



CHECKING THE COURT

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At the end of his dissent, at the end of the nearly one hundred pages of opinions in the most consequential Supreme Court decision in decades, at the end of a 2014–15 Supreme Court Term singular for its judicial activism, Justice Samuel Alito delivered these dispirited closing comments:

Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of *what those with political power and cultural influence are willing to tolerate*.

...

Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with

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the temptation to achieve what is viewed as a noble end by any practicable means. I do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the *deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.*¹

For the mild-mannered Alito, this was practically a call to arms. That call is pregnant with implications: the Court's 5-4 decision in *Obergefell v. Hodges*, creating a substantive-due-process constitutional right to same-sex marriage, Justice Alito seems to be saying, is more than "those with political power and cultural influence" should be "willing to tolerate." And the remedy for such an intolerably activist, lawless decision cannot be left to the Court itself: "decades of attempts" to restrain the Court's "abuse" of its constitutional power "have failed." One cannot rely on the justices' virtue, self-restraint, methodological discipline, or sense of humility to keep the Court from abusing power. The temptation is too great. To rely on the judiciary's sense of restraint is in effect to accede to the "irremediable corruption" in constitutional interpretation that has become the salient characteristic of the decisions of the Court. Traditional notions of the proper constitutional limitation of the judicial power do not effectively constrain the Court according to Alito. The only real check against judicial abuse of power – the Court's *corruption!* – is to check the judiciary from outside the judiciary.

The characteristically colorful and voluble Antonin Scalia was more blunt. He opened his *Obergefell* dissent by calling "this Court" – the *Court as an institution*, mind you, not just the majority opinion

¹ *Obergefell v. Hodges*, 135 S.Ct. 2584, 2643 (2015) (Alito, J., dissenting) (emphasis added).

in this specific case – a “threat to American democracy.” He closed his dissent by talking about the Court’s hubris, portending future downfall, in very nearly Old Testament prophetic language:

Hubris is sometimes defined as o’erweening pride; and pride, we know, goeth before a fall. The Judiciary is the “least dangerous” of the federal branches because it has “neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm” and the States “even for the efficacy of its judgments.” With each decision of ours that takes from the People a question properly left to them – with each decision that is unabashedly based not on law, but on the “reasoned judgment” of a bare majority of this Court – we move one step closer to being reminded of our impotence.²

Was Scalia saying what he seemed to be saying? The quotation – from Alexander Hamilton’s famous Federalist No. 78 defense of the propriety of judicial review and of the safety of such a power *because judicial power could never effectively be abused in a system where the political branches retain potent checks against any such abuse* – is pregnant with possibilities. Specifically, Hamilton’s straightforward observation was that a court that had the audacity to exercise *will* rather than legitimate legal judgment would, quite naturally, bump up against the responsibility of the executive branch not to carry out judicial judgments contrary to the Constitution. This, in today’s legal culture,

² *Id.* at 2631 (Scalia, J., dissenting).

is (almost³) unheard of: the President may refuse to execute a Supreme Court judgment that is, in his independent constitutional judgment, contrary to law!

But Scalia went further yet, interpolating into Hamilton's proposition of federal executive non-execution the words "*and the States,*" implying, clearly enough, the prospect that state government officials properly may seek to resist lawless Supreme Court decisions by interposing state-law authority against them. This, too, in today's legal culture, is (almost⁴) unheard of: it is reminiscent of old arguments of state "interposition" and "nullification" that, while dating back to Jefferson and Madison, had become discredited over time by their misuse by secessionists and segregationists.

Was Justice Scalia proposing (or prophesying) that the Court (properly?) receive its comeuppance in the form of executive or state defiance of judicial decisions that are acts of will rather than judgment? *Remind us of our impotence*, Scalia seems to have been saying. *This Court is out of control. Do something. You have the power.*

Then there's Chief Justice Roberts's lead dissent in *Obergefell*, which, while not explicitly calling for outside restraints on the Court, powerfully made the case for Scalia's major premise. "The legitimacy

³ But see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (asserting and defending the power of the President to, among other things, refuse to execute judgments of the judiciary that are, in his independent and faithful constitutional judgment, contrary to the Constitution). See also Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2725–27 (2003). As far as I know, I am the only academic defender of the propriety of executive refusal to execute judgments of the Supreme Court that he concludes, in his good-faith but independent constitutional judgment, are contrary to the Constitution. For the best arguments against this position, see Will Baude, *The Judgment Power* 96 GEO. L.J. 1807 (2008). See also discussion *infra*, at 103–09.

⁴ But see Paulsen, *Irrepressible Myth*, *supra* note 3, at 2734–38 (2003); see also, Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation*, 59 ALB. L. REV. 671, 688 (1995).

of this Court ultimately rests ‘upon the respect accorded to its judgments,’” wrote Roberts, which in turn depends on its “deciding cases according to the Constitution and law.”⁵ The *legitimacy* of the Court’s exercise of judicial power “depends on confining it to the exercise of legal judgment.”⁶ And the majority’s decision was “anything but” honest legal judgment, but an act of willful defiance of the Constitution: “The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent.”⁷ “Those who founded our country would not recognize the majority’s conception of the judicial role.”⁸

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What can the political branches of national and state governments do – *legitimately, constitutionally* do – when, in their good faith judgment, the Supreme Court has careened out of control and exercised not legal judgment, but lawless *will*? What legitimate “checks” exist, and can appropriately exercised, against willful abuse of the judicial power?

In this essay, I take as my starting premise the position of the dissenters in *Obergefell* that the majority opinion is, whatever its policy merits or demerits, lawless.⁹ The 5-4 majority result in *Obergefell* was an act of political judicial will, not of legal judgment.

⁵ *Obergefell*, 135 S.Ct. at 2624 (Roberts, J., dissenting).

⁶ *Id.* at 2626 (Scalia, J., dissenting).

⁷ *Id.* at 2612 (Roberts, J., dissenting).

⁸ *Id.* at 2624.

⁹ For a general discussion of the case, see Michael Stokes Paulsen, *The Wreckage of Obergefell*, FIRST THINGS, Oct. 2015, at 33-38, available at <http://www.firstthings.com/article/2015/10/the-wreckage-of-obergefell>.

The *force* of such acts of judicial will is a separate constitutional question. So too is the question of whether, and how, other constitutional actors effectually may serve as checks on judicial lawlessness. It is those constitutional questions, not the underlying merits of *Obergefell*, that I wish to address here.¹⁰

What follows is a brisk survey of the legitimate constitutional checks on the Supreme Court (and on the federal judiciary in general) possessed by the other branches of the national government and, to a lesser extent, by the states.¹¹ I do not pretend for this to be a comprehensive discussion of all aspects of – or of all the problems posed by – each such potential check. This canvass is more in the nature of

¹⁰ I also set to one side the question of whether this particular purported abuse of judicial power is the appropriate or best occasion for the exercise of any of these particular checks. While I believe that *Obergefell* is wrongly decided, that its reasoning is indefensible, that its judicial craftsmanship is laughable, and that its outcome is lawless – all major-league problems – one can legitimately hold such views without also thinking that *Obergefell* is a judicial horror of comparable dimension to cases like *Dred Scott v. Sandford* and *Roe v. Wade*, even if fully as indefensible as a constitutional matter. For better or worse (so to speak), *Obergefell* merely (“merely”?!), upends the important social-governmental institution of marriage without lawful basis. It does not wrongfully enslave or re-enslave people or create a private right of some human beings to kill other human beings. Compare Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003); Michael Stokes Paulsen, *The Unbearable Wrongness of Roe*, THE PUBLIC DISCOURSE (Jan. 23, 2012), <http://www.thepublicdiscourse.com/2012/01/4577/>.

¹¹ I will touch only briefly in this article on the question of *state* power to check departures from the Constitution by the national judiciary, emphasizing instead the checks possessed by political institutions of the national government. I hope to address the question of the propriety of state constitutional checks on the national government in future work, provisionally entitled “The Constitutional Case for Interposition and Nullification” (unpublished partial manuscript on file with the author). For a general historical discussion, see MICHAEL STOKES PAULSEN & LUKE PAULSEN, *THE CONSTITUTION: AN INTRODUCTION* 39–40 (2015) (discussing federalism “checks” in Constitution’s design); *id.* at 133–37 (discussing the Alien & Sedition Acts and the Virginia and Kentucky resolutions); *id.* at 167–69 (discussing secession). See also Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 703–15 (2004) (book review).

an opinionated “table of contents” and extended introductory commentary; each of the topics discussed might be a full-length article of its own. My discussion is organized as a steady crescendo from the most obvious and widely accepted such checks on the judiciary to the seemingly most dramatic, draconian, and debatable moves and measures that might be made.

Part I discusses the judicial appointment and confirmation process as the most basic front-end check on the Supreme Court and other federal courts. I defend the propriety, in principle, of imposing through the political process *sound* ideological litmus tests on the selection of federal judges.

Part II addresses the blunt, imprecise front-end check of “jurisdiction-stripping”: the power of Congress to control, in substantial measure, the jurisdiction of the Supreme Court and of lower federal courts. This hearty perennial is the subject of voluminous and intricate academic literature, which I will engage only at the most general level (and with apologies to the authors of the many works I have not cited). While I believe that this check exists, in some proper form, as a constitutionally valid power of Congress, I am uncertain of its practical usefulness. It does not check, prevent, punish, or rectify specific abuses of power; it merely curtails the scope of the judicial jurisdiction within which such abuses might take place in the future – which of course is still a significant restriction on the Court’s power, even if it does not specifically enforce correct judicial behavior or remedy particular departures from it. Removing matters from the Court’s jurisdiction might be taken as a form of (constitutionally allowable) *punishment* of the justices for a wrong decision – a public spanking, and loss of certain future privileges, as a consequence of past misbehavior. And punishments can have deterrent effects. But it is not clear how punishing such a punishment really is. (A better punishment, perhaps, would be to *increase* the Court’s jurisdiction and mandatory caseload, as I argue below.)

Still, the theoretical propriety of what is colloquially (but too-negatively) called “jurisdiction stripping” is an important point: it helps establish the proposition, for example, that the “supremacy” of

the Supreme Court is limited to its position within the federal judicial hierarchy, which is itself largely a creature of alterable congressional statutory arrangement. The Supreme Court is not supreme *over the other branches*, and definitely not supreme *over the Constitution itself*. In fact, the Supreme Court need not necessarily even be given the last *judicial* word on any particular question of federal law. It is the “supreme” federal court in the strict but limited sense that no appeal may lie from its decisions to another federal court. But it is *not* supreme in the sense that it *must have jurisdiction to decide everything*. That proposition is refuted by the Exceptions Clause of Article III, which explicitly authorizes exceptions to the Court’s appellate jurisdiction. Nor does the Supreme Court’s supremacy mean that lower federal court judges are mere subordinate functionaries of the Supreme Court. Rather, they are constitutionally independent judicial officers responsible for their own decisions. Their decisions can be reversed – if the chain of appellate hierarchy controlled by Congress so provides. But even where that is the case, it does not transform lower court judges into flunkies of the Supreme Court; their duty, too, is the faithful interpretation and application of the Constitution – no matter what the Supreme Court may have said to the contrary. (This is itself a check on the Court, as I discuss below, briefly, in connection with Part VI of this survey.)

Part III concerns the power of Congress to structure the Court itself, by manipulating its size – from the familiar (and famously unsuccessful) “Court-packing” proposal of President Franklin Roosevelt in 1937 to what I will call the “Un-packing” plan of allowing attrition of the Court’s membership over time. While I believe that nearly all such ideas are constitutional, I generally oppose Court-packing on structural constitutional policy grounds – specifically, that it diminishes the Court’s institutional checking power in a troubling

way,¹² by dilution of its membership and because it may serve as a disguised form of attempting to reverse specific judgments by swamping the Court with new votes and voters on the opposite side of a prior decision. That isn't unconstitutional, but it is truly a "nuclear" option. It leaves the Court a devastated wasteland – a *larger* wasteland, to be sure, but flattened as an institution, less "checked" by a surgical strike than carpet-bombed. This weakens the institution's ability to recover and perform *its* legitimate checking function. It also encourages the retaliatory use of such nuclear weaponry, on increasingly greater scales. Packing the Court is a recipe for assured destruction, on a long-term basis, of the Court as an institution.

Un-packing the Court, however, has considerable practical merit. I will defend the merit of shrinking the Court's membership, as a corollary to the exercise of the (non-) confirmation power, as a way of checking unwanted judicial appointments at least for a period of time. The prospect of a shrunken Court of seven justices is not nearly as damaging to the institution as a packed Court of fifteen, then twenty-three, then thirty-seven.

In Part IV, I discuss the prospect of using the "back-end" check of impeachment to remove judges and justices from office for engaging in what the House and Senate determine to be a sufficiently severe pattern or practice of constitutionally faithless judicial decision making – exercise by judges of political will rather than true legal judgment – in violation of the constitutionally required judicial oath of fidelity and obedience to the Constitution. Alexander Hamilton embraced this check as part of the constitutional design, in his land-

¹² See generally, Paulsen & Paulsen, *THE CONSTITUTION: AN INTRODUCTION*, *supra* note 11, at 221–26 (discussing and criticizing Roosevelt's Court-packing plan).

mark *Federalist* essays on the judiciary under the proposed new Constitution.¹³ And so do I: The Constitution's design explicitly contemplates Congress's power of impeachment as a check on the constitutional faithlessness of executive and judicial officers – including, I submit, the very “high” crime (or, at the least, “misdemeanor”) of deliberate, knowing, or reckless unfaithfulness to the Constitution and one's duties under it, in violation of one's sworn constitutional oath.

The exercise of such a check has not been part of our constitutional tradition in any serious way since the early days of the republic. Many would regard it as a shocking affront to our constitutional tradition of judicial independence and autonomy in decision-making. But there it is, under the Constitution. And it should be used. Where judges willfully violate the Constitution – even if (and perhaps especially if) the judges believe, in something resembling “good faith,” that this is a legitimate exercise of the power of “interpretation” – Congress may judge such literally *willful* conduct to be an abuse of office and a violation of the judges' oath, warranting impeachment and removal. To be sure, impeachment is an after-the-horse-has-left-the-barn remedy as to abuse of judicial power in any particular case. But it is tailored to the constitutional violation in that it punishes particular misconduct by bad judicial actors, removes such actors, and deters future such actions.

Part V considers the prospect of the use of Congress's general legislative powers – specifically, the Necessary and Proper Clause power to enact legislation appropriate for carrying into execution the federal judicial power by the judicial department – to control, to the extent possible thereby, the Court, by steering its exercise of judicial power in constitutionally proper directions through the vehicle of a

¹³ See *infra*, at 78–81 (discussing Hamilton's arguments in *The Federalist Nos. 79* and *81* with respect to the check of impeachment of judges).

statutory prescription of proper interpretive methodology. The power of this check, and what makes it controversial, is that it is a *fine* check, not a blunt one (like jurisdiction-stripping and impeachment) and one that in theory would operate on the judiciary in daily practice, unlike the up-front-only check of ideological litmus tests in the nomination and confirmation process or the back-end-sometimes-too-late-to-matter check of impeachment. The weakness of this check – but also, in a curious way, also its power – is that it relies on the judiciary for its execution, and cannot be enforced by Congress except through the exercise of one of its other, stronger, blunter, more punishing powers to check the Court as an institution or the misdeeds of individual justices. I believe that the specific proposal I will sketch here – a “Judicial Activism Abolition Act” prescribing correct interpretive principles for federal-law questions – is in many respects novel, and could constitute a potent check on the Supreme Court. (Full elaboration of this proposal, alas, must wait for another day.)¹⁴

Part VI discusses the most potent – and most controversial – constitutional check that other actors in our constitutional system possess on the lawless actions of the Supreme Court: the power to decline to abide by or enforce the Court’s willful, lawless judgments (and, *a fortiori*, the power to decline to abide by them as a prospective rule for future situations, or as precedent in future judicial cases). The power is most clearly possessed by the President – recall Hamilton’s almost casual mention of it in passing in *Federalist No. 78*, in the passage quoted by Scalia in his *Obergefell* dissent. But it is also a power, albeit a highly debatable and controversial one, possessed in different form by officers of *state* government – recall Scalia’s interjection of the words “*and the States*” into his quotation of Hamilton’s

¹⁴ I hope to set forth this idea in more detail in a future article, provisionally entitled *Abolishing Judicial Activism by Statute: A ‘Rules of Decision Act’ for Federal Questions* (unpublished partial manuscript on file with the author).

Federalist No. 78, in *Obergefell*. The powers of state “interposition” and “nullification” – especially where backed (explicitly or tacitly) by the actions (or inactions) of Congress and the President – can serve as a potent check on judicial abuses by the Supreme Court. (Full elaboration of the state-officer-interposition aspect of the non-execution of Supreme Court decisions must likewise await elaboration in some future article.)¹⁵

And finally, the power to decline to abide by Supreme Court judgments and precedents is a constitutional power, I shall claim – somewhat shockingly, I’m sure, to many readers – *of lower federal and state court judges*: A lawless Supreme Court judgment and opinion is not law, and should not be regarded as such by other judges, who possess *independent* constitutional authority and the independent duty to decide matters of federal law faithfully to the U.S. Constitution. The Constitution makes such independent judicial determinations subject, at least typically, to the power of the Supreme Court to *reverse* those decisions. (This reality, however, itself can be altered by Congress’s power to control the Court’s jurisdiction – the check discussed in Part II.) Lower courts are, in that sense, “*inferior*” courts – in that appeals often may be taken from their decisions and they will not have the last judicial-department word on a given case. But they are not “*subordinates*” in the sense that they are mere employees – law clerks, as it were – of the Supreme Court justices, bound to carry out the will of their supposed “bosses,” even when that will is flatly contrary to governing supreme law.¹⁶

¹⁵ As noted above, *supra* note 11, I hope to set forth this idea in more detail in future work.

¹⁶ Again, I shall only have the opportunity to limn that argument in this broad-gauged article surveying the full range of checks on the Court. I hope one day to develop this idea in an article provisionally entitled “The Constitutional Power of Lower

I. THE CONSTITUTIONAL PROPRIETY OF IDEOLOGICAL “LITMUS TESTS” FOR APPOINTMENT AND CONFIRMATION OF FEDERAL JUDGES

It’s a perennial question: May the President, in the exercise of his constitutional role in the process of appointment of federal judges – and the Senate, in the exercise of its constitutional role of providing its “advice” and (perhaps) its “consent” with respect to such appointments – properly consider judicial ideology in deciding whether to nominate and appoint (and confirm) a particular individual to be a federal judge or Supreme Court justice?

Almost incredibly, some people doubt that the President and Senate properly may do such a thing. Such a doubt-full (and doubtful) view reflects, I believe, a fundamental misunderstanding of the constitutional structure of separation of powers and attendant checks and balances. It also embodies (perhaps as a consequence) a completely mistaken reading of the actual provisions of the Constitution with respect to the judicial appointments process.

The correct answer to this question – may the President and Senate consider judicial ideology in the judicial appointments process – is *yes!* Emphatically yes! Absolutely yes! Incontrovertibly yes! *Of course* presidents and senators properly may consider judicial ideology in the course of considering an appointment to the federal judiciary! Indeed, the opposite conclusion is almost inconceivable – in addition to being naïve.

What leads certain folks to misfire on this question, I submit, is a conception of “judicial independence” or of the “judicial role” that is simply contrary to the Constitution and flawed in its reasoning at a

Court Judges to Disregard Supreme Court Precedent.” For an early version of the argument, see Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused*, 7 J. L. & RELIG. 33, 82–88 (1989). See discussion *infra*, at 113–116.

number of points: the belief that judges must be totally free to adopt any judicial philosophy or approach to judging they like (indefensible); the inference that judicial candidates therefore never need to *tell* anybody what that philosophy is (curious); the view that the (quite proper) decisional independence of the federal judiciary – its freedom from direct coercion by the political branches in the actual making of its decisions – implies a power to leverage forward such independence into a principle that forbids up-front *pre*-appointment *inquiry* into substantive views (unsound); and the conceit that it is the “role” of the courts, ultimately, to be the final and supreme interpreters of the Constitution and other law, trumping anything that any of the other branches says, for whatever reasons courts think wise and good (awful) – a view implying that it would be a demeaning to potential judges and an improper act of constitutional chutzpa on the part of presidents and congresses to engage in inquiry into judicial candidates’ substantive views.

This is all wrong as a matter of first premises.¹⁷ The power of constitutional interpretation is not a specifically enumerated power of any branch or department of the national government and surely not one exclusively vested in any single branch. Rather, the power of constitutional interpretation is a divided, shared power possessed by each branch, incidental to the exercise of its other constitutional powers. There is no “judicial supremacy” clause of the Constitution. There is a “Supremacy Clause” (or “Supreme Law Clause”), but it specifies *the Constitution* as supreme law, not judicial decisions.¹⁸

¹⁷ This conception is so badly wrong, yet so commonly held (in various forms), that it is worth attending to its errors in some depth at the outset, as the points made support the propriety of each of the other “checks” on the judiciary that I set forth in this article.

¹⁸ U.S. CONST. art. VI, cl. 2. The Supreme Court’s slipshod equivocation of its own decisions with the “supreme Law of the Land,” in dictum in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), is simply wrong. The Constitution is supreme law. A judicial decision may or may not be faithful to the Constitution. Where it is not, the claim that the unfaithful

There likewise is no “supreme interpreter” clause. The assignment of “the judicial Power” to a federal judiciary is not such a clause. Nor is the fact that that judicial power is authorized to encompass (“shall extend to”) cases in law and equity, where jurisdiction to decide such cases is conferred by Congress.¹⁹ Article III’s Vesting Clause and Extending Clause together describe judicial power, define who possesses it, and specify the types of matters to which it may extend. But this is nowhere close to a textual grant of judicial supremacy in constitutional interpretation. If anything, it is *the President* who comes the closest to being designated a supreme interpreter – and he is not in terms so designated either – by virtue of his unique, singular, constitutionally-specified sworn duty to “preserve, protect, and defend the Constitution” and to “take care that the laws” (presumably including the Constitution as supreme law) are “faithfully executed.”²⁰ Literally nothing in the text; nothing in the structure; nothing in the historical evidence of original meaning, intention, or expectation, remotely supports the wrongheaded first premise of complete judicial supremacy in constitutional interpretation.²¹

judicial decision is nonetheless supreme law equivalent to the Constitution itself is laughably self-serving, disingenuous, and logically indefensible. It is contrary to the core premises and reasoning establishing “judicial review” in the first place: the supremacy of the written Constitution over all government acts departing from it, and the independent obligation of each branch, supported by the oath to the Constitution, to follow the Constitution and not the faithless departure. See Paulsen, *Irrepressible Myth*, *supra* note 3, at 2711–24.

¹⁹ U.S. CONST. art. III, § 1 (Vesting Clause), § 2 (Extending Clause).

²⁰ U.S. CONST. art. II, § 1, cl. 8. See Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1261–63 (2004) (discussing the implications of the Presidential Oath Clause).

²¹ For fuller argument and detailed support of these propositions, I refer the reader to earlier articles in which I have developed this line of argument at length. See Paulsen, *Most Dangerous Branch*, *supra* note 3; Paulsen, *Irrepressible Myth*, *supra* note 3; Michael Stokes Paulsen, *Nixon Now, The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337 (1999); see also Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227 (2008).

Instead, what the Constitution's text, structure, and history make clear is that the branches are constitutionally *co-equal* in status and authority (each deriving its power directly from the Constitution, and thereby by the People, not from one of the other branches), *co-ordinate* (rather than sub-ordinate or super-ordinate) in their relationships to one another, and *independent* in the exercise of their powers within their respective spheres. This feature is at the very core of the Constitution's structural design – its most singular architectural feature. None of the branches is the boss of any of the others; each has as little agency as possible, consistent with practical reality and the nature of constitutional republican government, in the appointment of the others, or exercises direct control of each others' functions; none is bound by the views of the others; and each appropriately exercises checks over the others, even as the others exercise checks over it.

It is utterly irreconcilable with these first principles of separation of powers to maintain – and no prominent framer, defender, or ratifier of the Constitution ever did – that the judiciary is supreme over the others in the interpretation of the Constitution. Quite the contrary, as James Madison said in *The Federalist No. 49*: “The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.”²²

²² FEDERALIST No. 49, at 313 (James Madison) (I. Kramnick ed. 1987). See also FEDERALIST No. 47, at 305 (James Madison) (quoting Montesquieu with approval for the proposition that: “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.”)

As a consequence of the separation and independence of the three branches of government, coupled with the interaction, intersection, and overlap of their respective powers, each branch properly serves as a “check” on the others, at the same time that it properly may and should be *checked by* the others.²³ As applied to the power of constitutional interpretation, the proper conclusion from the Constitution’s separation of powers is that constitutional interpretation is a three-branch game; the functional resolution of any particular constitutional question depends on the interaction of the powers of the respective branches in any given situation.

All of this is, I submit, fundamental. Yet, in a sense, not quite all of this is necessary to my core conclusion in this section – which is an easy-as-pie application of these broader principles to the Constitution’s specific grant of powers with respect to appointment of federal judges: the political branches, *by virtue of their specifically assigned constitutional powers in this area*, properly may exercise an up-front check on judicial appointments, employing their best independent judgment as to what factors are appropriately considered as part of the checking function with respect to such appointments. This may include the political branches’ independent views of the proper method for interpreting, and the proper interpretations of specific provisions of, the Constitution. The President and senators share with the judiciary an oath to support the Constitution. Fidelity to that oath requires faithful interpretation of the Constitution in the exercise of granted constitutional powers, including the obligation not

²³ See FEDERALIST No. 48, at 308 (James Madison)(noting that the powers and interactions of the branches are “so far connected and blended as to give to each a constitutional control over the others”); *id.* at 311 (quoting Jefferson with approval for the proposition – and defending the Constitution’s arrangement as perfectly matching the description – that “the powers of government should be so divided and balanced . . . as that no one could transcend their legal limits without being effectually checked and restrained by the others”).

to follow the faithless interpretations of others.²⁴ The right and duty of the President and Senate to exercise their independent judgments about what constitutes faithful judicial constitutional interpretation is a straightforward implication of the Constitution's specific grants of power to these institutions over the making of judicial appointments.

The text alone is sufficient to justify the constitutional power to check judicial appointments. Nonetheless, correct first principles of separation of powers assist in seeing and understanding the logic of the constitutional structure with respect to such appointments. Simply put, the structure and logic of the system is one of checked independence and independent checks – exactly as the constitutional structure of separation of powers operates with respect to many other matters. The Constitution provides for an explicitly political process of selecting federal judges. Federal judges are independent in the exercise of their constitutional power, *once appointed*; but the political branches are likewise independent in the exercise of their respective powers *over the appointment decision*.

The parallelism is inescapable: The Constitution assures the independence of federal judges, and fortifies that independence through the structural features of life tenure and salary guarantees.²⁵ But the flipside is that the Constitution pre-conditions that decisional independence – and life-tenure and salary – on an equal-and-opposite structural feature of executive nomination and Senate confirma-

²⁴ Paulsen, *Irrepressible Myth*, *supra* note 3, at 2721–23.

²⁵ See U.S. CONST. art. III, § 1 (“The 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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”); *see also* FEDERALIST No. 78 (Alexander Hamilton) at 436–37 (explaining and defending this arrangement).

tion. Federal judges swear an oath, once appointed, to faithfully apply the Constitution and other law, and must exercise that power independently of the views of others. But the members of the political branches likewise swear an oath faithfully to support the Constitution in the exercise of their powers, and they likewise must do so independently of the views of others. Federal judges, once appointed, exercise their power for the most part independently: their role is independent constitutional judgment. Federal executives and legislatures, in the process of appointing judges, exercise their powers independently as well; and their roles likewise involve *independent constitutional judgment* – in this instance, independent constitutional judgment concerning the propriety of the judicial appointment.²⁶

In short, courts check but they are also subject to checks. To deny this core point is to deny the Constitution's structure of separation of powers and to disregard the Constitution's actual provisions governing the judicial appointments process.

But what *kind* of check can and should the appointment-and-confirmation process be, in practice? What can and should be embraced within the up-front checking process over judicial appointments? My proposition is that the federal judicial appointments process quite properly *must* involve the serious and thorough consideration of the judicial ideology or methodology of judicial candidates.

²⁶ See also Michael Stokes Paulsen, *Straightening Out The Confirmation Mess*, 105 YALE L.J. 549, 571 (1995) (hereinafter "Paulsen, *Straightening Out*") (reviewing STEPHEN CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* (1994)) ("If the judiciary's role, by virtue of the powers it has been given, is to be countermajoritarian, then the political branches' role in judicial appointments, by virtue of the powers *they* have been given in this regard, is necessarily to be *counter-counter*majoritarian.") The "countermajoritarian" role of the Court is defended (and the term coined) by Alexander Bickel in ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (2d ed. Yale Univ. Press 1986).

This position is, for some, disturbing. A common assumption today – not universally shared, but reasonably widespread – is that it is in some sense improper, or at least unseemly, to probe directly a judicial nominee’s ideological or methodological views, and that it is especially improper to examine how those views would be applied to specific issues or legal questions of ongoing dispute.

This unexamined assumption deserves to be challenged: Why on earth would any reasoning person think that we should not consider judicial ideology up front, in the appointments process? The judicial power is a real and important governmental power. The office of federal judge is a powerful one; and that power increases as one moves up the federal judicial hierarchy, as a function of the chain of appeal created by Congress’s jurisdictional statutes and the constitutional position of the Supreme Court within that hierarchy.²⁷ No doubt about it: power is at stake in judicial appointments and ideology matters in the exercise of that power. It matters both who exercises judicial power and how it is exercised. It thus seems no more sensible not to inquire how someone who is being selected as a federal judge understands the proper performance of the judicial function than it would be not to inquire of a candidate for elective office his or her views on issues falling within the purview of the constitutional powers of the office for which election is sought.

Judicial interpretive philosophy plainly affects the exercise of judicial power. It matters greatly, for example, whether a prospective judge is an “originalist,” a “textualist,” a “formalist,” a “precedentialist,” a “pragmatist,” an “activist,” a something-else-ist, or an “all-of-the-above-ist,” and what precisely the candidate might mean by any such labels or descriptions. It likewise matters whether a pro-

²⁷ More on that hierarchy – and of what features of it are and are not constitutionally required – presently. See *infra*, at 47–63.

spective judge purports *not to have* any judicial philosophy or methodological premises. (That is usually a very bad sign: it either means that the candidate thinks that the judicial role is to make up the law as he or she goes along; or that the candidate in fact has no idea of how he or she would go about the job, or what he or she would do in any matter of interpretive disagreement – that the candidate is unanchored in his or her methodological premises or, worse, that the candidate is simply dishonest.) Finally, it matters to the exercise of judicial power whether a prospective judge purports to be “eclectic” or “ecumenical” or “diverse” in his or her interpretive criteria. (“I would consider everything, of course.”) The all-of-the-above judicial philosophy *is a judicial philosophy*. Its meaning in practice could be either a “whatever-I-feel-like” judicial philosophy or a more-rigorous “hierarchy of interpretive criteria” judicial philosophy. It matters which of any of these views a judge holds concerning the scope and proper exercise of judicial power.

It follows from the importance and relevance of judicial philosophy to performance in the judicial role that the constitutional powers of nomination and of advice-and-consent embrace the full right to know about such things and to exercise fully independent constitutional judgment about the merits of competing judicial philosophies in deciding whether to make a particular judicial appointment. The right to know implies the right to ask: it is therefore constitutionally proper, indeed necessary, to make such inquiries.

Besides: Is there any real doubt but that this goes on anyway? It may happen to different degrees with respect to different judgeships. (The “standard of review” might be different as a practical matter for a U.S. District Judge than for an Associate Justice of the Supreme Court.) And the criteria of selection might include other considerations as well, like political loyalties or political symbolism of various kinds. But presidents obviously consider ideology in making judicial appointments. So should the Senate. There is no sound reason, especially with respect to appointments to an independent branch of government (as opposed to executive branch appointments) why the body supplying “advice” about, and whose “consent” is required to

confirm, a judicial nomination may not legitimately consider all the things that the person making the judicial nomination legitimately may consider.²⁸

Since consideration of ideology happens anyway, it seems peculiarly inappropriate to pretend that it doesn't – and then to purport to exclude from the appointment and confirmation process the exercise of constitutional judgment by the political branches about the proper exercise of constitutional power by the judicial branch. To do so merely drives the reality of ideological review “underground” into forms of ideological review by imprecise, random, and often inappropriate proxy criteria – both in the nomination process (winks, personal assurances, friendships) and in the public Senate-confirmation process (nanny taxes, marijuana smoking, video rentals, eating club memberships, religious views, marital status, and the like). It is better to bring this process above ground and into the constitutional daylight: it is far better to embrace the judicial nomination and confirmation process as part of the Constitution's legitimate, intended, and ongoing separation-of-powers struggle *over proper principles of constitutional interpretation* than to wage such confirmation wars by proxy criteria and political code. The inevitable and proper fights over judicial nominees should be waged on the constitutionally proper ground of debate over what constitute correct principles of constitutional interpretation.

The objection that some interpose is not that such constitutional standards are unimportant or immaterial, but that the political

²⁸ See Charles L. Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 663–64 (1970). There may be reasons to defer to a greater extent to a president's nomination of subordinate executive branch officers: those officers are the president's people and serve his administration, carry out his policies, and typically serve at his pleasure. But none of these reasons plausibly supports any principle of deference to the president's nominations for Article III judges. See *id.* at 659–60; Paulsen, *Straightening Out*, *supra* note 26, at 564 & n.45, 566–67 & n.53.

branches cannot be trusted to do a good job in such matters: elected officials might employ *wrong* criteria or embrace a *wrong* interpretive ideology (in the eyes of the person objecting to such review) and then seek to impose it on the federal judiciary through the appointments process. Or elected officials might employ criteria that are (one thinks) correct in concept, but then misapply them in practice.

Put to one side the court-centric elitism and parochialism such a view entails. (Presidents and senators are incapable of serious constitutional judgment; only judges and law professors are – or so the elitist argument whispers.²⁹) The short but sufficient answer to this objection is that potentially poor exercise of a constitutional power does not matter to the *existence* of a constitutional power. *Of course* constitutional powers can be misused or misapplied by those possessing them. This is not exactly big news. But the possibility of abuse or misuse does not mean the constitutional power therefore somehow does not exist. It merely means that lawful power can be used badly.³⁰

The prospect of abuse likewise cannot mean that the President and Congress ought not *exercise* their full constitutional powers with respect to appointment, even though they possess such powers. If

²⁹ I have addressed this unsound elitism in previous writing. Paulsen, *Straightening Out*, *supra* note 26, at 569 (criticizing as an “elitist, legal academic’s view of constitutional law” to say that political, public, or common-man understandings of the Constitution are to be disfavored simply because they do not employ the academic and judicial jargon of formal legal doctrine); *see also* Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385, 389–93 (1994) (responding to and refuting an argument, premised on courts’ supposed superior “comparative competence” in interpreting the Constitution, that other branches’ interpretations are therefore necessarily subordinate to the judiciary’s).

³⁰ Joseph Story put it precisely right: “[I]t is always a doubtful mode of reasoning to argue from the possible abuse of powers, that they do not exist.” 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 380 (Boston, Hilliard, Gray & Co. 1st ed. 1833 reprint).

that were the case, the argument would equally suggest that the judiciary ought not exercise its constitutional judicial powers because of the prospect of their misuse. As many would quickly (and rightly) point out, judicial power can be abused, too.³¹ In the end, the prospect of abuse of constitutional power is, if anything, a potent argument against the proposition of judicial supremacy and for checking judicial power in any appropriate way possible: Talk about potential for abuse! Adopt the view that one branch of government's exercise of its powers is supreme, unreviewable, and un-checkable by the others and you have a perfect recipe for abuse.³² The possibility of abuse

³¹ For a brief catalogue of judicial atrocities, see generally Paulsen, *Worst Constitutional Decision of All Time*, *supra* note 10, at 1001 (2003). For openers: *Prigg v. Pennsylvania*, 41 U.S. (1 Pet.) 539 (1842); *Dred Scott v. Sandford*, 60 U.S. (1 How.) 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Lochner v. New York*, 198 U.S. 45 (1905); *Buck v. Bell*, 274 U.S. 200 (1927); *Korematsu v. United States*, 323 U.S. 214 (1944); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Need I go on?

³² This was precisely the charge that the anti-Federalist writer "Brutus" leveled at the judicial department of the proposed new national government: it was unreviewable, un-checkable, and thus could run amok without limitation. See *ESSAYS OF BRUTUS XV*, in 2 *THE COMPLETE ANTI-FEDERALIST* 438-39 (Herbert J. Storing ed., 1981). In many ways, Hamilton's *Federalist* essays concerning the judicial branch were designed as a point-by-point refutation of Brutus's charges: Judicial review follows from constitutional supremacy and does not imply judicial supremacy (*FEDERALIST* No. 78, at 438 (refuting "perplexity" arising from "imagination" that judicial review for constitutionality "would imply a superiority" of the judiciary over the legislative); *id.* at 439 (judicial review does not "suppose a superiority of the judicial to the legislative power" but only that "the power of the people is superior to both"). The judicial branch, moreover, is not un-checkable and uncontrollable, Hamilton argues, but rather is subject to impeachment if they do not "behave properly" but instead engage in "malconduct" (*FEDERALIST* No. 79, at 443, 444) by engaging, for example, in a "series of deliberate usurpations" warranting the legislature in "punishing their presumption by degrading them from their stations" (*FEDERALIST* No. 81, at 453). Finally, Hamilton argues, judges would be expected to confine their exercise of judicial power to the "inflexible and uniform adherence to the rights of the Constitution and of individuals" by consulting "nothing . . . but the Constitution and the laws" (*FEDERALIST* No. 78, at 441) and not purporting to "construe the laws according to the spirit of the Constitution" (*FEDERALIST* No. 81, at 451).

of legitimate constitutional power is the very reason why separation of powers, and its resulting network of internal checks and balances, was regarded as so vital by the framers of the Constitution. Excesses or abuses would be checked by other branches' exercise of their powers; excesses in the exercise of such checks would be checked by other checks. The clash of rival interests and power centers would tend to negate concentrations or abuses of power.³³

Thus, the possibility of abuse of legitimate power is, in the end, an argument for the propriety of checks on that power by others, not an argument that the capable-of-being-abused power does not exist. As applied to the question of pre-appointment substantive ideological review of judicial candidates' interpretive philosophies and views, the possibility of misuse of power is an argument *for* checking judges in the first place and *against* abdicating such responsibility. It is, to be sure, also an argument for exercising the check of up-front review of judicial appointments *in a constitutionally proper fashion*. But it is assuredly not an argument for abandoning the checking enterprise because it might be performed imperfectly.

³³ This theme is pervasive in *The Federalist's* discussion of separation of powers. See, e.g., FEDERALIST No. 51, at 319 (I. Kramnick ed. 1987) (the "great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."); *id.* at 320 (referring to this "policy of supplying, by opposite and rival interests, the defect of better motives"); FEDERALIST No. 48, at 308 (noting that it is essential "to give to each [department] a constitutional control over the others"); *id.* at 311 (stating that "the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others").

Another immediate objection to substantive ideological review of judicial philosophy by the political branches is that it would degenerate into “litmus test” evaluation of candidates’ legal views on specific hot-button issues and propositions. Surely we wouldn’t want to impose such a strict ideological litmus test on judicial candidates, would we?

Yes, we would – and should. As I have argued elsewhere, “the best way to evaluate a judicial candidate’s judicial philosophy is to see how the candidate would apply it to real issues in dispute.”³⁴ The best issues for evaluating a candidate’s views “are ones that remain hotly contested,” precisely because they highlight the consequences of different approaches to judicial interpretation of the law on issues that matter to real people: they make otherwise abstract questions of judicial philosophy “accessible to popular understanding.” Posing so-called litmus test questions is thus the means of assessing judicial philosophy *most* “consistent with the public and designedly political nature of the appointments process.”³⁵

There is nothing at all wrong with posing concrete test questions. And there is nothing at all wrong with using a current issue of legal controversy as such a question. As I discuss presently, the only requirement of true “judicial independence” or of judicial ethics is that the questioner not exact from a candidate promises or pledges as to outcomes on specific cases or specific issues. Indeed, the perfect “litmus test” question of judicial philosophy – the one I submit is likely to yield (given appropriate follow-ups) the most information about a prospective judge’s judicial philosophy, approach, reasoning skills, rigor, and fortitude – is: “What do you think of *Roe v. Wade*?” Was

³⁴ Paulsen, *Straightening Out*, supra note 26.

³⁵ *Id.*

Roe rightly or wrongly decided, and why? If wrong, should it be followed as a matter of *stare decisis* or not?" (Okay, that's really three questions. But you get the point.)

The *Roe* litmus test is a concrete test of fundamental judicial philosophy.³⁶ It tests what one thinks the judicial role is; it tests what one views as the proper sources for judicial decision (text, precedent, political preferences, or something else); it tests what one's views are concerning the meaning of important constitutional provisions whose meaning is frequently contested (due process, equal protection, privileges or immunities, the Ninth Amendment); it tests such views in the context of one of the most important and contested legal and moral issues of our day; it tests how one reasons from first principles to results; it tests willingness and commitment to separate one's political views from one's legal interpretive methodology; and it tests both the soundness of one's views and the likelihood that one will stick to sound views. A prospective judge's strength of personal character, and resulting ability to resist temptation to drift, to cave under pressure, or to please or appease others, is well-judged by asking precisely such a hot-button, politically or socially sensitive, but still irreducibly *legal* question – and by attending closely to the answer and the comfort and confidence of the answerer.³⁷

³⁶ There may be others. *Obergefell* is another obvious candidate. So might be *Citizens United v. FEC*, 558 U.S. 310 (2010).

³⁷ The *Roe* litmus test may also test two other matters of possible relevance: First, it may test the candidate's grasp of the Constitution's separation of powers, checks and balances, and the (consequent) legitimacy of the political branches' independent power to interpret the Constitution in the exercise of their constitutional powers. A refusal to answer the question, on grounds of its impropriety as a matter of either "judicial independence" or "judicial ethics" should be challenged as *itself* substantively unsound and poorly reasoned. Cf. Paulsen, *Straightening Out*, *supra* note 26, at 575 & n.70. A president or senator might legitimately regard a persistent refusal to address such a question as deliberate evasion. *Id.*

Two objections remain to be addressed. The first is that explicit consideration of judicial ideology (including the posing of litmus test questions) in the federal judicial appointment process would compromise “judicial independence” or induce a violation of judges’ ethical duties not to prejudge a case. The second is that such inquiries would turn the process of appointing judges into de facto “political

Second, the *Roe* question might be seen as a test of the judicial candidate’s moral commitments. While this may be thought not properly relevant to a candidate’s *judicial* philosophy – one’s moral commitments ought to be completely and rigorously separate from one’s legal interpretations of an authoritative text – it is fair to observe that men and women whose personal moral commitments or political opinions are in opposition to a particular view of the law or who are weak in their moral commitments will tend more readily to trim their judicial philosophy to fit. This is not a noble observation about human character, including judicial character. But it appears to me to be true. Cf. Paulsen, *Straightening Out*, *supra* note 26, at 567–67 & n.54 (noting validity of “legal realist” observations in this regard).

My “right answers” to this litmus test suite of questions? In my view, no judicial candidate should be nominated or confirmed who believes that *Roe* was rightly decided on any of the legal grounds sometimes asserted for its result. The outcome in *Roe* simply lies outside the range of reasonable interpretation of the Constitution’s text, structure, and historical evidence of original understanding. See generally Paulsen, *Worst Constitutional Decision of All Time*, *supra* note 10; Michael Stokes Paulsen, *Paulsen, J., Dissenting*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 196 (Jack M. Balkin ed. 2005) (addressing arguments premised on “substantive due process,” the Privileges or Immunities Clause, the Equal Protection Clause, and the Ninth Amendment); Michael Stokes Paulsen, *The Unbearable Wrongness of Roe*, *PUBLIC DISCOURSE* (Jan. 23, 2012), <http://www.thepublicdiscourse.com/2012/01/4577/>

The fact that numerous judges and justices may have reached the contrary conclusion, or embraced the holding of *Roe* for other reasons, does not in any way refute or mitigate this position. It is a highly interesting fact about the pervasiveness of error, incompetence, willfulness, lawlessness or cowardice on the part of many judges. But it is not itself probative information concerning the objective meaning of the Constitution’s text, structure, and history concerning the issues presented in *Roe*. As to the force of precedent: The result in *Roe*, being flatly inconsistent with the Constitution, does not somehow become more consistent with the Constitution by repetition. The judicial doctrine of *stare decisis*, to the extent it suggests that the meaning of the Constitution is changed by erroneous judicial interpretations, is simply contrary to the Constitution. See Paulsen, *Irrepressible Myth*, *supra* note 3, at 2731–34 (and sources cited).

campaigns,” debasing the enterprise. I have addressed these objections at greater length elsewhere³⁸ and will only briefly restate those arguments here.

As to “judicial independence,” the short answer is that, *constitutionally*, judicial independence consists of life tenure, salary guarantees, and autonomy in exercising the judicial power to apply governing rules of law to specific cases within a court’s assigned jurisdiction. (Congress may not require federal courts to reach specified outcomes in individual adjudications.)³⁹ But that is it. “Judicial independence” is not a free-floating abstract principle of indeterminate application that renders unconstitutional the exercise of Congress’s up-front constitutional powers with respect to the appointment process (or for that matter, its back-end constitutional powers with respect to impeachment of judges – a more aggressive check I take up below⁴⁰). At most, the idea of judicial independence – true decision-making autonomy – means that the President and Senate may not leverage the appointment-confirmation power “forward” (so to speak) into a power to *commit a judge in advance to specific outcomes in specific cases or categories of cases, or to ruling certain ways on specific issues*. Likewise, however, the notion of judicial independence cannot be leveraged “backward” (so to speak) into a prohibition on inquiry into judicial philosophy or specific views on legal questions. So long as such inquiries fall short of requiring pledges or promises as to specific outcomes once the judge is confirmed, they are perfectly consistent with the Constitution’s design for (checked) judicial independence.⁴¹

³⁸ Paulsen, *Straightening Out*, *supra* note 26, at 570–79.

³⁹ *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). See discussion *infra*, 89–99.

⁴⁰ See *infra*, at 66–89.

⁴¹ See Paulsen, *Straightening Out*, *supra* note 26, at 573–74 (making this distinction between legitimate inquiry and extraction of promises of pledges; and between a candidate’s statement of views and actual commitments-in-advance of future decisions).

The same reasoning applies to the suggestion that it would be unethical, or that it would constitute improper prejudice (perhaps requiring disqualification in a future case), for a judicial candidate to answer substantive questions. Again, as long as the candidate's answer does not entail a commitment in advance to rule in certain ways, there is nothing improper about answering substantive questions. (A general, clear disclaimer that any substantive answer entails such a commitment is all that is needed; in my earlier article on this topic, I suggest a simple formula for accomplishing this.)⁴²

Litigants are not entitled to an "unbiased" judge in the peculiar sense that the judge possesses no prior views or thoughts on a legal issue. If that were the case, the entire current membership of the U.S. Supreme Court would be disqualified from ruling on most any question of constitutional law. (That would indeed be a strained conception of what it means to be *biased*.) Rather, litigants are entitled to a judge who will administer the law fairly and equally and rule on legal issues faithfully to the Constitution and laws and on the basis of views honestly held and not based on prejudice against particular parties. They are entitled as well to a judge who will serve as an open-minded trier of issues of specific fact. But a judge need not have an empty head to have an open mind. And in any event, a closed mouth does not mean that a judge in fact possesses no thoughts or views about a legal issue. The "legal ethics" objection, like the "judicial independence" objection, is a canard. It proceeds on unexamined assumptions rather than on rigorous analysis.

As to the "judicial-appointments-will-degenerate-into-political-campaigns" objection, the answer is simpler yet: Dude, they *already are* political campaigns. Anyone who does not realize this has not seen how the sausage is made (or has willfully closed his or her

⁴² *Id.* at 574.

eyes).⁴³ The federal judicial appointments process is a political process. The appointment process involves elements of a political nomination campaign. The confirmation process involves a political campaign to obtain the requisite number of Senate votes. Depending on the level of the judgeship, and the positions of the candidate, such a political campaign can be a very public event. To some extent, it has always been this way. Constitutionally, this is simply not a valid objection.

Is there anything left? Is there any reason – any reason at all – why the political branches constitutionally may not, or practically should not, engage in rigorous substantive ideological scrutiny of candidates for appointment to lifetime positions as federal judges who wield substantial government power?

II. JURISDICTION-STRIPPING AS A CHECK (AND JURISDICTION-LOADING AS AN EVEN BETTER ONE)

How about another old favorite proposal for checking the Supreme Court – so-called “jurisdiction stripping”? May Congress check (or punish) the Supreme Court by removing some or all (or at least a great many) cases from the Court’s appellate jurisdiction, thereby preventing future judicial mischief making, and scolding the Court for past mischief made?

The short constitutional answer is *yes*. The much longer answer is that there are many, many much longer law review articles that have addressed this question. The literature is seemingly interminable. The best of it is very good. But some of it tries almost desperately hard to avoid what appears to be the most natural sense of Article III’s provisions concerning the *jurisdiction* of the federal courts and the most natural general answer to the question of power to control

⁴³ *Id.* at 576–78.

or even manipulate it: Congress can do pretty much whatever it wants.⁴⁴

Article III, section 1 begins by vesting “the judicial Power” in a “supreme Court” and in such other federal courts as Congress decides to create. This is the famous “Madisonian Compromise” over whether the national judiciary would consist just of a single supreme federal court or a complete system and hierarchy of national courts. The compromise was to decide that Congress could decide.⁴⁵ The vesting of “the judicial Power,” however, is not a prescription or instruction as to the *jurisdiction* of the courts that will or may exercise that power. That comes later, in Article III, *section 2’s second* paragraph.

Article III, section 2’s *first* paragraph describes the categories to which the judicial power “shall extend” – a menu of the types of cases that federal courts constitutionally is empowered to decide. This is still not a grant of jurisdiction. (As just mentioned, that comes later – but now very soon, in the next paragraph.) It is a list of enumerated matters to which such jurisdiction constitutionally can be extended. The first paragraph of section 2 is a menu but it is only a menu.

⁴⁴ My position in the next several paragraphs owes much to the scholarship and argument set forth in John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997). I have also been much influenced, over the years, by Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985), which I read in draft when we were law school roommates. I know a little more now than I did then, and I disagree with a little more of that article now than I used to. With all due respect to the many other scholars who have entered into this controversy, I believe these two articles convincingly define the range of relevant plausible answers, the principal difference between the two being whether Congress may remove essentially all of the Supreme Court’s appellate jurisdiction as long as it leaves federal questions to be potentially resolved by at least *some other federal* court (Amar) or whether Congress may do so and even leave final resolution of such issues in state court systems (Harrison).

⁴⁵ See generally Michael Stokes Paulsen et al., *THE CONSTITUTION OF THE UNITED STATES* 488 (Foundation Press 2013, 2d ed.).

Who orders off the menu? Congress. Is it required to order everything on the menu? The most natural reading of the “shall extend to” language is *no* – the menu is a description of the potential scope of federal judicial authority, not itself a prescription of jurisdiction. It is the listing of the categories of cases *constitutionally eligible* for the exercise of “the judicial power” by the courts of the nation. In style (if not substantively), it is akin to the enumerated categories of topics *constitutionally eligible* for the exercise of “the legislative power” of Congress, under Article I, section 8: The potential exercise of the judicial power extends to the categories of cases in the Article III, section 2 menu; the potential exercise of the legislative power extends to the categories of legislative power included in the Article I, section 8 menu.

A description of the extent of constitutionally allowable power is not itself the enactment of jurisdiction (in the case of the federal courts) or legislation (in the case of Congress). The federal courts’ *actual* jurisdiction must either be granted by the Constitution directly (i.e., by some other provision of Article III) or by a congressional enactment carrying into execution the judicial power within the scope of Article III’s limits, pursuant to the Necessary and Proper Clause.⁴⁶

Thus, textually, neither the “Vesting” Clause nor the “Extending” Clause is a self-executing constitutional grant of *jurisdiction*. The former clause vests the judicial power in a third, independent department of the national government – when it has jurisdiction. The latter describes the allowable categories of cases to which such jurisdiction is constitutionally authorized to extend. “Mandatory” theories of federal-court jurisdiction that purport to derive some irreducible minimum of federal court jurisdiction from either the Vesting Clause or the Extending Clause are simply wrong: Justice Joseph Story (in

⁴⁶ See *Wayman v. Southard*, 23 U.S. 1 (1825); cf. *Ex parte McCordle*, 74 U.S. 506 (1868).

his famously convoluted dicta in *Martin v. Hunter's Lessee*) had it all goofed up. So do his intellectual acolytes, defenders, and revisers.⁴⁷

This textual reading of Article III is also the one that best comports with common sense, with historical evidence of original understanding – including the logic of the Madisonian Compromise and its implications for possible arrangements that might have been chosen – and with actual practice from the outset and for 225 years: the federal courts, and the U.S. Supreme Court, have *never* been granted the full sweep of case-deciding authority and jurisdiction that Article III, section 2's menu would allow. Practice is not dispositive, of course. (I would be the first to deny that consistent practice equals constitutional meaning.) But practice, here, is pretty persuasive indirect evidence, or confirmation, of correct constitutional meaning.

Article III, section 2's *second* paragraph finally gets us to the question of – and finally uses, for the first time, the word – “*jurisdiction*.” And here is where Congress's power to control jurisdiction becomes most clear. The second paragraph of section 2 directly bestows, as a matter of constitutional command, a flat minimum grant of original jurisdiction to the Supreme Court, keyed (more or less precisely) to certain of the categories of cases in the preceding paragraph's menu: “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.” Period. The Supreme Court must possess such original Jurisdiction, as a matter of constitutional requirement. Congress cannot mess with this assignment of original jurisdiction. Now, the Supreme Court perhaps may be given *more* original jurisdiction than that, at least as far as the text of Article III is concerned. (*Marbury v. Madison* held that it could not – that the

⁴⁷ See *Martin v. Hunter's Lessee*, 14 U.S. 304, 328 (1816) (section of opinion describing “mandatory” jurisdiction). I will not name the Neo-Story-Tellers by name. But you know who you are.

Original Jurisdiction Clause conferred a maximum as well as a minimum – though this holding of *Marbury* could very well be wrong.)⁴⁸ But the Court must keep this minimum. The Constitution says so.⁴⁹

It is the next sentence that is the textual key to the jurisdiction-limiting power over the Court's appellate jurisdiction: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

There you have it: Congress can make *exceptions* to (and regulations of) the Supreme Court's appellate jurisdiction (unlike its original jurisdiction). The initial constitutional default rule is appellate jurisdiction over everything else on the Article III menu not within the Court's assigned original jurisdiction, for cases coming from state courts and lower federal courts (if any are created). But the plain meaning of the Exceptions Clause is that Congress has power to enact jurisdictional statutes that depart from this baseline – an important specification of the Necessary and Proper Clause power to

⁴⁸ Michael Stokes Paulsen, *Marbury's Wrongness*, 20 CONST. COMM. 343, 353 (2003); cf. Akhil Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI L. REV. 443 (1989).

⁴⁹ The fact that the Supreme Court must possess original jurisdiction in the described category of cases does not necessarily mean that Congress might not also vest original jurisdiction over such cases in lower federal courts – or even allow the exercise of jurisdiction over such cases by state courts – permitting the Supreme Court to exercise appellate jurisdiction over such cases (and permitting it to decline original jurisdiction). It also does not answer the question of the correct understanding – the objective linguistic meaning – of the terms of the constitutional grant of Supreme Court original jurisdiction: Does the Original Jurisdiction Clause mean that even *federal question jurisdiction* cases that involve ambassadors or states constitutionally must lie within the original jurisdiction of the Court? Or does it more probably mean merely that, of that part of section 2, paragraph 1's menu describing jurisdiction conferred solely by virtue of the identity of the parties (the last six categories of controversies on the menu), the Supreme Court must possess original jurisdiction over the ambassador-defined and state-as-party defined categories?

carry into execution the judicial power, given that Article III's baseline assignment of plenary Supreme Court appellate jurisdiction in all the rest of the cases on the Article III menu otherwise might appear to be a flat rule from which Congress could not depart.⁵⁰

⁵⁰ Professors Steve Calabresi and Gary Lawson argue that it is the Necessary and Proper Clause (what they call the "Sweeping Clause") that gives Congress power to enact jurisdictional statutes – they are laws necessary and proper for carrying into execution the judicial power of the judicial department. 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, 1039–1042 (2007). This seems correct as a general matter. (A small nit to pick: Article III *itself grants* the Supreme Court both original and appellate jurisdiction, at least as an initial assignment subject to Congress's changes. The Necessary and Proper Clause power is not necessary to grant Supreme Court jurisdiction over anything, but only to make rules departing from the baseline initial assignment. The Necessary and Proper Clause *is* necessary for implementing the jurisdiction of lower federal courts that Congress chooses to create.)

But with all due respect to my old law school classmates (and much such respect is of course always due to those in the class immediately ahead of you), I submit that Calabresi and Lawson err in arguing that the Exceptions Clause cannot be a power to remove jurisdiction because the Necessary and Proper Clause is a power to confer it and because it would somehow feel strange for such a potentially potent power to be styled as an exception to Article III's grant. *Au contraire*: It makes perfect sense. Article III sets a baseline grant of the Supreme Court's jurisdiction. Article I grants necessary and proper carrying-into-execution power. And Article III's Exceptions Clause is an important point of clarification: the initial assignment of jurisdiction does *not* mean that Congress is stuck with that baseline rule of a plenary grant of appellate jurisdiction. (Without the Exceptions Clause, that would seem to be the rule – Article III's more specific grant controlling over Congress's general power under the Necessary and Proper Clause.)

As to the sloppy libel (committed by others as well, *see id.* at 1040; *see also* David E. Engdahl, *Intrinsic Limits on Congress's Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 123) that this would be way too "offhand" a way to have granted such an important power to make exceptions to the Supreme Court's appellate jurisdiction – Huh? The words "*with such Exceptions, and under such Regulations as the Congress shall make,*" appended as a direct condition to the grant of appellate jurisdiction is somehow too offhand, indirect, vague, sneaky, or subtle? – the simple answer is that the Exceptions Clause is stated as an *exceptions* clause because the general congressional power over federal court jurisdiction is conferred by Article I but Article III contains a specific grant of jurisdiction to the Supreme Court. One would need to have added a whole new cross-referencing grant of power to Congress to make exceptions to the Supreme Court's appellate jurisdiction into Article I, section 8's menu in order to accomplish

The Exceptions Clause makes clear that Congress *can* depart from this baseline. “Exceptions” means, apparently – and most naturally – *exceptions*. Congress can make whatever exceptions – deletions, limitations, or qualifications – it wants, as carve-outs from the Supreme Court’s appellate jurisdiction. And it can make as *many* exceptions as it likes. (The word “exceptions” is in the plural.) Taken in combination, Congress can make whatever and however many exceptions to the Court’s jurisdiction it thinks proper. It thus would

the same objective – and that would have created its own *expressio unius* problems concerning the scope of the Necessary and Proper Clause power. To my mind, the Exceptions Clause, placed where it is and written exactly as it reads, is the clearest, most natural, most straightforward, least troubling way of accomplishing the purpose of permitting Congress to fashion exceptions to a broad default assignment of Supreme Court appellate jurisdiction. To say that the clause is Way Too Important a Power for Such Simple Words is to rush right on by the clarity of the language and to assume the position being asserted: that anything other than plenary or near-plenary Supreme Court appellate jurisdiction would have been practically unthinkable.

The same response holds true for those who argue that the Exceptions Clause cannot possibly mean what it says or somebody would have made more of it at the Constitutional Convention. See *Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer*, 6 Op. O.L.C. 13 (May 6, 1982) (opinion of Attorney General William French Smith). This makes no sense at all. First, the last time I checked, the Constitution consists of its text, not its legislative history. (See generally Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113 (2003); see also Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 858, 873–875 (2009). Second, the last time I checked, the Constitution consists of its text, and surely not a *negative inference from silence* in its legislative history! Third, as just discussed, there is not the slightest reason to draw a text-denying inference from legislative silence on the basis of speculation that this was a case where the dog (surely!) would have barked if the clause meant what it seems to say. As Holmes (Sherlock, not Oliver Wendell) might have put it: this dog knew the supposed burglar.

In short: The Exceptions Clause is an altogether natural way of clarifying that Congress generally has discretion and control over the Supreme Court’s appellate jurisdiction. The arguments that, if this were so, the Constitution’s text and legislative history would need to have screamed more loudly that this was the arrangement, are greatly overstated and seem to depend on assuming the desired conclusion as a starting premise.

appear that Congress effectively has power take away *all* of the appellate jurisdiction, if it chooses: the “exceptions” (taken in their totality) can swallow the rule. It is, to be sure, plausible as a textual matter to argue that, to be an “Exception,” there must remain something not taken away. But it seems difficult to formulate a principled standard that would establish the boundary of when exceptions are no longer exceptions.

A few scholars have tried (not terribly successfully) to devise a principle for reading exceptions into the Exceptions Clause. The most frequent variation is to say that the scope of the exceptions may not be such as to impair the “essential function” of the Court or its “role” in the constitutional system.⁵¹ I was preparing to say that this is a noble and valiant effort, but alas one that does not succeed in light of the Exceptions Clause – and would require courts to make up a rule out of thin air. But it’s not really even that valiant an effort. It’s a result-driven and utterly question-begging one. It assumes the proposition it is trying to save: that the Supreme Court’s function or role requires it to have a whole bunch of appellate jurisdiction, irrespective of what the Exceptions Clause seems to say. May I be blunt? The Supreme Court’s “role” and “function” is *a function of the meaning of the Constitution’s text and structure concerning the judicial power* – what matters it may extend to, the assignment of its jurisdiction combined with the exceptions Congress is empowered to make to that jurisdiction – not the other way around. The text says that Congress has power to legislate exceptions to the Court’s appellate jurisdiction. The structure of the Constitution makes such control over jurisdiction a powerful limit on the powers of the Supreme Court and places

⁵¹ See, e.g., Leonard G. Ratner, Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction, 27 VILL. L. REV. 929 (1982); Leonard G. Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U. PA. L. REV. 157, 201–202 (1960). See generally Richard Fallon et al., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 307–22 (7th ed. 2015).

this power in the hands of Congress – a potentially formidable “check” on the Court. The mistaken implicit assumption of the “essential functions” or “core role” gambit is that the Supreme Court really ought to have the power to decide everything or nearly everything – that that is *its* role in checking the other branches – whether the Constitution actually says that or not. It is therefore presumptively improper to check the Court by limiting its jurisdiction. Such a position has intuitive appeal (for some) but it is simply contrary to the text of the Constitution (the Exceptions Clause) and to the structural logic of the Constitution, properly understood.

A somewhat better way of putting the argument is that the literal reading of the Exceptions Clause would negate the *supremacy* of what is, after all, the “supreme” Court. The argument would seem to be that to be a “supreme Court” requires a certain (unspecified) minimum quantum of appellate jurisdiction. Not a crazy argument – but not a very rigorous one either. Again, the big problem is that it either reads the Exceptions Clause out of Article III or reads into the Exceptions Clause a made-up exception of unclear content. The word “supreme,” as a modifier to “court” does not necessarily mean: “must have power to review and reverse the decisions of every other court in every other case mentioned in Article III.” (Context matters. Article VI’s specification of the Constitution as “supreme Law of the Land” does seem to bear a trumps-everything-else meaning.) Within the context of Article III, and backdrop historical understandings of judicial structure, it would appear that “supreme” when attached to “court” only has the necessary meaning of a court from which no appeal properly lies to another federal court (as opposed to having to have final jurisdiction over everything) or even perhaps *a* federal court of comprehensive, national *geographical* jurisdiction (rather than local jurisdiction) or of broad rather than specialized subject matter jurisdiction.

By the same token, an “inferior” federal court is one whose decisions constitutionally may (*or might not*) be made subject to review and reversal by a “higher” federal court within the chain-of-appellate-hierarchy prescribed by Congress’s jurisdictional statutes, or

whose geographic or subject-matter scope is limited in some material way that (impliedly) gives it a “lesser” status or stature. (I recently had a federal court of appeals judge say to me that he was a judge of an inferior *court*, not an inferior *judge*!) Once again, context matters. The analogy to the Appointments Clause of Article II – which provides an exception from required presidential appointment and Senate consent for “inferior *Officers*” – is an unsatisfactory one. Federal judges of lower courts are judges of “inferior courts” (whose decisions can be made subject to review and reversal by higher courts) but they are not “inferior Officers” within the meaning of the Appointments Clause – at least under a well established (but still debatable) line of cases demarking the government officers who can be appointed by the President alone, by the “Courts of Law” or by the “Heads of Departments.”⁵² Federal judges, even those staffing inferior courts, are principal officers of government, appointed by the President subject to Senate consent. Likewise, they are not “inferior” in the same sense of inferior *officers* in that they may not be removed from their stations by a superior court. They are *inferior* in the (limited) sense that their decisions may be reviewed and reversed – *if* that is how Congress sets up the jurisdictional regime – but they emphatically are not *subordinates* of the Supreme Court in the sense that they are hired by and may be fired by the Supreme Court. Article II’s specification of appointment procedures and Article III’s specification of life tenure requirements establish the contrary.

Thus, just as “supreme” before “Court” does not mean “needs to have jurisdiction over everything” (undoing in whole or in part the plain meaning of the Exceptions Clause), “inferior” before “Court” does not specify that the Supreme Court must have appellate jurisdiction over inferior federal courts in every matter within such lower

⁵² For collection and discussion of some of the most important cases in this line, see Paulsen et al., *THE CONSTITUTION OF THE UNITED STATES*, *supra* note 45, at 334–48.

federal courts' jurisdiction. It has never, ever been that way. (Again, that by itself is not dispositive; but it certainly seems instructive here.) Rather, in many cases, Congress can and has made the decisions of lower federal courts final – not subject to appeal – without thereby negating the “inferiority” of these inferior courts.

There is one last textual argument: Article III's Extending Clause menu differentiates between the first three listed categories of potential jurisdiction, with the words “all Cases, in Law and Equity” preceding each item, and the final six listed categories of potential jurisdiction, with the descriptor “Controversies between” preceding each of these. Some theorists attempt to make much of this distinction, in terms of the power to withdraw jurisdiction from the Supreme Court under the Exceptions Clause proviso.⁵³ Others find in the “all Cases” / “Controversies” distinction nothing more than a then-current (but now-outmoded) technical distinction between disputes that might involve certain subject matters (all “Cases,” including criminal prosecutions) and a sub-category of disputes between or among parties of supposedly equal dignity (“Controversies”).⁵⁴ Still others might find in the different language an example of (archaic and disfavored by today's writing standards) “elegant variation” in language without meaningful consequence.

Whatever view one holds, it is difficult to place on the word “all” the unbearable weight that defenders of “two-tiered” *modified*-mandatory Supreme Court appellate jurisdiction, following Justice Story, seem to place on it. My good friend Akhil Amar's ingenious and elegant theory of Article III to the contrary notwithstanding, the linguistic variation between “all Cases” and “Controversies” does not support a reading of the Exceptions Clause that permits exceptions

⁵³ See Amar, *supra* note 44.

⁵⁴ See Harrison, *supra* note 44.

to be made from the Supreme Court's appellate jurisdiction for the latter disputes but not the former.

I have spent much time on the Exceptions Clause *power* as a constitutionally permissible check Congress may employ against a runaway or renegade Supreme Court's misuse of its case-deciding power. Let me shift gears, now, from the question of constitutional power over the Court's jurisdiction to the practical-tactical question of what actually might make an *effective* device for checking the court: While it is, I submit, entirely constitutional to limit the appellate jurisdiction of the Supreme Court, the question of whether this is a particularly good way to "check" perceived abuses of judicial power by that Court may be a different matter.

Different people might reach different practical judgments as to the practical effectiveness of jurisdiction stripping in accomplishing that objective. To be sure, it may prevent some *future* harm. And that may well be enough to justify its use as a check. Congress might well choose to remove the Court's appellate jurisdiction on certain subject matter areas where it judges the Court to have performed unreliably or outright unfaithfully, and assign final resolution of such questions to the lower federal courts (or certain of them) – or even to state courts.⁵⁵ If one really wishes to be forceful in the exercise of such

⁵⁵ One occasionally hears the argument – or simply the assertion – that withdrawing a category of cases from the Supreme Court's appellate jurisdiction would *entrench* its erroneous decisions as binding precedent on lower courts. *See, e.g.,* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1075 (2010) ("I proceed from the premise that, following an attempted stripping of federal jurisdiction, the Supreme Court's precedents would remain binding on state courts as a matter of law.") With all due respect to the wonderfully brilliant Richard Fallon, this assumption simply makes no sense. It is wrong both as a matter of first principles and as a matter of common sense.

The analytically correct answer is that the Supreme Court's precedents are not themselves the Constitution (or statutes); they are judicial interpretations of the law, not the law itself. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 70 (1765-69) (decisions of judges are "as a general rule" to be taken as "evidence of what is the 'common law'"); see generally Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?* 109 YALE L.J. 1535, 1570-82 (2000). Whatever *persuasive* force such precedents have is a function of the soundness of their reasoning. Whatever "binding" force such interpretations have on lower courts is a function of the jurisdictional statutes providing that the Supreme Court can review and reverse lower court decisions that depart from them. Remove the avenue of review and all that is left is the persuasive force. See Amar, *supra* note 44, at 258-59 n.170 (embracing a version of this proposition and concluding that, if an exception were made from the Supreme Court's appellate jurisdiction in favor of final jurisdiction over an issue in lower federal courts, such lower federal courts would *not* be required to adhere to contrary Supreme Court precedents in matters no longer lying within the Supreme Court's jurisdiction).

This is the only conclusion that accords with common sense and the logic of the Constitution's structure. On the view described by Fallon, removing matters from the Court's jurisdiction is not a "check" on its decisions at all but rather - quite the reverse - a permanent *ratification* of them! On this rather perverse view, Congress's power to make exceptions to the Supreme Court's appellate jurisdiction is, within whatever scope the power is recognized, a sneaky device for enacting a Supreme Court judgment, even an erroneous one, as a judicially-uncorrectable *de facto* amendment to the Constitution. To call this a strange result is an understatement.

The exceptions-become-entrenchment argument displays a rather basic, if depressingly common, misconception: that the Constitution literally *means* (and statutes mean) whatever the Supreme Court *has said* the Constitution means (and statutes mean) - that is, that the content of "the law" is purely a function of the Supreme Court's decisions. This mistakes a description of the practical consequences of jurisdictional hierarchy with prescriptive constitutional design. In this respect, the *non-exercise* of the Exceptions Clause power has produced bad habits by repetition: people are accustomed to the Supreme Court's precedents dictating the practice of lower courts; the Court itself assumes that such authority is legitimate; lower courts have acquiesced to it; and no one is familiar with an arrangement in which the Supreme Court is more commonly not the court of final judicial resort on an issue of federal law. (I am a somewhat lonely dissenter on this view. See Paulsen, *Irrepressible Myth*, *supra* note 3, at 2733-34 (2003); Paulsen, *Accusing Justice*, *supra* note 16, at 77-88).

One practical benefit of "jurisdiction-stripping" might be to demonstrate, practically, the reality that the force of precedent is a function of the chain of appeal that is itself subject to Congress's control. To reinforce this, Congress might (for this reason and others) statutorily abolish in whole or in part the judicial doctrine of *stare decisis*,

check, one could even create a new federal court specifically for resolution of a certain category of issues, vest that court with original federal jurisdiction and appellate jurisdiction over state court cases presenting such federal question issues,⁵⁶ and deny appellate jurisdiction over such cases to the U.S. Supreme Court. Thus: Congress could create a new, federal “Abortion Cases Court” or “Same Sex Marriage Constitutional Issues Court” or “Substantive Due Process Court” and vest it with final federal judicial jurisdiction. Given the correct political situation, the President, acting with the advice and consent of the Senate, could staff such a court with newly appointed federal judges possessing all the same Article III attributes as Supreme Court justices – presidential appointment and Senate confirmation, life tenure, salary guarantees – and completely circumvent the Supreme Court.

Given Congress’s power to create inferior federal courts, the appointments process with respect to new judgeships, and the Exceptions Clause power over federal court jurisdiction, such an arrangement would be perfectly constitutional – and perhaps desirable. It would constitute a dramatic exercise of congressional and presidential power to check a (perceived) runaway Supreme Court.

In addition to preventing future harm, jurisdiction-stripping (and re-assignment) serves as a form of indirect punishment, or scolding, of the Court: “You’ve been bad boys and girls; you’ve shown us you can’t exercise judgment responsibly, so we’re taking away some of your privileges. Your car keys are being taken away;

for federal question cases – a proposal I have advanced before, see Paulsen, *Abrogating*, *supra* note 55, and that I briefly reprise below.

⁵⁶ There is no reason why Congress may not provide for appellate review of state court decisions on issues of federal law by *lower* federal courts. The arrangement was explicitly contemplated by the framing generation. Alexander Hamilton defends it clearly in *Federalist* No. 82. See *FEDERALIST* No. 82, at 460–61 (Alexander Hamilton) (I. Kramnick ed. 1987).

you are hereby grounded [to the extent of the jurisdiction removed].” Scolding and shaming are permissible reasons for exercising a legitimate constitutional power with which to check the Court.

But if you *really* want to reprimand and punish the Court, how about imposing *mandatory appellate jurisdiction* – not just certiorari jurisdiction, but mandatory plenary appellate consideration – for *all* federal question cases decided by the U.S. Courts of Appeals and by state highest courts? While we’re at it, why not add the (perfectly constitutional, even if unprecedented) category of mandatory Supreme Court appellate *diversity* jurisdiction? As a high school teacher recently told me, the most effective punishment to impose on smart, busy students is not detention but “busy work.” Give them more to do, rather than less.

To be sure, it might be dangerous to give the Supreme Court *more* cases to decide (and mess up). But it might also be an effective way to keep the justices out of trouble by keeping them busy with routine case-deciding work. On balance, I favor “jurisdiction loading” as a check, every bit as much as “jurisdiction stripping.” Of course, there is no reason the two could not be used in creative combinations: Take away jurisdiction of abortion, national security, same-sex marriage, health-insurance-law, and election districting cases. Assign vast mandatory appellate jurisdiction in other cases and even diversity jurisdiction cases.

While I’m at it: Along the same mischievous, obstructionist lines as jurisdiction-loading, what about doing things like canceling one year’s October Term and prescribing in its place a new “May Term” to run from Memorial Day through New Year’s Day of the next year – embracing the entire summer, when it’s hot and miserable in Washington, D.C. and also positively ruining the holiday season for the justices? This would have several positive benefits. First, it would effectively put the Court on forced-hiatus for nearly a year – the Court would be out of session, once, for about eleven months (and the justices able to do no harm during that time) – and then force the justices to do their increased workload in a shorter period of time.

There is historical precedent for this sort of legislation: the Jeffersonian Republicans abolished a Term of the Supreme Court for 1802, forcing the justices to sit on their hands from 1801 to 1803. That's part of the famous backdrop for the Court's decision in *Marbury v. Madison*. The May Term reform/check might also have the salutary effect of precluding summer speaking gigs and junkets to Austria and other interesting places, which might have collateral benefits beyond punishment: it might mitigate or minimize exposure to "foreign influence" (a big concern of the framing generation, it should be observed) that sometimes tends to lead to the slovenly practice of relying on foreign law to interpret U.S. law.

Finally, in the jurisdiction-loading, term-adjusting category of checks, why not bring back "circuit riding"? Historically, Supreme Court justices were required to sit in circuit court cases, which necessitated inconvenient travel. The justices hated it. But it wasn't unconstitutional. There is no constitutional reason why Congress's power over jurisdiction and to structure the federal judiciary might not be used to make the job more onerous and unattractive for the justices. Make the job unpleasant enough – at least for a while – and you might even induce the retirements or resignations necessary to provide the opportunity for using the appointment-confirmation up-front check a few more times.⁵⁷ And who knows? Maybe the justices will learn something from the experience of seeing America, and from sitting in sessions with judges in the "inferior" federal courts.

⁵⁷ Commenting on an early draft of this article, my colleague Robert Delahunty suggested a number of other potential dignitary-affront irritation-inducing checks Congress constitutionally could legislate, including removing the justices from their present marble temple looking (symbolically) over the shoulder of Congress and returning them to their former residence in the basement of the capitol, situated (symbolically) below the legislative branch. I like this idea, too! I am also attracted to the idea (which I heard from someone else, but do not recall who and when) of forbidding any federal funds from being used to pay for dry-cleaning judicial robes.

(Remember, they are not inferior *judges*. They just sit on inferior courts.)

III. FIDDLING WITH THE SIZE OF THE SUPREME COURT

President Franklin D. Roosevelt famously (or infamously, depending on one's view) attempted to "check" the Supreme Court by manipulating its size. FDR's well-known proposal to enlarge the size of the Supreme Court to as many as fifteen justices (depending on the age and length of service of the sitting justices) was quickly shot down by the political process.⁵⁸ Dubbed by history as the Roosevelt "Court-packing" plan, it was widely viewed as an improper attempt to "tamper" with the Court. Indeed, it was an attempt to tamper. But are any and all such attempts improper in the sense of being *unconstitutional*?

No: Nothing in the Constitution specifies the size of the membership of the Supreme Court, save for the fact that the text mentions a "Chief Justice of the United States." (It would appear that the Constitution thus requires that the Supreme Court have that one Chief Justice). Article III says that there shall be "one supreme Court." It says nothing about how big the bench must be. As Yoda aptly put it (in a somewhat different context): "Size matters not."⁵⁹

The size and details of the Supreme Court's membership are up to Congress, pursuant to its powers under the Necessary and Proper Clause. Over the years, the size of the Court's membership has ping-ponged (or perhaps ricocheted) from six to seven to nine to ten, back down to seven, and back up to nine again, for reasons of practicality, convenience, and politics. For a time, for example, the number of

⁵⁸ For a succinct summary of this historical episode, see PAULSEN & PAULSON, *THE CONSTITUTION: AN INTRODUCTION*, *supra* note 11, at 221-25.

⁵⁹ *Star Wars, Episode V: The Empire Strikes Back* (Lucasfilm 1980).

Supreme Court justices was keyed to the number of “circuits” in Congress’s organization of the lower federal courts. In 1863, a tenth justice was added, in part to accommodate the relatively new (then) tenth circuit comprising California and Oregon.⁶⁰ (I have long wondered whether it might not have been thought convenient to give Lincoln and the Republicans another appointment, to counter the influence of the still-Southern-dominated Taney Court, as vital issues concerning the conduct of the war threatened to, or actually did, make their way to the U.S. Supreme Court. At least some historical scholarship suggests that this intuition is sound.⁶¹)

Despite the *constitutionality* of Court-packing, such an approach remains institutionally problematic: it actually threatens systematically to weaken the Court as an institution, and thus *its* check on other branches. As my co-author, Luke Paulsen, and I have written of the Roosevelt Court-packing plan:

The criticism was probably deserved: had FDR succeeded, it would have established the precedent that whenever the President and Congress became annoyed with decisions of the Court, they could simply dilute the votes of the justices by adding justices more to their liking. This would not only reverse the earlier decisions, but also reduce the Court’s power by enlarging its membership. Unlike other checks on the Court and its decisions – presidential pardons and vetoes of bills on constitutional grounds that the Court has rejected, or even non-execution of judicial decrees in extraordinary circumstances, Court-packing could have permanently diminished the Court’s ability to check *the other* branches, an

⁶⁰ Fallon et al., *supra* note 51, at 27.

⁶¹ For a historian who takes precisely this view of the 1863 enlargement of the Supreme Court to ten justices, see DAVID M. SILVER, *LINCOLN’S SUPREME COURT* 84–88 (1956).

act that would have had major consequences for the Constitution's separation-of-powers balance.⁶²

To be sure, the political branches' exercise of available constitutional checks always risks establishing a precedent for permanently diminishing the Court as an institution: bringing the Court to heel diminishes its power; and there is always a "next time." But Court-packing strikes me as bearing special risks of judicial vote-dilution that are less easily undone (given life tenure) and that threaten greater and greater dilution each time there is a "next time." Congress's stripping of a portion of the Supreme Court's appellate jurisdiction can be repealed by simple statute – and we're immediately back where we came from. A rejected judicial nomination simply becomes a new nomination; an impeachment creates a single new vacancy to fill with a new prospect. Non-execution of judgments is case-specific. But Court-packing is the gift that keeps on giving. A court of nine justices becomes a court of fifteen. Fifteen becomes twenty-one becomes thirty-seven becomes one hundred and one Dalmatians and suddenly we're the House of Lords. Swamping the peerage of justices is just too easy and too enduring a game to play and has lasting consequences for the Court as an institution, affecting its ability to check the other branches, with consequences affecting the Court's decisions in *every* case – not just remedying wrong decisions. Court-packing is constitutional. But it is not advisable.

Just as I tend to appreciate jurisdiction-loading as a preferable punishment to jurisdiction-stripping, I favor Court-*unpacking* to Court-packing. Nine is a nice odd number. But eight is enough, really. *Attrition* is, for the patient Court-checker, a valuable potential check on a runaway Supreme Court whose runaway members run on way past their expiration date, and who try to strategically time

⁶² PAULSEN & PAULSEN, *supra* note 11, at 223.

their departures to assure the appointment of a fellow-traveler by a sympathetic administration. The check of un-packing is a variation on the confirmation-refusal power, with the added wrinkle that the Court gets smaller if it doesn't get better.⁶³

At all events, nothing in the Constitution requires a complement of nine justices, and the non-constitutionally-prescribed size of the Court gives the political branches not only the power to enlarge the Court's membership but also the power to allow it to shrink. Perhaps one day we will, along with the aphorism "A Switch in Time Saved Nine" invoke the maxim that "A Farewell Too Late Left Eight" or even "We Didn't Like Your Picks So We Dropped Down to Six."

IV. IMPEACHMENT OF JUDGES AND JUSTICES FOR ABUSE OF CONSTITUTIONAL POWER

We come now to a check on judges that is, within our contemporary constitutional practice and tradition, practically unthinkable. But it is also one that was specifically contemplated by the framers of the Constitution and that appears to be a nearly unavoidable implication of the constitutional text: *impeachment for abuse of judicial power*. Unthinkable? Hardly. Quite the contrary, the evidence is that the framers thought about it and thought well of it.

The power of impeachment is Congress's ultimate constitutional check against *misconduct* by executive and judicial branch officers. Simply put: the impeachment power permits Congress to remove executive officers and judges – "all civil Officers of the United States"⁶⁴

⁶³ I have suggested this approach in a substantive blog post, entitled *Eight is Enough: Let the Court Unpack Itself*, NATIONAL REVIEW (June 23, 2015), <http://www.nationalreview.com/bench-memos/420188/eight-enough-justices-let-court-unpack-itself-michael-stokes-paulsen>. See also Fallon et al., *supra* note 51, at 27 n.44 (suggesting that a similar strategy was employed by Congress in 1866, reducing the number of Supreme Court justices to seven to prevent President Andrew Johnson from filling vacancies).

⁶⁴ U.S. CONST. art. II, § 4.

– from office for constitutional malfeasance in office. That is, Congress may impeach officers for *constitutional faithlessness in the performance of assigned constitutional duties*. Dereliction of constitutional duty is within the legitimate constitutional province of Congress to punish – by removal from office and disqualification from other office only – on the basis of its reasonable judgment that such conduct falls within the broad, somewhat indefinite, language of “high Crimes and Misdemeanors”⁶⁵ to which offences the impeachment power extends.

Much ink has been spilled over the meaning of the constitutional term “high Crimes and Misdemeanors.”⁶⁶ The best short answer is that the term has an intuitive core meaning and an indeterminate periphery committed to the good-faith political judgment of the bodies charged with exercising it – the House of Representatives in its exercise of the “sole Power of Impeachment”⁶⁷ and the Senate in its exercise of the “sole Power to try all Impeachments.”⁶⁸ Simply put, the term “high Crimes and Misdemeanors” does not have a clear, fixed, or determinate meaning, as early contemporaneous commentary consistently affirmed.⁶⁹ It was left to the two houses of Congress to

⁶⁵ *Id.*

⁶⁶ A non-exclusive list of some of the most interesting old and new scholarship on such questions includes the following: JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 498 § 1629 (1833); 2 *id.* §§ 758–803, 810–11; CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK (1974); Raoul BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973); MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS (1996). There is a wealth of law-review article commentary and scholarship on the topic.

⁶⁷ U.S. CONST. art. I, § 2 cl. 5.

⁶⁸ U.S. CONST. art. I, § 3 cl. 6.

⁶⁹ *See, e.g.*, FEDERALIST No. 65 (Alexander Hamilton); Story, *supra* note 66, at § 783 (noting “political nature” of offences and their consequent susceptibility to political disagreement and partisanship, and further noting the impropriety of attempting to define offences with greater precision as tending to create “more injustice and inconvenience, than it would correct” and rendering the impeachment check “inefficient and unwieldy”). More on the legislative history and early commentary presently.

fill in the broad interstices with its interpretations and applications of the language in specific circumstances.

The “high Crimes and Misdemeanors” standard certainly embraces the power and discretion to remove from office persons who have committed literal, ordinary *crimes* – criminal offenses, either felony or misdemeanor, for which any other citizen might be arrested and punished by law – that the House and Senate judge to be sufficiently egregious and incompatible with continued office-holding to warrant removal.⁷⁰ And it specifies certain things that unquestionably count as impeachable: “*Treason, Bribery, or other high Crimes and Misdemeanors.*”⁷¹

But the impeachment standard also appears to embrace, in the breadth of the language employed, the commission of “*other*” and “*high*” public-political offenses of an arguably analogous kind involving betrayal of a public trust or misuse of official power or office that need involve no element of literal criminal-law criminality. The impeachment power reaches offenses against the body politic – against the nation, against the public interest, against the Constitution, against principles of general integrity – that Congress reasonably judges sufficiently weighty official or public misconduct to merit

⁷⁰ This reality is implicit in Alexander Hamilton’s discussion (in FEDERALIST No. 65, concerning the impeachment power) of the susceptibility of an impeached official to further criminal punishment through judicial process. FEDERALIST No. 65, at 382 (I. Kramnick ed. 1987) (noting that “the punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law.”).

⁷¹ U.S. CONST. art. II, § 4 (emphasis added).

removal from office. As virtually all scholars concede, this goes beyond offenses punishable by the ordinary criminal law.⁷² Specifically, the term “*misdemeanors*,” in its original meaning, carried with it less the sense of a *smaller or less serious* criminal-law offense (which would be today’s common usage of the word)⁷³ and more the

⁷² Even constitutional scholars who question whether the impeachment power is properly applied to remove public officials for ordinary criminality (a position that many Democrats advanced during the period surrounding the impeachment and trial of President Bill Clinton) typically embrace the view that betrayal of a public trust or abuse of official authority fall within the core meaning of the term “high Crimes and Misdemeanors.” See, e.g., Laurence H. Tribe, *Defining “High Crimes and Misdemeanors”: Basic Principles*, 67 GEO. WASH. L. REV. 712, 717 (1999) (“Indeed, it appears to be all but universally agreed that an offense need not be a violation of criminal law at all in order to be impeachable as a high crime or misdemeanor. A President who completely neglects his duties by showing up at work intoxicated every day, or by lounging on the beach rather than signing bills or delivering a State of the Union address, would be guilty of no crime but would certainly have committed an impeachable offense.”); *id.* at 718 (noting that impeachment power extends to “major offenses against our very system of government, or serious abuses of the governmental power with which a public official has been entrusted.”); *id.* at 720 (“For sufficiently grave abuses of official power – abuses entailing encroachment on the prerogatives of another branch of government or usurpations of the power of popular consent and representation – serious injury to the state seems implicit in the abuses themselves. But such injury to the state or, what amounts to the same thing, to the constitutional structure, may in exceptional cases be brought about by means other than an abuse of power entrusted to a public official.”).

My position with respect to impeachment of judges draws on this consensus. As I discuss below, impeachment of federal judges is warranted for offenses in the nature of abuse of the judicial power and office to encroach on the prerogatives of other branches or to usurp rights of popular consent and democratic choice central to the constitutional order – violations that the House and Senate might reasonably regard as (to borrow Professor Tribe’s words) “major offenses against our very system of government” or “serious abuses of the governmental power with which a public official has been entrusted.”

⁷³ The meaning of the Constitution’s words and phrases is the *original* meaning that such words, terms, or expressions would have had, in social, political, and linguistic context, at the time (and in the place) they were adopted, by the political community that adopted them as law. Any alternative approach is simply interpretive anachronism – reading words out of their historical and linguistic context, so as to transform

broader sense of *misconduct* or *misbehavior* – literally of not *demeaning* oneself properly (“*misdemeaning*”) in the exercise of an official capacity or position.⁷⁴ The breadth of the constitutional language employed as the standard for impeachment thus plainly embraces a range of congressional judgment, extending beyond bare criminality, as to what types of culpable official misconduct so amount to a betrayal of trust, responsibility, duty, or integrity as to warrant removal from office.

To jump ahead (briefly) to evidence of historical understanding and contemporaneous exposition: Alexander Hamilton, describing the Senate’s impeachment-trial power in *The Federalist No. 65*, stated the understanding that valid grounds for impeachment and removal include “*those offenses which proceed from the misconduct of public men, or in other words from the abuse or violation of some public trust.*” This is a significant – and apparently uncontested at the time – general statement of the meaning and legitimate scope of the impeachment

their meaning. See Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 50, at 875-77 (using “establishment” of religion and “domestic violence” as examples of words that, if read out of context, would bear different – and even somewhat comical – meanings than their original sense).

⁷⁴ See SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (1755) (defining misdemeanor as “offence; ill behavior; something less than an atrocious crime”). As several scholars have noted, the term misdemeanor was thus a fairly close synonym for misbehavior or misconduct, James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1242 & n.61 (2007); Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 97 & n.90 (2006); cf. Berger, *supra* note 62 (noting that “[m]isdemeanor” and “misbehavior” were sometimes interchangeable terms” and noting Blackstone’s observation that “the principal ‘high misdemeanor’ is ‘the maladministration of such high officers,’ ‘usually punished by the method of parliamentary impeachment’”).

The closeness in meaning of “misdemeanor” to “misbehavior” has potential implications for harmonizing the impeachment standard with Article III’s language describing the tenure of federal judges as “during good behavior.” See *infra*, at 76-77. At the very least, it suggests that any perceived “gap” between these two linguistic formulations is less acute than modern understandings of the language might lead one to suppose.

power, from an important source. And it confirms the broad sense of the Constitution's language. Hamilton continued, describing constitutionally impeachable offenses as including those "of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."⁷⁵ An impeachment trial thus would be a "NATIONAL INQUEST into the conduct of public men."⁷⁶

The exact parameters – the outermost bounds – of such a "national inquest" into "political" offenses, committed by public men, against "the society itself," are necessarily committed to the constitutional judgment of the two houses of Congress who share the impeachment power. This is the simple logic of the constitutional structure: the impeachment standard bears a range of meaning, and the power to apply that standard is explicitly (and by deliberate design) entrusted to the House and the Senate in their respective roles.⁷⁷

⁷⁵ FEDERALIST No. 65, at 380 (Alexander Hamilton) (I. Kramnick ed. 1987).

⁷⁶ *Id.* at 381.

⁷⁷ The Supreme Court has judged the constitutionality of the Senate's impeachment-trial procedures to be a "political question" committed to its judgment (except where the text of the Constitution specifies a different rule). *Nixon v. United States*, 506 U.S. 224 (1993). I have criticized the "political question" doctrine in other writing, on the ground that it (often) constitutes a roundabout and confusing way of rendering what is in fact a holding on the merits of the constitutional question at issue, albeit in the form of a ruling of "non-justiciability." See Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1817-21 (2009); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 713 (1993). Others have made the same point. See Fallon et al., *supra* note 51, at 248. My point here is *not* that the question of what constitutes an impeachable offense is a non-justiciable "political question" but that the *right answer on the merits* of this question is that the power to make judgments within the range of meaning afforded by the impeachment standard is committed to the House and to the Senate, and that a Senate's final judgment in an impeachment adjudication is not subject to any form of judicial appellate review. Cf. CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* 23-24 (stating that "'judicial review' has no part to play in impeachment proceedings").

It should also be remembered that it is *Congress*, after all, that defines, within the scope of its constitutional legislative powers, what constitute federal “*crimes*” in the first place. Thus, even if one were to strain to constrain the impeachment power to more-serious and somewhat-less-serious *criminal* offenses (reading “high Crimes and Misdemeanors” in this more limited sense), Congress is the master of the federal criminal code and could make a wide variety of official misconduct literally criminal. (Is there any room for doubt that Congress could, pursuant to the Necessary and Proper Clause, carry into execution the powers of each house of Congress with respect to impeachment by defining certain types of conduct that constitute “high” offenses, including political and constitutional offenses?⁷⁸).

The “legislative history” of the adoption of the impeachment clauses of the Constitution confirms this breadth.⁷⁹ Working from a backdrop of English legal history and the baseline exposition of Sir William Blackstone,⁸⁰ and filtered through American colonial and

⁷⁸ Congress perhaps could not by general statute either *constrain* or *command* the exercise of the respective impeachment powers of each house. (The powers of each house are exclusive, and not shared with the other; moreover, the Senate’s power to convict requires a two-thirds vote of the Senate.) But Congress surely could *lend its support* by general legislation to the exercise by each house of its impeachment powers, by defining offenses that *clearly fall within the discretionary power* to punish by impeachment and removal.

⁷⁹ That history has been thoroughly plumbed by others. See, e.g., Gerhardts, *supra* note 66; Berger, *supra* note 66; see also Black, *supra* note 66. I give only the most concise summary of it here. On the legitimacy and propriety of considering – and the appropriate weight to be accorded – such “legislative history,” including the then-secret deliberations of the Constitutional Convention and the public debates of ratifying conventions, as evidence of the original meaning of words and phrases employed in the Constitution, see generally Kesavan & Paulsen, *supra* note 50.

⁸⁰ Blackstone defined “high” treason as a betrayal of trust involving an injury to the crown – the state – as opposed to private acts of corruption creating private injury. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 75 (1765–69). Blackstone’s exposition of treason is interesting for its description of the *character* of this genre of public offences – and may be of some indirect value in thinking about offences of like kind (as referenced in the Constitution’s use of the term “other high

revolutionary-era thinking and state constitutional precedents,⁸¹ the Constitutional Convention took the language of the impeachment standard through many different formulations: The Convention early on employed language centered upon the idea of abuse of official governmental power: “mal-practice or neglect of duty.”⁸² In subsequent discussions, delegates defended the need for impeachment as a guard against “corruption” in various forms, embracing broad notions of betrayal of a public trust.⁸³ In July, the Committee of Detail proposed “Treason or Bribery, or Corruption.”⁸⁴

The Committee’s language was actively debated on the floor of the Convention. At one point “corruption” was dropped, but soon thereafter prominent delegates objected that “treason and bribery” standing alone was too narrow. George Mason proposed adding “maladministration” – returning to the original emphasis on improper use of government power – on the theory that there might be

Crimes and Misdemeanors”): Treason “imports a *betraying, treachery, or breach of faith*,” writes Blackstone. It is “indeed a general appellation, made use of by the law, to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation; and the inferior *so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such his superior or lord.*” *Id.* (emphasis added).

⁸¹ Professor Tribe, collating the history, usefully notes the influence of the writings of revolutionary theorist John Adams and other theorists of government of that era, and remarks that “American states transformed impeachment by restricting it to officeholders, limiting it essentially to official misdeeds, and confining the punishment to removal and disqualification.” Tribe, *supra* note 72, at 720.

⁸² 1 FARRAND 78 (statement of John Dickinson).

⁸³ 2 FARRAND 68–69. George Mason referred to “corruption.” Gouverneur Morris referred to betrayal of trust and the possibility of bribery. James Madison spoke most broadly of impeachment as necessary to protect the people against “negligence” or “perfidy” by the chief executive, noting that a president might “pervert his administration into a scheme of speculation or oppression” or “betray his trust to a foreign power.”

⁸⁴ 2 FARRAND 172.

an offense in the nature of “[a]ttempt[ing] to subvert the Constitution” that clearly should warrant impeachment but might not fit within the narrow categories of the words “treason” and “bribery.” James Madison expressed concern that “maladministration” did not quite capture the intended meaning, and might go too far in the direction of suggesting that the President could simply be removed at the pleasure of a two-thirds majority of the Senate for bare policy-administration disagreements. Responding to Madison’s concerns, Mason proposed instead of the vague “maladministration” the English-precedent language “other high crimes and misdemeanors against the state,”⁸⁵ language nearly as capacious and open-ended – and crucially, which seems to retain the idea of abuse of authority or official misconduct – but that was both more familiar and more precise in suggesting a degree of culpability on the part of the purported wrongdoer beyond mere political disagreement (which had been Madison’s concern with Mason’s “maladministration” language).⁸⁶ The language “against the state” was amended to read “against the United States” (a useful clarification) and then dropped entirely by the Committee of Style (without explanation, perhaps assuming that this meaning was implicit in any event and therefore redundant). That produced the language ultimately adopted, authorizing impeachment for “treason, Bribery, or other high Crimes and Misdemeanors.”⁸⁷

The legislative history is thus interesting, moderately illuminating, but ultimately not decisive. The debates suggest a general sense

⁸⁵ 2 FARRAND 550.

⁸⁶ Professor Black writes that “‘maladministration’ was distinctly *rejected* as a ground for impeachment.” This is true but somewhat overstated, and Black quickly qualifies his statement: the term was overbroad and vague: not *all* acts of (mere) maladministration were meant to be embraced, which was in part why the language was replaced. Nonetheless, the new language’s “coverage was understood to be broad.” Black, *supra* note 66, at 29.

⁸⁷ 2 FARRAND 600.

that the framers were striving for the right synonyms or phrases to capture a reasonably broad but not limitless political discretion to remove officers for misconduct and abuse of office. But the debates concerning the precise verbal formulation of the standard are ultimately no more precise and limiting than the verbal formulation chosen for the text itself.

The framers' earlier discussions at the Convention of the impeachment-standard language had focused primarily on the President. The language extending the application of this impeachment standard to "all civil officers" – a term including federal judges – was added fairly late in the constitution-drafting game, on September 8, 1787. But the impeachment standard by its terms thus applies to each such officer, and nothing in the history of the Convention debates indicates a different intention or understanding with respect to judges than for executive branch officials in terms of what the standard would mean or how it would apply.

At this point, the constitutional legislative history leading to adoption of the "high Crimes and Misdemeanors" standard meets up with that concerning the tenure of office of federal judges and their susceptibility to removal by impeachment. Judicial tenure "during good behaviour" had, by the time of the Convention, come to be a term of art for *life tenure in office* unless the officer was removed (by whatever procedure existed for such removal from office) for misconduct or violation of the terms and conditions of office.⁸⁸ Early on

⁸⁸ Hamilton, writing in *The Federalist No. 78* concerning Article III's provisions that judges' compensation could not be reduced (but unlike the president's could be increased during their tenure in office) referred to the situation of federal "judges who, if they behave properly, will be secured in their places for life." A paragraph later, he refers to "the permanent tenure of their offices." And in the paragraph immediately following that, Hamilton discusses "[t]he precautions for their [the judges'] responsibility" as consisting principally of the Constitution's impeachment provisions and

at the Convention, the delegates agreed in principle to judicial tenure during good behavior, as part of the “Virginia Plan” introduced by Edmund Randolph.⁸⁹ It was not until August 20 that a committee (the “Committee of Five”) was directed to report “a mode of trying the supreme Judges in case of impeachment.” The Committee returned two days later with a report recommending that Supreme Court judges “shall be triable by the Senate.”⁹⁰ Just over two weeks later, the impeachment and trial of federal judges was provided for by the addition of the “civil officers” language to the impeachment standard initially drafted with the president in mind. No delegates commented at that time on the relationship between “high Crimes and Misdemeanors” as the general constitutional impeachment

notes that this is “the only provision on the point which is consistent with the necessary independence of the judicial character.” FEDERALIST No. 79, at 443–44 (I. Kramnick ed. 1987).

Raoul Berger usefully collates some of the most prominent English precedents of the sixteenth, seventeenth, and eighteenth centuries describing tenure of office “during good behavior” and its termination for “misbehavior.” Berger, *supra* note 66, at 153 & nn.172–74. *Earl of Pembroke’s Case* (1597) stated that “every voluntary act done by an officer contrary to that which belongs to his office is a forfeiture of his office.” Popham 116, 118; 79 E.R. 1223, 1224 (1597). Coke similarly described forfeiture of office for “abusing, not using or refusing” the responsibilities of the office. *Earl of Shrewsbury’s Case*, 9 Co. 46b, 50a; 77 E.R. 798, 804 (1611). *Hawkins* (1716) stated that “in the grant of every office whatsoever, there is this condition implied by common reason, that the grantee ought to execute it diligently and faithfully” and that such office could be forfeited for neglect of duty. 1 *Hawkins* ch. 66, § 1 at 167 and § 2 at 168.

Berger, of course, draws a rather different (and I think erroneous) conclusion from the historical evidence: that removal for judicial “misbehavior” embodies a far different (and lesser) standard than the impeachment standard of “high Crimes and Misdemeanors” but that the impeachment process is not the exclusive way of removing federal judges and Congress may provide for *judicial* proceedings for removal of judges for “misbehavior” that would not constitute an impeachable offense. As we shall see presently, the supposed yawning gap between “misbehavior” and “misdemeanors” is, on Berger’s own evidence, small if not illusory. For a recent modern echo of the Berger position (with certain variations), see Prakash & Smith, *supra* note 74.

⁸⁹ 1 FARRAND at 21, 244.

⁹⁰ 2 FARRAND 337, 367.

standard and judicial tenure “during good Behaviour.” Rufus King, in suggesting the need for a provision governing removal of judges – which ultimately resulted in the inclusion of judges under the general impeachment standard – had suggested such a link a few weeks earlier: “the judiciary hold their places not for a limited time, but during good behavior. It is necessary therefore that a forum should be established for trying misbehavior.”⁹¹

Moving from the Convention’s deliberations to the more public evidence of state ratification debates, one can see statements by the Constitution’s defenders that consistently embraced a broad understanding of the potential sweep of the impeachment power. General Charles Coatsworth Pinckney, in South Carolina, said impeachment was the remedy to be applied against those “who behave amiss or betray their public trust.”⁹² Edward Rutledge, also in South Carolina, also said that an abuse of trust was impeachable.⁹³ Most strikingly, James Madison, at the Virginia ratifying convention, said the language permitted impeachment of a president for association with or sheltering of “suspicious” persons or for political-constitutional wrongdoing in the form of convening a rump Senate – excluding a substantial number of states – to consent to a treaty.⁹⁴

As had been the case at the Convention, most of the public ratification-era debates over impeachment focused on the case of the President and other executive branch officers, leaving relatively little evidence concerning the impeachment of judges specifically. Recall that Hamilton spoke generally in *The Federalist No. 65* of the relevant

⁹¹ 2 FARRAND 66–67.

⁹² 4 Elliot 281.

⁹³ 4 ELLIOT 276 (“If the President or the senators abused their trust, they were liable to impeachment and punishment; and the fewer that were concerned in the abuse of the trust, the more certain would be the punishment.”)

⁹⁴ 3 Elliot 498.

impeachable “misconduct” of public men (and today women) as being “*the abuse or violation of some public trust.*”⁹⁵ Thus the inevitable enormous question: Can impeachable “misconduct” include misconduct by judges in the form of deliberately-made judicial decisions that Congress judges to be sufficiently clearly contrary to governing national law (the Constitution, federal statutes, U.S. treaties) as to constitute abuse of judicial office?

I submit that the answer must be yes. Indeed, Hamilton’s discussion in *The Federalist* numbers specifically directed at the judicial branch – and political checks thereon – draws this conclusion rather explicitly. In *The Federalist No. 78*, Hamilton introduces the topic of the structure and powers of, and checks upon, the judicial branch, saying that he will proceed to discuss, in order, first, “the mode of appointing the judges”; second, “the tenure by which they are to hold their places”; and finally, the “partition of the judiciary authority between different courts and their relations to each other.” As to the second item, judicial tenure of office, this “chiefly concerns their duration in office, the provisions for their support, the precautions for their responsibility.” Hamilton approvingly discusses the provision that the “judges who may be appointed by the United States are to hold their offices *during good behavior*” as being consistent with most state constitutions and “certainly one of the most valuable of the modern improvements in the practice of government.”⁹⁶

In *The Federalist No. 79*, Hamilton equates federal judges’ tenure during “good behavior” with life tenure – that is, assuming the judges behave properly: “*if they behave properly*, [the judges] will be secured in their places for life.”⁹⁷ Hamilton then discusses Article

⁹⁵ FEDERALIST No. 65.

⁹⁶ Federalist No. 78, at 436–37.

⁹⁷ FEDERALIST No. 79, at 443–444 (emphasis added).

III's guarantee that judicial salaries will never be reduced. Taken together, life tenure and salary guarantees "affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges."⁹⁸

Hamilton then turns immediately to the check of impeachment as a way of assuring the propriety of judicial behavior:

The precautions for their [the judges'] responsibility are comprised in the articles respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives and tried by the Senate; and, if convicted, may be dismissed from office and disqualified from holding any other.⁹⁹

Hamilton proceeds to discuss (and defend) the seeming absence of a power to impeach for mere "inability," saying it would be difficult to judge. The implication is that voluntary or willful *misconduct* (or "malconduct") in performing the judicial office falls within the impeachment power, but mere *incompetence* probably does not. (This might be taken to imply a "culpability" or "mind-state" requirement for impeachment.)

Two papers later, in *The Federalist No. 81*, Hamilton is even more explicit about the propriety of impeachment as a legislative check on perceived abuses of judicial power in the form of wrongful performance of the judicial task. The passage merits quotation at length, to give a full sense of context and the force of impeachment as a check:

⁹⁸ *Id.* at 444.

⁹⁹ *Id.* The word "malconduct" appears to be a synonym for "misconduct" – the term Hamilton used in the same context in *The Federalist No. 65* with respect to impeachment generally.

It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority which has been upon many occasions reiterated is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. *And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations of the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations. While this ought to remove all apprehension on the subject it affords, at the same time, a cogent argument for constituting the Senate a court for the trial of impeachments.*¹⁰⁰

The sense of the passage is unmistakable. Impeachment of judges, for “usurpation” of power or “encroachments” on the authority of other branches of government, especially where “deliberate,” is entirely legitimate and a result to be expected. Indeed, the core of Hamilton’s argument is that the mere existence of such a powerful constitutional check should operate to deter and prevent such abuses

¹⁰⁰ FEDERALIST No. 81, at 453 (emphasis added).

of judicial power in the first place, rendering such a possibility a mere “phantom.”

Hamilton may have been too optimistic in his prediction of how the judiciary would behave in practice – at least he looks too cheerful, now, at a distance of two and a quarter centuries into the future, given some considerable history of judicial abuses of the Constitution. But Hamilton’s description of the *constitutional power* of impeachment, and the legitimacy of its use against judges as a way of “punishing their presumption,” remains valid. Moreover, it goes far to harmonize the “good behavior” condition of life tenure for federal judges with the impeachment standard of “high Crimes and Misdemeanors”: persistent or insistent abuse of judicial office or power counts as a violation of both standards, and judicial usurpation of power constitutes such an abuse.

A passing statement of James Wilson – an important framer of the Constitution and its judiciary article, and the leading proponent of its adoption at the Pennsylvania ratifying convention – might be read as offering something of a contrary view. And Wilson’s prominence requires that his views be taken seriously indeed. Here is the context and content of his comment. Wilson was responding to the question of other Pennsylvania convention delegates concerning whether judges would have the necessary fortitude to exercise independent constitutional judgment in the exercise of the power of (what we now call) judicial review, given the power of one house of Congress to impeach and the other to try, convict, and remove. “It is said that, if they [the judges] are to decide against the law, one house will impeach them and the other will convict them,” Wilson began, “I hope gentlemen will show how this can happen; for bare supposition ought not to be admitted as proof. The judges are to be impeached, because they decide an act null and void, that was made in defiance of the Constitution! What House of Representatives would

dare to impeach, or Senate to commit, judges for the performance of their duty?"¹⁰¹

Wilson's statement falls considerably short of a view that judges may not legitimately be impeached for *abuse* of their judicial power. Rather, his sharp rhetorical question assumes the situation where the judges *properly* exercise the power of judicial review in refusing to give effect to an *unconstitutional* legislative act – one enacted "in defiance of the Constitution." The most that Wilson's retort can be read to say is that it would be improper for Congress to impeach and remove federal judges for *properly* performing their judicial duties. That much is surely correct: as with any constitutional power, the power might be abused or misused; and it would be an abuse of the impeachment power to remove judges for properly performing their duties. (As noted above with respect to the propriety of imposing constitutional-ideological litmus tests on future judicial appointees, the possibility that those entrusted with a constitutional power might employ it badly or improperly is not an argument that such power does not exist.)¹⁰² But Wilson cannot fairly be read to repudiate entirely the propriety of impeachment as a check on judicial abuse of power. Wilson is as strong as any of the framers in his general defense of the independent province and duty of each branch to interpret the Constitution faithfully and to press its views in opposition to those of the others. He defends judicial independence but nowhere asserts judicial supremacy, inerrancy, or insusceptibility to checks.¹⁰³

¹⁰¹ James Wilson, Remarks in Pennsylvania Convention to Ratify the Constitution of 1787 (Tuesday, Dec. 4, 1787), in 1 COMPLETE WORKS OF JAMES WILSON 234 (Kermit L. Hall & Mark David Hall eds., 2007).

¹⁰² See *supra*, at 39–42.

¹⁰³ See Paulsen, *Most Dangerous Branch*, *supra* note 3, at 238–40 (collecting and discussing Wilson's views). Hear Wilson on separation of powers and checks-and-balances generally: "The salutary consequence of the mutual dependency of the great powers of government is, that if one part should, at any time, usurp more power than

The correct constitutional conclusion, I submit, is unavoidable – even if it is one unfamiliar to our modern legal culture: The term “high Crimes and Misdemeanors” does not have a fixed, determinate, narrow meaning that excludes impeachment of public officials for violation of the responsibilities of their offices. As I have put the point previously, the impeachment power legitimately can extend to “violations by an executive or judicial officer of his or her constitutional oath and constitutional responsibilities, as determined by the ultimate independent judgment of the House and the Senate.”¹⁰⁴ Such a conception harmonizes well with the framers’ description of the scope of the impeachment power. It also harmonizes reasonably

the constitution gives, or make an improper use of its constitutional power, one or both of the other parts may correct the abuse, or may check the usurpation. . . . The important conclusion to be drawn . . . is, that, in government, the perfection of the whole depends on the balance of the parts, and the balance of the parts consists in the independent exercise of their separate powers, and, when their powers are separately exercised, then in their mutual influence and operation on one another. Each part acts and is acted upon, supports and is supported, regulates and is regulated by the rest.” *See id.* at 239–40 (quoting Wilson’s Lectures on Law of 1790–92). And on the impeachment power specifically: “The doctrine of impeachments is of high import in the constitutions of free states. On one hand, the most powerful magistrates should be amenable to the law: on the other hand, elevated characters should not be sacrificed merely on account of their elevation. *No one should be secure while he violates the constitution and the laws; every one should be secure while he observes them.*” 2 COMPLETE WORKS OF JAMES WILSON 861 (Kermit L. Hall & Mark David Hall eds., 2007) (Lecture on Law).

Justice Joseph Story’s treatise is also interesting on the check of judicial impeachment, in part because Story is as emphatic a defender of judicial independence – and even judicial interpretive supremacy – as they come: Although “the constitution has, with so sedulous a care, endeavoured to guard the judicial department from the overwhelming influence or power of the other co-ordinate departments of the government, *it has not conferred upon them any inviolability, or irresponsibility for an abuse of their authority.*” Story then proceeds to speak of the impeachability of judges “for any corrupt violation or omission of the high trusts confided” to them.³ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 498 § 1629 (Boston, Hilliard, Gray & Co. 1st ed. 1833 reprint). Story thus appears to treat irresponsible or intentional abuse of authority as the type of violation of judges’ “high trusts” that warrant impeachment.

¹⁰⁴ Paulsen, *Irrepressible Myth*, *supra* note 3, at 2729.

well with Article III's grant to federal judges of life tenure during good behavior, and with contemporaneous explanations of the check of impeachment as a precaution to assure judicial responsibility and to guard against judicial usurpations of power. Thus, as I have summarized the position elsewhere, "Congress may impeach and remove federal judges, including justices of the Supreme Court, who in the ultimate judgment of Congress, act in deliberate violation or disregard of the Constitution or otherwise willfully ignore, manipulate, or disregard controlling law."¹⁰⁵

¹⁰⁵ *Id.*; see also Frank H. Easterbrook, *Presidential Review*, 40 CASE WESTERN L. REV. 906, 912 (1990) ("Congress may impeach and remove from office all who violate the Constitution, as Congress understands it."); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1311 (1996).

Charles Black, in his fine short book on presidential impeachment, *Impeachment: A Handbook*, offers several hypothetical illustrations of impeachable presidential misconduct in the form of flagrant violation of the Constitution even though not a common "crime": "Suppose a president were to announce that he would under no circumstances appoint any Roman Catholic to office and were rigorously to stick to this plan. I am not sure that this conduct would be punishable as crime, though it would clearly violate the constitutional provision that "no religious test" may ever be required for holding federal office. I cannot believe that it would make any difference whether this conduct was criminal for general purposes; it would clearly be a gross and anticonstitutional abuse of power, going to the life our national unity, and it would be absurd to think that a president might not properly be removed for it." Black, *supra* note 66, at 34. Black also gives as examples a president's announcement in advance of pardons to any federal agents or police who killed anybody in the line of duty in the District of Columbia, whatever the circumstances, *id.*, and a president's knowing and deliberate waging of an unconstitutional and unauthorized war. *Id.* at 34-35 ("It seems quite possible that military action, unauthorized by Congress and concealed from Congress, might at some point constitute such a murderous and insensate abuse of the commander-in-chief power as to amount to a "high Crime" or "Misdemeanor" for impeachment purposes, though not criminal in the ordinary sense.").

The same principle logically applies to judicial decisions in flagrant contradiction of the Constitution. Unless one is prepared to say that, by definition, *no judicial decision can ever be regarded as a violation or contradiction of the Constitution* - that a judicial decision, simply by being such, is never a contradiction of the Constitution - the conclusion follows that judicial abuses of the Constitution are fully as impeachable as presidential abuses of the Constitution. (I turn to this next in the text.)

But wait, you say – the Supreme Court’s decisions *are* the Constitution! It makes no sense to impeach justices for their decisions, on the ground that such decisions are a violation of the Constitution, because the Court’s decisions in fact determine what the Constitution *is*! This of course is utter nonsense. Unless one is prepared to indulge the myth of judicial supremacy and inerrancy to an extreme and ridiculous degree, one cannot plausibly hold such a position.¹⁰⁶ Posit the case of a knowing, deliberate, willful misinterpretation of the Constitution. *Dred Scott* comes to mind, along with perhaps a few others, as real-world illustrations.¹⁰⁷ Really? There is *never* a case where deliberate judicial disregard for the law would warrant impeachment for violation of the Constitution and the judicial oath? The proposition is too extravagant to be maintained.

But wait, you say – this would mean that Supreme Court justices could be impeached out of simple disagreement with their decisions! They could be impeached even if four other justices voted the same way (or, for that matter, five, six, seven, or eight other justices did)! To be sure, recognizing that the impeachment power embraces the power to remove judges and justices for their supposed disregard of the Constitution admits of the possibility of disagreement over what the Constitution in fact means, and presupposes an independent power of the houses of Congress to make judgments on this score and to act on them. That means, in practice, that Congress may impeach judges for what *Congress judges* to be violations of constitutional duty. And this may amount (in the eyes of some) to “simple disagreement” with judicial decisions.

¹⁰⁶ See Paulsen, *Irrepressible Myth*, *supra* note 3, at 2729–30.

¹⁰⁷ See generally Paulsen, *Lincoln and Judicial Authority*, *supra* note 21 (considering *Dred Scott* as a paradigmatic example of flagrant and seemingly willful and intentional abuse of judicial authority, and gauging Abraham Lincoln’s response to the question of the authority of such a decision).

Reduced to lowest terms, that is correct; in terms of the scope of Congress's *constitutional power*, it is an accurate description. One can make an excellent case for applying such a power in a *restrained* fashion, exercising prudent, reasonable good judgment; one can make an excellent case for limiting the exercise of such power, in practice, to fairly *clear cases* of clear judicial abuse; and one can make an excellent case for limiting its exercise, in practice, to the impeachment of judges who exhibit a *pattern* of deliberate disregard for the law (rather than a single or isolated misjudgment or misinterpretation) or to those who appear to be exercising such disregard *willfully*, knowingly, and seemingly deliberately – who possess some form of constitutionally culpable mind-state, so that the offense is more clearly a violation of one's oath and a betrayal of an accepted duty; and one can make an excellent case for limiting the exercise of such power, in practice, to situations where a judge or justice has been placed clearly on *notice* of the type of conduct that Congress will judge to be a violation of these standards.

But in the end, the power is one committed to the House and Senate in the making of such prudential judgments, and it constitutionally *could* be used in situations that amount to what might be thought simple disagreement with a justice's or judge's judicial decisions. (For what it is worth, the fact that other judges or justices joined a particular decision or opinion does not in my judgment render a flagrant judicial departure from the Constitution or other governing law any the less flagrant. An objectively outrageous decision is no less outrageous because a majority, or even a large majority, joined it. *Dred Scott* and *Roe v. Wade* were both 7-2 decisions. There should be no safety from impeachment in judicial numbers, though one might judge the mind-state of some justices less culpable on the ground that they may mistakenly have thought a decision plausible because other justices joined it too.)

But wait, you say – such a power could be abused by Congress, or used for partisan purposes! It could even be used in a *dumb* fashion by *dumb* politicians! To be sure, the impeachment power (like any other) could be abused or misused; but, once again, that does not

mean it doesn't exist. It is a power vested in the political bodies that possess it, for better or for worse. *Constitutionally*, their independent judgments are fully as much to be credited as the judgments of judges. Though political actors might not express their constitutional judgments in the same doctrine-heavy legal jargon as courts, that does not mean their constitutional judgments are any less entitled to constitutional respect.¹⁰⁸ (And if "dumb" representatives and senators hold office, that is simply the consequence of having a constitutional system of representative democracy – and, I suppose, of having dumb voters. For what it is worth, I think it hard to say that, at any time in our history, Congress has been dominated by stupidity in its membership. And for what it is worth, I think it is hard to say that, at any time in our history, the federal courts have possessed a uniformly able, brilliant, and non-partisan membership.) Finally, the epitaph "partisan" masks with a pejorative the pedestrian reality that different groups of people have different views about the legitimacy and propriety of different interpretations of the Constitution, and that these groups may coalesce into discrete camps – and perhaps into different political parties. (Again, the same can be said of federal judges.) "Partisan" may here simply be a different word for describing the fact of disagreement.

But wait, you say – doesn't *disagreement itself* show that impeachment of judges for the substance of their decisions is improper? No. Disagreement, by itself, proves nothing. The fact that people may disagree in no way implies that the disagreeing views are of equivalent merit. People disagreed over the moral propriety of slavery in 1860 and over the constitutional propriety of *Dred Scott*. That did not

¹⁰⁸ See Paulsen, *Straightening Out*, *supra* note 26, at 569 ("It is an elitist, legal academic's view of constitutional law to say that Ronald Reagan's or Joe Biden's crude intuitions about constitutional interpretation should play no role in judicial appointments merely because those intuitions are not expressed with the level of sophistication (or in the jargon) that law school professors think desirable.").

make pro-slavery views meritorious, just as the large numbers of persons holding such views – and holding human beings slaves – did not make such views meritorious. Nor did it make it in any way improper for persons holding anti-slavery views to press their positions with all the powers available to them. So, too, with impeachment of judges for flagrant abuse of the Constitution: the fact that five justices, or even millions of citizens, think a decision like *Obergefell v. Hodges*, or *Planned Parenthood v. Casey*, or *Dred Scott v. Sandford*, right does not make the decisions any the less objectively outrageous departures from the Constitution.

In the end, Congress, where it judges a departure from the Constitution, or series of such departures, committed by individual justices or by several justices, sufficiently culpable to warrant the strong remedy of impeachment, may pick up Alexander Hamilton’s gauntlet of “punishing [judges’] presumption by degrading them from their stations.”¹⁰⁹ This extreme remedy – this powerful check – may be shocking to modern sensibilities unduly conditioned by the myth of judicial supremacy and the unthinking habit of deference to even the most indefensible of Supreme Court decisions. But it should not be at all shocking: The breadth of the Constitution’s impeachment standard; its conscious design as a last-ditch check against abuses of the Constitution by executive and judicial officers; the framers’ assurance that “[t]his alone is a complete security” against the prospect of a “series of deliberate usurpations of authority”¹¹⁰ by courts as well as by the executive branch, all counsel in favor of according the impeachment power its full sweep. This has not, in the main, been the nation’s practice. But the Constitution fully equips Congress

¹⁰⁹ FEDERALIST No. 81, at 453.

¹¹⁰ *Id.*

with this most powerful of political remedies for flagrant offenses against the Constitution in the form of abuse of judicial power.¹¹¹

V. A RULES OF DECISION ACT FOR FEDERAL QUESTION CASES

Checks on judicial appointments through the political nomination and confirmation process are important, broad, up-front checks. But they are also somewhat crude and imprecise controls – simultaneously over-inclusive in the persons they may exclude from office and under-inclusive in their inability to check the conduct of a judge once appointed. Control over federal courts’ jurisdiction can be a more fine-tuned measure, but it too may be limited in its effectiveness: it can limit the exercise of judicial power, and punish in a particular way, but it too does not exercise effective direct control over and prevent or check specific instances of abuse of judicial power. Manipulation of the size of the Supreme Court, and the structure of the federal judiciary generally, is certainly a constitutional weapon in Congress’ arsenal of checks on the judiciary, but it has the problems that go with its advantage: court-packing tends to weaken the judiciary as an institution, rather than pin-point punish particular provocations; it can rectify serious errors only by a remedy that seriously weakens the Court as a whole, inviting more and larger packings. Impeachment is a truly formidable, proper constitutional check against judicial abuses. Employed judiciously (so to speak), it may serve with respect to judges its contemplated purpose of deterring

¹¹¹ It should be noted that the Constitution specifies the limits of the punishment of impeachment to removal from office and – *if Congress so chooses* – disqualification from holding any other. It seems entirely appropriate that impeachment and conviction for abuse of judicial power by a “series of usurpations on the authority of the legislature” be punished by disqualification from judicial office, but not necessarily legislative office: it may be that a judge’s conduct makes him unsuitable for continued service as a judge or justice but perfectly suited for the office of, say, U.S. Senator from California.

and preventing future abuses of judicial power. But in its immediate effects, it is pure after-the-fact punishment of individuals.

Each of these checks has its virtues and its limitations. Is there any legitimate, constitutional check on the judicial power that can assert more direct, immediate day-to-day power to channel the judiciary into *proper* performance of its constitutional functions? Is there any legitimate, constitutional check that can rectify, immediately and effectively, a specific abuse in a specific case?

This section and the next discuss checks of these kinds: finely-tuned “laser-beam” checks rather than broad-gauged shotgun or bazooka checks. In this section, I propose a statute *prescribing constitutional rules of constitutional and statutory interpretation governing the courts as rules of decision in federal question cases*. In the next section, I sketch a position I have long defended and set forth more fully in other writing: *the legitimate constitutional power and duty of the President to refuse to execute judicial decisions that he or she determines to be unacceptably serious and harmful departures from the Constitution or other governing law*.

My description of each of these checks shall be briefer than my treatment of the checks of appointment, jurisdiction, judicial structure and composition, and impeachment. With respect to my proposed statutory “solution” to the problem of abuse of judicial power, what follows will be a sketch of a position I hope to develop in future writing.¹¹² With respect to executive non-execution of judgments, I will paint in broad strokes, largely refer the reader to my other scholarship on the subject, and respond to a few new objections raised by others.

Here, in a nutshell, is the proposal of and argument for a “statutory” check in the form of a *direct legislative prohibition of abuse of judicial decision-making power*: Congress possesses constitutional power,

¹¹² See Paulsen, *supra* note 14.

under the Necessary and Proper Clause of Article I of the Constitution, to pass laws *appropriate* for carrying into execution the “judicial Power” under Article III of the Constitution. (The Necessary and Proper Clause power grants Congress power to pass laws not only for carrying into execution its other legislative powers but also the powers vested by the Constitution in any officer or Department of the national government.)¹¹³ This power includes the power to prescribe rules of practice, procedure, evidence, proof, standards of review, standards of appeal, legal capacity and standing, judicial ethics, choice of law, and even “rules of decision” governing judicial decision of cases, so long as the rules Congress prescribes are not *themselves* substantively unconstitutional, and so long as Congress does not remove from the courts the actual power of independent judgment in a particular matter within its jurisdiction – the core judicial power of ascertaining governing law and applying it to specific cases – or exercise a form of legislative-quasi-“appellate” review of specific judicial decisions.¹¹⁴ In short, Congress may within broad bounds prescribe the governing law for courts to apply and direct the manner, forms, and procedures of its application, and it may do so by

¹¹³ U.S. CONST. art. I, § 8, cl. 18 (“To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”) See generally William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of “The Sweeping Clause,”* 36 OHIO ST. L.J. 788 (1975); John F. Manning, Foreword: The Means of Constitutional Power, 128 HARV. L. REV. 1 (2014).

¹¹⁴ Some of the arguments advanced in this section are developed and supported in my earlier article defending the power of Congress to abrogate the judicial practice of *stare decisis*, in whole or in part. Paulsen, *Abrogating*, *supra* note 55. With respect to the scope of Congress’s legislative powers with respect to judicial practice, procedure, and governing rules of law, see *id.* at 1567–99. Specifically with respect to the *limits* of Congress’s power of legislation with respect to the carrying into execution of the judicial power, see *id.* at 1590–94. See also Michael Stokes Paulsen, *Lawson’s Awesome, Also Wrong (Some)*, 18 CONST. COMM. 231 (2001).

being as specific in its directives as it wishes, subject only to the constraints of the Bill of Attainder and Ex Post Facto clauses of the Constitution. Courts then possess the judicial power to apply that governing law in specific cases – and Congress may not exercise that power for the courts, displace their judgments, or reverse their determinations in specific cases (other than through the effect of constitutionally valid legislation).¹¹⁵

It follows, I submit, that Congress can prescribe “rules of decision” in the form of substantively proper – one might even say “correct” – principles for carrying out the judicial task of constitutional, statutory, and treaty interpretation.¹¹⁶ Congress’s power to do so is

¹¹⁵ It is (reasonably) well settled that Congress may not grant itself power to review and reverse a judicial judgment, *Hayburn’s Case*, 2 U.S. 408 (1792), may not similarly direct the judicial reopening of a final judicial judgment or decree, in a specific case or category of cases, *Plaut v. Spendthrift Farms*, 514 U.S. 211 (1995), and may not prescribe a specific outcome in a particular judicial case (other than by enactment of the governing law) or enact a substantively unconstitutional rule of decision, *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). None of these limitations prevents Congress from specifying general substantive rules of judicial decision otherwise within the scope of Congress’s powers and making such rules obligatory on the judiciary.

The proper understanding of the cryptic *Klein* case is matter of perennial controversy for aficionados of the law of federal courts (and for few normal people). See Fallon et al., *supra* note 51, at 54 (suggesting that the proper reading of the case is that Congress unconstitutionally invades the judicial function when it purports to bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds); Edward Hartnett, *Congress Clears Its Throat*, 22 CONST. COMM. 553 (2005); Michael Stokes Paulsen, *Killing Terri Schiavo*, 22 CONST. COMM. 585 (2005). The Supreme Court has recently granted certiorari on a case that might shed light on the proper understanding of *Klein* – or simply clarify directly the Court’s understanding of what the correct principle is in these areas: *Bank Markazi v. Peterson*, No. 14-770. See Michael Stokes Paulsen, *A Fine Time to Refine Klein*, NATIONAL REVIEW (Jan. 12, 2016), <http://www.nationalreview.com/bench-memos/429649/klein-bank-markazi-judicial-power>.

¹¹⁶ To the extent that one is prepared to say that there are certain “correct” rules for interpretation of the Constitution, or other federal-law enactments, as authoritative written legal texts to be faithfully applied by courts (see Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 50), Congress may prescribe such correct rules of interpretation. To the extent one believes the Constitution admits of

closely (if imperfectly) analogous to its power to have passed the original “Rules of Decision Act” – originally, section 34 of the Judiciary Act of 1789 – prescribing that federal courts deciding questions of law *not* governed by *federal* law should apply *state* law, rather than attempt to fashion their own common law or judicially-created substantive law as governing rules of decision for such matters.¹¹⁷

The constitutional premise of the Rules of Decision Act is that Congress may, pursuant to the Necessary and Proper Clause, legislate the rule that federal courts, in cases falling within federal jurisdiction but not involving a matter of federal substantive law (i.e., diversity cases and cases involving supplemental jurisdiction over state law claims), *not* generate their own “law” governing such matters – that judicial *jurisdiction* does not entail a judicial *law-making* power and Congress may so state as a proper rule of decision. In just the same way, I submit, Congress properly may legislate that federal courts, in cases within their jurisdiction but involving federal substantive law – “federal question” cases – likewise not invent the

some fair *range of choice* of interpretive method, and that within that range no particular method or approach is either required or forbidden by the Constitution (*cf.* Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J. L. & PUB. POL’Y 991, 994–96 (2008)), the argument would be that Congress possesses power to choose any proper interpretive rule within the relevant range, pursuant to the Necessary and Proper Clause. *Cf.* Paulsen, *Lawson’s Awesome*, *supra* note 114. The Necessary and Proper Clause, it should be recalled, affords Congress considerable latitude in choosing appropriate policies and rules within the allowable range of choice afforded by broad constitutional language, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 418–21 (1819); see generally Paulsen, *A Government of Adequate Powers*, *supra* note 116, at 994–1004, and that power extends to laws properly carrying into execution executive and judicial branch powers and duties. See generally Alstynne, *supra* note 113; Manning, *Foreword: The Means of Constitutional Power*, *supra* note 113.

¹¹⁷ The correct understanding of the Rules of Decision Act, now 28 U.S.C. § 1652, is of course the subject of the famous cases of *Swift v. Tyson*, 41 U.S. 1 (1842) and *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). For a general discussion of the issue, see Paulsen et al., *CONSTITUTION OF THE UNITED STATES*, *supra* note 45, at 570–76.

“law” for themselves, but rather be governed by the text of the federal law at issue, understood and applied in accordance with the original public meaning of its words and phrases, in context, at the time of the text’s enactment, and accounting for background understandings and specialized usages.¹¹⁸

The punchline: Congress may prescribe original-public-meaning textualism as *the* interpretive-methodological rule of decision for the judiciary in considering issues of federal constitutional, statutory, or treaty law and enact such a command in the form of a statute, pursuant to its powers under the Necessary and Proper Clause. Congress similarly may abrogate the judicial policy of (selective, occasional)¹¹⁹ *stare decisis* with respect to past judicial decisions departing from this core rule of decision.

What Congress does *not* have power to do is to prescribe a particular *result* in a particular case or class of cases (*e.g.*, “Rule for the plaintiffs in *Obergefell*” or “Overrule *Roe v. Wade*”), legislatively alter final judgments of the judiciary and enter judicial judgment itself (other than by changing the applicable substantive law in a permissible way), or legislatively reopen final judicial judgments (other than by waiving or abrogating the defense of *res judicata*).¹²⁰ The judiciary gets to render its decision on a matter before it. But that does

¹¹⁸ For a defense of the correctness of this methodology, see Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, *supra* note 50; Kesavan, *supra* note 46.

¹¹⁹ For a somewhat cynical, but (I submit) entirely logical deconstruction of the Supreme Court’s doctrine of *stare decisis*, see Michael Stokes Paulsen, *Does the Supreme Court’s Current Doctrine of Stare Decisis Require Adherence to the Supreme Court’s Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165 (2008).

¹²⁰ See *supra*, at 45–46. The first restriction corresponds to the legitimate scope of the doctrine associated with *Klein v. United States*. The second restriction corresponds to the principle that properly may be discerned from the series of moot cases commonly dubbed *Hayburn’s Case*, 2 U.S. 408 (1792). (See Paulsen, *Most Dangerous Branch*, *supra* note 3, at 303 (discussing *Hayburn’s Case*)). The third restriction corresponds to the decision in *Plaut v. Spendthrift Farms*, 514 U.S. 211 (1995). Each of these restrictions is

not in any way impair the power of Congress to prescribe sound general rules of interpretation governing matters of federal law, as an exercise of its legislative power to pass laws appropriate to the carrying into proper execution the judicial power.

What good would such a “Rules of Decision Act” do? You can lead a judge to pure interpretive waters but you cannot make him drink. True enough: The independent power of judicial decision carries with it the power to resist, with the powers at the judiciary’s disposal, Congress’s interpretive prescriptions. But likewise Congress has the power to resist the judiciary’s resistance with the powers at its disposal. There may be considerable value in Congress’s staking out an interpretive position concerning correct first principles. It can serve as a standard for appointments and confirmation. (“Do you, Judge Paulsen, commit to the principles of the Judicial Activism Abolition Act of 2017 as the standard for judging the propriety of your own judicial conduct? Do you subscribe to these principles?”) It can serve as a congressional shot across the bow in the separation-of-powers game – an implicit or overt threat concerning Congress’s understanding of the proper exercise of judicial power and a standard for possible impeachment in the event of its violation. (And, as discussed above with respect to impeachment, such an act might serve the valuable functions of providing *notice* of what Congress regards as the applicable standard, and of *defining* conduct Congress regards as a “high” misdemeanor of violation of constitutional duty.)¹²¹ It

well established, though the analysis in the Supreme Court decisions associated with each may fairly be questioned, and often has been limited in its reach by subsequent decisions.

¹²¹ The impeachment power (and for that matter the Senate’s confirmation power) provides further constitutional basis for Congress to enact such a interpretive-rules-of-decision statute as a matter of Article I constitutional power. Simply put, such a law readily might be considered necessary and proper for carrying into execution the impeachment power (and the Senate’s share in the appointment power) with respect to federal judges.

can fortify and encourage judges already inclined to apply correct interpretive principles. It may actually influence or persuade some wavering judges, unsure or unresolved in their own views about correct interpretive principles. And it might also alter the behavior of judges, in some cases, who are disposed to notions of deference to the considered views of the coordinate political branches on constitutional and other legal matters. (It obviously matters, for example, even to Chief Justice John Roberts – a reasonably hard-headed, strong-willed, and usually sound constitutional interpreter – *what Congress thinks*.)¹²²

Such a “Rules of Decision Act” or “Judicial Activism Abolition Act,” properly drafted, might well constitute a fine-tuned device for checking the Court with Congress’s ordinary legislative powers, in part because other, blunter, more aggressive checking powers lurk in the background. As written, it is milder, subtler, less ominous than impeachment: it is a reminder – a string around the judicial finger rather than a noose around the judicial neck. But the lesser power may in fact be the stronger one, precisely because it can be directed toward enacting with greater precision exactly what Congress understands to be proper judicial behavior.

The inevitable objection – “This Interferes with the Judicial Power!” – has instant intuitive appeal. But it quickly collapses. Only if Article III’s grant of “The judicial Power” entails a *power of judges to decide questions of federal law any way they like, according to any principles they choose*, would such a statute prescribing interpretive constraints violate Article III and the principle of separation of powers. Such a position is difficult to sustain. Really? Courts are free to decide cases

¹²² Court-watchers and commentators debate whether Chief Justice Roberts defers too greatly to Congress’s and the executive’s views on matters of constitutional and statutory interpretation. However one evaluates his conduct, it is clear that Congress’s views or likely intentions and expectations *matter* to the present Chief Justice. *See, e.g., King v. Burwell*, 135 S. Ct. 2480 (2015).

according to *any* approach they wish and Congress can *say nothing* about it? Congress could not prohibit federal courts from deciding legal questions by flip of coin, trial by ordeal, on the basis of the race of the parties, or by vote-trading by justices? Really? The corollary claim – that the judiciary possesses plenary power to decide the interpretive rules by which it operates, is similarly difficult to sustain. It embraces the same premise that there are no right or wrong principles of judicial interpretation and that the judicial power therefore somehow embraces the right to make up whatever ones courts choose. Really?

In the end, the argument against a power of Congress to prescribe interpretive rules consists either of the assertion of a plenary judicial power to decide cases according to any rules or principles they like – or even none at all (like coin flips) – or an assertion that the interpretive principles prescribed are themselves substantively wrong interpretive principles. The first option is simply untenable. It simply is not consistent with written constitutionalism to posit that the judiciary can do whatever it wants – that the judicial power really is the Trojan Horse, Uncontrollable Renegade, Supreme and Arbitrary Dictatorial Power. That was the Anti-Federalist Brutus's position, on steroids.¹²³ And that's the position that the framers were at pains to refute at every point in *The Federalist*. This really is the whole ball game: True, if the judicial power really were the Uberpower to Do Anything, then a proposed Judicial Activism Abolition Act prescribing interpretive principles would be unconstitutional. But it really takes accepting the Uberpower premise, whole hog, to reach this conclusion.

¹²³ ESSAYS OF BRUTUS XV, *supra* note 32 (“[T]he supreme court under this constitution would be exalted above all other power in the government, and subject to no controul.”)

The second option is more plausible, but depends on the premise that to prescribe original-meaning textualism is to prescribe *wrong* interpretive principles. That, of course, merely recreates the whole debate over proper constitutional interpretive methodology. Part of the point of a Judicial Activism Abolition Act is precisely for Congress to weigh in on that debate, prescribing what it considers to be correct interpretive methodology. The gauntlet thrown down for the courts is this: *I dare you to say that the idea that judges should faithfully apply the original meaning of the words of the written constitution in constitutional adjudication is unconstitutional.* That, hopefully, would be a duel that Congress could win. For, as John Marshall put it in *Marbury*, such a proposition is “too extravagant to be maintained.”

The slippery slope objection – the “this-power-might-be-wrongly-applied!” objection – suffers from the same weaknesses such an objection has when raised with respect to appointment standards or impeachment powers: the fact that a power might be wrongfully employed does not mean it does not exist. Any power can be misused. It is important to guard against misuses, of course, but that simply means keeping the focus on correct, proper interpretive rules. The power of Congress to prescribe substantively *correct* standards governing the exercise of judicial power in no way implies a correlative power to prescribe substantively *improper* interpretive standards. Congress may prohibit judicial coin-flips and decision on the basis of the race of the parties, as proper measures for carrying into execution the judicial power. But Congress cannot *mandate* coin-flips or decision on the basis of race for the simple reason that such a mandate would be substantively unconstitutional. The courts would rightly disregard such a command. In just the same way, Congress can prescribe fidelity to the original public meaning of an authoritative written text as the governing interpretive written methodology, but could not prescribe that judges *not* abide by the written text.

There is more – much more – to be said about the constitutionality and possibilities of a “Judicial Activism Abolition Act.” I hope to

develop these ideas, and respond to other possible objections, in future writing.¹²⁴ For now, it is sufficient to limn the idea and raise the prospect: One of Congress's potentially most powerful and useful – and overlooked – checks on a perceived runaway federal judiciary is to exercise its legislative power to prescribe what it understands to be correct rules of decision governing federal courts' exercise of the judicial power in deciding questions of federal law.

VI. THE POWER AND DUTY OF THE EXECUTIVE TO DECLINE TO EXECUTE JUDICIAL JUDGMENTS CONTRARY TO GOVERNING LAW

I conclude this survey and discussion of constitutional checks on the courts with the biggest and most controversial weapon in the political branches' arsenal – the one that Justice Scalia, in his *Obergefell* dissent, quoting Alexander Hamilton in *the Federalist No. 78*, rolled out as the ultimate check against extreme departures from the Constitution and usurpations of power by the judiciary in particular cases: the power of executive non-execution of judgments. This is a finely tuned check on judicial power: it targets specific abuses in specific instances; it does not punish bluntly, imprecisely, or wantonly. But it is an extraordinary remedy reserved for extraordinary occasions.

Hear Scalia (and, within him, *Publius* – Hamilton writing in *Federalist No. 78*) again:

Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the

¹²⁴ Hold me to this. I invite readers to pester me if I haven't produced an elaboration of these thoughts within eighteen months.

States, “even for the efficacy of its judgments.” With each decision of ours that takes from the People a question properly left to them – with each decision that is unabashedly based not on law, but on the “reasoned judgment” of a bare majority of this Court – we move one step closer to being reminded of our impotence.¹²⁵

Scalia reads Hamilton, correctly, as observing in passing – Hamilton is really quite casual and matter-of-fact about it – that the judiciary has no capacity to achieve usurpations of power *because the executive possesses the province of and responsibility over execution of the judiciary’s judgments*. Hamilton is explicit: judicial judgments ultimately depend for their “efficacy” on the cooperation of the “executive arm.” The implication is understated but undeniable: such cooperation might be withheld. The further implication is that such executive refusal to enforce judgments is a natural and entirely appropriate consequence of separate powers and functions: the executive might *legitimately* decline to execute judgments – withhold the support of executive “Force”¹²⁶ – where the judiciary in fact had wrongfully exercised “Will” rather than “merely judgment.”¹²⁷ Hamilton repeats the point in *The Federalist No. 81* – right before discussing the propriety of impeachment of judges as a “complete security” against

¹²⁵ *Obergefell*, 135 S. Ct. at 2627 (J., Scalia) (dissenting) (footnote citing FEDERALIST No. 78 omitted).

¹²⁶ Throughout *The Federalist*, including *No. 78*, Hamilton regularly refers to the executive as embodying or possessing the “force” or “sword” of the political community.

¹²⁷ In this respect, it is notable – especially in light of Justice Scalia’s dramatic ending quotation from *The Federalist No. 78* in his *Obergefell* dissent – that the other dissenters in *Obergefell* characterized the majority’s decision in precisely the terms of “Will” rather than “judgment.” See 135 S.Ct. at 2612 (Roberts, C.J.) (dissenting) (“The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent.”); *id.* at 2611 (quoting FEDERALIST No. 78 explicitly for this phrase).

“a series of usurpations” by judges – when he alludes again to the “comparative weakness” of the judiciary and its “total incapacity to support its usurpations by force.”¹²⁸

In the larger context of the New York ratification-debate pamphlet war of words with the Anti-Federalist writer “Brutus” of which *The Federalist* was a part, and to which the papers on the judiciary are essentially a systematic refutation, Hamilton’s meaning is unmistakable. Brutus had been a particular critic of the judicial power created by the Constitution, arguing that the “supreme court under this constitution” would be “exalted above all other power in the government, and subject to no control.” There would be “no power above them that can control their decisions, or correct their errors. There is no authority that can remove them from office for any errors or want of capacity, or lower their salaries, and in many cases their power is superior to that of the legislature,” Brutus charged.¹²⁹

Hamilton artfully referred to the last part of Brutus’s charge in *The Federalist No. 78* as resting on confusion about the nature of what we now call “judicial review.”¹³⁰ He defended the propriety of salary guarantees and life tenure explicitly in the same paper. But Hamilton denied – slapped away with the back of his hand – the idea that the judiciary’s decisions were uncontrollable in any fashion by any other authority: courts could properly exercise only “judgment” and “must ultimately depend upon the aid of the executive arm for the efficacy” of such judgments. Indeed, *The Federalist No. 81* quotes directly and proceeds to tackle head-on Brutus’s assertion that “the errors and

¹²⁸ FEDERALIST No. 81, at 453.

¹²⁹ See ESSAYS OF BRUTUS XV, *supra* note 32, at 437–39.

¹³⁰ “Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power.” FEDERALIST No. 78, at 438. This is a more or less direct response to Brutus, see 2 HERMAN J. STORING, THE COMPLETE ANTI-FEDERALIST 440 (ESSAYS OF BRUTUS XV, *supra* note 32) (“The power of this court is in many cases superior to that of the legislature.”)

usurpations of the Supreme Court of the United States will be uncontrollable and remediless,” scoffing that the claim “upon examination, will be found to be made up altogether of false reasoning upon misconceived fact.”¹³¹

It seems plain that Hamilton meant what we said. The executive might properly deny effect to a purported exercise of judicial authority consisting of improper political will rather than legitimate legal judgment, by withholding enforcement to such a decision. In such fashion, the executive could, *contra* Brutus, exercise a power of control, checking judicial usurpation, just as Congress could (again *contra* Brutus) impeach judges for usurpation or abuse of judicial power.¹³²

The case for executive power to decline to execute unconstitutional, illegitimate decisions of the judiciary is much more extensive and compelling. It rests on the text of the Constitution; the logic of its structure of separation of powers; the fundamental premise of *constitutional* supremacy (as opposed to *judicial* supremacy) reflected in Article VI’s Supreme Law Clause; the reinforcing inference from the Oath Clause of Article VI (and the specific Presidential Oath Clause); the careful reasoning supporting the argument for judicial review specifically and constitutional legal review generally, as set forth both in *The Federalist No. 78* and in *Marbury v. Madison*; the surprising consistency of statements by prominent earlier framers and defenders of the Constitution; and the utter (and surprising) paucity of textual and historical support for any claim of judicial supremacy, even as to judgments, in the Constitution or in contemporaneous evidence of its original understanding.

¹³¹ FEDERALIST No. 81, at 451 (quoting ESSAYS OF BRUTUS XV, *supra* note 32).

¹³² Brutus had argued that Supreme Court justices would be impeachable and removable “only for crimes.” *Id.* at 440.

I have made that case, at exhaustive length, in other writing.¹³³ The Myth of Judicial Supremacy is exactly that – a myth. As a general stance, the proposition that the other branches of government are bound, within the sphere of their own powers, to abide by and adhere to even the judiciary’s *erroneous* interpretations of the Constitution – the stance of judicial supremacy – is indefensible. Literally nothing in the text of the Constitution supports such a conclusion,

¹³³ For the most complete version of the argument, assembling both textual evidence, inferences from the framers’ structural postulates, and historical evidence of original meaning, and applying the argument to an array of circumstances (including the President’s power to decline to execute judicial judgments he concludes are not consistent with the Constitution), see Paulsen, *Most Dangerous Branch*, *supra* note 3. For a further defense, and response to objections and inquiries, see Michael Stokes Paulsen, *Protestantism and Comparative Competence: A Reply to Professors Levinson and Eisgruber*, 83 GEO. L.J. 385 (1994). I elaborate and reprise the argument, specifically addressing assorted judicial claims of judicial supremacy and elaborating on the structural and historical arguments, in Paulsen, *Nixon Now*, *supra* note 21, at 1345–68 (1999). For an earlier argument that the claim of judicial supremacy is either correct in *all* of its applications or in *none* of them – that the logic of the claim requires proceeding all the way down one or the other slippery slope and that there is no intellectually defensible middle ground – see Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993). See also *id.* at 105–06 (demonstrating that the “limited judicial supremacy” position of the binding supremacy on other branches of judicial *judgments* in specific cases, ultimately collapses into complete judicial supremacy at the option of the judiciary, in a fashion inconsistent with the claimed limitation). For an argument that the premises, logic, and analysis of *Marbury v. Madison* support a claim of complete interpretive independence and parity among the branches of the national government and decisively refute the myth of judicial supremacy for which the case is sometimes wrongly invoked, see Paulsen, *Irrepressible Myth*, *supra* note 3; see *id.* at 2725–27 (concluding that the logic of *Marbury* requires the conclusion that “the President may, indeed must, refuse to execute or carry out a decision of the judiciary that exceeds the limits the Constitution has imposed on that branch.”). See also Paulsen, *Lincoln and Judicial Authority*, *supra* note 21 (discussing the development of President Abraham Lincoln’s position of the complete interpretive parity of the executive branch, including a power to decline to execute unlawful judgments of the judiciary); cf. Michael Stokes Paulsen, *The Constitution of Necessity*, *supra* note 20, at 1261–62 (discussing the President’s independent non-delegable duty of faithful constitutional interpretation and preservation, as supported by the Presidential Oath Clause).

the logic of separation of powers decisively refutes it, and the framers uniformly denied it. As I have summarized the case elsewhere:

No provision of the text confers supremacy on the judiciary. The courts possess the “judicial power” to decide “cases” and “controversies,” including cases arising under the Constitution, but nothing in history, logic, or the intrinsic meaning of any of these terms of Article III implies judicial supremacy and none of the Constitution’s defenders and advocates ever suggested as much. No prominent framer, advocate, or defender of the Constitution – indeed, no obscure one, as far as I know – at any time during the framing, ratification, or early implementation of the Constitution *ever* embraced or endorsed the notion that the Constitution provides for judicial supremacy over the other branches in constitutional interpretation. Again, quite the opposite is true. All prominent public defenses of the Constitution at the time of its adoption are explicit in denying the notion of judicial supremacy. The only contrary statements during the ratification era appear in writings of the Constitution’s *opponents*. The first early-implementation era statements to the contrary appear a dozen years later, in the form of northern state attacks on the legitimacy of the Virginia and Kentucky resolves. The first prominent scholarly assertion of judicial supremacy over the other branches appears in Justice Joseph Story’s *Commentaries on the Constitution of the United States*, in 1833. Its first appearance in an important opinion by a Supreme Court Justice, in an actual case or controversy presenting the issue, is not until Chief Justice Taney’s opinion (as circuit justice) in *Ex parte Merryman*, in 1861. Judicial supremacy is simply not an originalist position. It is consistent with none of the evidence we have of the original meaning of the Constitution.

Nor is judicial supremacy fairly deducible from the constitutional structure of separation of powers Quite the reverse, judicial supremacy is irreconcilable with the structural postulates of the Constitution: separation of powers and the coordinacy and autonomy of the three branches. The fundamental premise of the Constitution's separation of powers into three great Departments is that they are all independent of and co-equal with each other. None has a superordinate power over any of the others – that is, a preemptory constitutional power to tell another branch what it must do or must not do. The intersection and interaction of the three Departments' respective powers provides the means for mutual checking of one another; but they are checks only, not trumps. The Constitution gives no branch, including the judiciary, an ultimate trump power over the others.

The framers could scarcely have been more clear on this score. The most succinct expression of their view comes in *The Federalist No. 49's* discussion of separation of powers: “The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.” That is a sweeping, categorical rejection of one-branch interpretive supremacy. It necessarily includes a rejection of the idea of judicial supremacy over the other branches (a position reinforced by *The Federalist No. 78's* discussion of judicial review . . .).¹³⁴

A few commentators have attempted to carve out a *limited* sphere of judicial supremacy – an exception to the coordinacy rule – in the

¹³⁴ Paulsen, *Nixon Now*, *supra* note 21, at 1349–51 (footnotes and citations omitted).

form of judicial supremacy *as to judgments in specific cases only*, and only *when rendered by a court with proper jurisdiction*. On this view, the other branches of government need not adhere to judicial precedents or opinions as a general proposition. However, the executive must abide by and enforce the specific judgments rendered by courts in matters falling within their jurisdiction. This position has been well argued in an excellent and insightful article by Professor Will Baude (in his pre-academic days).¹³⁵

There is a certain amount of historical evidence to support this view, at least as a general proposition describing usual and customary practice, and Baude marshals the evidence effectively.¹³⁶ Moreover, the position has enormous initial intuitive appeal: What use

¹³⁵ See Baude, *supra* note 3. I am honored to have been the inspiration for, and the targeted villain of, Baude's fine piece. Baude's stance is echoed and embraced in an excellent new book on presidential constitutional power by Professor Sai Prakash. SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 268–75 (2015). Baude and Prakash rely on much the same evidence and analysis.

¹³⁶ Some of Baude's (and Prakash's) historical evidence is of debatable probative value or weight, but I will for the most part not engage the debate at that level. On one point, however, I think Baude (and Prakash) severely over-read James Wilson's 1790's *Lectures on Law* (which we both agree is important early commentary that reflects the views of a sophisticated jurist, framer, and early Supreme Court justice, even if it is not direct "legislative history" as to the meaning of the Constitution's language). Baude quotes Wilson in this fashion: "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." Baude, *supra* note 3, at 1815, quoting 1 JAMES WILSON, *OF GOVERNMENT* (1790), reprinted in *COLLECTED WORKS OF JAMES WILSON* 689, 703 (Kermit L. Hall & Mark David Hall eds., 2007). Baude then remarks: "Ministerial powers, then as now, were non-discretionary. This meant that the Executive was required to execute judgments whether he liked them or not." *Id.* at 1815 (emphasis added). Not quite: The full context makes clear that Wilson was *distinguishing between the spheres* of power of the executive branch and the judicial branch, and observing that execution of a judicial judgment fell within the *executive's sphere* and *not* the judiciary's. Consider the two sentences preceding the excerpt Baude quotes, and the sentence following that excerpt. Here's the whole:

The third great division of the powers of government is the judicial authority. [Wilson has just completed his discussion of executive power.] It is

would courts be if the executive could, in a given case, decline to execute their judgments? Wouldn't they essentially be toothless advisory bodies?¹³⁷

sometimes considered as a branch of the executive power; but inaccurately. 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. The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties interested in them.

Wilson, *supra* note 136, at 703 (emphasis added). In context, the quotation as easily supports the reading that the power of executing judgments is executive, not judicial – and that something more must be done before a judgment is executed. The functions are distinct. Execution is a separate step, falling within the executive's duties and powers, not an immediate consequence of judicial decision and not an aspect of judicial authority, which consists of the more commonplace role of applying the law to concrete disputes. The word "ministerial," in this context, as likely bears the meaning "within the sphere of executive, not judicial power" as "required automatic duty." (Both were accepted meanings of the term in late eighteenth century usage.) Read in its entirety, the Wilson quotation seems very similar to Hamilton's observation in *The Federalist No. 78* that the judiciary "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." (Prakash tracks Baude's argument exactly, see Prakash, *supra* note 135, at 271 (quoting Baude's quotation of Wilson)).

Baude then quotes a much different section of Wilson's lectures for the proposition that *sheriffs* had the duty to execute "process issuing from the courts of justice" without questioning its validity, the sheriff being permitted only to "judge, at his peril, whether the court, from which the process issued, has or has not jurisdiction of the cause." Baude, *supra* note 3, at 1815 (quoting 2 JAMES WILSON, *THE SUBJECT CONTINUED: OF SHERIFFS AND CORONERS* 1012, 1015 (1790), reprinted in *COLLECTED WORKS OF JAMES WILSON* (Kermit L. Hall & Mark David Hall eds., 2007)). Wilson was here referring to the common law office of sheriff and the office as it had come to exist under Pennsylvania state law. The statement strikes me as having no probative value with respect to the federal executive power generally, and it is not even clear that it applies to anything other than literally the service and execution of formal common law judicial process.

¹³⁷ I have addressed these understandable concerns in prior writing. Paulsen, *The Merryman Power*, *supra* note 133, at 103–04 n.74 (responding to an argument of this kind, and observing that the framers regarded the power of *independent judgment* as meaningful in its own right but acknowledged with Montesquieu that the judicial power was the "weakest" of the three branches' powers, and forthrightly conceded that this was all the power the judicial branch rightfully possessed); Paulsen, *Nixon*

Ultimately, however, the supremacy-of-judgments-only view collapses into either the pure judicial supremacist position or the executive-review-of-judgments position. It merely relocates the core question to a slightly different point. Baude's own position demonstrates the problem. He concedes as part of his thesis that judicial judgments rendered *without jurisdiction* may – indeed must – be refused execution by the President: “Just as the President must treat unconstitutional laws as if they were no law at all, he must treat un-judicial [a terrific new word, I think!] judgments as if they were no judgment at all.”¹³⁸ And then, in trying to blunt the force of Hamilton's remarks in *The Federalist Number 78*, Baude writes:

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. 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 lat-

Now, *supra* note 21, at 1355–56 n.66 (responding to the argument that independent executive constitutional review of judicial judgments would render all judicial opinions unconstitutional “advisory opinions” and would render the judiciary “ciphers”).

Baude develops the intuition (that executive review would render judicial decision pointless) by referring to executive review as a type of “appeal” from a judicial decision (Baude, *supra* note 3, at 1810) or an executive power to “re-decide the case” (*Id.* at 1812). But these are simply misleading pejorative labels that obscure a vital separation-of-powers insight: the actions and decisions of one branch, within its sphere, are not binding on the actions and decisions of another branch, *within its sphere*. The executive does not act as an appellate court re-deciding a judicial case; the executive acts as an *independent branch* exercising co-equal and independent interpretive power in carrying out *the executive's* constitutional duties to take care that the laws are faithfully executive and to preserve, protect, and defend the Constitution as supreme law.

¹³⁸ Baude, *supra* note 3, at 1833.

ter. 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.¹³⁹

This gives away the game. (It also under-reads Hamilton's statement considerably; but I'll let that point pass for present purposes.) Here's the problem: *Who decides whether a particular judgment falls within the scope of judicial "jurisdiction"?* The courts? If so, we are back to pure, unadulterated judicial supremacy. (Baude recognizes the problem with this: "Nonetheless, something does seem constitutionally fishy about letting courts finally resolve their own jurisdiction in the very case where that jurisdiction is at issue."¹⁴⁰) The executive? If so, we are back to the power of executive review of judgments, at least as to questions of "jurisdiction."¹⁴¹

¹³⁹ *Id.* at 1834.

¹⁴⁰ Baude's article toys with various "recursive regime" scenarios including letting either a second court resolve the question of jurisdiction or allowing the executive's determination of judicial jurisdiction "(but only jurisdiction)" to be final. *Id.* at 1848-49 & n.230.

¹⁴¹ I have made this argument before. In Paulsen, *The Merryman Power*, *supra* note 133, I argued that the judicial-supremacy-as-to-judgments-exception to fully coordinate executive review was a "false resolution" - that it is "analytically incoherent in much the same way that the judicial-supremacy-with-exceptions resolution is incoherent." *Id.* at 103-04.

Acceptance of the exception, on its own terms, tends to destroy the analytic premises of the general rule of executive branch autonomy. If the President must honor judgments as law of the land, it follows that he should be under a similar obligation to honor them as precedents - as *law* - in like cases, unless and until they are judicially overruled. Indeed, he should follow the rule announced by the case in *all* his actions, including the pardon and the veto. Failure to do so would be to disavow the character of the judicial judgment as law (or, again, to be a Holmesian bad man). The theoretical power of the courts to have the last word any time they assert it means that the executive acts in bad faith by not according "the law" as declared by courts the same generality of application as statutory law.

There's more: What all might "jurisdiction" embrace, on this view (and who has power to decide *that* question)? Does "jurisdiction" embrace all sound doctrines concerning the proper limitation of federal courts' authority under Article III? Are those limitations confined to "justiciability" matters like the "case or controversy" requirement, standing, ripeness, mootness, and the political question doctrine (whatever that might mean), or do they embrace all Article III limitations on the exercise of federal judicial power? Are those limitations confined to *judicially developed* and recognized jurisdictional doctrines? And while we're at it, might not one reasonably question the basis for the distinction between judicial judgments that are *ultra vires* on jurisdictional (or, more generally, "nonjusticiability") grounds and judicial judgments that are *ultra vires* - in excess of legitimate judicial power - for some other reason?

As I have written previously:

Perhaps (it could be argued in response [to my position]), the executive must honor and enforce only those court judgments rendered in matters properly within the judiciary's sphere, actual "cases or controversies" within the meaning of Article III. Once again, this only relocates the problem. Who gets to decide what is a proper "case" or "controversy" such that a judicial decree rendered therein must be obeyed regardless of the result? If the courts get to decide, then we are back where we started, with the finality-of-judgments exception swallowing the some-sphere-of-autonomy rule. If the Executive gets to decide, he is asserting a power to refuse to obey and execute a certain class of (in his view) erroneous

Moreover, if the President does not conform his conduct to judicially-declared law in the form of precedents, the judiciary theoretically can order him to do so.
Id. at 104.

judicial decisions – erroneous decisions concerning justiciability. This is simply a *limited* version of the *Merryman* power. Call it “*Merryman Lite*.” But, if the President has the right to refuse to enforce some judgments on the ground that they were improperly rendered, why not others? There is no sound reason to suppose that the President has any great power to refuse to execute judgments he thinks erroneous on justiciability grounds than he does to refuse to execute judgments he thinks erroneous on other legal grounds.¹⁴²

And while we’re at it: Who decides the proper scope of the judiciary’s “judgment”? Is that a matter of “jurisdiction” – the scope of a court’s legitimate authority – or is it something else? Who decides *that*? If the executive must enforce a *judgment* rendered by a court with jurisdiction, but is otherwise not bound in its actions by judicial opinions, what is to keep a court from deciding, and making part of its “judgment,” that the executive must enforce the judiciary’s understanding of the law generally, in like cases and in all of the political branches’ other conduct, whether judicially reviewed or not? (And isn’t this after all what the Supreme Court purported to do in *Cooper v. Aaron*, and has repeated with fair consistency ever since?)¹⁴³

One is forced, eventually, down one slippery slope or another. The duty to enforce judicial “judgments” supplies no ledge or even much of a toehold against the inevitable avalanche of logic. The

¹⁴² Paulsen, *The Merryman Power*, *supra* note 133, at 105.

¹⁴³ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (observing that Article VI makes the Constitution the “supreme Law of the Land” but then going on to claim that *Marbury v. Madison* established the proposition “that the federal judiciary is supreme in the exposition of the law of the Constitution” and that “that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system”). The Court has then repeated this assertion innumerable times. For a partial list, see Paulsen, *Most Dangerous Branch*, *supra* note 3, at 225 n.18. For a refutation of the proposition that *Marbury* establishes any such proposition, see Paulsen, *Irrepressible Myth*, *supra* note 3.

“judgment supremacy” position, with the slightest push, slides straightaway into complete judicial supremacy. Or, if it doesn’t, the only principled conclusion is that the President retains the ultimate power to check the Court by refusing to carry into execution judicial judgments that he in good faith determines to be *beyond the scope of the judiciary’s legitimate constitutional authority* – exactly as Hamilton appears to have said, in the passage of *The Federalist No. 78* quoted at the end of Justice Scalia’s *Obergefell* dissent.

This is a serious, potent, and in certain respects dangerous check the executive possesses, and a strong argument can be made for reserving it for instances of flagrant judicial lawlessness.¹⁴⁴ But it is a constitutional check that one must labor hard to deny.

In his *Obergefell* dissent, Justice Scalia added his own amendment to Hamilton’s observation. The judiciary ultimately must depend “upon the aid of the executive arm” – *and the States*, Scalia interjected – “even for the efficacy of its judgments.” May officials of state and local governments similarly resist enforcement of specific Supreme Court judgments on the basis of their independent judgment that the Court’s decision is contrary to the Constitution?

This is an issue as old, at least, as the controversies over the Virginia and Kentucky resolutions resisting the Alien & Sedition Acts passed during the administration of President John Adams. It presents issues and difficulties going beyond those of presidential non-execution of judicial judgments on constitutional grounds.¹⁴⁵ And

¹⁴⁴ Paulsen, *Most Dangerous Branch*, *supra* note 3, at 331–42 (discussing various principles of possible “executive restraint” in exercise of the power of executive constitutional review of actions of the judicial branch).

¹⁴⁵ I have tentatively explored those issues in other writing. Paulsen, *Irrepressible Myth*, *supra* note 3, at 2734–38; *see also* Paulsen, *The Civil War as Constitutional Interpretation*, *supra* note 7, at 703–15 (reviewing DANIEL FARBER, *LINCOLN’S CONSTITUTION* (2003)). For a historical analysis of the issues presented, *see* Paulsen, *THE CONSTITUTION: AN INTRODUCTION*, *supra* note 11, at 133–37, 143–44.

the issue presented itself, in the wake of *Obergefell*, almost immediately in the form of resistance by state government officials to implementation of the Court's decision in parallel cases.¹⁴⁶ A discussion of the doctrines of state "interposition" and "nullification" would be an article all its own – and this one has gone on long enough. Suffice it to say that the questions of legitimate *state* checks on national judicial power present yet further, intriguing, difficult, and not entirely implausible avenues for inquiry as to means of constraining a perceived runaway federal judiciary.

So too a full discussion of the power to lower court judges – federal and state – to "check" the Supreme Court by resisting compliance with the Court's errant precedents, and perhaps even its specific decrees in specific cases, presents further, fascinating, and more far-reaching questions yet.¹⁴⁷ Suffice it to say here that such a position,

¹⁴⁶ See, e.g., Eugene Volokh, *When Does Your Religion Legally Excuse You from Doing Part of Your Job?*, Wash. POST. (Sept. 4, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/04/when-does-your-religion-legally-excuse-you-from-doing-part-of-your-job/>.

¹⁴⁷ Some years ago, I addressed these questions in the specific context of lower court defiance of the Court's illegitimate and indefensible decision in *Roe v. Wade*. Paulsen, *Accusing Justice*, *supra* note 16, at 82–88. My position in that essay was that lower court judges' oaths to the Constitution, and independent judicial commission, requires them to decide cases within their jurisdiction in accordance with the Constitution and not in conformity with Supreme Court decisions that seriously and harmfully depart from the Constitution; and that the structure and logic of Article III do not command a contrary result – lower federal and state courts are "inferior" in the sense that they (often) can be reversed, but not *subordinate* in the sense that they must decide cases and issue orders contrary to their first-best judgment as to legal propriety, out of a supposed duty to comply even with the wrongful directives of superiors. I continue to believe that this position is correct, and if so, is fully generalizable to any Supreme Court decision that cannot be reconciled with faithful performance by that Court of the judicial role to decide cases consistently with the Constitution. I hope to return to this argument in future writing. (I have briefly sketched some of the relevant arguments above, in connection with the "jurisdiction-stripping" power of Congress to remove certain matters from the Supreme Court's appellate jurisdiction, leaving final decision in lower federal or state courts. See *supra*, at 54–57; see also *supra*, at 24–25).

while universally rejected by today's legal community (and, of course, emphatically rejected by the self-interested Supreme Court), has much to commend it as a matter of theoretical propriety: If the Supreme Court has rendered an indefensible, illegitimate decision, the obligation of lower court judges to follow it or even enforce it in a particular case is hardly self-evident as a matter of first principle. The duty of *all* judges who swear an oath to support the Constitution is a duty to the Constitution, not to faithless departures from it by other courts. The oath of loyalty is to the Constitution, not the Court; the "supreme Law of the Land" is the Constitution, not the Court; and the structure of Article III permits – where so allowed by Congress – *reversal* of lower court decisions by successively higher courts but does not require lower courts themselves to rule in a fashion contrary to law. Lower courts can and should function to some extent as "checks" on a runaway Supreme Court, and have so served an error-correction, forced-reconsideration role in important controversies in the past.¹⁴⁸

VII. CONCLUSION

A long journey deserves a short conclusion, but one that consists of more than a simple rehash of the proposals and arguments made along the way. As this article has shown, there are many legitimate, constitutional means for checking the Court, and I have explained and defended the propriety of essentially all of them. Arguments for some or all of them have been made at many times in our constitutional history, corresponding to constitutional crises of different ages, precipitated by acts of the judiciary in serious actual or (rightly

¹⁴⁸ See Paulsen, *Accusing Justice*, *supra* note 16, at 85–86 & n.142 (highlighting important cases in which lower court "underruling" of Supreme Court decisions produced important correction of Supreme Court errors – including vindicated lower-court repudiations of *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) and *Plessy v. Ferguson*, 163 U.S. 537 (1896).

or wrongly) perceived conflict with the Constitution – from the Alien and Sedition Act cases to *Dred Scott* to Reconstruction to the New Deal to *Roe v. Wade* to *Obergefell*, with many other instances in between.

A somewhat different question is the question of political propriety and judgment. Does the situation, at any given time and circumstance, warrant the use of some or all of these checks on the Court? Is the degree and seriousness of judicial departure from the law such as to call forth the use of such checks?

Seemingly unique to this moment in the nation's constitutional history is the situation of a large minority of Supreme Court justices themselves apparently calling for – inviting, welcoming – such checks. As noted at the outset of this article, the four dissenters in *Obergefell* were unequivocal in their condemnation not only of the incorrectness of the majority's decision, but its fundamental *illegitimacy* and *lawlessness*. The Court is not just wrong, the dissenters insisted, but out of control – in effect a renegade institution in need of being reined in by the political branches. Chief Justice Roberts, recall, labeled the majority's decision “an act of will, not legal judgment” – a decision so extremely wrong that it calls into question the *legitimacy* of the Court. Scalia's dissent started by referring to “this Court's threat to American democracy” and ended with an allusion to the President's power to decline to execute lawless judgments of the Supreme Court – judgments predicated on will rather than legitimate exercise of judicial authority. A Supreme Court justice seemingly calling for resistance to a Supreme Court constitutional decision! Justice Thomas called the majority's decision “at odds not only with the Constitution, but with the principles upon which our Nation was built” and joined each of the other dissents – including Scalia's.

And finally, Justice Alito, as quoted at the very outset of this article, observed that the Court was incapable of checking itself: “the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate.” The implication is clear: Judicial abuse of the Constitution need not and should be tolerated by the other branches

of the national government, who likewise swear an oath to uphold the Constitution; and likewise should not be tolerated by the people, to whom those with power are answerable.

All of this is extraordinary – arguably more extraordinary even than the breathtaking decision of the majority in *Obergefell* itself. The four *Obergefell* dissenters have issued a call to arms – a dramatic invitation to the political branches, and to the public, to check the Court as an institution.

It has not been my purpose in this article to make such a call to arms myself, or to join in any rush to the barricades. It has instead been my purpose simply to lay out the full arsenal of weapons constitutionally available for checking the Court, and to defend the propriety of their use for occasions that may rightly call for it. The weapons exist. They are constitutionally legitimate. And they form an integral part of our constitutional system of separation of powers. It is time to be candid and clear in embracing their constitutional propriety.