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THE *MERRYMAN* POWER AND THE DILEMMA OF AUTONOMOUS EXECUTIVE BRANCH INTERPRETATION

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INTRODUCTION

Most everybody today concedes some degree of executive branch autonomy in the interpretation of federal law. The examples most frequently given of areas of executive interpretive autonomy involve situations where the President interprets the law incident to the exercise of those constitutional powers that are thought to be exclusively presidential (and thus unreviewable by the courts), such as the pardon and the veto.[1] The President may grant a pardon (it is generally conceded) on legal grounds rejected by the courts. For example, he may issue a pardon based on his opinion that a conviction was unconstitutional, notwithstanding the judiciary's contrary conclusion as to the constitutional propriety of the conviction. Presumably, the President could base his pardon on a disagreement as to statutory interpretation as well; that is, he may believe a criminal conviction to be founded on an improper reading of some statute. It is also widely recognized that the President may veto a bill for any reason or no reason at all, including constitutional reasons previously rejected by the Supreme Court. To generalize: the executive branch is conceded the power to interpret the law autonomously—that is, independently of the constitutional views of Congress or the courts—in any area where its action

* Associate Professor of Law, University of Minnesota Law School. This article is a revision of a paper presented at Benjamin N. Cardozo School of Law's symposium on executive branch interpretation of the law, November 15, 1992. I would like to thank Robert Delahunty for his countless insights and suggestions. I would also like to thank John McGinnis, Dan Farber, Dan Troy, Frank Easterbrook, John Harrison, Tom Merrill, David Strauss, and Geoffrey Miller for their comments on an earlier version of this paper. Of course, the ideas and errors remain the responsibility of the author.

[1] *See generally, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-4, 35-36 (2d ed. 1988) ("[S]o long as [other governmental actors] do not involve themselves in justiciable controversies coming within the subject-matter limits of Article III, the Supreme Court's view of the Constitution cannot be brought to bear, and those other governmental actors will be free to interpret and apply the Constitution as they deem best.") (citing examples of pardons, vetoes, and legislators' votes for legislation); GERALD GUNTHER, CONSTITUTIONAL LAW 21-23 (12th ed. 1991) (citing examples of pardons and vetoes); PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 91 (3d ed. 1992) (vetoes); *id.* at 1550-52 (pardons and vetoes). *See also* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 905 (1990) ("No one would take seriously an assertion that the President may not interpret federal law.").

cannot become the subject of an authentic "case or controversy" and in any area where the courts have yet to speak on the question.

At the same time, most everybody today concedes a degree of executive branch subordinacy in the interpretation of federal law. The classic example here is that the President is expected to enforce the specific judgments of the Supreme Court (and unappealed final judgments of lower courts) and not to exercise autonomous legal review of the correctness of those judgments as a prerequisite to executing them. The courts are understood to be the final authority on legal interpretation, at least on any case that comes before them.[2]

Between these poles—pardons and vetoes on the one side and enforcement of Supreme Court judgments on the other—there is considerable disagreement as to the proper scope of executive branch interpretive autonomy and executive branch interpretive subordinacy. These issues form some of today's most important theoretical and actual separation-of-powers battlegrounds: the controversy over executive branch "nonacquiescence" in court holdings as binding authority in any case other than for the parties before the court (including intracircuit nonacquiescence in Court of Appeals rulings)[3] and executive branch refusal to execute assertedly unconstitutional congressional statutes in the absence of a judicial ruling on their constitutionality,[4] to identify some of the most prominent disputes of

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[2] Even the most ardent supporters of executive branch interpretive autonomy concede as much. *See* Easterbrook, *supra* note 1, at 926-27; Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 988-89 (1987); *see also* Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46 (1993).

[3] *Compare* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989) (agencies need not always follow the rulings of their circuit) *with* Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990) (agencies must adhere to decisions of lower federal courts to insure equitable treatment of all parties); *see also* Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831 (1990); Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339 (1991); Joshua I. Schwartz, *Nonacquiescence*, Crowell v. Benson, *and Administrative Adjudication*, 77 GEO. L.J. 1815, 1904 (1989) (proposing "regular acquiescence" in intracircuit decisions, and "absolute acquiescence" to Supreme Court decisions); Williams W. Buzbee, Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582 (1985). A number of courts have criticized the practice of executive nonacquiescence in lower court precedent. *See, e.g.*, Johnson v. United States R.R. Retirement Bd., 969 F.2d 1082, 1083 (D.C. Cir. 1992); *cf.* Lopez v. Heckler, 725 F.2d 1489 (9th Cir.), *vacated on other grounds*, 469 U.S. 1082 (1984); Stieberger v. Heckler, 615 F. Supp. 1315 (S.D.N.Y. 1985), *prelim. inj. vacated sub nom.*, Stieberger v. Bowen, 801 F.2d 29 (2d Cir. 1986).

[4] *See* Easterbrook, *supra* note 1, at 924 (rationale of *Marbury v. Madison* supports the conclusion that the President may decline to enforce a statute he concludes is unconstitutional). *Compare* Freytag v. Comm'r, 111 S. Ct. 2631, 2653 (1991) (Scalia, J., concurring in part and concurring in the judgment) (noting Easterbrook position with apparent approval)

the day. But there is wide agreement on the boundaries of such disputes: there is a measure of unchallenged executive autonomy and a measure of unchallenged executive subordinacy.

My contention in this paper is that this prevailing consensus is analytically incoherent. The premises of executive branch interpretive autonomy and of judicial supremacy are, in principle, irreconcilable. Either the executive branch possesses the prerogative of autonomous legal interpretation within the sphere of its powers or it is subordinate to the judiciary; the two propositions cannot peacefully coexist. The premises supporting the two polar positions pose a sharp dilemma, forcing the principled interpreter down one slippery slope or the other. In the one case, one series of conclusions inexorably follows from the premise. In the other case, a different series of conclusions necessarily follows—irreconcilable with the first set. One or the other of the polar-case concessions making up the prevailing consensus must be wrong in principle, according to the premises that make the other polar-case *right* in principle. One or the other situation—and perhaps both—must represent not a principled interpretation of the constitutional question of who has the power of legal interpretation, but a pure legal-realist concession made on grounds of pragmatism and longstanding practice. In short, when the two contending positions come eyeball to eyeball, *both* sides blink.

It is not my purpose here to say which position is correct (though I do have my leanings). Rather, my purpose in this paper is to increase the level of cognitive dissonance on both sides—and especially that of those persons in the mushy middle that constitutes the prevailing consensus—with respect to the confidence they have in their premises or in their conclusions. My vehicle for doing so will be to look at perhaps the most famous and extreme example of autonomous executive branch interpretation of the law in our constitutional history—President Abraham Lincoln's refusal to honor judicial process, in the form of a writ of habeas corpus issued by Chief Justice Roger Taney in the case of *Ex parte Merryman* in 1861—and to pose the question of whether Lincoln's action was constitutionally proper.[5]

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with Lear Siegler, Inc., Energy Prod. Div. v. Lehman, 842 F.2d 1102, 1124-25 (9th Cir. 1988) (Executive may not decline to enforce a statute he believes is unconstitutional), *vacated in immaterial part*, 893 F.2d 205 (9th Cir. 1989) (en banc) *and* Ameron, Inc. v. United States Army Corps of Engineers, 787 F.2d 875 (3d Cir.) (same), *modified*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988). *See also* Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 395-99 (1987) (reaching conclusion similar to that of *Lear Siegler* and *Ameron* courts).

[5] 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). *Merryman* is the most famous example of presidential refusal to enforce a Supreme Court judgment, but it is not the only one. President Andrew Jackson is reputed to have refused to enforce the Supreme Court's decision in Worces-

My thesis consists of two "if . . . then" conditionals. First, *if* Lincoln's action was improper, then so in principle are presidential pardons and vetoes predicated on constitutional grounds rejected by the Supreme Court. In such event, there is *no* genuinely autonomous sphere of executive branch interpretive power, only executive branch lawlessness beyond the courts' control or (what amounts to the same thing, viewed from a different perspective) a sphere of pseudo-autonomy tolerated as a matter of judicial grace. Alternatively, *if* pardons and vetoes on constitutional grounds inconsistent with the expressed views of the judiciary are constitutionally proper—on the theory that the independence of the executive branch from the judiciary gives it a sphere of independent interpretive power—then Lincoln was within his rightful authority in refusing to obey a judicial decree that he thought was predicated on an incorrect understanding of the Constitution. In such event, the President's power to nullify judgments—"the *Merryman* power"[6]—means that there is no such thing as judicial supremacy: the President has legitimate constitutional authority to disregard any judicial decree or precedent he chooses. But the choice is necessarily between these two extreme-sounding propositions. There is no defensible middle ground.

Part I of this essay briefly sketches the divergent premises of executive branch coordinacy and judicial branch supremacy in legal interpretation. Part II shows how these premises came into stark conflict in Chief Justice Taney's battle with President Lincoln over the suspension of the privilege of the writ of habeas corpus in the case of *Ex parte Merryman*—a paradigm case for testing the validity of these dueling premises. Part III examines and rejects several possible reconciliations of executive coordinacy and judicial supremacy. Part IV concludes by noting the importance and ongoing relevance of this interpretive dilemma for issues of federal constitutional and statutory law today.

I. DUELING PREMISES

The premise underlying autonomous executive branch interpretation is the coordinacy of the three branches of the federal government—a premise based on no less an authority than James Madison and *The Federalist* No. 49:

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ter v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (overturning state assertion of jurisdiction over the Cherokee tribe as inconsistent with federal treaty law), by declaring that "John Marshall has made his decision, now let him enforce it." *See* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 144-46 (1992) (discussing the *Worcester* incident).

[6] *Merryman*, 17 F. Cas. at 144.

> [T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived . . . . 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.[7]

The premise of coordinacy, as articulated by Madison, implies that no branch has final interpretive authority, but that each branch has interpretive authority within the sphere of its other constitutional powers; the resolution of disputed points depends on the pull-and-tug of the different branches, just as the Constitution's separation of powers in other respects works to preserve a system of checks and balances. The coordinacy principle thus implies that the executive branch—that is, the Presidency[8]—has completely independent interpretive authority within the sphere of its powers.

The coordinacy argument is the premise on which the President's authority to engage in independent constitutional (or statutory) interpretation in exercising the pardon and veto powers is grounded. As President, Thomas Jefferson pardoned all those convicted under the Federalist-backed Sedition Act of 1798, on the ground that the Act, which forbade "seditious libel" against the government (except against the Vice President—Jefferson at the time), was unconstitutional. President Jefferson's pardons came in the teeth of Federalist judicial decisions upholding the constitutionality of the Sedition Act. Jefferson later justified his pardons in a letter to Abigail Adams, whose husband John Adams had been President at the time of enactment and enforcement of the Sedition Act:

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[7] THE FEDERALIST No. 49, at 339 (James Madison) (J. Cooke ed., 1961).

[8] The executive power is vested in "*a* President." U.S. CONST. art. II, § 1, cl. 1 (emphasis supplied). I believe the President is the head of a unitary executive branch, and accordingly use the terms "the executive branch" and "the President" interchangeably for purposes of this paper. The vesting clause of Article II (especially when contrasted with the vesting clauses of Article I and Article III), the structure of Article II, and evidence of the Framers' intentions all strongly suggest a unitary executive branch. *See generally* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-68, 1175-85 (1992) (setting forth arguments supporting the concept of a unitary executive under Article II and comparing and contrasting the vesting clauses under Articles I through III). *But see* Lawrence Lessig, *Readings by Our Unitary Executive*, 15 CARDOZO L. REV. 175 (1993).

Nothing in my argument here depends on acceptance of the unitary executive premise, which I adopt here solely for purposes of ease of presentation. Even if Congress has power to vest final executive decision-making power on some subject in an executive officer other than the President, the question of that officer's independent interpretive power vis-à-vis the other branches should be precisely analogous to the argument made here with respect to the question of the President's independent interpretive power vis-à-vis the other branches.

> You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. . . . [T]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch.[9]

President Andrew Jackson employed much the same reasoning in explaining his veto of legislation rechartering the Bank of the United States. Jackson vetoed the Bank Bill on the basis of constitutional objections identical to those that had been rejected by the Supreme Court in *McCulloch v. Maryland*[10]—that Congress lacked power to create a national bank. As Jackson put it in his veto message:

> The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.[11]

Both Jefferson and Jackson grounded their actions in the right of the executive to engage in constitutional interpretation *independent* of the views of the courts—a right they found traceable to the Constitution's separation of powers and the principle of the coordinacy of the branches. A necessary corollary of this proposition is that the Supreme Court is not—or at least is not always—supreme in the interpretation of the law.

But there is a competing strand of constitutional theory. The premise underlying the finality of the Supreme Court's constitutional judgments—and the consequent obligation of the President to obey and execute them—is the supremacy of the Supreme Court in matters of law that come before it. That premise is derived from the words of Alexander Hamilton, defending the institution of judicial review in *The Federalist* No. 78: "The interpretation of the laws is the proper and peculiar province of the courts. . . . It therefore belongs to them to ascertain [the Constitution's] meaning as well as the meaning of

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9 Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* 11 THE WRITINGS OF THOMAS JEFFERSON 50-51 (Albert E. Bergh ed., 1905).

10 17 U.S. (4 Wheat.) 316 (1819).

11 ANDREW JACKSON, VETO MESSAGE (July 10, 1832), *reprinted in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 582 (James D. Richardson ed., 1896).

any particular act proceeding from the legislative body."[12] Or, as powerfully put by the great Chief Justice John Marshall in the foundational case of *Marbury v. Madison*, "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is."[13] Marshall's words have come to be understood as standing for the principle that the Supreme Court has—where it speaks—the last word. As Justice Joseph Story put it in his famous *Commentaries* on the Constitution:

> The decision then made, whether in favor or against the constitutionality of the act, by the State or by the national authority, by the legislature or by the executive, being capable, in its own nature, of being brought to the test of the Constitution, is subject to judicial revision. It is in such cases, as we conceive, that there is a final and common arbiter provided by the Constitution itself, to whose decisions all others are subordinate; and that arbiter is the supreme judicial authority of the courts of the Union.[14]

The Supreme Court has, in more recent times, put the same spin on Marshall's words from *Marbury*. In the famous case of *Cooper v. Aaron*, the Court said of *Marbury*:

> This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.[15]

The premise of judicial supremacy implies that the executive branch does *not* have complete autonomy within the sphere of its powers (which includes the execution of statutes and judgments), but *is obliged* to carry out the final decisions of the judicial branch. It is at this point that the premise of autonomous executive branch interpretation collides with the premise of the binding, authoritative nature of judicial decrees. The *Merryman* case was an example of such a collision. But few people realize how much more extensive the collision is between the logic of these two principles. *Merryman* is the tip of a large iceberg.

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12 THE FEDERALIST No. 78, at 525 (Alexander Hamilton) (J. Cooke ed., 1961).

13 5 U.S. (1 Cranch) 137, 176 (1803).

14 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 375, at 266-67 (4th ed. 1873) (footnote omitted).

15 Cooper v. Aaron, 358 U.S. 1, 18 (1958). *See also* Baker v. Carr, 369 U.S. 186, 210-11 (1962) (referring to the "responsibility of this Court as ultimate interpreter of the Constitution"); Powell v. McCormack, 395 U.S. 486, 549 (1969) ("[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution."); United States v. Nixon, 418 U.S. 683, 704 (1974) (speaking of the "responsibility of this Court as ultimate interpreter of the Constitution").

II. LINCOLN, TANEY AND *MERRYMAN*

Abraham Lincoln is probably the foremost historical figure identified with the power of the President (and of Congress) to interpret the law independently of the pronouncements of the Supreme Court, and to act on that interpretation. As a Senate candidate in 1858, Lincoln declared his opposition to the *Dred Scott* decision[16] and his refusal to be bound by it as a legislator:

> We oppose the Dred Scott decision . . . as a political rule, which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on members of Congress or to the President to favor no measure that does not actually concur with the principles of that decision. . . . We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject.[17]

Lincoln's words upon becoming President in his First Inaugural strike the same theme even more strongly:

> [T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.[18]

Not only does a judicial decision not bind the executive and the legislature in making subsequent policy, Lincoln argued, but the contrary suggestion, that the political branches must acquiesce in Supreme Court judgments as supplying the rule governing all their actions, is inconsistent with democratic self-government: "the people will have ceased to be their own rulers, having to that extent practically resigned their Government" to the judiciary. Lincoln was thus a vigorous advocate of what we today would call "nonacquiescence."

Lincoln acted on his words. As President, he directed his subordinates to grant United States patents and visas to black citizens, persons that *Dred Scott* said could not be citizens; this was an affirmative act that judicial precedent would have indicated was unlawful.[19] In

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[16] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

[17] Abraham Lincoln, Speech at Sixth Joint Debate with Stephen A. Douglas, Quincy, Ill., (Oct. 13, 1858), *in* 3 COLLECTED WORKS OF ABRAHAM LINCOLN 255 (Roy P. Basler ed., 1953) [hereinafter Lincoln, 3 COLLECTED WORKS].

[18] ABRAHAM LINCOLN, FIRST INAUGURAL ADDRESS (Mar. 4, 1861), *reprinted in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN 268 (Roy P. Basler ed., 1953) [hereinafter LINCOLN, 4 COLLECTED WORKS].

[19] 5 THE WORKS OF CHARLES SUMNER 497-98 (1872); 6 THE WORKS OF CHARLES SUMNER 144 (1872). The events are recounted in Easterbrook, *supra* note 1, at 926 and Paul L.

addition, he issued the Emancipation Proclamation, in what appears to have been a blatant violation of constitutional rights of property, under the rule of law declared by the Supreme Court in *Dred Scott*.

In asserting the prerogative to disregard "controlling" judicial precedent, Lincoln apparently drew no line between assertion of such a power in the context of the exercise of presidential functions that are, as a practical matter, not subject to judicial review (such as the granting of pardons) and those that are (such as most instances of law enforcement). He drew no line between the propriety of executive refusal to acquiesce where there was a realistic chance the Court would overrule its prior decision and where there was not. (There was precious little chance the Taney Court would overrule *Dred Scott*.) The line he drew as a Senate candidate and, at least at first, upon becoming President, was that Supreme Court decisions are law for the case, but not the law of the land. In the Senate campaign speech quoted from above, Lincoln sought to make clear that:

> [w]e do not propose that when Dred Scott has been decided to be a slave by the court, we as a mob, will decide him to be free. We do not propose that, when any other one, or one thousand, shall be decided by that court to be slaves, we will in any violent way disturb the rights of property thus settled.[20]

In *Ex parte Merryman*, Lincoln erased even that line, refusing to honor a judicial decree as binding law on the executive, even in that specific case. It is important to set the scene: It was the spring of 1861. In response to Lincoln's election, several southern states had already seceded. Secessionist activity was rampant in several other states, including the border state of Maryland, which had voted for Kentucky's Breckenridge in the presidential election and had a large

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Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041, 1053 (1987).

[20] Lincoln, 3 COLLECTED WORKS, *supra* note 17, at 255. Lincoln's statement of principles with respect to *Dred Scott* is, technically, not inconsistent with his actions in the *Merryman* case. Lincoln did not say that the President could not exercise his executive powers effectively to countermand the enforcement of a judicial decree which he believed wrong and make Dred Scott a free man. He said only that "we, as a mob" should not "in any violent way disturb the rights of property thus settled." *Id.* at 255. The distinction could be justified on the ground that the President has interpretive power incident to his governing powers, but that a "mob" does not have governing powers and so has no right to "decide [Dred Scott] to be free." *See also* LINCOLN, 4 COLLECTED WORKS, *supra* note 18, at 268. In his First Inaugural address, Lincoln conceded that judicial decisions "must be binding, in any case, *upon the parties to a suit*, as to the object of that suit," *id.* at 268 (emphasis added), but in the same breath acknowledged only that they "are also entitled to very high respect and consideration, in all parallel [sic] cases by all other departments of the government." *Id.* This statement could be read as dodging the question of whether the executive must give only "very high respect and consideration," or something more, to the question of enforcement of the judgment in a particular case.

secessionist minority.[21] The capital city, Washington D.C., was practically surrounded by confederate sympathy. President-elect Lincoln had had to sneak through Baltimore on a late-night train to Washington in late February—in his own words, "like a thief in the night"—for his inauguration in March.[22] On April 19, a Massachusetts regiment, bound for Washington to protect the endangered capital, marched through Baltimore from one railway station to another (there being no railway line through Baltimore), spurring a mob riot and the subsequent destruction of crucial railroad bridges to the east of the city to prevent the passage through Baltimore and on to Washington of more Union troops.[23] Responding to this increasing secessionist violence in Maryland, Lincoln suspended the privilege of the writ of habeas corpus in an unpublicized order to Commanding General Winfield Scott on April 27, 1861.[24] (Congress was out of session at the time.) The order authorized Scott to suspend the writ for the "public safety" "[i]f at any point on or in the vicinity of any military line, which is now or which shall be used between the City of Philadelphia and the City of Washington," Scott encountered resistance rendering it necessary to do so.[25]

Army officers began arresting a large number of suspected secessionists and imprisoning them in Fort McHenry, Baltimore. One of those arrested—almost a month later, on May 25, 1861—was John Merryman, a prominent farmer and state legislator, and a lieutenant in a secessionist cavalry unit that had burned bridges and ripped down telegraph wires.[26] Merryman's lawyer petitioned directly to Chief Justice Roger Taney, the author of the *Dred Scott* decision, for a writ of habeas corpus.[27] On May 26, Taney issued a writ directed to

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21 JAMES MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 285 (1988).

22 *Id.* at 262. An entertaining fictionalized account is presented in GORE VIDAL, LINCOLN 3-7 (1984).

23 MCPHERSON, *supra* note 21, at 285; 5 CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836-64, at 842 (1974).

24 MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 8 (1991); SWISHER, *supra* note 23, at 842.

25 NEELY, *supra* note 24, at 8. *See* MCPHERSON, *supra* note 21, at 288; SWISHER, *supra* note 23, at 843.

26 MCPHERSON, *supra* note 21, at 286-87; SWISHER, *supra* note 23, at 844-45.

27 The "Federal Cases" reporter system, and some historians, have treated the petition as directed to Taney in his capacity as presiding circuit judge. The *Merryman* case is cited as 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). *See also* MCPHERSON, *supra* note 21, at 287-88 & n.17. Swisher, however, treats the matter as addressed to the Chief Justice in chambers, not as a circuit court case. SWISHER, *supra* note 23, at 845-47. Swisher's explanation—that Merryman's counsel wished to bypass the circuit court, whose habeas writs had already been dishonored by military commanders in another case—is borne out by a close reading of *Merryman*. The petition was addressed "To the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States. . . ." 17 F. Cas. at 145. Taney explains that the petition

the commanding officer at Fort McHenry, General George Cadwalader, returnable the next day.[28] The General (appearing through a subordinate) declined to produce Merryman, citing Lincoln's order and requesting a postponement until he could receive further instructions from the President, a reasonable request under the circumstances.[29] Taney, however, would have nothing of it and instead directed that an attachment be issued against General Cadwalader for contempt, returnable the next day.[30] Service of the writ was refused at the gate to Fort McHenry, and on the next day, May 28, Taney made his ruling from the bench.[31] The Chief Justice declared that the President had no right to suspend the writ, as such power was implicitly vested in Congress by virtue of its location in Article I of the Constitution, which sets forth Congress's powers.[32] Accordingly, Merryman was "entitled to be set at liberty and discharged immediately from imprisonment."[33] Moreover, Taney ruled, General Cadwalader was in contempt. The Marshal had authority to summon the *posse comitatus* to aid him in seizing the General and bringing him before the Court, Taney said, but because such a posse would undoubtedly be met with superior force, there was no point in the effort.[34] As Taney put it in the closing paragraph of his *Merryman* opinion: "I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome."[35] Taney ended both his oral and written opinions by indicating that he would direct that the complete record of proceedings be transmitted to President Lincoln personally "in order that he might perform his constitutional duty, to enforce the laws, by securing obedience to the process of the United States."[36]

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was presented to him in Washington but that he decided to have the case heard in Baltimore. *Id.* at 147. The reason for the confusion is that opinions of Supreme Court Justices in chambers were not normally published, but that Taney had directed that his opinion be filed with the clerk of the circuit court for the district of Maryland for purposes of being transmitted to President Lincoln. *Id.* at 147, 153.

The decision to present the habeas corpus petition to Taney may not have been solely attributable to the prestige of the office of Chief Justice. Personal relationships may have played a role in the decision. Swisher notes that Merryman's father and Taney attended Dickinson College together. SWISHER, *supra* note 23, at 845.

28 *Merryman*, 17 F. Cas. at 147.

29 *Id.* at 146.

30 *Id.* at 146-47.

31 *Id.* at 147.

32 *Id.* at 148-49.

33 *Id.* at 147.

34 *Id.*

35 *Id.* at 153.

36 *Id.* at 147. The report in *Federal Cases* is not a direct quotation at this point. A newspaper report quoted Taney's words from the bench as calling on Lincoln "to perform his consti-

The underlying merits of *Merryman* are fairly subject to debate. The placement of the suspension clause is somewhat instructive, but Article I Section 9 does not itself grant the power to suspend the writ; it merely specifies limits on when that power lawfully may be exercised. Article I Section 9 is a mini-Bill of Rights against government power generally.[37] None of its provisions grants powers. The power to suspend the writ must come from somewhere else, yet no textual provision confers it. Lincoln's interpretation was at least an arguable one—that the power inheres in the executive, and necessarily so while Congress is out of session.

But the more important question framed by *Merryman* concerns not the interpretation of the writ suspension provision, but whether the Executive is bound to enforce a judicial decree that he believes is founded on an incorrect reading of the law. Was Lincoln entitled to stick to his guns once Chief Justice Taney had made his ruling? Or was he required either to comply or to seek review and reversal by the full Supreme Court—the same southern-dominated Taney Court that had decided *Dred Scott*?[38]

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tutional duty to enforce the laws. In other words, to enforce the process of this Court." SWISHER, *supra* note 23, at 847. The last two sentences of Taney's written opinion read as follows:

> I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the president of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation to "take care that the laws be faithfully executed," to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

Merryman, 17 F. Cas. at 153.

[37] *See* THE FEDERALIST No. 84, at 576 (Alexander Hamilton) (J. Cooke ed., 1961).

[38] In May of 1861—the time of the *Merryman* controversy—the Supreme Court had only six sitting justices. Justice Daniel had died in 1860 and had not been replaced. Justice McLean had died in April of 1861. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 984 (1992). Justice Campbell resigned on April 25, 1861 to join the Confederacy. SWISHER, *supra* note 23.

Five of the remaining justices—Taney of Maryland, Wayne of Georgia, Catron of Virginia, Nelson of New York, and Grier of Pennsylvania—had been members of the *Dred Scott* majority. *See id.* at 622. The sixth justice—Justice Clifford of Maine—had joined the Court in 1858. At the time of his nomination, he told President Buchanan of his firm adherence to the *Dred Scott* decision. He was a Northern Democrat of Southern sympathies. *Id.* at 733. Using *Dred Scott* as an informal barometer of sympathies on the Court, it was solidly "Southern."

Of course, one cannot predict with certainty the outcome of an appeal of Taney's *Merryman* decision to the Supreme Court merely on the basis of *Dred Scott* sympathies. Nonetheless, given Lincoln's public statements of "nonacquiescence" in *Dred Scott*, the apparent further affront to judicial authority of the *Merryman* affair, and the intrinsic weaknesses (both legal and political) of the administration's position with respect to unilateral presidential suspension of the writ of habeas corpus, one would not be optimistic about Lincoln's chances of prevailing with the 1861 Taney Court.

Taney was emphatic that the President was obliged to conform his conduct to the commands of the courts and specifically "to enforce the process of this Court."[39] Taney interpreted the Constitution not only as vesting the power to suspend the writ solely in Congress, but also as vesting in the courts the power to direct the President with respect to the execution of the laws. Taney stated:

> The only power . . . which the president possesses . . . [is] "that he shall take care that the laws shall be faithfully executed." He is not authorized to execute them himself . . . but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the constitution. It is thus made his duty to come in aid of the judicial authority . . . ; but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.[40]

To Taney, the courts had authority to define the scope of the President's duty faithfully to execute the laws (including judicial decrees) and to command the performance of that duty as understood by the courts. This was a bold assertion of judicial supremacy—arguably the first genuine assertion of judicial supremacy in the sense of the courts telling the President what he must do. Taney ventured far beyond anything Chief Justice John Marshall had said in *Marbury v. Madison*, and further even than the Supreme Court would go nearly a century later in *Cooper v. Aaron*.[41]

But Chief Justice Taney did not have the last word on the *Merryman* case. President Lincoln did. Lincoln, it should be remembered, was an astute constitutional lawyer and theorist in his

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[39] *Merryman*, 17 F. Cas. at 153.

[40] *Id.* at 149.

[41] *Marbury* can be read as asserting not judicial supremacy in constitutional interpretation, but only judicial coordinacy: The logic and thrust of Marshall's argument is that the courts are not bound by the determinations of Congress as to constitutionality because that would give Congress a practical pre-eminency over the Constitution. The same logic could be used to suggest that the *courts* should not be understood to have a practical pre-eminency. Marshall never claimed a power of judicial supremacy over the conduct of the President in connection with the President's duty to take care that the laws be faithfully executed. Indeed, the Court in *Marbury* disclaimed such a power. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169-70 (1803).

Cooper can be read (albeit much less naturally) as asserting only the supremacy of *federal* officers' interpretation of the law over *state* officers' interpretations—the situation in which the Court's decision arose. *Cooper*'s dictum seems considerably more far-reaching, however. *See* Cooper v. Aaron, 358 U.S. 1, 18-19 (1958); *see supra* text accompanying note 15. Justice Story's commentaries strongly assert the premise of judicial supremacy, but like the Court in *Cooper*, Story's discussion seems primarily directed at refuting the notion that *state* governments exercise a coordinate or superior power of legal review. *See* STORY, *supra* note 14, § 376, at 268-71.

own right. His First Inaugural address was, in part, a brilliant lawyer's brief arguing both the incorrectness of Taney's *Dred Scott* decision and the unconstitutionality of secession.[42] Lincoln did lodge an appeal (after a fashion) from Taney's *Merryman* decision, but, like his "appeal" of *Dred Scott*, it was taken to Congress and public opinion, not to the Supreme Court. He indirectly replied to Taney's *Merryman* opinion in a major speech delivered to Congress on July 4, 1861.[43] In that speech, Lincoln referred first to his secret April 27 order authorizing General-in-Chief Scott to suspend the writ.[44] He then turned, without naming him,[45] to Taney:

> [T]he legality and propriety of what has been done under it, are questioned; and the attention of the country has been called to the proposition that one who is sworn to "take care that the laws be faithfully executed," should not himself violate them. Of course, some consideration was given to the questions of power, and propriety, before this matter was acted upon.[46]

Lincoln then offered two arguments (the first of which is actually a series of *questions*, not affirmations) in his defense. First, Lincoln suggested that the President can violate a *single* law (presumably he was referring to the habeas suspension clause of Article I, though it is possible he was referring to Taney's order), in order to preserve the Constitution as a whole:

> [A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?[47]

Lest the rhetorical questions be answered unfavorably, Lincoln offered a second argument, in the alternative: "But it was not believed that this question was presented. It was not believed that any law was

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[42] LINCOLN, 4 COLLECTED WORKS, *supra* note 18, at 265-68. For a modern argument against the lawfulness of secession, see Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1451-66 (1987).

[43] ABRAHAM LINCOLN, MESSAGE TO CONGRESS IN SPECIAL SESSION (July 4, 1861), *reprinted in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN, 421, 421-40 (Roy P. Basler ed., 1953).

[44] *Id.* at 423.

[45] Throughout the speech, Lincoln makes artful use of rhetorical questions and the passive voice in order to provide a sense of detachment and objectivity and perhaps to remove, diffuse, or de-personalize blame. Perhaps the most memorable example of this stylistic form is from Lincoln's Second Inaugural Address: "And the war came." ABRAHAM LINCOLN, SECOND INAUGURAL ADDRESS (Mar. 4, 1865), *reprinted in* 11 COLLECTED WORKS OF ABRAHAM LINCOLN 332 (Roy P. Basler ed., 1953).

[46] LINCOLN, *supra* note 43, at 429-30.

[47] *Id.* at 430.

violated."[48] Lincoln read the writ suspension clause as an implicit authorization for suspension in cases of rebellion, and noted that the provision is silent as to who is to exercise the power. Because

> the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.[49]

Lincoln deferred any further argument to Attorney General Edward Bates.[50]

Interestingly, Lincoln did not, except by implication, assert what I call "the *Merryman* power"—authority to disregard, or to countermand, judgments rendered by federal courts. He did not directly contest Taney's assertion that the executive is subordinate to the judiciary in interpretation and execution of the laws. Rather, Lincoln simply offered a rebuttal to Taney's position *on the merits* of the suspension clause question, without specifically discussing the question of *authority*—whether, even if the President disagrees with the court's interpretation of the law on which a judgment is based, he must nonetheless enforce that judgment. But the plain implication of Lincoln's actions is that he believed the President need not enforce such a judgment. Certainly that is the implication of Lincoln's "necessity" defense: if the government will go to pieces if the privilege of the writ is not suspended, it will no less go to pieces if the reason the writ is not suspended is obedience to a court order.

Lincoln left it to Attorney General Bates to develop the broader argument for the *Merryman* power. Bates's opinion, dated July 5, 1861 (the day after Lincoln's address), developed the argument from the Madisonian premise of the coordinacy of the branches. The American people, Bates wrote, were "actuated by a special dread of the unity of power" and hence deliberately adopted a system in which no one branch has "sovereignty."[51] Sovereignty resides in the people, not in any organ of government. Accordingly, the American people adopted a system that divides and distributes power among several agencies in order to furnish "checks and balances" against concentration and abuse of power.[52]

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48 *Id.*

49 *Id.* at 431.

50 *Id.* "No more extended argument is now offered; as an opinion, at some length, will probably be presented by the Attorney General." 10 Op. Att'y Gen. 74, 76 (1861) (footnote omitted).

51 10 Op. Att'y Gen. at 76.

52 *Id.* at 76-77.

> These departments are co-ordinate and coequal—that is, neither being sovereign, each is independent in its sphere, and not subordinate to the others, either of them or both of them together.... [I]f we allow one of the three to determine the extent of its own powers, and also the extent of the powers of the other two, that one can control the whole government, and has in fact achieved the sovereignty.
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> ....
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> Our fathers, having divided the government into coordinate departments, did not even try (and if they had tried would probably have failed) to create an arbiter among them to adjudge their conflicts and keep them within their respective bounds. They were left ... each independent and free, to act out its own granted powers, without any ordained or legal superior possessing the power to revise and reverse its action. And this with the hope that the three departments, mutually coequal and independent, would keep each other within their proper spheres by their mutual antagonism—that is, by the system of checks and balances, to which our fathers were driven at the beginning by their fear of the unity of power.[53]

One can hear in Bates's opinion distinct echoes of Madison's *Federalist* No. 49, so much so that one is led to suppose that Bates had No. 49 in front of him as he wrote. Madison began with the premise of the sovereignty of The People as "the only legitimate fountain of power,"[54] each branch deriving only limited authority from this fountain. Bates's opinion likewise begins with the postulate that no branch can be sovereign. Madison wrote that the three branches are "perfectly co-ordinate by the terms of their common commission ...."[55] Bates's opinion also recites the "co-ordinate" and "coequal" status of the branches.[56] Madison argued that the principle of coordinacy means that no branch "can pretend to an exclusive or superior right of settling the boundaries between their respective powers ...."[57] Bates's opinion states that the "fathers" (presumably including Madison) "did not even try ... to create an arbiter among them to adjudge their conflicts and keep them within their respective bounds."[58] It takes Madison until *Federalist* No. 51 to arrive at the answer to the problem of keeping the branches within their spheres (having rejected the idea that any branch can be the final judge of this

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53 *Id.*

54 THE FEDERALIST No. 49, *supra* note 7, at 339.

55 *Id.*

56 10 Op. Att'y Gen. at 76.

57 THE FEDERALIST No. 49, *supra* note 7, at 347-48.

58 10 Op. Att'y Gen. at 76. The contrast between the Madison-Bates view and Justice Story's view is striking. Story asserts that the Supreme Court is the "final and common arbiter ... to whose decisions all others are subordinate." STORY, *supra* note 14, at 267.

question and the suggestion of recurrent appeals to the people): "the defect must be supplied, by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[59] The conclusion of Bates's opinion is practically identical to Madison's language: the three coequal branches were left "independent and free, to act out [their] own granted powers, without any ordained or legal superior possessing the power to revise and reverse [their] action[s]" in the hope that they "would keep each other within their proper spheres by their mutual antagonism . . . ."[60]

Bates derived from these Madisonian premises the conclusion that the Executive cannot be made subordinate in the exercise of his powers to the judgments and orders of the judiciary:

> If it be true, as I have assumed, that the President and the judiciary are co-ordinate departments of government, and the one not subordinate to the other, I do not understand how it can be legally possible for a judge to issue a command to the President to come before him *ad subjiciendum*—that is, to submit implicitly to his judgment—and, in case of disobedience, treat him as a criminal, in contempt of a superior authority, and punish him as for a misdemeanor, by fine and imprisonment.[61]

The echoes here are to Presidents Thomas Jefferson and Andrew Jackson in their explanations for their Sedition Act pardons and Bank Bill vetoes, respectively: If the President is truly coequal, he may not be controlled in the exercise of his constitutional responsibilities by the opinions of the judges. The logic of the Madison-Jefferson-Jackson position led Lincoln and Bates to reason that the President could never be made subordinate to the judgments of courts.

The rest of the *Merryman* story is not nearly so interesting from the standpoint of legal theory, but it is interesting history. John Merryman's continued incarceration proved something of an embarrassment to the Administration and a source of useful propaganda for political enemies. There is some evidence that Merryman's release would have been ordered by the Administration in response to General Cadwalader's request for instructions, had Taney given the Administration half a chance. The extent of Merryman's military responsibility for the burning of the bridges was unclear.[62] There is at least some intimation that the army had rousted the wrong man from

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[59] THE FEDERALIST No. 51, at 340 (James Madison) (J. Cooke ed., 1961).

[60] 10 Op. Att'y Gen. at 76.

[61] *Id.* at 85.

[62] SWISHER, *supra* note 23, at 852.

his slumber, intending to arrest the captain of the secessionist company, not Lieutenant Merryman.[63] Lincoln's concern in any event was less with prosecution and punishment than with keeping Maryland and other border states in the Union. But Taney had raised the stakes. Releasing Merryman in response to the Chief Justice's opinion would have been a tacit admission of the validity of the charge of improper interference with liberty—a propaganda windfall for Lincoln's opponents.[64] The Administration got Merryman off its hands by having him indicted by a civil grand jury in the United States Circuit Court in Maryland (apparently stacked with strong Union men), transferred to civil jurisdiction, and released on bail, ending Merryman's seven week stay at Fort McHenry. Merryman's case never came up for trial, either because the administration doubted that any Maryland jury would convict him or because it feared the prosecution was not worth the political price.[65]

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Merryman poses as sharply as it has ever been posed, or is likely ever again to be posed, the dilemma between executive autonomy and judicial supremacy in interpretation of the law. Given an unsympathetic reading, the facts of the case show quite starkly how executive power could be (ab)used if the President considered himself entitled to disobey court orders, including those protecting individuals from arbitrary seizure and detention by the executive or the military—the very purpose of the Great Writ of habeas corpus.

The virtually unanimous view of the legal community today is that Lincoln and Bates carried the logic of coordinacy too far. Some may grudgingly accept Lincoln's argument from necessity (whether or not Lincoln was right on the underlying issue of which branch possesses the power to suspend the writ. The Constitution is not a suicide pact and, depending on one's view of the historical facts, to honor the writ might have been constitutional suicide. But this is at best a "choice of evils" defense or an argument that Lincoln's actions were unconstitutional but nonetheless morally and politically justified. Others may condemn Lincoln's actions as lawless (again, irrespective of the merits of the underlying dispute). But I know of no judge or legal scholar who, assuming arguendo the correctness of Lincoln's view of the merits, defends the correctness of Lincoln's actions in defying Taney's writ on the basis of the reasoning set forth by Attorney General Bates. The prevailing consensus is that Lincoln's ac-

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63 *See Merryman*, 17 F. Cas. at 145.

64 SWISHER, *supra* note 23, at 853.

65 *Id.*; MCPHERSON, *supra* note 21, at 289.

tions were wrong as a matter of constitutional law, at least in principle: the final judgments of the judicial branch must be enforced by the executive; orders of the courts—even orders directed to the President—are the law of the land and must be obeyed and enforced. The *Merryman* power is thus generally thought to be over the line.

Yet at the same time, many—if not most—legal scholars and judges accept the legitimacy of Jefferson's pardons and Jackson's veto on their own terms. It is my contention that this consensus position is untenable. Rejection of the Lincoln-Bates conclusion requires rejection of its premises. Acceptance of its premises requires acceptance of the *Merryman* power.

III. THE DILEMMA (AND FALSE RECONCILIATIONS)

Can a measure of executive branch interpretive autonomy be defended without sliding all the way down the slippery slope to the *Merryman* Power? Can the concept of the finality of judicial decrees as against the President be defended without thereby denying that the executive has any measure of genuine, independent interpretive power (and by implication denying the coordinacy of the branches)? Defenders of intermediate positions tend to cast their arguments in one of two ways. They either defend the concept of judicial supremacy—but with certain exceptions in favor of executive autonomy (to cover the cases of pardons and vetoes). Or, they might start with the idea of executive autonomy—but create certain exceptions in favor of judicial supremacy (to justify the finality of judgments). Either way, however, the exceptions, if justified in principle, do not "prove the rule," but instead swallow it.

A. *Judicial Supremacy—with Exceptions*

One false resolution begins from the premise of judicial supremacy—the judicial branch has final, binding power to interpret federal law—but recognizes certain exceptions in favor of autonomous executive branch interpretation *in areas of exclusive executive power*. The executive branch may exercise autonomous interpretive power in those areas, and only those areas, where the President has *unreviewable* constitutional authority. Pardons and vetoes are said to fall into this category because the President may exercise these exclusive presidential powers with or without reason. He may pardon or veto for constitutional reasons, for policy reasons, to punish political opponents or reward political allies, or even out of pure whim. The

powers are plenary.[66]

However (the argument goes), in areas where the President's powers are *not* plenary—that is, on any matter that can be made the subject of a "case or controversy" susceptible of judicial determination—the executive's legal determinations must give way to the judiciary's. Thus, while the President might validly decline (on constitutional grounds) to enforce a statute pending a judicial determination of the issue, he has no right to nullify a judicial determination of constitutionality in a given case. (*A fortiori*, he may not seek to enforce a statute that the courts have found unconstitutional.) While a President might validly decline to follow precedent in order to seek to have "a new judicial rule established upon th[e] subject"—Senate candidate Lincoln's view with respect to *Dred Scott*—,[67] he must accept the old rule when reaffirmed. Moreover, beyond a certain (unclear) point, it becomes illegitimate for the executive to engage in repeated challenges to a settled judicial rule where there is no reasonable likelihood that the rule will be changed.[68]

There are two difficulties with this view. First, if Supreme Court precedents are otherwise "supreme" in the sense of being binding law for the other branches, the President's refusal to adhere to such law simply because the courts cannot (or will not) review his actions does not make those actions lawful and legitimate, but the cynical actions of a Holmesian bad man. If it is illegitimate for the President to defy "the law" (as declared by the courts) where his actions *can* be reviewed, it is no less illegitimate for the President to defy the law where his actions *cannot* be reviewed. Jefferson's pardons and Jackson's veto were, on this view, "lawful" only in the crude legal realist sense that the Constitution's allocation of powers was such that no one was in a position to keep them from getting away with their otherwise law*less* interpretations.

This is hardly a satisfying rationale for independent interpretive power in the area of pardons and vetoes. It certainly was not the one that Jefferson and Jackson advanced for their actions; they maintained that each branch has independent interpretive power and that the decisions of the judges therefore do not control the actions of the

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66 Article I, § 7 requires that the President return a vetoed Bill "with his Objections" and that the originating house enter those objections on the journal and, if it re-passes the bill with a two-thirds majority, send the bill "together with the Objections" to the other house. Nowhere is it specified what are permissible grounds for the President's objections. U.S. CONST. art. I, § 7.

67 Lincoln, 3 COLLECTED WORKS, *supra* note 17, at 76.

68 Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965).

executive. Accepted on their own terms, Jefferson's Sedition Act pardons and Jackson's Bank Bill veto call into question the entire premise of judicial supremacy. If the President, by virtue of the independence of the branches, may exercise independent legal judgment within the sphere of his powers, that principle should apply to *all* the President's powers—not just pardons and vetoes, but the execution of the laws as well. This entails a power to decline to execute as law judgments of courts that the President concludes are contrary to law.

There is no principled justification for distinguishing among the President's powers in this regard. It should not make any difference that some of the President's powers are not exclusive of action by other branches. If the President may interpret law in a manner contrary to Supreme Court case law in instances where the Court cannot review his actions, he no less should be allowed to interpret law in a manner contrary to Supreme Court precedent where the Court *can* review his actions. If anything, there would seem *less* to be feared from errant or willful presidential misinterpretation in the latter context, where such misinterpretation can be checked publicly in a meaningful way.

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

Matters need not have turned out that way. Suppose, for example, that the judiciary had asserted a power to review the grounds on which the President exercised his veto, holding that the veto was limited to constitutional grounds, but declaring a veto null when based on a constitutional argument rejected by the Court (either previously

or in the case challenging the validity of the veto).[69] In the case of the Bank, the Court could have declared that Jackson's veto was constitutionally ineffective and that the rechartering bill had become law without his signature. Whose view prevails? Is the Bank rechartered or not? Is the judiciary's judgment the rule or the executive's?

Whichever answer is chosen recreates the *Merryman* dilemma. If the executive's judgment prevails in our hypothetical case of the Bank Bill, it logically should prevail in any other case where the executive is persuaded that the Court's decision is wrong on the merits—and we suddenly have accepted the theoretical argument for the *Merryman* power. The judicial-supremacy-with-exceptions theorists cannot accept that. If, on the other hand, the judiciary's rule necessarily prevails, the slope is steep and slippery to total executive subordination to the courts. Once it is conceded as a matter of principle that the courts can (in theory) decide any question of law with finality, including questions of the scope of the executive's powers—and that they can decide them in ways that everyone would agree are wrong on the merits—it becomes impossible to carve out areas of necessarily exclusive executive prerogative within a general system of judicial supremacy. If the Court's decisions are supreme and binding on the executive, there is no reason why the Court could not find that the executive has no area of interpretive autonomy. The judiciary will decide what are the areas of executive prerogative. And, of course, all such questions will be justiciable cases or controversies if the judiciary says they are (that, too, being a legal question). As the Supreme Court put it in *United States v. Nixon*:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.[70]

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[69] The hypothetical is not really that far-fetched. Cases exist challenging the exercise of the President's pocket veto. *See, e.g.*, Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot sub nom.* Burke v. Barnes, 479 U.S. 361 (1987); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974). At the time, Jackson's Bank Bill veto was regarded as controversial because he cited *non*constitutional reasons along with constitutional reasons for his veto. It was thought by many that the veto was to be used by the President only as a means of constitutional defense. *See* Easterbrook, *supra* note 1, at 907. A judicial ruling purporting to limit the scope of the pardon power, for example, by declaring invalid a pardon of an entire class of persons or of an individual for crimes he might have committed, is also not unimaginable. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 4-11, at 256 & n.10 (2d ed. 1988) (collecting examples of legal challenges to the scope of the pardon power).

[70] 418 U.S. 683, 704 (1974) (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)). *See also* Cooper v. Aaron, 358 U.S. 1, 18 (1958).

In sum, the "exclusive executive sphere" theory, if allowed, is either an unprincipled exception that contradicts the very premise of the judicial supremacy rule, or a grand illusion under which a sphere of executive interpretive autonomy exists only because the judiciary says it does. Pardons and vetoes are not really exceptions to a general principle of judicial supremacy, but applications of it.[71] There is no real sphere of executive branch interpretive autonomy, but only areas where the courts have, as a matter of grace, allowed the executive some freedom of action. The premise of judicial supremacy logically implies that the executive branch does not have true interpretive independence, but only so much autonomy (such as in the area of pardons and vetoes) as the courts choose to permit.[72]

B. *Executive Autonomy—with Exceptions*

Another false resolution starts from the premise that the executive branch has a coordinate power of legal interpretation within the sphere of its powers, independent of the judicial branch, but recognizes certain exceptions in favor of judicial supremacy. The key exception, of course, is the final and binding character of *judgments*. The argument here is that the separation-of-powers premise of coordinate interpretive power is checked by some understanding of "the judicial power" embodied in Article III as including a power to issue final, binding judgments—binding on the executive as well as the parties—in cases properly before the courts.[73]

This argument has some promise, but it too has problems. No one to date has done the careful historical analysis necessary to sustain such a reading of the words "the judicial power."[74] More fundamentally, though, this reconciliation is analytically incoherent in much the same way that the judicial-supremacy-with-exceptions reso-

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[71] The "political question" doctrine and other discretionary doctrines of decision avoidance are also, on this view, matters of judicial grace, not correct constitutional doctrine. The courts need not hold that any issue is committed to another branch's final determination.

[72] The judiciary might also permit the executive occasionally to challenge the correctness of a precedent, in lower courts, to provide helpful "percolation" of issues, *see* United States v. Mendoza, 464 U.S. 154, 160 (1984), and perhaps even in the Supreme Court, to avoid stagnancy. But the Court would still have the final word both as to result and as to the extent to which the executive could challenge judicially-declared law. Again, this is not executive branch interpretive autonomy, but (literally) autonomy-for-the-sake-of-argument—helpful executive branch *discussion* in service of the Court's exercise of supremacy.

[73] This is Judge Easterbrook's position. Easterbrook, *supra* note 1, at 926. It also appears to be Professor Merrill's. Merrill, *supra* note 2, at 46.

[74] Judge Easterbrook simply asserts that "a 'judicial power' is one to render dispositive judgments." Easterbrook, *supra* note 1, at 926. It is certainly true that the "judicial power" is one to "*render . . . judgments*." But the word "*dispositive*" before "judgments" bears the entire weight of Easterbrook's argument and begs the question at issue without further analysis. Eas-

lution is incoherent. 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 the 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.

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

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terbrook, *supra* note 1, at 926. I am not saying that Easterbrook's point is necessarily wrong, only that it is unproven.

In the version of his article presented at the symposium, Professor Merrill made a more structural argument:

> Subordination of executive interpretation in this context [enforcement of judgments] is necessary to preserve a system of separation of powers. If the executive could sit in review of judicial judgments, there would be little point in having an independent judiciary. Instead of the three-branch system of government created by the Constitution, we would have in effect a two-branch system, with the executive serving as both prosecutor and court of last resort.

Thomas W. Merrill, Article Presented at the Benjamin N. Cardozo School of Law Symposium on Executive Branch Interpretation of the Law (Nov. 15, 1992) (unpublished manuscript). Professor Merrill's published version makes essentially the same argument. *See* Merrill, *supra* note 2, at 71. Merrill's argument conflates the *separation*-of-powers with an assertion that the branches must have a rough *equality*-of-powers. But separate does not mean equal. It does not reduce three-branch government to two-branch government if the judiciary's power is (in Hamilton's words) "merely judgment"; that is, the power to render *independent judgment*, but that remains dependent "upon the aid of the executive arm even for the efficacy of its judgments." THE FEDERALIST No. 78, *supra* note 12, at 523. "The judiciary is beyond comparison the weakest of the three departments of power." *Id.* (citing Montesquieu, *Spirit of Laws*, at 186 in a footnote for the proposition that "of the three powers above mentioned, the JUDICIARY is next to nothing."). On this view, the three branches, while coordinate and independent in terms of the source of their authority and their relationship to one another, simply have unequal powers, the judicial branch's being the least. THE FEDERALIST No. 78, *supra* note 12, at 523. To Hamilton, it is the very *weakness* of the judicial branch that forms the strongest argument for the independence of the judges. *Id.* I suspect Hamilton would strongly disagree with Merrill's assertion (as Merrill put it in the draft of his paper presented at the symposium) that there is "little point in having an independent judiciary" if the executive is not subordinate to their judgments. There is still the important moral (and consequently political) force of persuasive, independent judgment. Again, as with Easterbrook, I am not saying that Merrill's conclusion is necessarily flawed, only that his argument is flawed.

ments in *Cooper v. Aaron*.[75]) Thus, as noted above, the courts could interpret away any degree of executive autonomy and the Executive (by the logic of the exception) would have to abide by that decision—even if he thinks it demonstrably and horribly wrong. Taken seriously, the exception swallows the rule. If the executive branch *must* honor and enforce court judgments, then it has no genuine sphere of interpretive autonomy.

Perhaps (it could be argued in response) 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.[76] 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 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 greater 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.

The alternative is that the finality-of-judgments exception is not really an exception to the principle of executive branch autonomy at all. Rather, like the pardon and veto exceptions to the judicial supremacy position, it is an unprincipled, ad hoc, counterfeit exception that exists not as a matter of judicial right, but as a matter of executive branch grace: Supreme Court (and lower court) judgments are enforced by the executive branch as the law of the land only because (and only so long as) *the executive branch* decides to treat them that way.

If this is so, then Lincoln was right—not only pragmatically right, but right as a matter of constitutional law and theory—in asserting the *Merryman* power. The current widespread non-use of the

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[75] 358 U.S. 1, 18 (1958).

[76] Judge Easterbrook might be coyly adopting this view. *See* Easterbrook, *supra* note 1, at 926 (exception to executive interpretive autonomy exists for "carrying out an order of the court, rendered in a case *within the court's jurisdiction* . . . ") (emphasis added).

Merryman power reflects not a deficiency in the argument for its existence but merely executive forbearance (or perhaps political reality or cowardice) in the face of erroneous judicial assertions of authority. Indeed, the implication of *Merryman* is that Lincoln may have been too restrained in his campaign and inaugural statements with respect to *Dred Scott* when he agreed that Dred Scott personally must remain a slave once the Supreme Court has adjudicated him to be the property of another. Surely if the Court's decree, to be effective, required executive action—for example, rendition by federal officers—Lincoln (had he been President at the time) would have been justified in refusing to lend any assistance to, indeed, in directing federal officers' noncompliance with, a final judgment he regarded as an unsound (and immoral) interpretation of the law. Under the Lincoln-Bates view expressed in the *Merryman* situation, if Dred Scott's reenslavement depended on federal executive law enforcement, the President could justifiably proclaim him free.

C. *Dialectical Deference?*

A third possible approach to reconciling the conflicting premises of executive autonomy and judicial supremacy is not to attempt a reconciliation at all, but to hold on to both premises simultaneously and assert that their very contradiction furnishes a valuable check on the dangerous logic of either of them. This approach seeks to make a Hegelian virtue out of a logical contradiction. (A foolish consistency, after all, is the hobgoblin of narrow minds.) The better approach (the argument would go) is that the judiciary *is* supreme in constitutional interpretation, but that the correct interpretation of the Constitution on the merits is that the President has unreviewable discretion to issue vetoes and grant pardons on any grounds he likes. Indeed, more generally, the President has independent interpretive power except where the courts have spoken. At the same time, the executive *does* have autonomous authority to interpret the law. However, the correct executive branch interpretation of the Constitution on the merits is that the executive must enforce final judgments of the judicial branch. So long as each branch adheres to these "correct" interpretations, the contradiction of the premises in theory does not create a contradiction in practice.

The chief difficulty with this approach is its shell-game quality. What makes the unreviewability of the President's exercise of the pardon power by the courts the correct interpretation of the Constitution? What makes the subordinate duty of the President to enforce judicial decrees the correct interpretation of the Constitution? As ar-

gued above, the premises that make one result correct tend to render the other incorrect. If law is something more than a collection of ipse dixits, but requires *reasons* grounded in *principles*, this approach will not suffice.

This theoretical problem is mirrored by a practical one. To accept both premises as valid provides no basis for deciding cases in between the poles—the real world issues of executive nonacquiescence in precedent and of declining to execute statutes that have not been declared unconstitutional by the courts.[77] If the judiciary is supreme *and* the executive is autonomous in legal interpretation, how are these cases to be resolved? Who has the "final" authority to resolve them? Any result can be derived from contradictory premises. To give an answer—one way or the other—is to unmask the charade of equipoise. The Hegelian balance inevitably collapses into one of the two approaches previously discussed.[78]

A "softer" variant of this Hegelian approach might be as follows. Rather than embrace both premises as true, one might decline to "reach" the limit of their logic by asserting a mediating principle of deference that trumps both judicial supremacy and executive autonomy. The reasoning would go something like this: "Assuming, arguendo, judicial supremacy, courts nonetheless should defer to executive branch interpretation of the law within certain spheres of exclusive executive province; moreover, courts should embrace general doctrines of judicial restraint in order to avoid needless conflict with the executive." On the executive side, the argument would go: "Assuming, arguendo, perfect coordinacy (and thus executive autonomy), the executive nonetheless should give substantial deference to the judiciary, enforce their judgments in all but the most extreme, emergency situations, and even follow their precedents." In short, the Court *may* have final, dispositive interpretive power, but should exercise it in a restrained way; and the President *may* have independent, autono-

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[77] *See supra* notes 3-4.

[78] Professor David Strauss's proposed answer—that the President should treat Supreme Court precedent more or less as a Supreme Court justice would—collapses into either judicial supremacy or executive coordinacy depending on whether one has a strong or weak theory of stare decisis. David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 127-28 (1993). If precedents are very nearly *binding*, then judicial decisions essentially control (or at least have the potential to control) executive branch interpretation. If precedents may be disregarded when the interpreter is persuaded they are wrong, then the executive branch is essentially autonomous in matters of legal interpretation. I read Strauss as tilting strongly toward the former view—a fairly strong conception of stare decisis. But if the President can disregard court judgments as precedents for future cases (at least some of the time), why may he not disregard such judgments in the specific case in which they are rendered (at least some of the time)? Earlier in his article, Professor Strauss concedes that the two cases cannot be distinguished in principle. *Id.* at 115.

mous interpretive power, including the *Merryman* power, but should refrain from using it in practice.

This "mutual respect" approach has the apparent virtue of avoiding resolution of the difficult question of which premise—executive coordinacy or judicial supremacy—is superior in principle, by deciding that they are both inferior to another principle. We thus need not decide that it is a correct interpretation of the coordinacy principle to infer the *Merryman* power or a correct interpretation of the judicial supremacy principle that executive autonomy in the areas of pardons and vetoes can be justified only as a consequence of implicit judicial decision.

There are at least two problems with this approach. The first is the most damning: if the Executive is fully persuaded that judicial action is unlawful or unconstitutional (or a judge is so persuaded with respect to executive action), why should he *ever* "defer" to the *illegal acts* of the other, if in principle he possesses legal authority to resist such acts? Would that not be a violation of his constitutional oath? If Taney ordered Lincoln to discontinue prosecution of the Civil War, on the ground that it was unconstitutional to suppress this supposed "domestic insurrection" because the South's secession was completely lawful, should Lincoln have obeyed? What if Taney had invalidated the Emancipation Proclamation (the lawfulness of which was at least as debatable as that of Lincoln's suspension of the writ, and was plainly contrary to the *Dred Scott* precedent)? Should Lincoln have "deferred" to Taney? Conversely, was the Court right to defer to the executive in *Korematsu v. United States*?[79]

It is difficult to justify the choice of "deference" as a principle superior to following the correct rule of law, in its claim on the conduct of officers swearing an oath to uphold the Constitution and laws of the United States. The Constitution does not prescribe rules of etiquette among the branches. To the contrary, the Madisonian vision is that each branch will keep the others in line, and so protect liberty, by *asserting* its constitutional prerogatives, not by automatically deferring to the views of others.

Second, it should be noted that this approach of dialectical deference is really just a species of the coordinacy principle: each branch may take its own view—the courts may assert judicial supremacy (in principle), the President may assert executive autonomy (in principle)—and, as long as they defer to each other in certain areas, there is

[79] 323 U.S. 214 (1944) (upholding military internment of Japanese-Americans in concentration camps on the west coast during World War II, based upon a presumption of disloyalty and dangerousness based on race).

no problem. In other words, as long as each branch practices deference to the others, the illusion may be maintained that judicial supremacy and meaningful executive autonomy can coexist side-by-side. But like the "hard" version of this dialectical argument, the deference principle collapses whenever any issue of genuine dispute arises and the two sides stop deferring to each other.

In sum, an intermediate position only works if the executive and the judiciary: (a) agree on the merits of the underlying legal question; (b) disagree on the merits, but agree that the Constitution assigns final resolution of the issue to a particular branch; or (c) disagree on the merits and on who properly has power to decide, but one of the two nonetheless agrees to "defer" to the view of the other. Outside of these situations (which is to say, in all interesting cases of disagreement between the branches) an intermediate position cannot be sustained. The problem, in short, arises in cases like *Merryman*, where push comes to shove. And that has been the point of this paper: when push comes to shove, either the principle of executive coordinacy or the principle of judicial supremacy must give way.

IV. CONCLUSION

The premises of executive branch interpretive autonomy and judicial branch supremacy are hopelessly at war with one another. Either the President has complete interpretive autonomy, implying with it the power to decline to enforce judicial decrees that he believes rest on an unsound interpretation of the law—what I have called the *Merryman* power—or he is subordinate to the judiciary in matters of legal interpretation, in which case the President has no genuine interpretive autonomy at all but only an illusion of autonomy in areas where the Court, as a matter of grace, has allowed the President free reign.

Which view is correct? Much is potentially at stake in the answer to this seemingly theoretical question. If the President has complete interpretive autonomy, he not only may veto bills and grant pardons based on his independent constitutional judgment, but he also clearly acts within the scope of his legitimate authority when he "nonacquiesces" in precedents he thinks wrong and declines to execute assertedly unconstitutional statutes in the absence of a judicial ruling. In short, every major issue of disputed power to engage in legal interpretation is resolved in the direction of the President. What's more, he may decline to enforce statutes whose constitutionality has been upheld by courts, and even specific judgments between private parties whenever, in his independent legal judgment, the

court's ruling is incorrect. In such event, the finality of judicial decrees is a charade. The decisions of courts, in any matter requiring executive enforcement, are entitled to such persuasive weight only as the President may think them worth.

This might have made a difference on some of the signal legal issues of recent history. President Eisenhower might validly have refused to enforce the Supreme Court's desegregation decisions, had he thought them wrong.[80] President Nixon would have been within his rights in refusing to produce the tapes, based solely on his dissenting views.[81] And if a president today concluded that *Roe v. Wade*[82] was and remains an unwarranted departure from a proper understanding of the Constitution, he would be justified in refusing to enforce it, to the extent that federal enforcement is required to effectuate *Roe*.[83] If the argument for autonomous executive branch interpretive authority proves anything, it proves too much—or at least too much for the prevailing consensus to bear.

If, on the other hand, the judiciary has the final say in matters of legal interpretation, all of these disputed issues become matters of judicial control. Indeed, the Supreme Court even has final power to decide that a lawsuit challenging the propriety of grounds on which vetoes or pardons are issued poses a justiciable controversy, to decide the merits of the controversy, and to grant appropriate relief. Relief might entail an injunction directed to the President restraining him from making certain use of the pardon power, a declaration that a vetoed bill has become a law, or merely an order "vacating" the President's pardon or veto and "remanding" for further action *sans* the forbidden constitutional declaration.[84] It is all up to the courts. Ex-

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[80] Of course, the Eisenhower administration had argued in Brown v. Board of Education, 347 U.S. 483 (1954), that Plessy v. Ferguson, 163 U.S. 537 (1896), should be overruled. Indeed, it was Eisenhower's decision to send the troops to Little Rock—a year before the Supreme Court's opinion in Cooper v. Aaron, 358 U.S. 1 (1958)—that saved the day for racial injustice, not the Supreme Court's rhetoric.

[81] United States v. Nixon, 418 U.S. 683, 705-06 (1974).

[82] 410 U.S. 113 (1973).

[83] One can imagine a scenario in which a state passes abortion laws inconsistent with *Roe* and Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), a federal court enjoins enforcement on the authority of those cases, but the President directs federal officers to take no steps to carry out the court's order due to his belief that those cases are unsound. If the President and the state executive branch agree on that point, the state law would be enforced.

[84] Under this view, if President Bush had based his pardons of the six Iran-Contra defendants, *see* Proclamation No. 6518, 57 Fed. Reg. 62,145 (1992) (granting executive clemency), in part on constitutional objections to the Independent Counsel statute—objections rejected by the Court in Morrison v. Olson, 487 U.S. 654 (1988)—a court could, in a case it deemed justiciable, invalidate or vacate the legal effect of the pardons. Depending on the timing of the lawsuit, this could have considerable consequences if in the meantime a new President of a different political party (less disposed to grant the pardons) had taken office.

ecutive interpretive autonomy is a gift from the courts. What the Court giveth the Court can always taketh away.

For some, that already would be enough to support the conclusion that Jefferson's fears had been realized—that the power to control the judgments of other branches "would make the judiciary a despotic branch."[85] But that is not all: if the judiciary has final power of legal interpretation, it can eviscerate *all* the powers of the Presidency (or of Congress, or of the states) if it were inclined to do so. Thus, if the argument for the finality of judicial decrees proves anything, it also proves too much: it supports an essentially unlimited conception of judicial supremacy. And the prevailing consensus is not comfortable with admitting this, either.

It has not been my purpose in this paper to resolve this dilemma, but merely to pose it. The answer to this dilemma depends on a careful reading of the text, structure, history, and political theory of the Constitution and, depending on one's methodology, also on considerations of precedent, practice, experience, and policy. Where these factors lead is a topic for another article, but I am convinced that the one place they cannot lead to is the middle. The middle ground—the position held in one form or another by just about everybody in the legal community—is the one position that is not intellectually defensible.

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[85] *See* 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 9.