is on my side!" he cannot appeal to the Executive or the Legislature to overrule it. There are often ways to appeal a judgment to another court before it becomes truly final, and occasionally even then a judgment may be slightly provisional, like a consent decree subject to ongoing revision.¹² Those processes, however, are internal to the Judiciary. The other branches of our government do not generally exercise judicial power, so they have as little power over a judgment they dislike as the losing party does.

There are, however, important limits to the judgment power. One is that courts only have the power to issue binding judgments in cases where they have jurisdiction. That means that if the controversy is not one that the court is authorized to resolve, the judgment binds nobody. If the District Court for the Northern District of California, for example, attempted to preside over a President's impeachment trial, its judgment would simply have no force. The judgment power is the power to resolve controversies within a court's jurisdiction, not elsewhere.

This also means a court's judgments bind only parties who are properly before the court. If for whatever reason a court cannot obtain personal jurisdiction over one of the parties, it cannot assign that party legal duties. More importantly, it means that while a court's judgments settle the rights of the litigants before it, it has no power to tell other people not before the court what *they* should do. The time for that will come, if it comes at all, when those other people come to court in their own cases.

Nothing in this model rests on judicial supremacy, on doubt about the President's power and ability to interpret the Constitution, or on the view that legal rules exist only when judges say so. Indeed, it is consistent with the increasingly conventional wisdom that the President can or must disregard some or all laws that he independently believes to be unconstitutional.¹³ Thus, the

12. See, e.g., *Alliance to End Repression v. City of Chicago*, 237 F.3d 799 (7th Cir. 2001) (applying FED. R. CIV. P. 60(b)(5) to modify a consent decree).

13. See, e.g., *Presidential Authority To Decline To Execute Unconstitutional Statutes*, 18 Op. Off. Legal Counsel 199, 200 (1994); David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 61; Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. 905 (1990); John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 368-87 (1998); Dawn E. Johnsen,

President's power to deal with judgments that he thinks were wrongly decided is substantially narrower than his power to respond to laws that he thinks were unconstitutionally passed.¹⁴

In sum, the judicial power is the power to issue binding judgments and to settle legal disputes within the court's jurisdiction. But judgments settle only those legal disputes, not others. Existing scholarship on the constitutional finality of judgments deviates from this model of judgment finality in several different ways.

Some scholars reject judgment finality. Several prominent originalists and defenders of departmental Constitutional interpretation argue that the President has a qualified or absolute ability to reject judgments because they are wrong.¹⁵ Others join in this conclusion on more pragmatic grounds.¹⁶ The most vigorous version of this thesis comes from Michael Stokes Paulsen, who demonstrates that each branch of the federal government generally has both the duty and power to interpret the Constitution according to its own best judgment.¹⁷ Thus, he claims, Congress can and must refuse to pass unconstitutional laws, the President must refuse to execute them if they do pass, and each branch must make these judgments according to its own interpretation of the Constitution, not according to a possibly incorrect interpretation made by the courts.¹⁸

Pushing this basic framework to what he acknowledges to be its limit, Paulsen argues that the Constitution awards the President an unenumerated exception to judicial finality. Paulsen terms this exception "the *Merryman* power," taking its name from Abraham Lincoln's refusal to comply with a purported writ of habeas corpus in *Ex parte Merryman*.¹⁹ The *Merryman* power is a presidential power to disobey—to refuse to execute—a judgment he believes to be erroneous.

A related school of thought agrees with Paulsen's logic, but treats it not as an

Presidential Non-Enforcement of Constitutionally Objectionable Statutes, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1303–13 (1996); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 378–79 (1994); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 267–72 (1994); Saikrishna Bangalore Prakash, *The Executive's Duty To Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008); Peter L. Strauss, *The President and Choices Not To Enforce*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 107; Christine E. Burgess, Note, *When May a President Refuse To Enforce the Law?*, 72 TEX. L. REV. 471 (1994).

14. See *infra* section I.C.1.

15. Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 12 n.40 (2007); Lawson & Moore, *supra* note 13, at 1313–29; Paulsen, *supra* note 13, at 276–84; cf. Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 153 (1999) ("I remain agnostic regarding Paulsen's claim that executive disobedience of judgments is legal.")

16. Note, *Executive Revision of Judicial Decisions*, 109 HARV. L. REV. 2020, 2027–29, 2037 (1996); *Leading Cases*, 109 HARV. L. REV. 111 (1995).

17. Paulsen, *supra* note 13, at 211.

18. *Id.* at 238–40 (citing James Wilson's post-ratification writings on the Constitution, in WORKS OF JAMES WILSON 299–300 (Robert Green McCloskey ed., Harvard Univ. Press 1967) (1790–92)).

19. Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 83–84 (1993) (citing *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487)).

argument for ignoring judgments but as a *reductio ad absurdum*. In other words, the school accepts his claim that the authority of judicial judgments rises and falls with other forms of deference to the Judiciary, but argues that this means that both are compelled, not forbidden.²⁰ Thus, because judgments are final, other judicial activity (like opinions) must also be final.

The remaining bulk of commentary has assumed that judgments are indeed especially final, but has offered no complete constitutional theory of why this is so.²¹ The right of the Executive to review judgments for lack of jurisdiction is ignored. Any exceptions to judgment finality are assumed to be issues of constitution-bending emergency.²² If they are amenable to legal analysis at all, it is as a subset of the exploration of emergency powers in the fog of war.

This Article challenges each of these views about the finality of judgments. In contrast to Paulsen and others who endorse any form of executive review of the *substance* of judgments, it argues that the judicial power forecloses any presidential ability to re-decide the case. Because of this, the President is required to execute judgments even if he disagrees with their underlying legal reasoning. In contrast to those who think that the supremacy of judgments cannot be justified without relying on some broader theory of judicial supremacy, it argues that the special supremacy of judgments has public and private law roots dating to the framing of the Constitution and beyond. In contrast to those who think judgment supremacy is plenary, or suspended only during times of war, it suggests that judgment supremacy has jurisdictional limits. These limits originate from the private law of judgments, and therefore have to do with technical questions of judicial jurisdiction, not high political theory. Establishing that the President cannot legally ignore a final judgment if a court had jurisdiction to issue it does more than resolve a minor squabble about the limits of executive power. This model of the judgment power has deeper implications for the role of the Judiciary in the federal system. First, understanding which judgments are not binding reveals that twentieth-century deviations from traditional principles of jurisdiction have upset the original role of the Judiciary in the constitutional structure.²³ Second, the centrality of jurisdiction to the Judiciary's role also demonstrates the great importance of the difference between jurisdictional and non-jurisdictional rules, which this Article illustrates with a series of recent

20. See, e.g., David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 123–25 (1993).

21. E.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 259–65 (1962); DANIEL FARBER, *LINCOLN'S CONSTITUTION* 182–88 (2003); Easterbrook, *supra* note 13; David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 312 (1992); John Harrison, *Judicial Interpretive Finality and the Constitutional Text*, 23 CONST. COMMENT. 33, 42 (2006); Hartnett, *supra* note 15; Meese, *supra* note 13; Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008–09 (1965).

22. See Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 20–21.

23. *Infra* section III.A.

Supreme Court cases and the famous showdown over habeas corpus between President Lincoln and Chief Justice Taney.²⁴

This Article focuses on the separation of executive and judicial power—in particular, the President’s obligation to enforce judgments. Thus, it leaves largely unexamined the scope of Congress’s power, including its ability to interfere with the finality of judgments by failing to provide sufficient resources to enforce them,²⁵ by creating retroactive causes of action,²⁶ or by prospectively changing legal rules.²⁷ Similarly, it does not reach the well-worn question about Congress’s power to restrict (or “strip”) the jurisdiction of federal courts.²⁸ Although jurisdiction is central to the finality of judgments, that alone does not resolve whether Congress should have more power over jurisdiction (to check judicial error) or less (to preserve judicial independence). It also puts aside the normative and predictive questions about whether Presidents ought to disobey judgments, or are likely to get away with it if they do.²⁹ Finally, it also leaves behind courts whose power does not derive from Article III (like state and foreign courts).

A methodological note is also warranted: This Article grounds the power to issue binding judgments in the text, history, and structure of the Constitution. It examines the original meaning of Article III’s grant of the judicial power. For those who agree, as a first-order matter, that this is the correct way to read the Constitution, no more methodological justification needs to be produced.³⁰ For

24. *Infra* section III.B.

25. See Jennifer Mason McAward, *Congress’s Power To Block Enforcement of Federal Court Orders*, 93 IOWA L. REV. (forthcoming 2008); see also *infra* notes 96–98 and accompanying text.

26. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

27. See, e.g., *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855); see also DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861*, at 192–94 (2005).

28. See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007); Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59 (2007); Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364–65 (1953).

29. See generally David S. Law, *The Paradox of Omnipotence: Courts, Constitutions, and Commitments*, 40 GA. L. REV. 407, 426–30 (2006); Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns* (Univ. of Chi. Law & Econ., Olin Working Paper No. 348, 2007), available at <http://ssrn.com/abstract=1002996>.

30. E.g., Randy E. Barnett, *An Originalism for Non-Originalists*, 45 LOY. L. REV. 611 (1999); John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL’Y 83 (2003); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1124–33 (2003); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006); Michael Stokes Paulsen, *How To Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2056–62 (2006); Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America*, 106 COLUM. L. REV. 2207 (2007) (reviewing CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005)); Saikrishna B. Prakash, *Unoriginalism’s Law Without Meaning*, 15 CONST. COMMENT. 529 (1998)

those who think text, history, or structure are not wholly irrelevant, but who need some second-order reason to adhere to them in a particular case, there are further reasons to heed the original understanding of the judicial power.

For one thing, some of the strongest critics of the Judiciary's power to issue binding judgments criticize it on historical and structural grounds, and they have not yet been met on their own terms.³¹ Furthermore, there may be a particularly strong case for adherence to the originally-agreed-upon scope of constitutional power in an area that is comparatively technical, as the judicial power and the law of judgments are.³² As Alexis de Tocqueville asked *Democracy in America's* readers, "how can one make the political action of American tribunals understandable without entering into some technical details of their constitution and procedures?"³³

In any case, the Court's current practice is to analyze the judicial power through the lens of text, structure, and history, and this Article follows that tradition.³⁴ Part I lays out the original understanding of the judicial power and the private law of judgments, showing how the Constitution gives the Judiciary final power to decide cases within its jurisdiction. Part II examines and responds to competing theories of the judgment power. Part III proffers implications of the theory—the need to rethink the modern rules for adjudicating jurisdiction, the importance of clarifying the difference between jurisdictional rules and merely mandatory ones, and an evaluation of Lincoln's conduct in suspending habeas corpus.

I. JUDGMENTS AND THE CONSTITUTION

To demonstrate the way in which judges have traditionally had the power to bind those who disagree with them, this Part examines the history of public and private law doctrines of judicial power. Section I.A canvasses both theoretical discussions and actual implementation of Article III of the Constitution in this context. Section I.B explores the private law of judgments. Together, they show

(reviewing JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996)).

31. Compare, e.g., Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385, 385 (1994) (asking "Will nobody defend judicial supremacy anymore?"), with Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1369–70 (1997) (defending judicial supremacy while effectively conceding Paulsen's historical analysis).

32. Cf. John Harrison, *Would All the Laws but One Be Close Enough for Government Work?*, 2 GREEN BAG 2D 333, 336–37 (1999) ("[T]he inquiry into the respective roles of the judicial and executive powers can be pretty dull. The constitutional separation of executive and judicial power has given rise to some of the Supreme Court's most notoriously arcane, tedious, and unedifying decisions.").

33. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 138–39 (J.P. Mayer ed. & George Lawrence trans., Harper & Row 1988) (1835).

34. Cf. Amar, *supra* note 28, at 207 n.7 (justifying "heavy, if not exclusive, reliance on constitutional text, history, and structure" in interpreting Article III because "the scholarly literature has thus far been waged largely on interpretivist terms").

that the judicial power has traditionally been the power to issue binding judgments, and that those judgments bind those who disagree, but are also subject to the important limit that they bind only to the limit of a court's jurisdiction. The remainder fleshes out several implications of this argument and offers further evidence for it.

The judges, officers, and others whose thoughts are covered in these sections all appear to have treated indistinguishably subject-matter jurisdiction (jurisdiction over the case) and personal jurisdiction (jurisdiction over the parties). Fully defining these two types of jurisdiction is the work of an entire academic sub-discipline, and is addressed to some extent in section III.B. For now, it hopefully suffices to say that a court's jurisdiction is a question of its power to decide a particular case and is generally distinct from the merits of that case.

A. "THE JUDICIAL POWER"

1. Theory

Article III of the Constitution commands 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."³⁵ During the ratification of the Constitution and immediately afterwards, a wide range of constitutional scholars, jurists, and officers explained that the "judicial" power vested by this clause was the power to make authoritative and final judgments in individual cases.

In discussing the independence of the Judiciary in his famous *Lectures on Law*, James Wilson, an Associate Justice of the Supreme Court, said this: "When the decisions of courts of justice are made, they must, it is true, be executed; but the power of executing them is ministerial, not judicial."³⁶ Ministerial powers, then as now, were non-discretionary.³⁷ This meant that the Executive was required to execute judgments whether he liked them or not.

In a later discussion on "the ministerial power of the sheriff," Wilson said the same thing about judicial process, which was arguably analogous.³⁸ As he put it, "[w]ith regard to process issuing from the courts of justice, the sheriff's power and duty is, to execute it, not to dispute its validity."³⁹ The President, as the head of the Executive Branch, logically stood in the same relationship to the courts. Execution of a writ was a ministerial duty of the Executive Branch. However, Wilson acknowledged one important exception to the rule of automatic execution. A sheriff was both permitted and required to "judge, at his

35. U.S. CONST. art. III, § 1.

36. 1 JAMES WILSON, *Of Government* (1790), reprinted in COLLECTED WORKS OF JAMES WILSON 689, 703 (Kermit L. Hall & Mark David Hall eds., 2007).

37. E.g., *McConnell v. Kenton*, 1 Ky. (1 Hughes) 257, 288 (1799); *Wroe v. Harris*, 2 Va. (2 Wash.) 126, 129–30 (1795).

38. See 2 JAMES WILSON, *The Subject Continued: Of Sheriffs and Coroners* (1790), reprinted in COLLECTED WORKS OF JAMES WILSON, *supra* note 36, at 1012, 1015.

39. *Id.*

peril, whether the court, from which the process issued, has or has not jurisdiction of the cause.”⁴⁰ This discussion of ministerial execution confirmed that judgments could be reviewed by the Executive for jurisdiction and nothing else.

James Wilson was one of the most sophisticated defenders of the school of thought that is now called departmentalism. Indeed, his *Lectures on Law* are a linchpin in the arguments of Michael Stokes Paulsen, one of the strongest critics of judicial supremacy.⁴¹ But although Wilson believed strongly in a departmentalist separation of powers, the foregoing passages show that, for Wilson, the mandatory enforcement of judgments was a part of the separation of powers too.

Wilson was not alone. Numerous others described the independent power of the Judiciary to resolve particular disputes as a central element of the Philadelphia Constitution. For example, St. George Tucker declared in his famous edition of *Blackstone's Commentaries*, that the Judiciary had:

that uncontrollable authority in all cases of litigation, criminal or civil, which, from the very nature of things is exclusively vested in this department, and extends to every supposable case which can affect the life, liberty, or property of the citizens of America under the authority of the federal constitution, and laws, except in the case of an impeachment.⁴²

This was central to the American notion of separation of powers. As Tucker put it, “In America (according to the true theory of our constitution,) [the Judiciary] is rendered absolutely independent of, and superior to the attempts of both [the Executive and the Legislature], to control, or crush it.”⁴³ While Tucker did not discuss the ministerial duty of execution as explicitly as Wilson, the reference to “uncontrollable authority” implies that the Judiciary had *power* to do something of legal consequence, not simply the right to write paper opinions and hope that the President agreed.⁴⁴

Tucker went on to explain exactly how our Judicial Branch executed law independently of our President, and squarely rejected the notion that the Judiciary was restricted to trying to persuade the Executive to do as they said. “Perhaps,” Tucker said, “in other countries, [its] province [is] to *advise* the

40. *Id.*

41. Paulsen, *supra* note 13, at 238–40.

42. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES app. D at 354 (photo. reprint 1996) (Philadelphia, Birch & Small 1803). Tucker's invocation of “life, liberty, or property” may also have implications for the relationship between judicial power and due process. U.S. CONST. amend. V; *id.* amend. XIV; see also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217–18 (1995); *id.* at 247–48 (Stevens, J., dissenting).

43. 1 TUCKER, *supra* note 42, at 353.

44. At the time, opinions were rarely even written down by their authors. See, e.g., *Buckner v. Finley*, 27 U.S. (2 Pet.) 586, 591 (1829); Letter from James Kent to Thomas Washington (Oct. 6, 1828), in 3 VA. L. REG. 563, 568 (1897) (“The opinions from the bench were delivered *ore tenus*. We had no law of our own, & nobody knew what it was.”).

executive, rather than to *act* independently of it But, in the United States of America, the judicial power is a distinct, separate, independent, and *co-ordinate* branch of the government; expressly recognised as such . . . by the federal constitution, from which the courts of the United States derive all their powers. . . .”⁴⁵ The Judiciary was independent, and that independence meant the ability to legally resolve cases, not merely to opine on them to the President.

This was consistent with the distribution of government powers that Madison had laid out in *The Federalist*. Madison wrote that the preservation of liberty through separation of powers would have been violated if “the sole executive magistrate, had possessed . . . the supreme administration of justice.”⁴⁶ This was just as Montesquieu had said.⁴⁷ But this doctrine or the principle of separation of powers was “not in a single point violated by the plan of the convention.”⁴⁸ Madison’s Constitution deliberately avoided giving the President total control over judgments.

Indeed, said Madison, one of the goals of the Constitution’s structure was to avoid the examples of Virginia, where the legislature had “‘decided rights which should have been left to judiciary controversy,’”⁴⁹ and Pennsylvania, where “cases belonging to the judiciary department [had been] frequently drawn within legislative cognizance and determination.”⁵⁰ As Publius, Alexander Hamilton also defended the supremacy of judgments from Congressional override, explaining the “impropriety . . . on the general principles of law and reason,” of suspending judgments.⁵¹ “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.”⁵² The Supreme Court would later hold federal judgments immune from state legislative override, too, in *U.S. v. Peters*.⁵³

John Jay also adverted to the binding nature of judgments in the course of a

45. *Id.* at 354 (first two emphases added).

46. THE FEDERALIST NO. 47, at 251 (James Madison) (George W. Carey & James McClellan eds., 2001).

47. 1 M. DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS bk. 11, ch. 6 (G. Bell & Sons, Ltd. 1914) (Thomas Nugent trans., 1752) (“[T]here is no liberty, if the judiciary power be not separated from the legislative and executive.”); *cf. id.* (“[T]he judiciary power” is that which “punishes criminals, or determines the disputes that arise between individuals.”).

48. THE FEDERALIST NO. 47, *supra* note 46, at 252.

49. THE FEDERALIST NO. 48, at 259 (James Madison) (George W. Carey & James McClellan eds., 2001) (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1784)) (emphases omitted).

50. *Id.* For exploration of the rejected practice, see Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998).

51. THE FEDERALIST NO. 81, at 419 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

52. *Id.*; *see also* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389 (1798) (Chase, C.J.) (stating that bills of attainder are forbidden by the Constitution because they are “legislative judgments; and an exercise of judicial power”).

53. 9 U.S. (5 Cranch) 115, 136 (1809) (“If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery.”).

defense of the Constitution's provision for treaties. "[T]he judgments of our courts," he said, "and the commissions constitutionally given by our governor, are as valid and as binding on all persons whom they concern, as the laws passed by our legislature. All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature."⁵⁴

Opponents of the Constitution interpreted it the same way. The antifederalist Brutus had complained about the judgment power in a 1788 essay, arguing that the judicial independence granted by the Constitution would lead to judicial tyranny.⁵⁵ Not only did the Constitution protect the tenure of judicial offices and the size of their salaries, but it did not provide for any revision of judgments. As Brutus put it, "[n]o errors they may commit, can be corrected by any power above them . . ."⁵⁶ Indeed, because of the separation of powers, "[t]he legislature . . . have no more right to set aside any judgment pronounced upon the construction of the constitution, then they have to take from the president, the chief command of the army and navy, and commit it to some other person."⁵⁷ Because of the potential plasticity of constitutional exposition, the concentration of judicial power would be dangerous.

In a later essay, Brutus reprised this theme, explaining that the problem was not so much that judges had tenure during good behavior, but that "[t]here is no power above them to control any of their decisions."⁵⁸ He repeated this emphatically: "[T]here is no power above them that can correct their errors or control their decisions. The adjudications of this court are final and irreversible, for there is no court above them to which appeals can lie, either in error or on the merits."⁵⁹ On this point, the Constitution's friends and foes agreed,⁶⁰ and subsequent events proved them both right.

2. Practice

Within a few years, this public meaning of the judicial power had been endorsed from the federal bench. Almost all of the first Justices of the Supreme Court are solidly on record as believing that the Executive can have no role in overturning their judgments, even on nonconstitutional questions. An example arose in the proceedings under the Pension Act of 1792. It told veterans to file

54. THE FEDERALIST No. 64, at 335 (John Jay) (George W. Carey & James McClellan eds., 2001).

55. Brutus, *Essay XI* (Jan. 31, 1788), reprinted in THE ESSENTIAL ANTIFEDERALIST 185 (W.B. Allen & Gordon Lloyd eds., 2002). Brutus was a pseudonymous critic of the work of the Constitutional Convention. The consensus view is that his real identity is a New York judge named Robert Yates, but the issue is not settled. See Paulsen, *supra* note 13, at 245 n.93, and sources cited there.

56. Brutus, *supra* note 55, at 185.

57. *Id.* at 188.

58. Brutus, *Essay XV* (Mar. 20, 1788), reprinted in THE ESSENTIAL ANTIFEDERALIST, *supra* note 55, at 196, 197.

59. *Id.*

60. Alexander Hamilton's response to Brutus, in *The Federalist*, is too ambiguous to endorse or reject this Article's view of the judgment power. See *infra* section I.C.2.

their claims in the first instance with the circuit court, which would “forthwith proceed to examine into the nature of the wound . . . and transmit the result of their inquiry . . . to the Secretary of War, together with their opinion in writing, what proportion of the monthly pay of such applicant will be equivalent to the degree of disability.”⁶¹ He, in turn, would review the findings for suspicion of “imposition or mistake,” and report the results to Congress.⁶²

The judges in the circuit courts, which included five Supreme Court Justices riding circuit, would have none of it, explaining in opinions or letters their refusal to hear cases under the Act. These are reprinted in *Dallas’s* report of *Hayburn’s Case*,⁶³ (William Hayburn was an unsuccessful pension petitioner) and are a thorough articulation of the thesis of judgment supremacy.⁶⁴

Justice James Wilson, joined by Justice Blair and District Judge John Peters wrote together, reiterating the view of the judgment power Wilson had laid out in his lectures:

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.⁶⁵

The Circuit Court for New York, staffed by Chief Justice Jay, Justice Cushing, and District Judge Duane, took the same view. It might be constitutional for Congress to conscript judicial officers to perform non-judicial duties, but it most certainly was not constitutional for Congress to grant executive review of judicial ones:

61. Pension Act of 1792, ch.11, § 2, 1 Stat. 243, 244.

62. *Id.* § 4.

63. See generally *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410–14 (1792).

64. For more background, see DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 6–9 (1985).

65. Letter from the Circuit Court for the District of Pennsylvania (Justice Wilson, Justice Blaine, and Judge Peters) to President George Washington (Apr. 18, 1792), reprinted in *Hayburn’s Case*, 2 U.S. (2 Dall.) at 410–11, (emphases in original). The Circuit Court’s cryptic parenthetical notation that “(its *opinions* are its judgments)” is puzzling. See generally Hartnett, *supra* note 15 (demonstrating why opinions are not judgments).

Most likely, this comment was meant to explain why the Act implicated the judgment power at all. The Court is emphasizing that the written opinions called for by the statute were—in a constitutional sense—*judgments* and therefore that the principle of judgment supremacy applied to them. See Pension Act of 1792, ch.11, § 2, 1 Stat. 243, 244 (requiring judges to render “opinion in writing” that was submitted for executive review).

Or perhaps the comment was simply written in panic. See Letter from the Circuit Court for the District of Pennsylvania, *supra* at 412 (The incident “excited feelings in us, which we hope never to experience again.”).

[T]he duties assigned to the Circuit courts, by this act, are not [judicial] . . . 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.⁶⁶

The Circuit Court of North Carolina, where Justice Iredell sat, saw it the same way:

[T]he 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 reversion, 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.⁶⁷

The clear judicial consensus was that the judicial power could not be revised in particular cases by the Executive. This view was reaffirmed throughout the nineteenth century and into the twentieth.⁶⁸

It is perhaps unsurprising that early practice by those who exercised the judicial power was uniformly in support of the view that the judicial power included the power to bind others through judgments, although even Paulsen

66. Opinion for the Circuit Court for the District of New York (Chief Justice Jay, Justice Cushing, and Judge Duane) (Apr. 5, 1791), *reprinted in Hayburn's Case*, 2 U.S. (2 Dall.) at 410.

67. Letter from Justice Iredell and Judge Sitgreaves to President George Washington (June 8, 1792), *reprinted in Hayburn's Case*, 2 U.S. (2 Dall.) at 413.

68. *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (“Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.”); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113–14 (1948) (“It has also been the firm and unvarying practice of Constitutional Courts to render no judgments . . . that are subject to later review or alteration by administrative action.” (citations omitted)); *Gordon v. United States*, 117 U.S. 697, 702 (1885) (“The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it.”); *United States v. Ferreira*, 54 U.S. (13 How.) 40, 47 (1852) (“[The judge] is required to transmit, both the decision and the evidence . . . to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. . . . It is too evident for argument on the subject that such a tribunal is not a judicial one.”); *Hunt v. Palao*, 45 U.S. 589, 590–91 (1846) (“[I]t would be useless and vain for this court . . . to proceed to judgment . . . when . . . no means or process is authorized by which our judgment could be executed.”).

concedes that “[t]hose views can no more be disregarded as self-serving than can early Executive Branch defenses of independent executive interpretive authority.”⁶⁹ So it makes sense to examine the early understanding of the judicial power from the other side of the bench as well. As it happens, the Executive Branch agreed that judgments issued within the jurisdiction of the Judiciary were binding.

In 1801, the United States entered a peace treaty with France providing that certain property that had been seized but not yet “definitively condemned,” would be restored to the owner.⁷⁰ The Supreme Court applied the treaty to a schooner (named Peggy) that had been held condemned by a circuit court a year earlier (and before the final ratification of the treaty), and determined that when applicable law changes, an appellate court applies new law, not old.⁷¹ Moreover, the Court held that because an appeal had still been pending, Peggy had not been “definitively condemned” by the circuit court, and was therefore to be restored.⁷² Thomas Jefferson’s attorney general, Levi Lincoln, explained that he thought this decision was erroneous because it conflated decisions on appeal with decisions subject to review by writ of error.⁷³

Lincoln apparently had not read the Court’s opinion, and once he was given a copy by French consul Louis-Andre Pichon, he wrote a second assessment eight days later.⁷⁴ The second confirmed the first, and Lincoln explained again why he thought the Court had gotten it wrong. However, Lincoln then added that his analysis could “have little or no effect on the case of the schooner Peggy,”⁷⁵ because the Court’s judgment was legally binding:

The Supreme Court, who were competent to decide this principle, have determined it in her case. It must, therefore, be considered as binding in this particular instance. Although they have fixed the principle for themselves, and thereby bound others, in reference to the case on which they have adjudicated, it can, I conceive, extend no further.⁷⁶

In other words, the Supreme Court’s interpretation settled legal rights authoritatively in a particular case, even though the President had the authority to decide similar cases differently if there was no judicial decree.⁷⁷ Attorney

69. Paulsen, *supra* note 13, at 303.

70. Convention Between the French Republic and the United States of America, art. IV, 8 Stat. 178, 178, 180 (1801).

71. U.S. v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

72. *Id.* at 109.

73. Restoration Under Treaty with France, 1 Op. Att’y Gen. 114, 117–19 (1802).

74. Restitution Under Treaty with France, 1 Op. Att’y Gen. 119 (1802).

75. *Id.* at 122.

76. *Id.*

77. Lincoln added, “In all *other* cases in which the Executive or other courts are obliged to act, they must decide for themselves; paying a great deference to the opinions of a court of so high an authority as the supreme one of the United States, but still greater to their own convictions of the meaning of the laws and constitution of the United States, and their oaths to support them.” *Id.* (emphasis added).

General Lincoln's view was that judgments "bound others," even when they were wrong, and even if the President was free to act differently in other cases not before the court. For all that Jefferson is cast as an enemy of judicial power, his conduct in office appears to have hewed to the principle announced by his attorney general.

For example, consider Jefferson's response to judges who frustrated his attempt to enforce the embargo, one of the major initiatives of his second term. In *Ex parte Gilchrist*, Justice Johnson on circuit had held that the President lacked power to tell inferior officers how to execute the embargo statutes, and therefore issued a writ of mandamus ordering a collector to follow his own judgment rather than Jefferson's.⁷⁸ This was "the most important case concerning the embargo, other than the decision on its constitutionality,"⁷⁹ and a major frustration for Jefferson.

The President's response was to have his new attorney general, Caesar Rodney, promulgate his own legal opinion. Jefferson encouraged executive officials to follow the Rodney counter-opinion rather than the Johnson opinion in their future conduct.⁸⁰ Rodney argued that the Judiciary Act (as John Marshall had argued in *Marbury*) did not give any mandamus jurisdiction to the circuit courts, and therefore that executive officers could not be subjected to mandamus for following the President's interpretation of the law rather than the Court's.⁸¹

The latter argument would have been totally unnecessary if there were a general executive power to ignore *incorrect* judgments rather than jurisdictionally deficient ones. And, even if circuit courts did lack mandamus jurisdiction, there remained the problem of suits for damages, as Albert Gallatin pointed out to Jefferson.⁸² This comment conceded the ability of courts to issue binding judgments in some cases. Jefferson never purported to be able to overthrow liability in every case where judges had (in his view) gravely misinterpreted the law and the Constitution; instead, his administration sought statutory amendments and Congressional relief.⁸³

If Thomas Jefferson believed he had the constitutional power to ignore all erroneous federal court orders, this was a weird way to act. His attack on *Gilchrist* would not have needed to be couched purely in jurisdictional terms; he could have simply said that the court was wrong and that he was having none of it. He would not have had to worry about damage judgments that Gallatin

78. *Ex parte Gilchrist*, 10 F. Cas. 355 (C.C.D.S.C. 1808) (No. 5420). For more discussion, see 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 324–38 (1922); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 *YALE L.J.* 1636, 1678–79 (2007).

79. Mashaw, *supra* note 78, at 1678.

80. See Letter from Attorney General Cesar Rodney to President Thomas Jefferson (July 15, 1808), in 1 *AM. L.J.* 429, 433–39 (1808); see also Mashaw, *supra* note 78, at 1679.

81. Letter from Attorney General Cesar Rodney, *supra* note 80, at 435.

82. 1 WARREN, *supra* note 78, at 338.

83. Mashaw, *supra* note 78, at 1679–85.

pressed him about either, because those too would not be enforced if Jefferson found them wrong. His comparatively roundabout attacks on judicial power took as given that he could not avoid letting the courts finally decide individual cases where they had jurisdiction.

It is conceivable that Jefferson *secretly* believed that he had—by constitutional right or simply raw force—the power to ignore judgments.⁸⁴ If so, perhaps he merely treated judgments as final because he felt constrained to by popular pressure. But that hypothesis merely reinforces the constitutional case for finality. To the degree that original practice matters to constitutional interpretation, it is because it is evidence of the publicly understood meaning of legal rules. Secret understandings that one is afraid to voice do not count.⁸⁵

Jefferson's other presidential claims to independent interpretive authority did not call the judgment power into question at all. Jefferson's belief that he was able (and possibly compelled) to pardon everybody convicted under the unconstitutional Alien and Sedition Acts does not rest on a general ability to review judgments for error.⁸⁶ The pardon power is an *enumerated* and traditional method of disrupting a criminal judgment of conviction and can be exercised without regard to the merits of the judgment.⁸⁷ At most, Jefferson's pardon demonstrates what should have been obvious at any rate—that a President may use his own legal judgment in deciding which criminal convictions to pardon.

Paulsen also points out the rumors that Jefferson may have been prepared to refuse to recognize the Supreme Court's mandamus jurisdiction in *Marbury v. Madison*.⁸⁸ This, too, shows no conflict with the thesis of judgment supremacy, for the same reason Jefferson's response to *Gilchrist* did not. The traditional rule was that a judgment was supreme *only* where it had been issued with jurisdiction. So Jefferson was, at most, prepared to treat a Supreme Court writ as if it had issued without jurisdiction if the Supreme Court purported to have jurisdiction that he thought it did not have.

In light of *Marbury's* jurisdictional holding, the decision printed in *Cranch* is essentially an advisory opinion about the substantive rights of William Marbury,

84. See, e.g., Fallon, *supra* note 22, at 7–8; Paulsen, *supra* note 13, at 306–07.

85. In this vein, sundry rumors about what Andrew Jackson might have done in Georgia if he had gotten the chance, see Fallon, *supra* note 22, at 8–9, are also fairly non-probative.

86. Letter from President Thomas Jefferson to Mrs. John Adams (Sept. 11, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 49, 51 (Albert Bergh ed., 1905) [hereinafter JEFFERSON] (“[T]he 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.”).

87. See John Harrison, *Pardon as Prerogative*, 13 FED. SENT’G REP. 147, 147 (2001); Michael B. Rappaport, *The President’s Veto and the Constitution*, 87 NW. U. L. REV. 735, 776–79 (1992).

88. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Paulsen, *supra* note 13, at 306–08 (citing Letter from Thomas Jefferson to William Johnson (June 12, 1823), in 15 JEFFERSON, *supra* note 86, at 439, 447–48). Jefferson's letter does not actually say as much, although it does express an unmistakable tone of scorn and outrage, and accuse Marshall of going beyond his jurisdiction. See also 1 WARREN, *supra* note 78, at 264–65. *But see* Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235, 1275–77 (2003) (questioning the conventional story that Jefferson would have defied *Marbury* if it had been decided the other way).

who never received his commission.⁸⁹ Jefferson ignored this advisory opinion because he thought it was wrong and recognized that because the Court conceded that it lacked jurisdiction, it had not required (and could not require) him to do anything. Much of Jefferson's criticism of *Marbury* was on jurisdictional grounds; for example, that it was "*coram non iudice*, and unauthoritative."⁹⁰

The fact that judgments may bind where and only where a court has jurisdiction explains why the stakes are so high in considering the exact scope of the Federal Judiciary's jurisdiction, especially in equity, over the President and other officers (or what their immunity is to that jurisdiction). This jurisdiction is a thorny question beyond the scope of this Article,⁹¹ but does not affect its thesis. The claim here is not about the *scope* of federal jurisdiction, but the consequences of it.

Jefferson's outrage at the *Marbury* dicta and his response to *Gilchrist* reinforce the binding and jurisdictional nature of the judgment power. "Jefferson would not have sat still for"⁹² the Court's claim that the President was within its mandamus jurisdiction precisely because the President was understood to have no general power of declining judgments that had issued within a court's proper jurisdiction. Mandamus jurisdiction was important because judgments were binding. In contrast, if Jefferson had believed in Paulsen's version of the *Merryman* power, the jurisdictional questions would have been of little interest, because the President could have ignored any judgments he believed incorrect as they arose.

Jefferson's successor, James Madison, defended the judgment power while in office even more explicitly. As President, he was called upon to intervene in the Olmstead Case, a minor insurrection at Fort Mifflin, Pennsylvania.⁹³ The fight involved a controversial admiralty judgment issued by federal district judge Richard Peters (who had joined one of the opinions in *Hayburn's Case*). For five years Peters's judgment had gone unenforced in the face of a Pennsylvania statute purporting to rob his decree of legal force. The case reached the Supreme Court, which issued a writ of mandamus ordering Peters to enforce his

89. See Letter from Thomas Jefferson to William Johnson (June 12, 1823), *supra* note 88, at 447–48.

90. See, e.g., Letter from Thomas Jefferson to George Hay (June 2, 1807), in 11 JEFFERSON, *supra* note 86, at 213, 215; see also *infra* notes 111–119 and accompanying text (explaining the role of "*coram non iudice*" in private law).

91. For more on aspects of the immunity issue, see *Clinton v. Jones*, 520 U.S. 681 (1997); *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866); JAMES HART, *THE AMERICAN PRESIDENCY IN ACTION: 1789*, at 44–47 (1948); Akhil Reed Amar & Neal Kumar Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 HARV. L. REV. 701 (1995).

92. Paulsen, *supra* note 13, at 307.

93. See generally H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* 122–27 (2002) (detailing the saga of the Olmstead Affair and the Olmstead Case); *Protest of Pennsylvania Against the Decision of the Supreme Court in the Case of Gideon Olmstead*, in 2 AMERICAN STATE PAPERS: MISCELLANEOUS 2 (Walter Lowrie ed., Gales & Seaton 1834) (same); Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401, 408–453 (2005) (same).

judgment in the normal fashion.⁹⁴ Fighting broke out.

In an 1809 letter, Governor Snyder asked President Madison to intervene and stop the federal judgment.⁹⁵ Madison sent him a scolding letter: “the Executive of the U. States is not only unauthorized to prevent the execution of a Decree sanctioned by the Supreme Court of the U. States, but is especially enjoined by statute to carry into effect any such decree, where opposition may be made to it.”⁹⁶ That was that.

Madison’s reference to being “especially enjoined by statute” is a bit curious. Did Madison mean to imply that the duty to enforce judgments was statutory rather than constitutional? Most likely he was referring to the Militia Act, which authorized the President to mobilize the militia wherever “combinations too powerful to be suppressed by the ordinary course of judicial proceedings” opposed the execution of federal law.⁹⁷ It is also possible he was thinking of his duty to ensure faithful execution of the Judiciary Act of 1789, which required U.S. marshals to “execute . . . all lawful precepts directed to [them]” or of the Crimes Act of 1790, which provided that any person who obstructed a federal officer executing any federal writ or judgment be imprisoned up to twelve months and fined up to \$300.⁹⁸ In any case, Madison’s letter makes clear that the President has no power to interfere with a judgment and some obligation, from wherever derived, to carry it out. What it does not make clear is how much physical force the President is obligated to place at the disposal of the Judiciary and how much Congress can regulate this by statute, questions mostly beyond the scope of this Article.⁹⁹

Madison’s view here should not have been a surprise to a careful reader of *The Federalist*; this is not a case where “earlier, general statements of principle” conflict with “the later, case-specific practice.”¹⁰⁰ Madison’s belief that he was legally powerless to interfere with a proper judicial decree was not the post hoc invention of a power-shy President. It had not only been covered by Madison, Hamilton, and Jay in *The Federalist* (and Brutus in his criticism of the Constitu-

94. *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809).

95. Letter from Governor Simon Snyder to President James Madison (Apr. 3, 1809), in 2 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra* note 93, at 11–12.

96. Letter from President James Madison to Governor Snyder (Apr. 13, 1809), in 2 LETTERS AND OTHER WRITINGS OF JAMES MADISON 438, 438–39 (Philadelphia, J.B. Lippincott 1865). The version of the letter reported in the *American State Papers* differs slightly, eliminating the shorthand, adding commas, and replacing “especially” with “expressly.” See Letter from President James Madison to Governor Snyder (Apr. 13, 1809), in 2 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra* note 93, at 12. The differences seem unimportant to me.

97. Militia Act of 1795, ch. 36, § 2, 1 Stat. 424, 424; see also Insurrection Act of 1807, ch. 39, 2 Stat. 443 (giving the same power to call forth the army and navy); cf. POWELL, *supra* note 93, at 126 & n.12 (also implying that Madison meant the Militia Act).

98. Judiciary Act of 1789, ch. 26, § 27, 1 Stat. 73, 87; An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 22, 1 Stat. 112, 117 (1790).

99. See *infra* section I.D.

100. Compare Paulsen, *supra* note 13, at 309 (accusing Madison of contradicting his earlier position in *The Federalist* in his letter to Snyder), with POWELL, *supra* note 93, at 126 (“Snyder . . . had entirely misread Madison’s position.”).

tion), but it had also been explained by St. George Tucker and James Wilson in their famous studies of American constitutional law, and it had been endorsed by nearly every Justice on the first Supreme Court, as well as the famously unshy President Jefferson and his attorney general. Indeed, Jefferson even wrote to Madison from Monticello to encourage him that he would have done the same in the Olmstead situation.¹⁰¹ The judgment power reigned supreme in early American public law.

B. THE LAW OF JUDGMENTS

The early understanding of the judicial power endorses the view that courts, where they had jurisdiction, could settle legal claims and resolve legal disputes. Modern critics of this view, however, have suggested that an insistence that judicial decisions must be obeyed categorically in the cases where they were properly issued but not given binding effect otherwise is just *ipse dixit*—an unprincipled compromise between the inconsistent principles of finality and departmentalism.¹⁰² However, James Wilson's two precepts—that judgments must be enforced, except where a court lacked jurisdiction—would not have seemed strange or arbitrary to the founding generation. The doctrine of judgment supremacy in public law borrows its logic from the private law of judgments.

In private law, the very point of judgments was to authoritatively settle disputes between the parties. The validity of a judgment, once it had issued, did not depend on its legal reasoning; a judgment could be invalid because of lack of jurisdiction or other procedural defects, but the power to decide cases was the power to settle some legal questions beyond relitigation.

Two basic rules about judgments were universal in founding-era case law, although one must be cautious that the law of judgments may well have been plural rather than unitary. Without going into the hot debate of whether rules for judgments and the conflict of laws are commanded by the Full Faith and Credit Clause (or statute),¹⁰³ the Due Process Clause,¹⁰⁴ general law,¹⁰⁵ or local law,

101. Letter from Thomas Jefferson to James Madison (May 22, 1809), in 9 JEFFERSON, *supra* note 86, at 241–42, quoted in POWELL, *supra* note 93, at 127.

102. E.g., Paulsen, *supra* note 13, at 297 n.275; Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 719 (2004) (reviewing FARBER, *supra* note 21) [hereinafter Paulsen, *Civil War*]; Strauss, *supra* note 20, at 123 (“The executive autonomy view, in nearly all its manifestations, pulls its punches in a way that suggests a deeper incoherence.”).

103. *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 289–305 (1992).

104. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877); A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 621 (2006) (“By 1945, the notion that the law of state court jurisdiction was a matter with which the Due Process Clause was concerned was not fairly open to challenge.”).

105. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 594–97 (2003); Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 349–50 (1998).

the point is that there were certain principles originally agreed upon about what made a judgment. Those principles are logically incorporated into the Article III power to render judgment in appropriate cases and controversies. First, a judgment's legality was independent from its correctness on the merits. That is, legal or constitutional error did not necessarily infect the entire proceedings and render the judgment invalid. Second, a judgment's legality was dependent on the jurisdiction of the issuing court. A court without jurisdiction over the parties and the subject matter could not bind them to judgment, right or wrong.

One recitation of the first rule came from John Marshall in 1809, when a plaintiff sought to set aside a verdict of treason from a New Jersey court of general jurisdiction that had resulted in land forfeiture.¹⁰⁶ Marshall acknowledged that the underlying verdict of treason was quite probably wrong, but denied relief because being wrong was not a good enough reason to for a state court's decision to be ignored: "The judgment it gave was erroneous, but it is a judgment, and, until reversed, cannot be disregarded."¹⁰⁷

The settling power of judgments was extended interstate in Justice Story's opinion in *Mills v. Duryee*, which held that the Congressional implementation of the Full Faith and Credit Clause made "a judgment conclusive when a Court of the particular state where it is rendered would pronounce the same decision."¹⁰⁸ For reasons too long-winded to treat here, it is not clear that Story's interpretation of the Full Faith and Credit Act was correct,¹⁰⁹ but there was no real dispute that the intrajudicial rule for judgments was that they could not be challenged simply because the new judge might have decided the old case another way.

The scope of interstate preclusion under the Full Faith and Credit Clause and statute was contested, but only because there was a dispute about whether those provisions really put foreign judgments on the exact same footing as domestic ones. So far as domestic judgments went, the state courts agreed that an erroneous judgment was still a judgment, and therefore still just as enforceable as an accurate one.¹¹⁰

106. *Kempe's Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173 (1809).

107. *Id.* at 186; cf. *Christmas v. Russell*, 72 U.S. 290, 302 (1866) ("Where the jurisdiction has attached the judgment is conclusive for all purposes, and is not open to any inquiry upon the merits.").

108. 11 U.S. (7 Cranch) 481, 485 (1813).

109. Congress, for example, appears to have thought the *Mills* interpretation incorrect—both before and after it was decided. See generally Stephen E. Sachs, *Full Faith and Credit in the Early Congress* 29–80 (Nov. 26, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=1032676>.

110. *Lucas v. Bank of Darien*, 2 Stew. 280, 312 (Ala. 1830) ("[A] decision of a Court of competent jurisdiction, being *res judicata*, is conclusive and binding on all other Courts of concurrent jurisdiction."); *Richardson v. Hobart*, 1 Stew. 500, 504 (Ala. 1828); *Griswold v. Bigelow*, 6 Conn. 258, 264 (1826) ("The decrees of a court of competent jurisdiction, are conclusive, while they remain unreversed, on every question, which they profess to decide." (citation omitted)); *Rockwell v. Sheldon*, 2 Day 305, 312–13 (Conn. 1806) ("[T]he decrees of a court of probate having competent jurisdiction, are conclusive, while they remain unreversed, on every question which they profess to decide."); *Roach v. Lessee of Martin*, 1 Del. (1 Harr.) 548, 558 (1835); *Picquet v. M'Kay*, 2 Blackf. 465, 468 (Ind. 1831) ("The position is unquestionably correct, that the judgment of a Court of competent jurisdiction is

Just as old as the rule that judgments closed a case was the rule that they only did so when the judgments had been rendered with jurisdiction.¹¹¹ The rule had been ubiquitous in English practice, under the theory that proceedings without jurisdiction were *coram non judice*—that is, not before a judge.¹¹² As the Supreme Court put it in considering an ejectment action in 1870:

It is of no avail . . . to show that there are errors in that record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law.¹¹³

In *D'arcy v. Ketchum*, the Court laid down the basic rule that for purposes of full faith and credit, a judgment was entitled to no recognition if it had not been rendered with jurisdiction.¹¹⁴ According to the Court, in other contexts this rule was “the international law as it existed among the States in 1790.”¹¹⁵ Indeed, Justice Johnson’s dissent from *Mills v. Duryee* thirty-eight years earlier was in part based on a worry that the decision would cut into this legal axiom.¹¹⁶

conclusive between the parties, the same matter being in controversy.”); *Moore v. Tanner’s Adm’r*, 21 Ky. (T.B. Mon.) 42, 45 (1827); *Carlyle v. Long*, 15 Ky. (5 Litt.) 167, 169 (1824) (“[N]o principle is better settled, than that which recognizes the decision of any matter by a court of competent jurisdiction, to be conclusive between the same parties, when again drawn in question in any court of concurrent or co-ordinate jurisdiction.”); *Simpson v. Simpson’s Ex’x*, 13 Ky. (3 Litt.) 141, 147 (1823) (“[I]t is an established principle, that the decision of a matter by a court of competent jurisdiction, is conclusive between the same parties in all courts of concurrent jurisdiction.”); *Moffett v. White*, 11 Ky. (1 Litt.) 324, 324 (1822) (“[I]t is an established rule, that the decision of a court of competent jurisdiction is conclusive between the same parties on the same matter, in all other courts of co-ordinate jurisdiction.”); *Thomas v. Clarke*, 11 Ky. (1 Litt.) 287, 288–89 (1822); *Hayden v. Boot*, 9 Ky. (2 A.K. Marsh) 353, 354 (1820) (“[I]t is, accordingly, a settled rule, that judgment of a court of competent jurisdiction is as a plea, a bar, and, as evidence, conclusive between the same parties, upon the same matter directly in question, in the same or any other court.”); *Leonard v. Leonard*, 31 Mass. (14 Pick.) 280, 283 (1828) (“In general, the judgment of a court of competent jurisdiction is conclusive against the parties.”); *Tilton v. Gordon*, 1 N.H. 33, 35 (1817) (“[N]o legal question is more fully settled and at rest than that the merits of a judgment recovered in a court of competent jurisdiction, whilst unreversed, is conclusive as to the subject matter of it, to every intent and purpose, and cannot be re-examined in a new action founded on evidence, which would have made a defence to the original suit.”); *Le Guen v. Gouverneur*, 1 Johns. Cas. 436, 493, 510 (N.Y. 1800); *Aldridge v. Giles*, 13 Va. (3 Hen. & M.) 136, 140 (1808) (Tucker, J.); *Robinson v. Swift*, 3 Vt. 283, 289–90 (1830).

111. See Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164, 164 (1977) (“For over three centuries it has been black-letter law that the judgment of a court without jurisdiction over the subject matter of the action before it is null and void in its entirety.”) (footnotes omitted).

112. See *Case of the Marshalsea* (1613) 10 Co. Rep. 68b, 76a, 77 Eng. Rep. 1027 (K.B.).

113. *Cooper v. Reynolds*, 77 U.S. 308, 316 (1870).

114. *D’arcy v. Ketchum*, 52 U.S. 165 (1851).

115. *Id.* at 176 (“[I]nternational law . . . among the states” is what we might now call the federal common (or general) law of interstate relations.); cf. Nelson, *supra* note 105, at 593–97 (noting “founding generation” viewed Full Faith and Credit Clause against backdrop of choice of law rules in the general common law).

116. *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 486–87 (Johnson, J., dissenting). That worry had briefly been realized in Massachusetts, for example. See *Commonwealth v. Green*, 17 Mass. 515,

The *D'arcy* Court “deem[ed] it to be free from controversy” that in every state, a judgment without jurisdiction was void; the only question was whether the rules for full faith and credit abrogated the universal rule.¹¹⁷ The Court was not wrong to take the jurisdictional rule for granted. Outside of the full faith and credit context, the Court had employed the rule a year earlier, in *Boswell's Lessee v. Otis*.¹¹⁸ State cases between *D'arcy* and the founding saying the same thing are ubiquitous.¹¹⁹ A version of the notion that a judgment settles legal disputes survives today, although the modern doctrine has significantly evolved (or degenerated) from the one current at the founding.¹²⁰

Michael Collins argues that American *federal* courts in fact broke with the traditional understanding of *coram non iudice* in England and in the American states. Citing the Supreme Court's decisions in *M'Cormick v. Sullivant*¹²¹ and *Ex parte Watkins*,¹²² he claims that in the federal system “[j]urisdictionally defective judgments could be reversed on appeal; but until reversed or set aside by the court that issued them, they were ‘not absolute nullities’ that might be disregarded on collateral attack.”¹²³ This is because lower federal courts “were not ‘inferior’ courts in the English common law sense whose judgments might be ignored when jurisdiction was lacking.”¹²⁴

545–46 (1822), *overruled by* *Hall v. Williams*, 23 Mass. 232, 245–46 (1828). As *Hall* put it, *Mills*, “when first referred to in this Court in the case of the *Commonwealth v. Green*, was supposed to have put an end to all questions on this subject, and to have established . . . that a judgment . . . was absolute and incontrovertible, and would admit of no inquiry even as to the jurisdiction of the court which rendered it.” *Hall*, 23 Mass. at 242–43. “[B]ut,” the court went on, “having the general question now brought distinctly before us . . . [w]e . . . are all of opinion, that” a judgment may be examined for jurisdiction. *Id.* at 246; *see also* James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 177 n.31 (2004).

117. *D'arcy*, 52 U.S. at 174. Justice Story, the author of *Mills*, later wrote that full faith and credit “d[id] not prevent an inquiry into the jurisdiction of the Court, in which the original judgment was rendered, to pronounce the judgment. . . .” JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 509 (Boston, Hilliard, Gray, & Co. 1834).

118. 50 U.S. 336, 350 (1850) (“It may be difficult in some cases to draw the line of jurisdiction so as to determine whether the proceedings of a court are void or only erroneous. . . . The inquiry should be, have the requisites of the statute been complied with, so as to subject the property in controversy to the judgment of the court, and is such judgment limited to the property named in the bill. If this cannot be answered in the affirmative, the proceedings of the court beyond their jurisdiction are void.”).

119. *E.g.*, *Aldrich v. Kinney*, 4 Conn. 380, 383–84 (1822) (“Admitting, as I do most fully, that a judgment rendered in a sister state, by a court which has jurisdiction of the subject matter and *parties*, is conclusive and unimpeachable; I am equally clear, that where the defendant neither appeared, nor had legal notice to appear, a judgment against him is invalid. . . .”); *Hall*, 23 Mass. at 244 (“[I]n all instances, the jurisdiction of the court rendering the judgment may be inquired into.”); *Bank of U.S. v. Merchs. Bank of Balt.*, 7 Gill 415, 429–30 (Md. 1848) (“It is certainly true, that unless the court rendering the judgment, had jurisdiction, both of the cause and of the parties, it would be treated as a nullity.”); *see also* sources cited *supra* note 110 (describing a court “of competent jurisdiction” as being a prerequisite to a binding judgment).

120. *See infra* section III.A.

121. *M'Cormick v. Sullivant*, 23 U.S. (10 Wheat.) 192 (1825).

122. *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830).

123. Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1859 (2007) (internal citations omitted).

124. *Id.*

This may be reading the cases for slightly more than they are worth. In *Sullivant*, the real issue was not jurisdiction, but evidence of jurisdiction. Mr. Doddridge, the lawyer for the appellants, had demanded title to a plot of land on the Pennsylvania-Ohio border even though a federal district court had already held the new owners to hold bona fide title. Doddridge argued that because the record in that case did not establish diversity jurisdiction one way or the other, the judgment must be considered “*corum non iudice*.”¹²⁵ What the Court held was that a twenty-year-old federal judgment need not be held void when the record made jurisdiction unclear to later courts, not that actual lack of jurisdiction was excusable.¹²⁶ In other words, an evidentiary presumption of jurisdiction applied on collateral attack. As Collins acknowledges, the case rested on the peculiar role of pleading and records in early federal practice—not on the claim that the fundamental principles of jurisdiction were anything other than what they had always been recognized to be.¹²⁷ Even at its limit, *Sullivant* would stand for the principle that courts may conclusively adjudicate their own jurisdiction, not for the irrelevance of that jurisdiction.¹²⁸

Ex parte Watkins was a habeas case sensibly rejecting the rule that a court lacked “jurisdiction” to convict a defendant of criminal charges if the penal statute was misinterpreted.¹²⁹ In England and elsewhere, some “inferior” courts properly had jurisdiction only if they correctly interpreted the statutes they were charged with applying.¹³⁰ *Watkins* held simply that courts of *general* jurisdiction, such as the federal courts, were susceptible to no such rule.

Moreover, *Sullivant* and *Watkins*—decided a generation after the Constitution was made law—must be read against practice at the founding. Compare them with *Turner v. Bank of North-America*, decided in 1799.¹³¹ There the Supreme Court dismissed a suit on direct appeal because it could find no evidence on the record that the parties were diverse.¹³² The Court explained that “the proceedings of no Court can be deemed valid further than its jurisdiction appears, or can be presumed,” and that in the absence of any evidence it would not presume jurisdiction.¹³³ The *Turner* Court rejected the argument that a federal circuit court was “inferior” in the strict sense, but still refused to treat it as “a Court of general jurisdiction.”¹³⁴ It is true that *Turner* could be distinguished from

125. *Sullivant*, 23 U.S. (10 Wheat.) at 195 (argument of Mr. Doddridge).

126. *Id.* at 199–200. The expansion to cases “in which the record affirmatively showed that jurisdiction was bad,” only came more than fifty years later. Collins, *supra* note 123, at 1861 (citing *Des Moines Navigation & R.R. Co. v. Iowa Homestead Co.*, 123 U.S. 552, 558–59 (1887)).

127. Collins, *supra* note 123, at 1853.

128. See *infra* section III.A (suggesting an alternative to this principle).

129. *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 209 (1830).

130. For more on courts of inferior and general jurisdiction, see David E. Engdahl, *What's in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 *IND. L.J.* 457, 466–68 (1991); Ann Woolhandler, *Demodeling Habeas*, 45 *STAN. L. REV.* 575, 588–90 (1993).

131. *Turner v. Bank of North-America*, 4 U.S. (4 Dall.) 8 (1799).

132. *Id.* at 11.

133. *Id.*

134. *Id.*

Sullivant because it concerned direct rather than collateral review. In fact, the two cases were consistent in reciting the rule that jurisdiction was necessary to make a judgment bind. They differed only about when to presume that jurisdiction existed.

In sum, judgments closed disputes even when they were wrong, but only when there was jurisdiction. This tradition of the law of judgments helps make sense of the discussion of the judicial power at the time of the founding. The lawfulness of judicial action in a given case depended on the authority of the judge, not the reasons for judgment. This rule was not merely an interstate rule of recognition, but stemmed from basic understandings about what it was for a proceeding to have judicial authority at all. One consequence of that judicial authority in civil proceedings was full faith and credit. For the separation of powers, the consequence was constitutional finality. Thus the judgment power is consistent not only with the constitutional plan but with the background principles of law at the time.

Perhaps because judgments and conflicts of law are regarded as a private-law field, these principles can seem arbitrary to modern constitutional scholars. Paulsen objects:

[I]t is very difficult to draw a principled distinction between the legitimacy of the President's refusal to execute judgments that he believes are wrong on 'justiciability,' or Article III, grounds and the legitimacy of his refusal to execute judgments that he believes are wrong on some other ground.¹³⁵

While Paulsen may be correct that this distinction is difficult to draw in hard cases,¹³⁶ there is nothing unprincipled about the distinction between judgments without jurisdiction and judgments that are just wrong. Indeed, the distinction could fairly be deemed a central legal principle at the time of the founding. The legality of a judgment had to do with the power to resolve a question, not the resolution given. Thus, as Marshall had put it, erroneous judgments are still judgments.¹³⁷ Judgments without jurisdiction, however, were not.

Read back into Article III, the law of judgments confirms Madison's and Wilson's view as the most natural reading of the text. The grant of Article III judicial power in particular cases is the power to resolve those cases conclusively *if* the court has jurisdiction to do so in the first place.

C. ILLEGAL JUDGMENTS

From these historical materials, what could be said against judgment supremacy? Two possible counterarguments are: First, the same logic that allows

135. Paulsen, *supra* note 13, at 297 n.275.

136. See *infra* section III.B.1.

137. *Kempe's Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173, 186 (1809) (Marshall, C.J.) (discussed *supra* notes 106–07).

the President to treat as void any statute that exceeds Congress's powers might seem to allow him to treat incorrect judgments as void too. Second, there are scattered references, most notably in Alexander Hamilton's *Federalist* 78, to the prospect that the President might not enforce judgments in some circumstances. In fact, reading these arguments against the private-law background of the judgment power makes clear that neither one defeats judgment supremacy. The analogy to Congress's powers reinforces the jurisdictional supremacy of judgments. The comment by Hamilton does not particularly support that view of judgments, but it is just as consistent with it as it is with anybody else's.

The Constitution does envision some class of judgments that are illegal and to be ignored by the President. Those familiar with the private law of judgments at the founding would most naturally have read that class as being judgments that lacked jurisdiction.

1. Legislative Power and Judicial Power

In *The Federalist*, John Jay had analogized "the judgments of our courts," to "the laws passed by our legislature."¹³⁸ As Jay explained, "[a]ll constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature."¹³⁹ The President enforces valid laws, so he must enforce valid judgments too, which have "as much legal validity and obligation."¹⁴⁰ One departmentalist objection to the judgment power might be to point out that just as the Executive is not required to execute laws that he believes to be substantively unconstitutional, he is not required to execute judgments he thinks are erroneous, either.

This intuition misunderstands the difference between legislative and judicial power. The legislative power vested by Article I authorizes Congress to pass laws concerning a host of explicitly enumerated and implicit subjects. A law within that list of authorized subjects is constitutionally permissible; a law that regulates something not provided by Article I (or the other relevant provisions¹⁴¹) is not. Article III, however, does not give the Judiciary a list of permissible *outcomes* but rather a list of permissible *cases* or *controversies*. If an Article III court tries to adjudicate a controversy not within the Article III listing, that is unconstitutional.¹⁴² But if an Article III court with jurisdiction adjudicates a controversy listed in Article III and gets it wrong, that is just as unreviewable as Article I legislation that happens to be bad policy. The Presi-

138. THE FEDERALIST NO. 64, *supra* note 54, at 335.

139. *Id.*

140. *Id.*

141. See, e.g., U.S. CONST. art. IV; *id.* amend. XIII *et. seq.*

142. See *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 453 (1851) (statute granting admiralty jurisdiction is constitutional only if it does not exceed the admiralty jurisdiction of Article III); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800) (legislative grant of alien jurisdiction confined by terms of Article III).

dent can use his explicit powers (the veto, the pardon¹⁴³) to alleviate the results, but he has no implicit power to suspend the entire procedure on constitutional grounds.

Jurisdictional objections to Article III judgments (or objections going to the Article III limitations on the judicial power) are another matter entirely. Those are parallel to Article I objections to Congress's enumerated powers. Just as the President must treat unconstitutional laws as if they were no law at all, he must treat unjurisdictional judgments as if they were no judgment at all. So long as one is not misled into thinking that every erroneous legal adjudication infects the resultant judgment, the analogy between Article II review of Article I powers and Article III powers holds up.

2. "Merely Judgment"

In response to Brutus's essays about the risk of government by judiciary, Alexander Hamilton wrote a series of essays as Publius. He responded to Brutus's fears that judicial interpretation would give judges too much discretion by arguing that text and cases would render judges "bound down by strict rules and precedents."¹⁴⁴ He then responded to Brutus's claim that the judges would be able to subvert the "political rights of the constitution" because nobody could stop their judgments.¹⁴⁵ This was not a problem, Hamilton explained, because "the judiciary . . . may truly be said to have 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."¹⁴⁶ Thus, the Judiciary would be "the least dangerous to the political rights of the constitution," and could "never attack with success either of the other two" branches.¹⁴⁷ Hamilton was not the only person to suggest that the Constitution permitted some sort of executive review. St. George Tucker later said something similar: "If we consider the nature of the judicial authority, and the manner in which it operates, we shall discover that it cannot, of itself, oppress any individual; for the executive authority must lend [its] aid in every instance where oppression can ensue from [its] decisions."¹⁴⁸

Hamilton's response can be read in different ways.¹⁴⁹ One possibility is that Hamilton was not discussing here a *legal* authority to disregard erroneous judgments but simply predicting what would actually happen if judges started abusing their offices. Under this theory, presidential obstruction of the Judiciary might well be a welcome event, even if it happened in violation of the

143. U.S. CONST. art. I, § 7 (veto); *id.* art. II, § 2 (pardon).

144. THE FEDERALIST No. 78, at 404 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

145. *Id.* at 402.

146. *Id.* (emphases in original).

147. *Id.*

148. 1 TUCKER, *supra* note 42, at 356.

149. See Lawson & Moore, *supra* note 13, at 1322–23 ("[T]his statement is . . . too cryptic to count for very much.").

President's oath of office.¹⁵⁰

However, it is more consistent with the theme of the rest of the Judiciary essays if Hamilton was referring to the President's *legal* power to refuse to use force to enforce some judgments. Still, Hamilton does not elaborate on which judgments he means. Under an anti-judgment-supremacy theory, the President can ignore any judgment he thinks is incorrect, modified by whatever degree of deference he thinks appropriate.¹⁵¹ Under my theory, the President can ignore any judgment that exceeds the power and jurisdiction of the issuing court. Both theories are consistent with Hamilton's comment, and he gave no reason to prefer the former interpretation to the latter.¹⁵² The more plausible reading, in light of the other evidence, is that the President would fight against judicial oppression by ignoring judgments when the Judiciary lacked power to issue them, that is, lacked jurisdiction. Hamilton's comments point in neither direction.

D. ENFORCING JUDGMENTS

While the rules of jurisdiction, finality, and supremacy that were taken for granted in the founding era may seem overly technical to the modern reader, they still leave open many questions about how exactly this system was supposed to work. Having described the outlines of the role of the President and the Judiciary in a legal dispute over a particular case, a preliminary discussion of a few details of enforcing judgments is appropriate.

One potential criticism of this historical analysis is that it elides what might be a crucial difference between judgments that bind only the parties, and judgments that also bind the office of the Executive Branch. Of course, in many of the most controversial instances of judicial finality, the Executive Branch is a party to the suit, so this distinction drops away.¹⁵³ However, even in private litigation, the historical theory of the judicial power does not give a basis for the distinction.

Most importantly, the founding-era discussions of the judicial power do not generally distinguish between the Judiciary's ability to bind parties to a case, and its ability to bind the Executive with respect to those parties in that case. Returning, for example, to Attorney General Lincoln's discussion of the French treaty litigation, his determination was that the Supreme Court's judgment in a private suit "bound others, in reference to the case on which they have adjudi-

150. I am grateful to Sai Prakash for this suggestion.

151. Paulsen, *supra* note 13, at 334–35.

152. One paragraph later, Hamilton conceded that "individual oppression may now and then proceed from the courts of justice," which seemed to acknowledge that at least some incorrect judgments would not be subject to executive review. THE FEDERALIST No. 78, *supra* note 144, at 402.

153. *E.g.*, *Ex parte Merryman*, 17 F. Cas. 144 (C.C. Md. 1861) (Case No. 9487); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

cated.”¹⁵⁴ Given the executive-branch audience of his opinion, and the fact that he went on to say that the Executive Branch had no obligation to extend the judgment beyond its jurisdiction, it is hard to avoid concluding that the “others” bound by that judgment in that case included the Executive.

Furthermore, this conclusion was grounded in constitutional theory: The power of the federal Judiciary was that vested by the Constitution, commissioned in particular officers directly by the President or indirectly through his appointees. The President’s obligation to ensure faithful execution of the law included an obligation to ensure faithful execution of lawful judgments, because judgments were seen implicitly to have a legal status like the laws under which they were issued.

This also means that the President’s duty to ignore judgments that lack jurisdiction (or to enforce judgments that do) is not unique to constitutional suits, as some have suggested.¹⁵⁵ The President does not have the power to ignore judgments because they misinterpret important constitutional rules; he has the power to ignore judgments because they issue in a case the court should not have decided at all. Because judgments issued without jurisdiction are *coram non iudice*, they lack legal force. The President’s duty is to enforce that which does have legal force, and in the absence of a judgment that means returning to the constitutional provision itself.

Finally, the biggest remaining question is what exactly the President is required to do when called upon to enforce a judgment. In cases in which the Executive Branch is a party, the judgment itself may resolve this question by explicitly ordering the performance of or abstention from some act. In other cases, the direct obligation is less clear. For example, one view of judgment enforcement included the common-law posse power. James Wilson called this “the high power of ordering to [a sheriff’s] assistance the whole strength of the county over which he presides.”¹⁵⁶ He described this “*posse comitatus*” (literally “[t]he power or force of the county”) as “[t]he entire population of a county above the age of fifteen,” all of whom could be mustered “to suppress . . . unlawful force and resistance.”¹⁵⁷ Years later, Attorney General Edward Bates would describe this as “[t]he right of the courts to call out the whole power of the country to enforce their judgments” which was “as old as the common law.”¹⁵⁸

Leaving aside the interesting question whether the posse power belonged to the courts or was part of the “ministerial power of the sheriff,”¹⁵⁹ it is not clear how this power translates to the federal system. The common-law powers of

154. *Restitution Under Treaty with France*, 1 Op. Att’y Gen. 119, 122 (1802); *see also supra* notes 70–77 and accompanying text.

155. Lawson & Moore, *supra* note 13, at 1325–26.

156. 2 WILSON, *supra* note 38, at 1016.

157. *Id.* at 1016 & editors’ note 5.

158. *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att’y Gen. 74, 80 (1861).

159. 2 WILSON, *supra* note 38, at 1015.

such courts are murky, and their judgments were generally enforced not by posses but by the U.S. marshals whose offices were created by the Judiciary Act of 1789.¹⁶⁰ It is not evident that Congress had a constitutional obligation to create these offices or the other statutes that enable the President to enforce the laws by force of arms, but it is also unclear what would have been the default rule in their absence.

However, whatever amount of *physical* force Congress or the Constitution places behind a judicial judgment, the Constitution vests such judgments with binding *legal* force. At a minimum, this must include “the sanction of nullity.”¹⁶¹ This is the power to disqualify—to nullify—a person’s claim to have acted lawfully in a given case. Even if a judgment does not entitle one to have armed officers defend one’s rights with guns, it can still strip away the legal authority to infringe those rights. In early administrative-law adjudication, government officers were regularly sued in tort and then used their offices as a defense.¹⁶² The sanction of nullity could strip such a defense and allow a misbehaving officer to be held accountable as the lawbreaker he was. Similarly, the Due Process Clause allows people to be locked up only where properly authorized by law; a binding judgment could therefore say that a given person had a right to be free.¹⁶³

There is much more to investigate about the details of the obligation to enforce judgments. At a minimum, however, this obligation extended to cases arising under both the Constitution and other laws, and to cases whether or not the President was a party, and at a minimum this obligation included respect for the sanction of nullity, whatever other force it entailed.

E. FURTHER EVIDENCE

1. Good-Behavior Tenure

One straightforward confirmation of the judgment power comes from Article III’s provision that judges “hold their Offices during good Behaviour”¹⁶⁴—that is, receive protected tenure in office. The constitutional provision mirrored a similar term in British law, which was employed in a controversial attempt to win judicial independence from the crown.¹⁶⁵ There is some dispute over the

160. Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87 (1789).

161. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 154 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Harrison, *supra* note 13, at 385–87.

162. Akhil Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1506–12 (1987); Mashaw, *supra* note 78, at 1682–83.

163. John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 *GEO. L.J.* 2513, 2518 (1998) (discussing how “the Due Process Clause can operate through the sanction of nullity”).

164. U.S. CONST. art. III, § 1.

165. Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 *YALE L.J.* 72, 89–102 (2006).

exact scope of the constitutionally protected tenure.¹⁶⁶ But it is not disputed that its purpose is to give federal judges significantly more protection than they would have if they held their offices at the pleasure of the Executive Branch.¹⁶⁷

If the Constitution does not allow the Executive Branch to revise judgments, this protection makes perfect sense. Indeed, the very purpose of constitutionally protected judicial tenure may be to keep the Executive from using any power of removal to affect the outcomes of cases and controversies. Thus the structural purpose of good-behavior tenure for judges is the converse of the argument for presidential removal of executive officers. Proponents of the unitary executive argue that the President must have the power to remove his subordinates in the Executive Branch, otherwise he will not be able to ensure that they faithfully execute the law.¹⁶⁸ Just the same, the President *cannot* have the same plenary power to remove officers in the Judicial Branch, otherwise he will be able to ensure that they decide cases the way he wants them to.

Constitutional protection of judicial *tenure* makes the most sense in a constitutional structure where constitutional protection of judicial *judgments* is assumed. If the President has the independent interpretive authority to say what the law is in particular cases, then it is wasteful inefficiency to make judges independent from him. Just as one does not frame constitutional text to “alter the caption on the complaint,”¹⁶⁹ one does not write it to grant serious tenure to powerless judicial personnel. The Good-Behavior Clause casts doubt on any inference that judgments are subordinate to the Executive Branch.

2. English Practice

The private law background of the law of judgments and the public discussion of the Constitution’s separation of powers provide sufficient reason to believe in the finality of judicial judgments. Further confirmation can also be found, though, in the British practices that served as a background for the framing of the American constitution.¹⁷⁰ England had long rejected a system of executive review of judicial judgments.

Judges in England long ago had sat as the King’s servants and did his

166. Compare *id.*, with Martin H. Redish, *Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 *YALE L.J.* 139, 141 (2006).

167. Prakash & Smith, *supra* note 165, at 87; Redish, *supra* note 166, at 149–50.

168. *E.g.*, 1 *ANNALS OF CONG.* 474 (Jun. 16, 1789) (statement of Rep. Ames) (“[The President] must . . . have assistants. But in order that he may be responsible to his country, he must have . . . a control over them, with power to remove them.”); *Myers v. United States*, 272 U.S. 52, 132–35 (1926); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986*, at 194–95 (1990).

169. David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 *N.Y.U. L. REV.* 547, 548 (1997).

170. *Cf.* *United States v. Wilson*, 32 U.S. 150, 160 (1833) (“As th[e pardon] power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect [of it] . . .”).

bidding.¹⁷¹ However, according to William Holdsworth, “[b]y the end of mediaeval period the King had ceased to decide cases in person in his courts of common law; and [] Coke had laid it down that he could no longer decide them, since he had delegated all his judicial power to his judges.”¹⁷² In other words, the new British rule was that “[t]he crown has no control over civil justice.”¹⁷³

The exact mechanism for this British constitutional shift is unclear. One major force was a string of powerful Chief Justices and the growth of the culture of the rule of law.¹⁷⁴ Another crucial turning point was a famous conflict between Edward Coke and King James I.¹⁷⁵ In *Prohibitions del Roy*, Coke claimed to have explained to the King at length that he could not “take any cause out of any of his Courts, and give judgment upon it himself.”¹⁷⁶ Giving judgments was a judicial power, and though the King may not be accountable to other men, he was above neither God nor law. As Holdsworth mildly adds, “[i]t is not surprising that the king was angry,” and that was not the end of the matter.¹⁷⁷ Coke stuck to his views in a later case.¹⁷⁸ Eventually, he was removed from office.¹⁷⁹ But in the end he was on the right side of British history.¹⁸⁰

The consolidation of this change may also be thanks to the protection of judicial tenure. William Anson attributes the final victory of British judicial independence to the Act of Settlement of 1701:

The interference of the Crown in the administration of justice may be said to have ceased when the Act of Settlement altered the tenure of the judges. When the judges ceased to be removable at the royal pleasure they lost a motive for regarding the royal wishes in their administration of justice.¹⁸¹

Anson may overestimate the exact role of the Act of Settlement in the protection

171. See F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 134 (1908) (discussing the medieval period in which “we must not, for a long time yet, think of the judges as enjoying any great degree of independence; they are still the king’s servants; they hold their offices for centuries to come during the king’s good pleasure, and occasions on which the royal will is allowed to interfere with the course of royal justice are but too frequent”).

172. 10 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 415 (1938).

173. MAITLAND, *supra* note 171, at 479.

174. J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 144 (2d ed. 1979).

175. See 5 HOLDSWORTH, *supra* note 172, at 428–31.

176. *Prohibitions del Roy* (1608) 12 Co. Rep. 63, 64, 77 Eng. Rep. 1342, 1343 (K.B.); see Ronald G. Usher, *James I and Sir Edward Coke*, 18 ENG. HIST. REV. 664 (1903) (discussing competing accounts of the incident, and concluding that Coke’s account was partly, though not entirely, honest).

177. 5 HOLDSWORTH, *supra* note 172, at 430; see also *id.* at 431 (“This scene between Coke and the king settled nothing.”).

178. See *Colt & Glover v. Bishop of Coventry & Lichfield*, (1612) Hobart, 140, 80 Eng. Rep. 290 (K.B.); Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1675–76 (1994).

179. 5 HOLDSWORTH, *supra* note 172, at 440–41.

180. See BAKER, *supra* note 174, at 144–45 (crediting Coke); 10 HOLDSWORTH, *supra* note 172, at 415–16 (same); MAITLAND, *supra* note 171, at 478–79 (same).

181. 2 WILLIAM R. ANSON, *THE LAW AND CUSTOM OF THE CONSTITUTION* 297 (3d ed. 1908).

of judicial tenure;¹⁸² but as discussed earlier, the power to issue binding judgments was surely reinforced in part by the ability to avoid getting fired for doing so. So by the time of the framing, the natural understanding of the British judicial power was that it included the power to resolve conflicts and issue judgments that the King could not revise. (To the degree this practice was still disputed in England, the puritans apparently favored Coke's view of things.¹⁸³)

Even Paulsen does not dispute the doctrine of judgment supremacy in England before the founding.¹⁸⁴ Of course, it is conceivable that the distribution of power in America was different; America had no Kings. Thus, the question is whether the American constitution copied British judgment supremacy or rebelled against it.

Comparing the structures of British and American governments, the natural inference is that the judicial power was just as independent here as there. In England, the courts were in some sense a subdivision of the Crown, though Coke and Blackstone had held that having delegated the power of decision to his courts, the King could no longer take it back.¹⁸⁵ In America, the irrevocable grant of the judicial power came from the Constitution itself, and therefore from "We the People."¹⁸⁶ Just as the King could not revise judgments in England because he (and history) had placed his courts beyond his reach, the President could not revise judgments in America because the Constitution placed the courts beyond his.

Paulsen attempts to turn the implication from British history on its head by suggesting that because "[t]he English courts were . . . not, strictly speaking, an independent branch of government, but an arm of the executive," the American analogy to English judgment supremacy "is . . . of one branch's ability to *bind itself*."¹⁸⁷ But under the American system, the Executive *does* bind itself to the execution of the judicial power. Jurisdiction can be regulated by law, which the Executive participates in making. Judges are "officers of the United States" who must be commissioned and appointed by the Executive.¹⁸⁸ Congress can vest the appointment of judges who are inferior officers, but must vest it in some-

182. See Prakash & Smith, *supra* note 165, at 92–102.

183. JOHN DYKSTRA EUSDEN, PURITANS, LAWYERS, AND POLITICS IN EARLY SEVENTEENTH-CENTURY ENGLAND 142–43 (1958).

184. Paulsen, *supra* note 13, at 300 n.283; see also John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 392 (1993) (finding the English model of the Judiciary at the time of the framing a reason why Paulsen's independent authority model is unpersuasive).

185. See *supra* notes 176–178 and accompanying text; 1 WILLIAM BLACKSTONE, COMMENTARIES, *257, *261; Prakash & Smith, *supra* note 165, at 131.

186. U.S. CONST. pmbl.; 1 TUCKER, *supra* note 42, at 354–55 ("[T]he courts of the United States derive all their powers, in like manner as the legislative and executive department derive theirs," that is, from the Constitution.).

187. Paulsen, *supra* note 13, at 300 n.283 (emphasis in original) (citations omitted); cf. MONTESQUIEU, *supra* note 47, at bk. 11, ch. 6 (describing judicial power as one of the two kinds of executive power).

188. U.S. CONST. art. II, § 3; *id.* § 2, cl. 2.

body whose appointment can in turn be traced back to the President.¹⁸⁹ Judges derive their constitutional authority from presidential activity even though the Constitution makes it pellucidly clear that they do not hold office at his sufferance.

In their discussions of the judgment power, the Founders had explicitly confronted the separation of judicial from executive power in America and England. James Wilson had described the Executive's duty to execute judgments as ministerial. He acknowledged that because of this confusion "the judicial authority" is "sometimes considered as a branch of the executive power; but inaccurately."¹⁹⁰ The point was simply that the legal duty of the Executive was sometimes to comply with a decision of the Judiciary, just as the legal duty of the Judiciary is sometimes to comply with a decision of the Executive.¹⁹¹

William Rawle said the same thing:

To make laws and to execute them are the two great operations of government; but they cannot be fully and correctly executed unless there is somewhere resident a power to expound and apply them. This power is auxiliary to the executive authority, and in some degree partakes of its nature. But it is also required at times to control the executive, and what it decides to be unlawful, the executive cannot perform.¹⁹²

Although Madison had described the British Judiciary as "shoots from the executive stock,"¹⁹³ the examples he gave for the structural relationship between Executive and Judiciary were almost as true under the American Constitution as under the British. The chief minglings of executive and judicial power that Madison described in England were that the Executive had the power to appoint and commission judges, just as he does in the American system (subject to Senate confirmation), and the Executive's power to remove them and get advice from them.¹⁹⁴ Nowhere did Madison suggest that the nature of judgment execution had changed in moving across the Atlantic. The American Judiciary had independently vested power, but that reinforced rather than refuted its power to render binding judgments.

189. *Id.* § 2, cl. 2 (vested appointments must be given to executive department heads or to judges). There may also be some limits on Congress's ability to constrain appointments by statute. See Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. (forthcoming 2008).

190. 1 WILSON, *supra* note 36, at 703.

191. *E.g.*, 5 U.S.C. 701(a)(2) (2000) (precluding statutory judicial review where "agency action is committed to agency discretion by law").

192. WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES* 199 (2d ed. 1829).

193. THE FEDERALIST NO. 47, *supra* note 46, at 251, quoted in Paulsen, *supra* note 13, at 300 n.283.

194. THE FEDERALIST NO. 47, *supra* note 46, at 250–51. The only one missing from American practice was the power to demand advice from judges, which the Justices of the Supreme Court refused to give. See Letter from Chief Justice John Jay and the Associate Justices to President George Washington (Aug. 8, 1793), in HART AND WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 66–67 (Paul M. Bator et al. eds., 3d ed. 1988).

Brutus, who did think that the American Constitution departed from the model of the British judicial power, complained that our Constitution had given the Judiciary more power over the other branches than in England, not less. As he put it, our constitution “followed that of the British in rendering the judges independent by granting them their offices during good behavior, without following the Constitution of England in instituting a tribunal in which their errors may be corrected.”¹⁹⁵ The federalists and anti-federalists may have disagreed about the scope of the separation of powers in England, but they did not disagree about it here.

II. COMPETING THEORIES OF THE JUDGMENT POWER

The doctrine of judgment supremacy is rooted in the Constitution’s text, history, and structure. The Constitution also suggests a limit on the supremacy of judgments—the jurisdiction of the issuing court. Leading scholars, however, all reject some part of this theory.

A. PAULSEN

As may be apparent from the foregoing discussion, the strongest criticism of the supremacy of judgments comes from Michael Stokes Paulsen. According to Paulsen, the general principle that each branch has the obligation and authority to decide constitutional questions for itself trumps any tradition of treating judgments as legally conclusive. Under this view, the ultimate settlement of legal questions in any case where there is intractable disagreement between the branches will be more of a matter of political and military will than jurisdictional technicalities.¹⁹⁶

Paulsen’s chief argument for this is structural, what he calls a geometric “indirect proof.”¹⁹⁷ As he puts it, if the President does not have the authority to overturn judgments, then that means all judgments are supreme. That means that all judgments as to the scope of the Judiciary’s power are supreme, and that means that there is no scope for independent Presidential judgment. But the inability of one branch to bind another, including independent presidential judgment, has been widely supported since the founding, so therefore judgment supremacy must not exist.¹⁹⁸

However, as Paulsen acknowledges, judgment supremacy also had prominent supporters at the founding. Moreover, several of the most famous defenders of presidential interpretation—Wilson and Madison, for example—also believed in the judgment power. So we should not be so quick to assume their views to have been contradictory. In fact, judgment supremacy does not automatically contradict all presidential independence because the original understanding of

195. Brutus, *supra* note 58, at 196.

196. Paulsen, *supra* note 13, at 323–24.

197. *Id.* at 284.

198. *Id.* at 284–88.

judgment supremacy was a more nuanced one than Paulsen hypothesizes. The claim is not that all judgments issued by all courts are always supreme; the claim is that judgments issued *by a court of competent jurisdiction* are conclusive where that jurisdiction runs. Thus, it is simply not the case that the Judiciary has conclusive authority to enlarge its own power.

Paulsen suggests that this limitation on the judgment power is enough to destroy it:

To grant the President a power to ignore judgments thought to be outside the judiciary's "sphere" would give him a power to nullify judicial decrees as broad or as narrow as his understanding of the appropriate scope of "the judicial power." On the not untenable assumption that an erroneous invalidation of governmental power (or, for that matter, an erroneous validation) is, in some sense, an *ultra vires* judicial action, the executive might reasonably conclude that an erroneous judicial decision is "*ultra vires*" and therefore lies outside the proper bounds of the judicial power and outside of his duty to enforce as valid law. Again, the concession would disprove the supremacy-of-judgments hypothesis.¹⁹⁹

In other words, says Paulsen, if the President has the authority to conduct jurisdictional review of judgments, he might decide that every incorrect judgment lies outside of a court's jurisdiction, and therefore have total executive review after all.

But as discussed earlier, there is no good textual, historical, or structural reason to think that every incorrect judgment lies outside of a court's "judicial power" or jurisdiction. No competent founding-era lawyer ever treated the law of judgments that way, and it is a facially implausible reading of the text. The Constitution gives the Judiciary authority to decide cases and controversies, which normally entails the ability to decide which side is correct. Thus, no President faithful to his constitutional oath would make up an unprecedented rule that "the judicial power" does not extend to any decision he thinks is incorrect. Not only is Paulsen's "not untenable assumption" not required, it is not in fact tenable.

Paulsen argues that Madison's general principle of departmental authority trumped Madison's belief that he was obliged to execute judicial decrees.²⁰⁰ In fact, the constitutional requirement is more nuanced than the one Paulsen attacks, so the contradiction disappears. The President is both empowered to interpret the Constitution by his own lights most of the time, but also required to enforce some judgments premised on different interpretations.

199. *Id.* at 285.

200. *Id.* at 309.

B. LAWSON AND MOORE

Gary Lawson and Christopher Moore also claim that the President has some constitutional authority to review judgments for their legal accuracy.²⁰¹ Acknowledging the constitutional reasons to think judgments have some legal-settling power, they qualify this authority with a high burden of proof, thus concluding that this executive review of judgments is limited to cases of clear error.²⁰²

They reach this conclusion by setting out a list of arguments supporting the case for judgment supremacy and another list supporting the case against. In favor of judgment supremacy lie statements at the founding, a long tradition of treating judgments as binding, and the implausibility of giving the Judiciary a purely advisory role.²⁰³ On the other hand, Lawson and Moore point out, judgments have always been subject to various forms of revision and collateral attack.²⁰⁴ Also, a few statements appear to support some sort of executive review of judgments.²⁰⁵ Finally, absolute judgment supremacy in all cases seems implausible.²⁰⁶

Lawson and Moore are right to think that the Constitution demands some middle course between total supremacy of judgments and total impotence. However, the more plausible rule is not that the President should give judgments deferential review on the merits, but rather that he should scrutinize whether a given judgment is in fact an exercise of a court's power and jurisdiction. Lawson and Moore think the President can and should defy judgments that are clearly erroneous rather than judgments that lie outside of a court's competence to decide.

In support of their rule, Lawson and Moore point to the doctrines in the private law of judgments that made judicial judgments subject to collateral attack—like the doctrine of jurisdiction discussed above. According to them, “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.”²⁰⁷ However, it is anachronistic to see the eighteenth-century doctrines as simply a modern public-policy balancing test. The rules for void and voidable judgments were formalistic and procedural, not opportunities for new substantive relitigation of settled questions.

What that suggests in the context of executive review is that Lawson and Moore are right that the Constitution envisions some exceptions to judgment finality, but those exceptions should be based around the formal properties of a judgment, not its substance. One such formal characteristic is the jurisdiction of the issuing court. It is conceivable that other characteristics could be shown to

201. Lawson & Moore, *supra* note 13, at 1313–29.

202. *Id.* at 1325.

203. *Id.* at 1319–21.

204. *Id.* at 1321–22.

205. *Id.* at 1322–23.

206. *Id.* at 1323.

207. *Id.* at 1322.

be consistent with the constitutional plan. There is some historical case to be made for exceptions to judgment supremacy other than jurisdiction—like the doctrines that judgments were voidable for fraud²⁰⁸—although it is a closer call. However, even these exceptions do not resemble the sort of substantive review that Lawson and Moore endorse. They are correct to think that the private-law doctrines of the law of judgments provide a guide to the supremacy of judgments and its limits, but they fail to let those doctrines guide them in determining whether those limits are substantive or jurisdictional.

C. ALEXANDER AND SCHAUER

Even some who agree about the settling power of a judgment dispute the uniqueness of its constitutional role. Larry Alexander and Fred Schauer have argued that in order for law to settle disputes, some branch must be vested with final interpretive power, a power that the Court has claimed since the mid-twentieth century.²⁰⁹ Alexander and Schauer think that when the U.S. Supreme Court issues a majority opinion that will eventually be printed in the *U.S. Reports*, the words in the opinion become law, binding on the other branches even if those words rest on legal or factual inaccuracies.²¹⁰ These opinions must be treated as legally binding by the other branches, even as applied to parties that were not before the Court in the first place. In other words, Alexander and Schauer accord no special power to a judgment's ability to settle disputes. They give the same force to the legal opinion that typically (although not always) accompanies and explains a judgment.

This Article does not dispute that, at some point, legal questions are better settled than right. But one can agree with Alexander and Schauer that legal questions must at some point be settled without agreeing with their view about who settles them and how. The historical answer is different than theirs.²¹¹ *Judgments* become binding law, not *opinions*. Opinions merely explain the grounds for judgments, helping other people to plan and order their affairs. Conflicts are thus settled case by case, by judgments issued in concrete controversies between two parties, rather than in abstract prospective opinions. And they are settled by any court of competent jurisdiction, rather than settled exclusively by a single court with a very small docket that sits in Washington, D.C.

One source of intuitive resistance to this view of the judgment power may be

208. STORY, *supra* note 117, at 499.

209. Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000) [hereinafter Alexander & Schauer, *Defending*]; Alexander & Schauer, *supra* note 31.

210. Alexander & Schauer, *Defending*, *supra* note 209, at 478–82; Alexander & Schauer, *supra* note 31, at 1378–82, 1386–87.

211. Alexander and Schauer concede that this historical answer may well be what the Constitution purports to require. But they are indifferent to this point, because they believe that the Constitution's views on judicial supremacy should not be binding. Alexander & Schauer, *Defending*, *supra* note 209, at 459–61. *But see* Alexander & Schauer, *supra* note 31, at 1377–79 (arguing that people should follow the Constitution's answer to normative questions, not their own).

that as a matter of logic, it is hard to grasp why the Judiciary's power to settle disputes should be pursued only one case at a time. This Article puts the supremacy of judgments on firmer historical footing. The judicial power to settle cases is the power to issue dispositive judgments. Whatever opinion power the courts may have is a different beast entirely.

In other words, there are good historical, textual, and structural reasons to treat judicial dispositions of individual cases as legally binding. However, those arguments were specific to the role that judgments play in the constitutional structure. No part of that argument gives a similar binding pedigree to the opinion that a court typically writes to accompany its judgment.²¹²

It is not impossible that somebody might produce some *other* legal argument that opinions ought to be treated as if they had the force of law. It is also possible that opinions could be given the force of law by some statute or constitutional provision in certain cases. For example, one might read the statutory and constitutional provisions for federal courts inferior to the Supreme Court to create an implicit obligation on the lower courts to treat Supreme Court opinions as rules of decision.²¹³ Or one might infer from the habeas provisions of the Antiterrorism and Effective Death Penalty Act an obligation on state courts to do the same.²¹⁴

But the important point is that there is no argument from the Constitution's text, history, and structure to support a general rule of opinion supremacy. Nor can Alexander and Schauer's argument rest merely on the need to have some way to conclusively resolve legal questions. The judgment power *does* conclusively resolve legal questions, even if it does so in a fashion that is less centralized than they would like.

Judicial opinions cannot claim authority from the same sources as judicial judgments do. Judgments derive their authority from the combination of judicial power and jurisdiction enshrined by the originally understood text and structure of the Constitution. Opinions must find another path to authority, if they find one at all.

212. Indeed, a historical pedigree is quite doubtful given the state of early opinions, which were underreported, often unwritten, and often seriatim. See Hartnett, *supra* note 15, at 126–31; Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 34 (1959); see also Buckner v. Finley, 27 U.S. (2 Pet.) 586, 591 (1829); Harrison, *supra* note 21; Letter from James Kent, *supra* note 44 (“The opinions from the bench were delivered *ore tenus*. We had no law of our own, & nobody knew what it was.”). Even a modern pedigree is not unproblematic. See *Mondragon v. Thompson* 519 F.3d 1078, 1081 (10th Cir. 2008) (“The formalism of the Federal Rules of Civil Procedure” forbids “confus[ing] an opinion with a judgment.”).

213. See Evan Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 828–39 (1994) (exploring and critiquing these possibilities).

214. Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, 1219 (1996) (codified at 28 U.S.C. § 2254(d)(1) (2000)) (permitting habeas relief from “a [state court] decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States”). This assumes the not-obvious-to-me conclusion that Congress can impose such rules of decision on state courts.

III. IMPLICATIONS FOR FEDERAL JURISDICTION

Here are three observations implied by the view that the judicial power is the power to issue binding judgments, but only within a court's proper jurisdiction. First, the modern doctrine that courts may use the judgment power to conclusively resolve that they have jurisdiction they do not is a deviation from the original model of judicial power. Second, the poorly understood difference between jurisdictional rules and mandatory rules may be more important than previously realized. Third, the resulting regime may not only be constitutionally commanded, but also functionally desirable.

A. JURISDICTIONAL BOOTSTRAPPING

So judgments bind the President when they have jurisdiction, and when they don't, they don't. This formulation of the constitutional rule leaves unanswered the obvious follow-up question—who decides whether a court has jurisdiction? Since jurisdiction is itself simply another question of federal, general, or state law, there is in principle no reason a court could not make judgments about its own jurisdiction. But that rule risks collapsing “judgments within a court's jurisdiction” into “judgments, period.” Even if the judgment power is limited by jurisdiction, courts might use their judgment power to hold themselves to have jurisdiction not properly theirs, then use their newly stolen jurisdiction to issue binding judgments after all. Critics of judgment supremacy have objected to precisely this possibility.²¹⁵

The modern rule of *res judicata* allows this sort of jurisdictional bootstrapping. In *Durfee v. Duke*, the Supreme Court held that a court's judgment as to jurisdiction, even if it is wrong, is *res judicata* so long as the issue was “fully and fairly litigated” in that court.²¹⁶ That is, a court which in fact has no power to adjudicate a particular subject matter, or no power to make a particular litigant come before it, can nonetheless use its judgment power to give itself that power. The *Duke* doctrine's requirement that the determination be “full[] and fair[]” at least implies that there might be room to reject a court's self-granted jurisdiction in truly unfair or ill-considered cases, or where jurisdiction was determined by default. But the exact scope of the modern test remains somewhat indeterminate.²¹⁷

There are good reasons to be skeptical about grafting *Duke* onto the constitutional scope of the judgment power. First of all, even the Court has acknowledged that this modern rule is a jurisprudential innovation and replaces the more traditional rule that a court without jurisdiction can't get it by (incorrectly)

215. See, e.g., Paulsen, *supra* note 13, at 297 n.275; Paulsen, *supra* note 19, at 105; Paulsen, *Civil War*, *supra* note 102, at 719; see also Lawson & Moore, *supra* note 13, at 1324.

216. *Durfee v. Duke*, 375 U.S. 106, 111 (1963).

217. Attempts to codify the modern doctrine's shift from an analysis of judicial power to an analysis of fundamental fairness can be found at RESTATEMENT OF JUDGMENTS §§ 4–8, 10 (1942) and RESTATEMENT (SECOND) OF JUDGMENTS §§ 10, 12 (1982).

awarding it to itself.²¹⁸ Under the traditional rule, if a federal court adjudicates a case without getting personal jurisdiction over the defendant, or over a question where it lacks subject-matter jurisdiction, its decrees are simply void. Thus, a writ of habeas corpus issued by a court that has no jurisdiction to issue writs of habeas corpus is, as Dan Farber has put it, no more than “a purported writ of harum-scarum.”²¹⁹

Furthermore, it is not clear that the rules should be the same for personal jurisdiction and subject-matter jurisdiction. Personal jurisdiction can generally be waived as a practical matter, because under the law of most states a litigant consents to the jurisdiction of a court by appearing there to litigate. Thus it made some sense for the Court to declare in *Baldwin v. Iowa State Traveling Men's Ass'n* that “in every case where one voluntarily appears, presents his case and is fully heard,” he should “be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.”²²⁰ *Baldwin* also explicitly invoked the public policy of finality to support its result.²²¹ This result was rapidly transplanted to an array of questions of subject-matter jurisdiction.²²² Not only is subject-matter jurisdiction not generally waivable, but this shift happened without consideration of the separation of powers. Even if Article III incorporated or reflected background principles of civil procedure at the time of its enactment, it is not clear that modern changes in procedural doctrines should also change the constitutional rule.²²³

This criticism of the modern rule of *Duke* is much more tentative, and a great deal more research and analysis would be necessary to untangle the interaction between *res judicata* interstate, *res judicata* in federal courts, *res judicata* between federal and state courts, the Full Faith and Credit Clause of the Constitution, the Full Faith and Credit statute, and the Due Process Clause.²²⁴

218. RESTATEMENT (SECOND) OF JUDGMENTS § 12 (1982). (“[M]odern decisions” have reduced the scope of the original rule.); see also Note, *supra* note 111, at 174 (“The Supreme Court, in a series of decisions between 1931 and 1963—with the main decisions coming in a sixteen-month period between 1938 and 1940—fundamentally altered the relationship between finality and judicial power in the United States.”); Developments in the Law, *Res Judicata and Jurisdiction: The Bootstrap Doctrine*, 53 HARV. L. REV. 652 (1940).

219. FARBER, *supra* note 21, at 191.

220. *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525–26 (1931).

221. *Id.* at 525 (“Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.”).

222. See *Sherrer v. Sherrer*, 334 U.S. 343, 349–51 (1948); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 403–04 (1940); *Treinius v. Sunshine Mining Co.*, 308 U.S. 66, 76–78 (1939); *Stoll v. Gottlieb*, 305 U.S. 165, 176–77 (1938); *Bennet Boskey & Robert Braucher, Jurisdiction and Collateral Attack: October Term, 1939*, 40 COLUM. L. REV. 1006 (1940); see also *Durfee v. Duke*, 375 U.S. 106, 112 & n.11 (1963) (citing all these cases).

223. For a suggestion that the original civil procedures are consistent with some jurisdictional preclusion, see *Collins*, *supra* note 123, at 1876–98.

224. See generally Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit, and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986); Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976).

This analysis must also be sensitive to the difference between courts of general jurisdiction and “inferior courts” with jurisdiction so circumscribed that determinations of the court’s jurisdiction to hear a case frequently collapsed into the merits.²²⁵ Perhaps there is some valid constitutional reason for the modern rule that gives courts the power to give themselves jurisdiction by holding themselves to have it.²²⁶ Perhaps the original restrictions on self-adjudicated jurisdiction were merely widely shared assumptions of those who framed the Constitution, but were not in fact legally required by it. Perhaps the permissible rules differ for state and federal jurisdiction. Nonetheless, something does seem constitutionally fishy about letting courts finally resolve their own jurisdiction in the very case where that jurisdiction is at issue.

What is the alternative? One possibility is this: Jurisdiction is a legal question settled by final judgment like any other, except that a court’s judgment cannot conclusively resolve its jurisdiction *in that very case*. In practice this means that if an officer doubts the jurisdictional validity of a judgment he can refuse to enforce it, but then a second lawsuit might be brought to determine the jurisdiction of the first proceeding. For example, this new suit might be a suit for damages, an action for a writ of mandamus to enforce the judgment, or a contempt proceeding against the original defendant. The new suit can conclusively resolve the jurisdiction of the first court, although its own jurisdiction might in turn be open to question. That jurisdictional question could be resolved by a third judgment, and so on.

On its face, this regime seems needlessly duplicative and basically silly. After all, if a President doubts the jurisdiction of Court A, why will he believe in the jurisdiction of Court B or Court C or Court D?²²⁷ But in many cases the legal questions become easier to resolve with each layer of regress. (Just as people who cannot agree on good policy can nonetheless agree on what policy has been enacted into law, and people who cannot agree on the law can nonetheless agree on what court is authorized to interpret it.)

Consider an example. A court decides a complicated constitutional case with massive political implications. Jurisdiction is based on diversity, but it is not clear whether the plaintiff is a citizen of any relevant state. The court holds that he is and decides the case. The President ignores the judgment, arguing that the plaintiff is not a citizen and that therefore there was no federal jurisdiction in his case. The plaintiff now brings a new action in federal court, asking for a

225. See *supra* notes 129–134 and accompanying text; cf. *Sherrer*, 334 U.S. at 346 (noting that decision had not been challenged on appeal to state high court); *Treinius*, 308 U.S. at 76 (noting non-inferiority of prior tribunal); *Stoll*, 305 U.S. at 172 n.14 (same).

226. See, e.g., Dan B. Dobbs, *The Validation of Void Judgments: The Bootstrap Principle* (pt. I), 53 VA. L. REV. 1003 (1967); Dan B. Dobbs, *The Validation of Void Judgments: The Bootstrap Principle* (pt. II), 53 VA. L. REV. 1241 (1967); Note, *supra* note 111, at 182–224.

227. This is likely to be a real problem if one thinks that Presidents rarely make legal determinations that differ from their policy preferences. See Frederick Schauer, *Ambivalence About the Law*, 49 ARIZ. L. REV. 11, 24–26 (2007).

declaratory judgment resolving the validity of the first judgment. Even if the diversity question was a close one, the diversity question is incontestably a question of federal law, and therefore the court will have federal-question jurisdiction to consider it (unless there is some new jurisdictional problem with the federal declaratory judgment²²⁸). The second court's judgment is thus obviously final and could be disregarded by a President only if he acted in transparently bad faith.

In contrast, imagine that John Marshall had issued a writ of mandamus in *Marbury v. Madison* and ordered Thomas Jefferson to commission William Marbury. Imagine further that Jefferson had ignored the writ on the grounds that it had issued without jurisdiction.²²⁹ Trying to seek a second writ of mandamus from the Supreme Court enforcing the first one would accomplish nothing, because President Jefferson would presumably object to it on the same jurisdictional grounds and the Supreme Court could do nothing but hurl writ after writ. (Today, federal district courts have general federal-question jurisdiction and the ability to issue declaratory judgments, so a court could easily resolve the mandamus issue without relying on mandamus jurisdiction, but doing so then would have been much trickier). Thus, the mandamus issue might not achieve conclusive resolution if both sides dig in their heels. It is not clear this is a bad result—it simply means that courts that push their jurisdiction to implausible limits may not be able to convince others to go along.

This regime could be summarized as: No court can give itself jurisdiction in a case where it does not have it, but its jurisdiction can still be litigated conclusively in any later case. If the jurisdictional problems became simpler with each layer of regress, the branches would reach meta-agreement. If not, then jurisdiction would remain unresolved as each branch refused to accede to the most recent jurisdictional adjudication of the other. The latter cases would be unfortunate, but sometimes disagreement genuinely goes all the way down.

So far, the structural and historical case for this regime seems better to me than any of the alternatives.²³⁰ In any case, this Article's broader thesis does not necessarily rest on this regime. The constitutional case that judgments are constitutionally final where courts have jurisdiction is somewhat independent of the regime for establishing the jurisdiction of those courts. Any objection that

228. See, e.g., *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673–74 (1950) (discussing “jurisdictional limitations” of the Declaratory Judgments Act).

229. Cf. *supra* note 88 and accompanying text (discussing the possibility that Jefferson was prepared to ignore the Supreme Court's writ for lack of jurisdiction, were a writ issued).

230. Some people, for example, may think that even my recursive regime gives courts too much power to resolve jurisdictional questions given the modern reality that each phase of high-stakes litigation may end up before the same court—the Supreme Court. One plausible alternative might be to make executive determinations of judicial jurisdiction (but only jurisdiction) final. Another might be to allow different courts to resolve one another's jurisdictions, but never to allow a single court to conclusively resolve its prior jurisdiction, even in later cases. I have not yet seen (but am open to) an argument that this could be squared with the law or history of federal jurisdiction. The same result might be achieved through appropriate congressional jurisdiction-stripping.

judgment finality collapses into generalized judicial supremacy should in fact be directed to the rules for establishing judicial jurisdiction, *not* to the consequences of that jurisdiction once established.

B. JURISDICTIONAL AND MANDATORY RULES

1. Modern Doctrine

So far this Article has used the word “jurisdiction” as if it were more or less obvious what legal rules went to the jurisdiction of the relevant court and which rules did not. Unfortunately, courts and scholars have not always been meticulous in adhering to only one usage of the word. Because jurisdiction is the source of the Judiciary’s power to issue dispositive judgments, this carelessness borders on negligently courting a constitutional crisis. (Indeed, it has been central to at least one case.²³¹)

As the Supreme Court has lamented, “Jurisdiction . . . is a word of many, too many, meanings.”²³² A number of related legal questions—statutory and constitutional standing, the existence of a cause of action, the existence of a remedy, and the satisfaction of statutory thresholds—are sometimes confused or combined with questions of jurisdiction. In fact, there is a key difference between a mandatory non-jurisdictional rule and a jurisdictional rule. The former is simply a rule that the courts are obligated to apply in deciding cases—that the Constitution is the supreme law of the land, or that the possession of a switchblade in violation of valid state law is illegal. The latter is a rule about the authority of the court to adjudicate in the first place.²³³

Under current doctrine, there are high stakes in distinguishing between jurisdictional rules and mandatory non-jurisdictional ones. Issues of subject-matter jurisdiction cannot be waived by the parties, because they go to the very power of the adjudicating court.²³⁴ Courts also may not treat jurisdictional issues as constructively waived and are thus obligated to ensure that they have jurisdiction to proceed even if no party questions it.²³⁵ Understanding that the constitutional settling power of the federal courts reaches as far and only as far as those courts have jurisdiction means those stakes are even higher than has

231. See *infra* section III.B.2.

232. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 90 (1998) (internal quotations omitted).

233. See *Fauntleroy v. Lum*, 210 U.S. 230, 234–35 (1908) (“No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty, of the court.”).

234. *United States v. Cotton*, 535 U.S. 625, 630 (2002); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908); *Wallace v. Anderson*, 18 U.S. (5 Wheat.) 291 (1820). The waivability of sovereign immunity is a good reason that the doctrine should be seen, as it historically was, as a doctrine of *personal* rather than *subject-matter* jurisdiction. See generally Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002).

235. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884) (“This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.”); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804) (“[I]t was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it.”).

previously been thought.

Perhaps because twenty-first-century jurisprudence has slid away from its original moorings, many courts have been alarmingly informal in confusing the difference between jurisdictional rules and mandatory non-jurisdictional ones. In a recent series of cases, the Supreme Court acknowledged that “[c]ourts, including this Court . . . have been less than meticulous in this regard,”²³⁶ and undertook to restore some precision to the concept of jurisdiction, asking courts and litigants to “use[] the label ‘jurisdictional’ . . . only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”²³⁷

Thus, the Court unanimously explained in *Kontrick v. Ryan* that the time limit in Rule 4004 of the Federal Rules of Bankruptcy Procedure does not limit the jurisdiction of a court to hear claims filed out of time.²³⁸ In *Eberhart v. United States*, the Court issued a per curiam opinion saying the same about Rule 33 of the Federal Rules of Criminal Procedure, although acknowledging that confusion was rampant and partly the Court’s own fault.²³⁹ In *Arbaugh v. Y & H Corp.*, the Court quite rightly held that although Title VII imposes nondiscrimination requirements only on businesses of a certain size, that does not mean that federal courts lack *jurisdiction* to hear claims against businesses with fewer employees, just that the size of the business is an “essential ingredient[] of a federal claim for relief.”²⁴⁰

It is possible—though it is hard to tell—that the latest entries in this project represent backsliding. *Bowles v. Russell*, decided in 2007, held that the *statutory* time limits for federal appeals (in contrast to the other time limits considered in *Eberhart* and *Kontrick*) are jurisdictional requirements, so that even a litigant who had received permission from a district judge to file a few days late was out of court.²⁴¹ Four Justices dissented from this conclusion, suggesting that the majority was repudiating the Court’s efforts, “in recent years . . . to clean up our language, and . . . avoid[] the erroneous jurisdictional conclusions that flow from indiscriminate use of the ambiguous word.”²⁴²

John R. Sand & Gravel v. United States,²⁴³ the most recent case, garnered seven votes for the conclusion that a statute of limitations for suits against the government in the court of claims was jurisdictional and therefore could not be waived. However, Justice Breyer’s opinion for the Court suggests further backsliding into casual use of the “jurisdictional” label. Indeed, the opinion called the term “‘jurisdictional’” a “convenient shorthand,” rather than maintain-

236. *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004).

237. *Id.* at 455.

238. *Id.* at 456.

239. *Eberhart v. United States*, 546 U.S. 12, 19–20 (2005).

240. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 503 (2006).

241. *Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007).

242. *Id.* at 2367 (Souter, J., dissenting).

243. *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 753 (2008).

ing that it was referring to jurisdiction in the traditional sense.²⁴⁴

So far, the Court's recent effort to mop up messy confluences of jurisdictional and mandatory rules has not received a great deal of scholarly attention.²⁴⁵ Even a veteran Supreme Court reporter described *Sand & Gravel's* jurisdictional issue as "mind-numbing."²⁴⁶ And apart from the recent cases, plenty of other sources of potential confusion remain untouched by the Court. For example, appeals courts regularly hold that they have no jurisdiction to hear a federal claim if they deem that claim to be so wrong as to be frivolous.²⁴⁷ The Supreme Court has described this doctrine as "more ancient than analytically sound,"²⁴⁸ and twenty-five years ago, Chief Justice Rehnquist called upon the Court to reexamine this "legal landmine,"²⁴⁹ but so far it has not.

Judge Posner has described the frivolous claims issue as "fascinating to aficionados of federal jurisdiction, [but of] limited practical importance."²⁵⁰ Understanding the judgment power raises the practical stakes. If it is true that a federal court lacks jurisdiction to decide frivolous claims, that would mean that the other branches would be entitled to reach their own resolution even in that particular case. Messy complications would arise. What if the Executive believed a claim to be frivolous when the Judiciary did not? What if it were the other way around? Whose determination of frivolity would control the Court's jurisdiction? The Court may well come to recognize that it is better, as Justice Rehnquist thought, that frivolity is not deemed to be a jurisdictional question.²⁵¹

Careful attention to the concept of jurisdictional rules is of first-order constitutional importance. The jurisdictional underpinnings of the judgment power suggest that the Court's project to distinguish between jurisdictional and mandatory rules is even more important than heretofore realized. By deciding that a given requirement is not jurisdictional, the Court is deciding not only that the requirement can be implicitly or explicitly waived, but it is deciding that the

244. *Id.* (quoting *Bowles*, 127 S. Ct. at 2364). Justice Breyer was one of the *Bowles* dissenters.

245. The major exceptions are Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457 (2006), and Howard Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643 (2005). See also Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55 (2008); Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1614 (2003) (claiming, in the face of history and doctrine, that "jurisdiction is conceptually indistinct from the merits").

246. Posting of Tony Mauro to The BLT: The Blog of Legal Times (Jan. 8, 2008, 14:42 EST), <http://legaltimes.typepad.com/blt/2008/01/sand-gravel-and.html>.

247. See, e.g., *Tenet v. Doe*, 544 U.S. 1, 12 (2005) (Scalia, J., concurring) (endorsing this doctrine); *Decatur Liquors, Inc. v. District of Columbia*, 478 F.3d 360, 362 (D.C. Cir. 2007); *In re African-American Slave Descendants Litigation*, 471 F.3d 754, 757 (7th Cir. 2006); *Crowley Cutlery Co. v. United States*, 849 F.2d 273, 276 (7th Cir. 1988); see also 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3564 (2007) and cases cited therein.

248. *Rosado v. Wyman*, 397 U.S. 397, 404 (1970).

249. *Yazoo County Indus. Dev. Corp. v. Suthoff*, 454 U.S. 1157, 1159 (1982) (Rehnquist, J., dissenting from denial of certiorari).

250. *Crowley Cutlery Co.*, 849 F.2d at 277.

251. See 13B WRIGHT, *supra* note 247, § 3564 ("[I]t is reasonable to expect that more will be heard of [Rehnquist's] proposal" to revise the frivolous-claims rule.).

requirement does not affect the “court’s adjudicatory authority”²⁵²—in other words, its power to issue binding judgments.

2. *Ex parte Merryman*

For a less frivolous example of how the difference between jurisdictional and non-jurisdictional rules has high stakes for the separation of powers, consider *Ex parte Merryman*²⁵³ itself, the namesake of Paulsen’s presidential “*Merryman* power” to ignore judgments. It turns out that reading President Lincoln’s arguments in their best light (and in light of the opinion of his Attorney General, Edward Bates) suggests that even Lincoln may not actually have claimed the power to ignore a judgment entered by a court of competent jurisdiction; Taney may have lacked jurisdiction to issue the writ. This reading shows how the fate of the nation can rest on the difference between a jurisdictional and a non-jurisdictional rule.

After taking office and promising the country that he had no quarrel with the Judiciary’s ability to issue binding judgments,²⁵⁴ Lincoln sailed into a constitutional maelstrom. Acting in the absence of explicit congressional authorization, and indeed in the absence of Congress altogether until it could convene at a special session later that summer, he issued a military order authorizing his forces “to suspend the writ of habeas corpus for the public safety,” if they encountered resistance.²⁵⁵ One of the resisters they encountered was a secessionist named John Merryman, who was imprisoned and then petitioned Taney for a writ of habeas corpus.²⁵⁶

The government did not produce Merryman, since in its view, the writ had been suspended. Taney held that because habeas corpus could be suspended only by Congress the writ had not been suspended, and ordered Merryman released.²⁵⁷ He was not.²⁵⁸ When Congress finally came to Washington, Lincoln explained what had happened, explained why he thought the suspension was

252. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

253. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

254. President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in *LINCOLN: SELECTED SPEECHES AND WRITINGS* 284, 289–90 (Don E. Fehrenbacher ed., 1992).

255. Letter from President Abraham Lincoln to General Winfield Scott (Apr. 27, 1861), in *LINCOLN*, *supra* note 254, at 298–99. It is an interesting semantic question whether there is a difference between suspending “the *privilege* of the writ,” U.S. CONST. art. I, § 9 (emphasis added), as the Constitution calls it, and suspending the writ itself, the phrase Lincoln used and now the common one. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 130–31 (1866) (“The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself.”); BRIAN MCGINTY, *LINCOLN AND THE COURT* 77 (2008) (exploring the difference).

256. See generally MCGINTY, *supra* note 255, at 65–91; WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 11–45 (1998); CARL B. SWISHER, *THE TANEY PERIOD: 1836–64*, at 841–54 (The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, vol. 5, 1974).

257. *Merryman*, 17 F. Cas. at 152.

258. SWISHER, *supra* note 256, at 846–47. Merryman was paroled shortly after Lincoln addressed Congress and was ultimately released. MCGINTY, *supra* note 255, at 88.

lawful, and asked them to ratify his actions by law.²⁵⁹

On the merits of the suspension argument, Lincoln had good points. His more famous argument, that “all the laws but one”²⁶⁰ would fall if the technical rules for suspension were obeyed, relied on the debatable but not impossible claim that the Constitution values its own legitimacy above its formal commands.²⁶¹ His more technical argument had even stronger force. The Constitution does not discuss who can suspend the writ; the Suspension Clause’s location in Article I proves very little (the veto power is in Article I too), and at any rate the Suspension Clause is a *limit* on the suspension power, not a *grant*. That means that authority to suspend the writ when the Suspension Clause does not forbid it must be derived from some other provision—if anywhere.²⁶² Congress probably could pass a law doing so, but that need not be the only way. Unlike quartering troops or spending treasury money, the Constitution does not explicitly require suspension be done only by statute.²⁶³ The President might also have such power in certain circumstances, whether from previous militia statutes,²⁶⁴ the “executive power” given by the vesting clause and his status as Commander in Chief,²⁶⁵ or even as an incidental part of his power to call special sessions of Congress in emergencies.²⁶⁶ The authority to get Congress rounded up during times of rebellion is not worth very much if the President is powerless to quell the rebellion long enough to get Congress to Washington.²⁶⁷ At any rate, Lincoln thought that he had constitutionally suspended the writ of habeas

259. President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in LINCOLN, *supra* note 254, at 300, 307.

260. *Id.*

261. *Id.* Compare Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004), with Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 NOTRE DAME L. REV. 1299 (2004).

262. See U.S. CONST. amend. IX (reminding readers not to infer that a limit on power implies that the power is otherwise granted).

263. See U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”); *id.* amend. III (“No soldier shall . . . be quartered in any house, without the consent of the Owner . . . in time of war, but in a manner to be prescribed by law.”); cf. LINCOLN, *supra* note 254, at 300, 307 (“But the Constitution itself, is silent as to which, or who, is to exercise the [suspension] power.”).

264. See FARBER, *supra* note 21, at 162–63; Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 TEMP. L. REV. 391, 395–96 (2007) [hereinafter, Vladeck, *Field Theory*]; Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 176–80 (2004).

265. U.S. CONST. art. II.

266. *Id.* § 3 (“[H]e may, on extraordinary Occasions, convene both Houses, or either of them.”). Lincoln had ordered Congress to convene forty-two days after being inaugurated and less than two weeks before authorizing Scott to suspend the writ. President Abraham Lincoln, Proclamation Calling Militia and Convening Congress, in LINCOLN, *supra* note 254, at 296.

267. LINCOLN, *supra* note 254, at 300, 307 (“[A]s the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.”). Of course, one should not understate the volume of contrary opinion. See sources cited in David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1137 n. 26 (2006).

corpus, and Congress may have agreed.²⁶⁸

Yet the thrust of judgment supremacy is that even when the President is certain he knows what the law says, the jurisdiction of a court is a special realm where their power, not his, is to say what the law is. As this Article has endlessly repeated, if Taney had jurisdiction to hear the case, he had jurisdiction to get it wrong and Lincoln would have had no place ignoring him. But did Taney really have jurisdiction to hear the case? That turns out to be tricky and may therefore mean that even *Ex parte Merryman* is not an instance of the so-called *Merryman* power.²⁶⁹

The central question is whether the suspension of habeas is “jurisdictional”—that is, whether a suspension that complies with the Suspension Clause robs jurisdiction to hear petitions at all, or only determines the rule of law that a court should apply when it hears them. That, in turn, may depend on the source of Lincoln’s authority to suspend the writ. The traditional rule is that statutes are not construed to strip jurisdiction unless they clearly say so,²⁷⁰ but there are historical and structural reasons to think that suspension of the writ may be a form of jurisdiction-stripping, and therefore render habeas writs not only improper but void.

In *Ableman v. Booth*, Chief Justice Taney had described the inability of state courts to issue habeas writs as a limitation on jurisdiction.²⁷¹ Once they learned that a prisoner was in federal custody, those courts “can proceed no further,” because “the prisoner is within the dominion and jurisdiction of another”²⁷² Of course, the fact that one limitation on habeas was jurisdictional does not alone prove that suspension was too. But since one core purpose of suspension was to keep judicial process—possibly dishonest process—from interfering with public safety, it was reasonable for habeas-stripping to act as a limitation on jurisdiction. Representative Roger Nelson had suggested as much when Congress contemplated suspending the writ during the Burr Conspiracy, saying, “[Suspension] ought never to be proposed, unless when the country is so corrupt that we cannot even trust the judges themselves Whenever . . . the officers of the judicial court are so far corrupted as to countenance rebellion, and release rebels from their confinement, it may be then time to say, they shall no longer

268. An Act to Increase the Pay of the Privates in the Regular Army and in the Volunteers in the Service of the United States, and for Other Purposes ch. 63, § 3, 12 Stat. 326, 326 (1861) (“[A]ll acts, proclamations, and orders of the President of the United States after [March 4, 1861] respecting the army and navy of the United States . . . are hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States.”). *But see* CONG. GLOBE, 37th Cong., 1st Sess. 442 (1861) (statement of Rep. Fessenden) (“[This bill] refers simply to the proclamations that were made for, and the employment of volunteers The bill avoids all questions with regard to the habeas corpus”); Currie, *supra* note 267, at 1139–40.

269. FARBER, *supra* note 21, 189–92.

270. *Ex parte Yerger*, 75 U.S. 85, 103 (1869) (“These considerations forbid any construction giving to doubtful words the effect of withholding or abridging [appellate habeas corpus] jurisdiction.”).

271. *Ableman v. Booth*, 62 U.S. 506, 515–16 (1858).

272. *Id.* at 523.

remain in your hands; we will take them from you.”²⁷³

Another argument for seeing suspension of the writ as a limitation on jurisdiction to issue it comes from the nature of habeas relief itself. As Trevor Morrison has argued, suspending the writ of habeas corpus should not be understood to mean that it suddenly becomes lawful to detain people arbitrarily; suspending habeas merely limited the remedies available to those detained.²⁷⁴ In modern jargon, the right to habeas corpus is a procedural rule rather than a substantive one. Limitations on the detention power come from other statutory or constitutional provisions, like the Due Process Clause. Morrison points out that one corollary of this is that a faithful Executive is still required to satisfy *himself* that detentions are lawful, even if no court will second-guess that judgment.²⁷⁵ There is another corollary, however. If suspension of habeas corpus is purely a procedural rule—a new answer to the question “who decides?”—then it is also logically a jurisdictional limit. By saying that the legality of certain emergency detentions is within the power of Congress and the President to decide, the Suspension Clause says that it is not within the Judiciary’s.

It is also possible that Taney’s writ in *Merryman* had other jurisdictional infirmities besides the suspension problem. It is not entirely clear whether Taney was attempting to issue the writ in his capacity as a Justice riding circuit, or as a Supreme Court Justice in chambers; the latter might be an exercise of original jurisdiction outside the bounds of Article III.²⁷⁶

There remains the question of whether Taney, if he lacked jurisdiction, nonetheless could give himself jurisdiction by adjudicating himself to have it. Under the modern doctrine—where jurisdictional determinations are conclusive if fully and fairly litigated²⁷⁷—the answer is unclear. In *Merryman*, the government did initially issue a return to the court informing them without elaboration that the writ had been suspended.²⁷⁸ While Taney does not appear to have heard further argument on the issue, he did promise that he had conducted “a careful and deliberate examination of the whole subject.”²⁷⁹ Judged anachronistically, Taney’s self-adjudicated jurisdiction would thus depend on whether the “fully and fairly” test turns on the full participation of the litigants or the full consideration of the court. In any case, the more sensible answer to the conundrum is the traditional one: If Taney did not have jurisdiction to issue the

273. 16 ANNALS OF CONG. 414 (1807) (statement of Rep. Nelson).

274. Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533 (2007).

275. *Id.* at 1602–15.

276. See MCGINTY, *supra* note 255, at 88–90; Paulsen, *supra* note 19, at 90 n.27; Vladeck, *Field Theory*, *supra* note 264, at 1 n.2, and sources cited therein.

277. See *Durfee v. Duke*, 375 U.S. 106, 111 (1963).

278. *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C. Md. 1861) (Case No. 9487); see also REHNQUIST, *supra* note 256, at 40–41 (criticizing Taney’s hastiness and the “want of process” in deciding *Merryman*).

279. *Merryman*, 17 F. Cas. at 148.

writ, issuing the writ could not give him jurisdiction.²⁸⁰

Lincoln did not explicitly offer this jurisdiction-based justification for his actions when he spoke to Congress. However, the jurisdictional justification explains why Lincoln addressed only the question of the lawfulness of suspension and not his disobedience to an alleged grant of the writ.²⁸¹ Moreover, after defending the suspension, Lincoln promised Congress that his Attorney General, Edward Bates, would provide an expanded explanation.²⁸² Bates did so in explicitly jurisdictional terms.

He provided his opinion the next day, though it is not clear that his nineteen-page opinion improved much on Lincoln's argument on the merits.²⁸³ Bates began with a long primer on the constitutional separation of powers and departmentalist interpretation, with explicit endorsement of the judicial judgment power.²⁸⁴ But in seeming contradiction to what he had just said he understood about the power of judges to bind parties to a case, Bates then announced that he did "not understand how it can be legally possible for a judge to issue a command to the President to come before him *ad subjicendum*—that is, to submit implicitly to his judgment."²⁸⁵

Bates made three arguments to explain why, despite the "[t]he right of the courts to call out the whole power of the country to enforce their judgments,"²⁸⁶ Taney had no power to release Merryman against Lincoln's say-so. First, Bates explained, if one thought the President jurisdictionally immune to judicial process, that settled the matter, because the acts of the President's agents were "no less his act than if done by his own hand."²⁸⁷ Second, presidential immunity did not actually come into play because "the whole subject-matter is political and not judicial."²⁸⁸ In modern parlance, Bates would have said that whether or not habeas corpus was properly suspended was a political question.²⁸⁹ Finally,

280. See *supra* section III.A.

281. Cf. REHNQUIST, *supra* note 256, at 45 (Although several legal scholars wrote about the merits of *Merryman*, "there was no extended public criticism of the administration's disregard of the decision.")

282. LINCOLN, *supra* note 254, at 307.

283. See Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74 (1861).

284. *Id.* at 77 ("[I]t is quite possible for the same identical *question* (not *case*) to come up legitimately before each one of the three departments, and be determined in three different ways, and each decision stand irrevocable, *binding upon the parties to each case.*") (last emphasis added); *id.* ("[T]he judgment of one [department] is not binding upon the other two, *as to the arguments and principles involved* in the judgment. It binds only the parties to the case decided.") (emphasis added); *id.* at 78 ("It is the especial function of the judiciary to hear and determine *cases*, not . . . so as to conclude any person but the parties and privies to the cases adjudged."); *id.* at 80 ("The right of the courts to call out the whole power of the country to enforce their judgments, is as old as the common law.").

285. *Id.* at 85.

286. *Id.* at 80.

287. *Id.* at 86.

288. *Id.*

289. Cf. Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333 (2006); Scott Keller, *Stripping Habeas Corpus Jurisdiction over Non-Citizens Detained Outside the United States: Boumediene v. Bush & the Suspension Clause*, 8 ENGAGE 89, 93–94 (2007) (criticizing Tyler, *supra*).

Bates maintained, habeas jurisdiction was “in the nature of an appeal,” (as the Supreme Court had said before and would say again) and there had been no proceeding below.²⁹⁰

All three of these arguments went to personal or subject-matter jurisdiction. If the President is immune from judicial process it means that a court cannot obtain personal jurisdiction over him without his consent.²⁹¹ He is treated just like a government with sovereign immunity.²⁹² As to the argument that suspension determinations were outside of the judicial power, this part of the political question doctrine, as Bates apparently understood it, was a limitation on the subject-matter jurisdiction of federal courts—an implication of the rule that courts can only pronounce on topics that are properly judicial and not denied to them by the Constitution itself.²⁹³ So if the suspension of habeas was a wholly political question, it would be outside of judicial “cognizance.”²⁹⁴ Bates’s argument about the appellate nature of habeas corpus—perhaps the most confused of his arguments—echoes the Court’s decision in *Marbury v. Madison* that appellate and original jurisdiction are not to be mingled, and that a case falling into one category rather than the other cannot be given jurisdiction under the wrong heading.

Bates’s arguments may not be the strongest that were available to the Administration at the time.²⁹⁵ For example, the claim that the President’s agents deserved his absolute immunity from suit when they were following his orders flew (without explanation) in the face of history.²⁹⁶ But as Bates complained, the Suspension Clause does not explicitly resolve the relevant questions and “[v]ery learned persons have differed widely about the meaning of this short sentence.”²⁹⁷ Bates added, quite humbly, “I am by no means confident that I

290. 10 Op. Att’y Gen. at 86–87 (citing *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100 (1807)); see also *Ex parte Yerger*, 75 U.S. 85, 98 (1869) (endorsing *Bollman*). Bates characterized Taney as sitting “at chambers,” rather than riding circuit, a fact on which this argument depended. 10 Op. Att’y Gen. at 86; see Vladeck, *Field Theory*, *supra* note 264, at 1 n.2.

291. See *supra* note 91 and accompanying text.

292. See generally Nelson, *supra* note 234.

293. See, e.g., *Luther v. Borden*, 48 U.S. 1, 47 (1849) (describing what is now the political question doctrine as a “boundar[y] which limit[s] the Court’s own jurisdiction”). Whether Bates was correct to see the doctrine as a jurisdictional rule is beyond the scope of this Article.

294. 10 Op. Att’y Gen. at 86. There had been comments from Marshall, Story, and in *Merryman* itself suggesting that parts of a suspension determination were nonreviewable. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (Marshall, J.); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1336 (Boston, Hilliard, Gray, & Co. 1833); *Merryman*, 17 F. Cas. at 151–52 (quoting them both).

But if part of the determination was nonreviewable that did not mean all of it was. Cf. Tyler, *supra* note 289, at 367 (conceding that the “public safety” prong of the suspension clause might not be reviewable even if the invasion-or-rebellion prong is). Even if the propriety of legislative suspension were not reviewable, that did not have to mean the Judiciary was generally powerless to determine if non-legislative suspension were possible.

295. See REHNQUIST, *supra* note 256, at 44 (“It was not a very good opinion.”).

296. See *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).

297. 10 Op. Att’y Gen. at 87.

fully understand it myself.”²⁹⁸ Even leaving aside the deficiencies in his argument, I think on balance the evidence points toward seeing Lincoln’s suspension as a restriction on adjudicatory authority for the reason Nelson suggested during the Burr Conspiracy.²⁹⁹ Part of the problem was that the North may have thought some “officers of the judicial court [we]re so far corrupted as to countenance rebellion, and release rebels from their confinement,” as Nelson had said.³⁰⁰ The judgment power envisions that untrustworthy judges must lose their adjudicatory authority, not that they should keep it subject to slightly new rules of decision.

The bigger problem with the jurisdictional defense of Lincoln’s suspension is this: Even if one agrees that the suspension of habeas corpus does not always need to happen by statute, it is not clear what official act exercised the hypothetical executive suspension power. Statutes are relatively clear, passed in accordance with constitutionally required process, and published in the *U.S. Code*. Lincoln, however, issued no equivalent—nothing that looks to modern readers like a formal executive order. All he produced was a letter to his officers authorizing *them* to suspend habeas corpus if they met resistance. It is not clear when and how they did this.

This has caused David Barron and Marty Lederman to conclude that it is wrong to think of Lincoln’s actions as the exercise of any sort of formal power to suspend jurisdiction over writs. As they put it:

Of course, the army generals were hardly in a position to “suspend” the statutory power of courts to issue writs, and no effort was made to use military force to compel judges to refuse to entertain habeas petitions. The notion of executive “suspension,” then, is something of a misnomer. What Lincoln’s order allowed was for army generals to detain persons without conforming to the procedural requirements otherwise applicable by virtue of constitutional or statutory requirements that usually govern such deprivations of liberty.³⁰¹

Barron and Lederman are right to point out the historical curiosity of purporting to suspend the writ of habeas corpus by writing a letter to military officers, rather than giving a formal legal instruction to those with the power to issue it. But one should not be too quick to conclude from the informality of Lincoln’s exercise of power that there could not be any real suspension power to exercise.

Consider the state of administrative law at this point in history. These were the days before the *Federal Register* and the Administrative Procedure Act. Yet administrative law still existed, because the President still had an Administra-

298. *Id.*

299. See *supra* note 273 and accompanying text.

300. 16 ANNALS OF CONG. 414 (1807) (statement of Rep. Nelson).

301. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 999 (2008).

tion to control—discretionary powers to exercise and officers to direct.³⁰² The President frequently exercised those powers in fashions that now seem informal.

For example, much of Jefferson's administration of the embargo was conducted by having letters circulated to the customs collectors who enforced it, as Jerry Mashaw has exhaustively detailed.³⁰³ When Jefferson wanted to change policy and exercise his powers to interpret the statutes he executed, he could simply write a letter to his customs collectors. Similarly, substantive regulation of the disposition of the public lands occurred with "no particular process, for adopting these general rules or regulations, which were issued as circulars or letters to the various local land offices or to the surveyors."³⁰⁴ Thus, Lincoln's decision to exercise his executive powers by writing to his subordinates rather than a more formal proclamation was hardly anachronistic given the lack of more formal procedures for exercising his suspension power.

Lincoln's decision to direct his orders to his inferior officers rather than to courts themselves is similarly explainable. Although judicial officers were appointed and commissioned by the President, they were not members of the Executive Branch in the same way, and traditionally exercised their commissions with constitutionally granted independence. Thus, even when habeas was suspended, judges would be entitled to make a *prima facie* determination about whether or not habeas had been suspended, just as any court makes a *prima facie* determination about whether it has jurisdiction to hear a case. That is why it is unsurprising that "no effort was made to use military force to compel judges to refuse to entertain habeas petitions."³⁰⁵ The traditional way to contest a court's jurisdiction was not necessarily to use force to stop the court from even beginning noncoercive proceedings. One could also simply resist any process and judgments that ultimately issued from the court because they were unauthoritative.³⁰⁶ And that is precisely what Lincoln's men did.

This does leave a historical mystery about when and where, precisely, habeas corpus was suspended. Textually, Lincoln's orders appear to authorize conditional suspensions of habeas corpus by his subordinates within a geographic territory. But it is not clear when they actually did the suspending. Automatically? Only when hostilities began? Only when prisoners were taken? Only once habeas proceedings began? Only once those proceedings turned adverse? For example, in *Merryman* itself, Taney noted that General Cadwalader "refuse[d] to obey the writ of habeas corpus, upon the ground that he [wa]s duly authorized by the president to suspend it,"³⁰⁷ without explaining whether

302. See generally Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 *YALE L.J.* 1256, 1258–70 (2006).

303. Mashaw, *supra* note 78, at 1661–74.

304. *Id.* at 1708.

305. Barron & Lederman, *supra* note 301, at 999.

306. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 122 & 544 n.41 (2005).

307. *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C. Md. 1861) (Case No. 9487). Thanks to Marty Lederman for pointing this out.

Cadwalader had exercised this authorization. General Cadwalader did not explicitly tell Taney that he had suspended the writ, but instead “respectfully request[ed] that [he] postpone further action upon this case, until [Cadwalader] c[ould] receive instructions from the president of the United States, when [Taney] shall hear further from him.”³⁰⁸ Taney then complained that there had been no public notice of the suspension, but appeared to acknowledge that by Cadwalader’s response he had been “officially notified that the privilege of the writ has been suspended, under the orders, and by the authority of the president.”³⁰⁹ It is simply hard to tease out from the public reports what the theory was.

Dan Farber, the first modern scholar to raise the jurisdictional reading of Lincoln’s response to *Merryman*, seems to agree with Bates that Lincoln justifiably thought Taney lacked jurisdiction.³¹⁰ Farber worries, however, about the counterargument “that in practice it would leave the executive as the sole judge of whether the writ was validly suspended . . . to a limited extent.”³¹¹ But as Farber notes, this is true only to that limited extent. Even if the President incorrectly ignores habeas writs for lack of jurisdiction during the period of alleged suspension, the courts may well have jurisdiction to hear suits for damages later on.³¹² This depends on the relevant law of official immunity, whether any or all aspects of the Suspension Clause are non-justiciable, and other technicalities. In basic structure, this would mean that the President should ignore orders from courts during wartime if he believes them to lack jurisdiction, but then must accept orders from courts when peacetime jurisdiction resumes, even if the peacetime courts will hold him to account for ignoring the wartime ones. The fact that a court does not conclusively resolve its own jurisdiction does not mean that another court cannot do so later.

It is possible that this model of emergency jurisdiction-stripping with ex post judicial review after the crisis is over is the most reasonable accommodation of accountability and emergency power.³¹³ At any rate, it may well be the accommodation demanded by the Constitution.

CONCLUSION

“A number of hard words and technical phrases,” as Brutus put it, “are used in [Article III of the Constitution], about the meaning of which gentlemen learned in the law differ.”³¹⁴ Interpreting Article III in its historical context requires reference to original principles of power and jurisdiction that in turn

308. *Id.* at 144.

309. *Id.* at 148.

310. FARBER, *supra* note 21, at 190–91; *see also* AMAR, *supra* note 306.

311. FARBER, *supra* note 21, at 191–92.

312. *See id.* at 192.

313. *See* ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 50–51, 149–50, 272 (2007) (suggesting that something like this is the traditional paradigm).

314. Brutus, *supra* note 55, at 186.

contain even more “hard words and technical phrases.” So it should not be any surprise that many people yearn to oversimplify the role of the Judiciary in the separation of powers, because it seems odd that fundamental questions of sovereignty should be bound up in pedantic questions of jurisdiction.

Yet so far as the Constitution is concerned, pedantic questions of jurisdiction mark the boundaries of the judicial and executive powers. Our Constitution gives the Judicial Branch the awesome power to issue judgments that conclusively resolve a particular controversy between particular parties, even if the President thinks that judgment is wrong. But that power is also a narrow one, obtaining only over the people and things where a court has jurisdiction.

This in turn means that the hard words and technical phrases of federal jurisdiction which bedevil judges and students with their formalism and legal fictions are central to policing the balance of powers. There may be many good ways to reform and clarify the jurisdiction of federal courts in our federal system. Hopefully the reasons to do so will be seen to be even greater now with the addition of this one: Jurisdiction is the power to decide cases, and the power to decide cases is constitutionally final.