Departmentalism, Constitutional Resistance, and the Separation of Powers

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INTRODUCTION

Constitutional law and theory often focus on the role of legal power. Many interesting and vitally important questions focus on claims as to whether a constitutional actor has or lacks a particular constitutional/legal power in a given context. Does the Executive have the power to legally hold enemy combatants? To refuse to spend funds or hire personnel? To remove various officers? To commit the military without a declaration of war, or the authorization of Congress? Does the Congress have the power to regulate wheat? Guns? To strip federal courts of jurisdiction on a particular topic? On all topics? Does the judiciary have the power to review impeachment trials? To review a decision of Congress not to seat a member? Claims of gerrymandering?

The Constitution, one must recall, was to a great extent a general and imprecise plan which was to be implemented and changed in practice. So it’s unsurprising that constitutional actors often find themselves seeking to exercise powers that they have never yet been acknowledged to have, and which it is uncertain whether they possess. Since in the United States, most political problems have (or take on) constitutional tones, it’s not surprising that assertions of power do so. Interpretive claims about the Constitution are thus often translatable into claims for particular legal powers, and vice versa. It’s also unsurprising that fights have simmered over what to some observers is the greatest ‘power’ of them all – the authoritative interpretation of the Constitution.

One avenue for attempting to make both general and specific constitutional power claims draws on a theory usually called departmentalism. The idea animating departmentalists is quite simple. In their view, nothing in the Constitution grants the Judiciary the exclusive power to interpret the Constitution, and, moreover, the branches are all

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1 Consider, for example, the constitutional absence of extradition.
2 There are various reasons for considering such an interpretive ability to be so important, but the obvious and sundry one is the Supremacy Clause. U.S. Const. Art. VI. (“The Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”) In American constitutionalism, then, authority and power granted under the Constitution is granted by supreme law. In Hart-like terms, the rule of recognition in the United States devolves ultimately to constitutional authority and popular acceptance thereof. See generally H.L.A. HART, THE CONCEPT OF LAW (1961).
meant to be co-equal. A Judiciary that has the ‘ultimate power’ of
authoritative interpretation is set above and apart from the other coordinate
branches, and this is a failure of separation of powers. Thus one might
defend a constitutional power claim on ‘departmentalist grounds’ by
saying that a particular branch feels in its interpretive capacity that it has a
particular constitutional power, and that such a determination is either
owed a great deal of deference, or that a branch should simply operate on
its own view of constitutionality, irrespective of what another branch
(often the Judiciary) believes about its exercise of constitutional power.

This article has two distinct aims. The first, which animates Part I, is to
offer a new and comprehensive analytic account of departmentalism. I
suggest that recognizable forms of ‘departmentalism’ can be seen from
adopting any of four distinct theses of constitutional practice. These theses
are, in increasing order of controversy, internal legal review, coordinate
legal review, independent constitutional judgment, and constitutional
resistance. I hope to show that these theses are logically independent, and
moreover, that three of them – all except constitutional resistance – have
significant doctrinal and theoretical support. Part I concludes by
suggesting that there are significant theoretical reasons to be concerned
about adopting constitutional resistance as a norm.

Part II is a brief case study using the framework developed by Part I. It
is based on Jennifer Mason McAward’s article on the proposed
congressional power to block court orders by appropriations. McAward
concludes in her article that the power, while threatening, is relatively
untenable because of existing constitutional norms blocking its viability. I
suggest, contrary to her view, that the proposed power is exactly the kind
of power a departmentalist espousing constitutional resistance would
propose without difficulty, and I also demonstrate why the power is
problematic exactly at that point where its employment is tied to
constitutional resistance.

I conclude by examining the legal-theoretic assumptions of
constitutional resistance, and why constitutional resistance is both
appealing but ultimately untenable. These conclusions of course apply
equally well to any departmentalist who espouses a theoretical model that
shares the essential feature of constitutional resistance: an unwillingness to
accept exercises of power by other constitutional actors, if they are
deemed unconstitutional by the branch being checked. That is,
constitutional resistance encourages branches to think they have un-
checkable powers, and however occasionally true in practice, this is an
undesirable conclusion to generalize.

I. DEPARTMENTALISM

‘[The Framers] did not envision a government in which each branch
seeks out confrontation; they hoped the system of checks and balances
would achieve a harmony of purposes differently fulfilled. The branches of government were not designed to be at war with one another. The relationship was not to be an adversary one, though to think of it that way has become fashionable.” – Edward H. Levi

“Rather than ducking constitutional conflicts, [institutions] should be encouraged --through incentive-based institutional design, public suasion, or other means—to engage in more constitutional showdowns than they would otherwise choose.” – Eric Posner & Adrian Vermeule

In contemporary constitutional theory, departmentalism is quite fashionable, enough so that at the conclusion of one of the earliest contemporary debates on departmentalism, – namely, the colloquy in the Georgetown Law Journal consisting of Professor Paulsen’s seminal article The Most Dangerous Branch: Executive Power to Say What the Law is, the responses by Professors Eisgruber and Levinson, and Paulsen’s reply - Professor Paulsen could ask bemusedly “Are we really all ‘departmentalists’ now? Will nobody defend judicial supremacy anymore?” Of course, the challenge was met in due course, but even the defenders of judicial supremacy had to acknowledge that the classic doctrinal statement in Cooper v. Aaron was seen by “accepted wisdom [as]…an overstatement, politically necessary in its context but indefensible as a general claim of judicial interpretive authority.”

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9 Id.
11 358 U.S. 1, 18 (1958). The Supreme Court has reiterated the claim of judicial supremacy in several other major cases. See United States v. Nixon, 418 U.S. 683, 704 (1974); Powell v. McCormack, 395 U.S. 486, 549 (1969); cf. City of Boerne v. Flores, 521 U.S. 507, 535-536 (1997)(concluding that when “the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued”, it is the Court’s “precedent…which must control” and “contrary expectations must be disappointed.”)
12 Alexander & Schauer, supra note 10, at 1362.
As with most debates characterized by nuanced views, however, the apparent consensus breaks down when one more carefully engages the claims of proponents. To that end, I propose a set of four positions that more accurately depict departmentalist constitutional theory claims. Of course, it should be noted that I am superimposing this analytic schema, and that this is not necessarily how departmentalists have seen their own claims. Nevertheless, I think the breakdown is useful, particularly since these positions are not mutually exclusive, and one can develop a much more clear understanding of what kind of departmentalism a particular party is propounding by gauging whether they accept or reject each of the following propositions. These propositions are: internal legal review, coordinate legal review, independent constitutional judgment, and constitutional resistance. I suggest that the only genuinely problematic departmentalist positions are ones that adopt constitutional resistance as a norm, and that this is more so the case when constitutional resistance is adopted along with the other theses, which, by themselves, are significantly less controversial (if they are really controversial at all).

A) INTERNAL LEGAL REVIEW

A preeminent concern of departmentalist theorizing is the importance of internal legal review: in fact, to my knowledge, there is no departmentalist who does not somewhere or other stress it. What do I mean, precisely, by internal legal review? I mean the view that each branch of the government is constitutionally bound to review its own activities preemptively for constitutionality and act accordingly. A few examples will help to clarify what exactly that constitutes in practice, the easiest such examples being ones where a branch clearly did not seriously consider or act upon constitutionality. I will use an example from each branch to show that the concern is a truly general one from the standpoint of both constitutional theory and practice.

Let us first consider Congress. In the Senate debate over the Military Commissions Act, Senator Arlen Specter made a series of scathing comments about the legislation, which I quote from the Congressional record:

What this bill would do in striking habeas corpus would take our civilized society back some 900 years to King John at Runnymede which led to the adoption of the Magna Charta in 1215, which is the antecedent for habeas corpus and was the basis for including in the Constitution of the United States the principle that habeas corpus may not be suspended. I believe it is unthinkable, out of the question, to enact Federal legislation today which denies the habeas

corpus right which would take us back some 900 years and
deny the fundamental principle of the Magna Charta
imposed on King John at Runnymede... In essence and in
conclusion, what this entire controversy boils down to is
whether Congress is going to legislate to deny a
constitutional right which is explicit in the document of the
Constitution itself and which has been applied to aliens by
the Supreme Court of the United States.\textsuperscript{14}

This is stirring stuff, exactly what an observer might want out of an
ideal Congress in high and principled debate. There’s only one problem:
Sen. Specter proceeded to vote \textit{for} the Military Commissions Act,
disregarding the provisions he found so problematic!\textsuperscript{15} A proponent of
internal legal review would have a simple time explaining her stance
relative to Congress: legislators have constitutional duties to behave
exactly as Sen. Specter did not and if they have serious and plausible
constitutional doubts about legislation, they should at the very least not
vote for such legislation.

Consider for an example of attempted internal legal review on the part
of the Judiciary, Justice Jackson’s famous dissent in \textit{Korematsu}.\textsuperscript{16} Jackson
goes out of his way to note that does not think that military orders should
necessarily be subject to judicial review, or indeed constitutional
constraints:

\begin{quote}
It would be impracticable and dangerous idealism to expect
or insist that each specific military command in an area of
probable operations will conform to conventional tests of
constitutionality. When an area is so beset that it must be
put under military control at all, the paramount
consideration is that its measures be successful, rather than
legal.\textsuperscript{17}
\end{quote}

Nevertheless, Jackson insists, it remains true that even if the Court
should not “confine military expedients by the Constitution, neither would
I distort the Constitution to approve all that the military may deem

\textsuperscript{14} Congressional Record of the Senate, S10368, \textit{available at:}
http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S10368&dbname=2006_record
\textsuperscript{15} U.S. Senate Roll Call on Passage of the Bill S.3930 As Amended, \textit{available at:}
http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=1
09&session=2&vote=00259. See also Paul A. Diller, \textit{When Congress Passes an}
Rev. 281, 295-305.
\textsuperscript{16} 323 U.S. 214 (1944).
\textsuperscript{17} \textit{Id.} at 244 (Jackson, J., dissenting).
expedient.”18 For Jackson what should be the role of the Court is clear: “The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy,”19 and it is for that reason that Jackson suggests that the Court not “be asked to execute a military expedient that has no place in law under the Constitution”20 – it would only “lead people to rely on this Court for a review that seems to me wholly delusive...If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint.”21 This leads Jackson to suggest that the Court order Korematsu’s release, even if the Court would know or have reason to suspect it would be disobeyed in doing so.22

Jackson’s logic animates the spirit of internal legal review perfectly. Whatever the desirability of the Court’s non-interference with military policy, it may not abandon its constitutional role, and it certainly may not justify acting unconstitutionally – refusing to apply constitutional norms in a case before it to achieve a desired result. Whatever the merits of the position that a governmental actor should prefer not to act than to act unconstitutionally, the bottom line remains a concern with the integrity of the legality of a constitutional branch’s own activity.

Finally, consider the presidential practice of “signing and not enforcing.” If a cynical observer is not surprised that Congressmen often vote for bills they believe to be unconstitutional, there should be no surprise that Presidents often sign bills they believe are unconstitutional. This is the crux of the so-called ‘signing statements controversy’. May a President declare in writing (a signing statement) that he will not enforce a particular provision of a law because it is unconstitutional, if that provision will only become law due to its being signed?23 On the one hand, there are compelling practical reasons to suggest a President may do so – for example, the practice of passing vitally important appropriations bills with countless riders and amendments. Should a President truly veto or refuse to sign such a bill because of a paltry one-line provision that is

18 Id.
19 Id. at 247.
20 Id. at 248.
21 Id.
22 For a contemporary version of such a stance, see Qassim v. Bush, 407 F.Supp.2d 198, 201, 203 (2005)(Robertson)(On a writ of habeas corpus from Guantánamo; holding that though “[t]his indefinite imprisonment at Guantánamo Bay is unlawful” nevertheless “facing the question [of relief], I find that a federal court has no relief to offer.”)
23 Of course, the issue of non-enforcement becomes particularly vexing when Presidents make such a judgment with respect to a piece of legislation that was vetoed explicitly on constitutional grounds, and then passed by the 2/3 Congressional override. Arguably, a President’s power to not-enforce, if it exists at all, is weakest when the effect of such action would be to effectively re-veto legislation passed by override, since it would effectively render the Constitutional power of override a nullity.
objectionable? These concerns are complicated by the knowledge that the Framers were perfectly aware of such legislative practice, and gave the Presidency no further ability (such as a line-item veto) to deal with such practice, as well as current Supreme Court doctrine concerning the line-item veto. Perhaps not surprisingly, the executive branch has consistently supported both the proposition that the Executive may issue signing statements declaring intent to sign and not-enforce, and the proposition more generally that the Executive may choose to not-enforce statutes it sees as unconstitutional. On the other hand, the net effect of these doctrines is to suggest that the Executive is bound by the Constitution in one of his constitutional duties, execution of the laws, but not bound in a different constitutional duty, signing bills into law. This is extremely unattractive if one takes constitutional duty seriously, and suggests a blithe disregard for acting constitutionally similar to the behavior of Sen. Specter discussed above.

One position of departmentalism, then, is to insist that there is a constitutional duty shared by each branch of government to review its own actions for constitutionality, and to take the conclusions of such review with the utmost seriousness. Of course, this is an orthodox position to take with respect to the Supreme Court, so the usual emphasis is on “stress[ing] that the executive and the legislature, too, bear responsibility to think about the Constitution for themselves and take steps to fulfill the Constitution’s promise.”

Concern with internal legal review is independent of concern with coordinate legal review, independent constitutional judgment, or constitutional resistance; in fact, it can even be seen as a necessary preliminary concern – a sort of internal-housekeeping operation required to take seriously constitutional interpretive claims outside the normal. Prof. Pillard, for example, argues that before “[b]efore the debates over judicial supremacy and departmentalism can be fully joined, however, and before we hail the virtues of political-branch constitutionalism even with the range that judicial supremacy leaves it, I argue that we need to evaluate critically the specific mechanisms of executive-branch

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24 Suggesting such behavior might not be supportable on originalist premises.
27 For a piercing and insightful development of this argument, see Michael B. Rapaport, The Unconstitutionality of “Signing and Not Enforcing”, 113 Wm. & Mary Bill Rts J. 113 (2007).
Pillard’s own conclusion is that as it stands, “our current executive constitutionalism is underdeveloped even for the modest role that judicial supremacy leaves it,” which is to argue the executive does not satisfactorily fulfill even the goal of internal legal review. That is not to say that she rejects the higher, more aspirational goals for executive constitutionalism, per se, but that the shortcomings she identifies “should give us pause in embracing the more ambitious goals of extrajudicial constitutionalists” – e.g., departmentalists.

Pillard’s most serious criticism resonates precisely with the kinds of behavior examined above. She contends that the Office of Legal Counsel and the Solicitor General’s Office, which bear the primary responsibilities for internal review in the executive branch, lack the ability to act as independent constitutional checks on the executive precisely in the areas where they would be most useful – where the Judiciary is most deferential – precisely because of the way that these offices “very loosely and imperfectly mimic the courts” and rely “overwhelmingly on a court-centered view of constitutional law.” The imperfection of the process that is most glaring here is what Pillard calls “structural myopia.” When the Office of Legal Counsel employs a “quasi-judicial process to buttress their independent stance, they are hobbled by the absence of a mechanism for development and insight” – that is, “OLC…receives the requestor’s view of the question, but ordinarily hears no adverse view…[t]hus, even where OLC seeks to be quasi-judicial, the information presented to it is likely to be systematically skewed, leading to under-enforcements of constraints on executive power.” To put the point less diplomatically and more bluntly than Pillard does, OLC usually only hears pro-executive arguments of constitutionality, and – surprise, surprise - usually opines that proposed executive action is constitutional, which at its worst is not much different than Sen. Specter’s blithe disregard of constitutionality.

Another Clinton-era OLC alum, Prof. Johnsen, also focuses on internal legal review in the executive branch. Thus, while Johnsen proposes that there be limited authority for the executive branch to act on independent

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29 Id. at 681-2.
30 Id. at 683.
31 Id. at 685.
32 Id. at 737.
33 Id.
34 See, e.g., Memorandum for Alberto R. Gonzales, Counsel to the President, RE: Standards of Conduct for Interrogation Under 18 U.S.C. §§2340-2340A (Aug. 1, 2002). This is, of course, the first famous ‘torture memo’. The literature on this memo (and many others filed by the OLC at that time) has already become immense enough to discourage even a string citation, but a particularly readable account of it can be found in Chapter 5 of David Luban’s LEGAL ETHICS AND HUMAN DIGNITY (2007). It is particularly striking, for the purposes of the current argument, that the memo was sufficiently flawed to be withdrawn within the same administration. See Memorandum Opinion for the Deputy Attorney General, RE: Legal Standards Applicable Under 18 U.S.C. §§2340-2340A (Dec. 30, 2004).
constitutional views,\textsuperscript{35} much of her work emphasizes executive branch legal process and developing “characteristics of processes likely to encourage principled, high-quality political branch constitutional interpretation” which are, in Johnsen’s view, “integral to constitutional authority.”\textsuperscript{36} These characteristics, deliberativeness, transparency, humility, variability, and attainability,\textsuperscript{37} parallel and reinforce many of the same concerns about internal legal review that Prof. Pillard is worried about, and to the extent that Johnsen’s ‘functional departmentalism’ is adopted with the aid of improving intra-branch deliberation, particularly within the Executive Branch, it’s doubtful that anyone will find much to object in it.\textsuperscript{38}

To summarize, one recognizably departmentalist thesis is internal legal review – proposing that each branch has constitutionally-based duties to concern itself with the constitutionality of its own actions and to act accordingly. These concerns are predominantly, though not solely,\textsuperscript{39} aimed at the Executive Branch’s self-policing given the wide extent of areas in which judicial oversight is minimal, are largely constructive in tone, and both relatively uncontroversial and widely accepted.

B) COORDINATE LEGAL REVIEW

Coordinate legal review is a position that has somewhat more theoretical bite than internal legal review. The use of the term ‘coordinate review’ is fairly common in discussions of departmentalism – it usually refers to the doctrine where no branch has interpretive finality or supremacy, and where each constitutional actor is “bound to support the Constitution as they understand it, and not as it is understood by others…Thus the interpretation of one branch cannot control those of any other branch.”\textsuperscript{40} As I see it, the normal use of the terms coordinate review


\textsuperscript{36} Id. at 110. See also Dawn E. Johnsen, Faithfully Executing the Laws: Internal Legal Constraints on Executive Power, 54 UCLA L. Rev. 1559, 1576-1595 (discussing guidelines for giving legal advice to the President); Memorandum: Principles to Guide the Office of Legal Counsel (Dec. 21, 2004)(same).

\textsuperscript{37} Johnsen, supra note 56, at 130-134.

\textsuperscript{38} Johnsen and Pillard are not the first to evince concern about such executive processes – even with respect to OLC specifically; see also, e.g., Harold Hongju Koh, Saving the Office of Legal Counsel From Itself, 15 Cardozo L. Rev. 513 (1993).

\textsuperscript{39} For an interesting and quite recent piece that stresses the role of legislators (particularly Congress) in considering their own actions under a broad conception of the Fourteenth Amendment, see Robin West, The Missing Jurisprudence of the Legislated Constitution, in THE CONSTITUTION IN 2020 (Jack M. Balkin & Reva B. Siegel, eds.)(2009).

\textsuperscript{40} ROBERT SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 15 (1971). Scigliano evinces some discomfort in describing a name for the doctrine: “It is easier to describe than to name the doctrine at hand, although coordinate review might be an acceptable
or coordinate legal review conflate up to three different concepts: the review of another branch’s arguments for legality, and applying independent constitutional judgment for what constitutes legality in so doing, and resisting the legal finality of other branches’ determination of constitutionality. Accordingly, I will use the phrase ‘coordinate legal review’ in a constricted sense where coordinate legal review might occur with or without independent constitutional judgment or resistance as the thesis that a constitutional actor can/should review the actions of other branches for constitutionality, and act appropriately.

Once again, in the case of the Judiciary, it is a relatively uncontroversial view, since that is precisely what judicial review consists of, and is usually not characterized as departmentalism – though in the case of the Judiciary, it is also uncontroversially combined with independent constitutional judgment. Judicial review is perhaps at its most defensible as a form of coordinate legal review when one notes that oftentimes “courts are examining activity where no one has engaged in thoughtful contemplation of constitutional requirements prior to acting” – the case for courts engaging in coordinate legal review is strongest when there are consistent or egregious failures by other branches to engage in internal legal review.

What is uncontroversial for the Judiciary is somewhat more controversial when applied to the Legislature and the Executive, and more often going by the title of departmentalism, but still at the end of the day relatively uncontroversial. To change tenor somewhat, instead of beginning with failure examples, as in the section before, let us begin with an example more positive and heartening, an example drawn from Judge appellation.” Id. at 14. See also, e.g., Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power To Say What the Law Is, 83 Geo. L.J. 217, 228-241 (1994)(“coordinate legal review” means co-equal constitutional interpretive authority and duty of each branch).

41 There are some exceptions, however. See, e.g., LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)(arguing that the holding of Marbury v. Madison is best understood as departmentalist assertion by the Court claiming co-equal interpretive authority with the legislative and executive branches). One point bears clarifying however: ‘strong’ departmentalists DO question judicial supremacy as separate from judicial review – their position is often that judicial review is acceptable as a form of coordinate legal review but that the Supreme Court’s interpretation of the Constitution does not bind other constitutional actors; the Supreme Court then is simply doing what other constitutional actors should do as well, with the understanding that the Judiciary has different institutional duties in furtherance of which it interprets the Constitution. See, e.g., Paulsen, supra note 24.

Also, I should further clarify that there is plenty of controversy as to what the Court’s independent constitutional judgment should be institutionally; e.g., debate over interpretive methodology, activism/abstention, and the like. No-one, however, disputes that the Court must have a constitutional vision; in fact, it is an assumption implicit in any notion of ‘jurisprudence’.

Easterbrook’s analysis of presidential review. Judge Easterbrook discusses four uncontroversial examples of presidential action on the basis of “constitutional views, sometimes at variance with those of the court…: pardons, vetoes, additions, and proposals for legislation.” Three of these are obvious from inspection, and the fourth (addition) can be explained easily: the idea that the Executive branch may choose to provide more rights, more procedural protections, or do more than they are strictly ordered to by law (provided, of course, that this ‘more’ is consistent with constitutional and legal norms).

Easterbrook’s concern is with a fifth kind of example, one which is “not controversial in practice but should be so in theory” - an example in which a “President may refuse to enforce a law that is ‘like’ one held invalid by the courts.” As a preliminary note, the example concerns the faithful application of a constitutional standard or understanding promulgated by the Supreme Court, not by the Executive branch itself, so the example does not hinge on independent constitutional judgment; the tenor of such a ‘practice’ becomes not only controversial, but an example of a radical claim of legal power, when the refusal to enforce is predicated on independent constitutional judgment.

In the 1970s the Court struck down sex differences in social welfare laws. The Department of Justice trudged through these statutes identifying similar gender-based rules and instructing the Executive Branch not to follow them. In the end the Supreme Court decided only five or six Social Security sex discrimination cases, and the remainder of the sex-based provisions were carved out of the law by administrative decision, or on occasion by decisions of district judges that were not appealed and were acquiesced in nationwide…The Attorney General, on the advice of the Solicitor General and the Assistant Attorney General for the Office of Legal Counsel, decided not to enforce so many statutes that Congress required the Department of Justice to notify counsel for House and Senate when the Administration decided not to appeal from a decision holding a statute unconstitutional. A few of these non-

44 Id. at 907. I will return to these examples in part c) infra, which discusses the independent constitutional judgment thesis.
45 Id. at 913.
46 The power claim changes qualitatively at this point and becomes an example of constitutional resistance, since it denies the power of Congress to enact effective legislation, except subject to the President’s constitutional judgment.
† See, e.g., Califano v. Westcott, 443 U.S. 76 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977)[citation from original]
†† E.g., 2 U.S.C. §288k(b) (1988) (notice to Senate counsel)[citation from original]
enforcement decisions even reached the Supreme Court by the back door, and the Court did not seem restive that constitutional questions had been resolved by another branch.\textsuperscript{47}

This is not an example of internal legal review since what the Executive did was examine a wide variety of legislation for constitutionality in light of Supreme Court rulings so were engaging in review of the work of another constitutional actor – reviewing a coordinate branch’s work for legality. Congress’s reaction, asking for notice, shows that they too understood clearly that the Executive’s action was directed at their work. Now, no-one seriously argues that things should have gone otherwise. It would have been a waste of time and energy for the Executive or Congress to insist that every sex-based provision in countless statutes was presumptively valid irrespective of the logic and holding of the Supreme Court’s sex discrimination decisions, and that they would wait for each individual provision to be challenged, and defend them completely – indeed, such a move would have (correctly) been seen as a kind of legal stonewalling.

Nevertheless, Easterbrook suggests that we should find the practice potentially problematic in theory. His argument is direct and it will prove quite useful to carefully and critically examine it. The above practice of coordinate legal review was predicated, Easterbrook notes, on the assumption that if “the Court’s opinions have generality and force beyond the parties” to implement such generality and force the President must “have the ability to declare [statutory, administrative] laws unconstitutional in the course of applying the governing [constitutional] rules.”\textsuperscript{48} But this forcibly presents the question of “what counts as a ‘similar’ decision” and that “will depend on the level of generality selected, a question to which there is no right answer” and so “[t]o grant the President the power to generalize is to grant him the power to make independent constitutional decisions.”\textsuperscript{49}

Easterbrook’s argument contains a subtle but potent flaw which limits the efficacy of his argument. Consider what Easterbrook argues about generality: that for coordinate legal review to operate in the strong sense in his example, the President must interpret the Court’s decisions, and in doing so select a level of generality for which he understands the issue decided by the Court. This is strictly true, but only invokes independent constitutional judgment if the Court itself did not specify the generality of its holding, and so could often be trivially and uncontroversially true. For a brief example, consider a hypothetical Court decision which stated: “As a matter of constitutional due process under the 5th and 14th

\textsuperscript{47} Easterbrook, supra note 63, at 913.
\textsuperscript{48} Id. at 914.
\textsuperscript{49} Id.
Amendments, no law of any kind may offer any kind of benefit that is not in every possible sense equally available to both men and women, and may not offer differing benefits in any possible sense.” Now, ignoring the merits, in any sense, of such a constitutional decision, what is clearly true is that the Court has indicated the generality of its decision unequivocally. In fact, the sentence is so repetitive in declaring its broad scope (“no law of any kind may offer any kind of benefit that is not in every possible sense equally available and may not offer differing benefits in any possible sense”), that in the normal course of interpretation, one would well wonder why a Court would be apparently anxious to declare scope so emphatically. Nevertheless, at face value, the amount of judgment and discretion required to follow such a decision for the purpose of Executive coordinate legal review of existing statutes (as in the sex discrimination cases above) would be quite minimal, and the President’s choice of level of generality collapses into the choice to follow the Court’s judgment as to scope – it was quite obnoxiously clear - or to independently choose a more or less general level. That is to say, if the President wishes to follow the Court’s constitutional declarations faithfully, he only must resort to independent constitutional judgment in the case where the Court has declined to clearly state the generality of its holding. Of course, refusing to do so invites exactly such judgment, and can thus be interpreted as the Court purposefully permitting (indeed, inviting) the Executive’s independent constitutional judgment, which is then unproblematic.

Easterbrook’s argument then does not prove that coordinate legal review necessarily entails discretion and independent constitutional judgment; it only shows that that such discretion is exercised in either the absence of explicit guidance in the promulgated norm itself, or in the decision to ignore the explicit scope itself. A constitutional branch could quite coherently decide to apply a powerful version of coordinate legal review when the understood norm was both general and uncontroversially applicable (as in Easterbrook’s example), decline to take steps when the scope of a decision was either legitimately controversial or difficult to discern, and perhaps take measured steps in cases where the Executive in good-faith understood a decision to have a general scope, but perhaps not completely universal scope.50

50 See, e.g., Pillard, supra note 49, at 755-8. Pillard’s discussion emphasizes that a “particular institutional strength of the executive…is the ability to reach out and tackle a problem, rather than wait for it to come knocking.” Id. at 755. She uses an example similar to Easterbrook’s, namely the “OLC-led project under Assistant Attorney General Walter Dellinger of developing a constitutional response to the Supreme Court’s Adarand Constructors, Inc. v. Peña decision restricting affirmative action in construction contracting…it was… a distinctively executive constitutional response in that it reached out to the various executive entities involved in substantial government contracting, sought their detailed input, and ultimately offered them progressive guidance well beyond anything the courts have announced on how to determine whether to eliminate certain
The objection to Easterbrook’s argument can be generalized powerfully: nothing about accepting coordinate legal review necessarily implies anything about the *means* of such review. Return to two of Easterbrook’s easy examples – vetoes and pardons. Several features of those examples are actually quite important, if possibly banal outside the context of constitutional theory. First, those two examples involve the exercise of legal powers which are uncontroversially already possessed by the President, in fact, given to him by unambiguous text. Second, it’s clear that the *purpose* of those two powers is to give the Presidency a degree of coordinate review of the other two branches – one might well think to Madison’s proposed ‘Council of Revision’ to see the aim of the veto power as being a power of review. Third, the scope of these powers is fairly well established and broad. Altogether, depending on the powers claimed to the review, coordinate legal review is entirely consistent with a corresponding lack of novel power claims or independent constitutional judgment – in fact, it’s comprehensible as a normative claim about the duty of each branch to support the Constitution. In fact, some pro-executive arguments argue the opposite direction with similar logic – that the Oath clause puts a normative duty on the President to review laws for constitutionality (and often, to reject them), and that this would be difficult to countenance without supporting power.

The discussion up to this point of coordinate legal review has focused on a particular species of coordinate legal review – namely, coordinate legal review of Congress by the executive, with the understanding from the onset that Judicial coordinate legal review was uncontroversial. We should then examine what coordinate legal review exercised by Congress would look like. The question of what coordinate legal review on the part of Congress might be thought a peculiar one, if only since Congress’s role is to *create* legal norms, not act upon them (as the Judiciary and the Executive do). Surprisingly, however, there are quite a few ways to conceptualize Congressional coordinate review, and several are quite intuitively appealing.

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programs and how to make adjustments to others to avoid constitutional problems.” *Id.* at 755-6. Of course, such a broad OLC project also would include a fair degree of independent constitutional judgment, since, as Pillard notes, they went “well beyond” where the Court had given instruction.

51 U.S. Const. Art. I. Sec. 7, Cl. 2 (veto provision); Art. II. Sec. 2, Cl. 1. (pardon & reprieve power).

One candidate for such a view relies on the fact that Congress is the least continuous of the constitutional actors. Each Congress, in a peculiar sense, is ‘coordinate’ to its predecessors, in that each Congress legislates primarily against the background of its predecessors’ work. Amendments and repeals are the most obvious form of such, and a clear example of Congress reviewing the existing legal state of affairs. This theory would also and perhaps more profoundly apply to the Executive branch in reviewing/repealing executive orders and setting the administrative agenda, and apply least to the institutionally slow-moving judiciary, which nevertheless and obviously does not lack for opportunities to exercise coordinate legal review.

Another candidate for Congressional coordinate legal review, which looks much more like what one might expect in calling it ‘coordinate’, utilizes the lack of bounds on a ‘second bite at the cherry’:

Whether through the ruse of working through the commerce clause or by discovering powers earlier hidden within the words of the Reconstruction Amendments, Congress has managed to pass… laws despite a host of important court decisions to the contrary. There seems to be nothing in either history or theory that forbids congressional attempts to revive acts the courts have overturned. At times, the legislative changes made to resuscitate a voided law are minimal…And there are instances when the Congress has simply repassed the offending statute, not seeking to have the Court distinguish but simply to have to relent.

Admittedly, much of what Agresto wrote in 1984 seemed more like conventional wisdom before the recent exertions of the Rehnquist Court to constrict the power of Congress under both the Commerce Clause and the Reconstruction Amendments. Nevertheless, Agresto’s main point remains true, viz. that nothing prevents Congress from trying. Agresto

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53 Every particular Congress, by definition, lasts only two years due to the complete election of the House. U.S. Const. Art. I. Sec. 2. Cl. 1.
54 Also often termed ‘second bite at the apple’, but see infra text accompanying note 78 for why I chose ‘cherry’.
57 See City of Boerne v. Flores, 521 U.S. 507 (1997)(striking down provisions of Religious Freedom Restoration Act (RFRA) applying to states on the reasoning that Congress could only protect rights under Section 5 of the 14th Amendment pursuant to the Court’s interpretation of such rights).
cites to an important precedent in this area, one well worth examining – from the congressional debate over the Civil Rights Act of 1964:

[Sen. John Passmore:] I am a little disturbed about the carefulness we are exercising on both sides here with relation to the inviolability of an opinion of the Supreme Court of 1883. I submit that until it is changed by another opinion of the Supreme Court, or by constitutional amendment, that it is the binding law of the land and we must preserve it. But is there any constitutional prohibition about Congress taking a second bite at the cherry?

Mr. [Burke] Marshall [assistant attorney general, Civil Rights Division]: No, there isn’t, Senator.58

The Supreme Court opinion referred to by Passmore was of course the Civil Rights Cases59 in which the Supreme Court overturned the Reconstruction-era Civil Rights Act of 1875. Indeed one might note, as Agresto does, that notwithstanding the Reconstruction Amendments, there is “hardly any major civil rights legislation today on the books that does not stand in open rejection of the Court’s earlier considered judgment on the true and final meaning of the Constitution.”60 So this form of Congressional coordinate legal review is not only well-established and uncontroversial, but also theoretically unthreatening.61 Of course, as in the discussion of the MCA above, there might well be reasons grounded in internal legal review to substantively contest particular acts of Congress, particularly when Congressmen admit to acting in ways that they believe not only unconstitutional by the Court’s doctrine, but also by their own judgment; nevertheless, it’s difficult to assess how as a structural matter one might so limit Congress, and it’s clear that doing so would likely remove a power of review in Congress that’s often for the good.62

58 AGRESTO, supra note 75, at 127 (citations omitted).
59 109 U.S. 3 (1883).
60 AGRESTO, supra note 75, at 126-7.
61 Just as the Congress can continue repassing a statute, the Court, if it so deems it worthwhile, could continue invalidating the statutes. Actually, here the Court has an unusual structural advantage – at a certain point of stating its own position clearly, it would no longer have to do much in invalidating the statutes, since district court judges would likely do so, and it could adopt their decisions per curiam if it was tired of restating its own views.
62 AGRESTO, supra note 75, at 27-31. (broadly cataloguing the history of Court hostility to individual rights-protecting or rights-creating legislation and concluding that “The odds are, in other words, against an easy equation of an active Court with liberty or social justice. At the level of national legislation, a Court whose primary mission is to check legislation will only on the rarest occasions be checking illiberal or oppressive enactments. It is more likely to find itself hindering compromised, benign, fair, and often long-overdue legislation.” Id at 31.) Of course, one may easily temper Agresto’s
Yet another example of Congressional coordinate legal review is actually quite straightforward and serves at once as both review of the Executive and (prospectively) the Judiciary: judicial nomination. The vast majority of the nomination procedure, for better or for worse, is aimed at trying to discover a judge’s legal views on a variety of topics. The appointments power is a power vested in the Executive, and the Executive has not been shy about placing judges sympathetic to its views on the Court; just the same, Congress has not been shy about exerting influence in either the process for selection of judges or the confirmation process. As the Executive pushes towards a particular legal view in the judiciary through nomination, Congress exerts a counter-pressure, and the process could aptly be called an instance of coordinate legal review.

Of course, not all examples are as anodyne as the ones I have proposed above. The power in Congress to make exceptions to the jurisdiction of the federal courts can often be used as a particularly aggressive form of coordinate legal review. Leaving aside for the moment the enormous theoretical literature on the extent and nature of the power, consider the uses of the power. A notable recent example was the jurisdictional aspect of the Military Commissions Act of 2006. Congress, at the request of President George W. Bush’s second administration passed the MCA to, among other things, strip all federal courts of jurisdiction over habeas corpus cases brought by Guantánamo Bay, and only allow detention challenges to be brought under the DTA (Detainee Treatment Act) with exclusive jurisdiction given to the D.C. Circuit Court of Appeals.

pessimism about judicial review and relative enthusiasm for national legislation with pessimistic takes on Congress, as the institution most vulnerable to capture by various special interest groups, particularly corporate ones.

63 See, e.g., FISHER, supra note 21 at 31-35; SCIGLIANO, supra note 60, at 85-124.

64 U.S. Const. Art. III. Sec. 2. Cl. 2. (“In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.”)

65 28 U.S.C.A. § 2241(e)(1) (Supp. 2007) (“No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly determined as an enemy combatant or is awaiting such determination.”). See Boumediene v. Bush, 128 S.Ct. 2229, 2265 (construing 28 U.S.C.A. § 2241(e)(1) as “unequivocal…jurisdiction-stripping language”).

66 See 28 U.S.C.A. § 2241(e)(2) (Supp. 2007) (“Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”); 10 U.S.C.A. § 801(e)(2)(A) (“In general.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final
Without wading into the merits or wisdom of the attempt, one can dispassionately and factually note that with the combination of the DCA and MCA, Congress acted to remove legal cases from the jurisdiction of the Court, and specify the court that it thought should hear the claims (namely, the D.C. Circuit). This is an example of coordinate legal review; the Congress did not approve of recent legal decisions by the Supreme Court and attempted to remove the Court’s power to hear a specific class of cases. At the very least, one can say that with these acts Congress engaged the Court’s decisions, even if one disagrees with the substance or method Congress chose for its engagement. Of course, the MCA/DCA cases are complicated by the fact that the particular cases and cause of action that Congress tried to strip jurisdiction raised deep constitutional issues under the Suspension Clause.\(^67\) Regardless, \textit{Boumediene} is exceptional in fighting an attempt to deny jurisdiction; in two other prominent cases, the Supreme Court upheld the jurisdictional-stripping, though construing the provisions narrowly: In \textit{Felker v. Turpin}\(^68\), the Supreme Court did not contest the propriety of the jurisdiction stripping by noting that other avenues of appellate review existed, and in \textit{Ex parte McCordle}\(^69\), the Supreme Court upheld an act of Congress stripping it of appellate jurisdiction over claims relating to a military tribunal, raised in a Circuit Court.\(^70\)

Concluding, we may note that as with the Executive, the objectionable nature of coordinate legal review exercised by Congress has more to do with either the nature of the means used, or with objections to the substance of the review, and relatively little to do \textit{per se} about the Congress engaging in such review. The next doctrine, of independent constitutional judgment, will therefore be the first considered here that could be problematic on its own grounds.

C) INDEPENDENT CONSTITUTIONAL JUDGMENT

It is, of course, always hard to judge a true ‘starting point’ for long-standing scholarly or political controversy. Even so, it’s hard to dispute decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.”

\(^{67}\) U.S. Const. Art. I. Sec. 9 Cl. 2. (“The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”) The Supreme Court struck down the problematic provisions of the MCA and DTA on precisely those grounds, \textit{Boumediene}, 128 S.Ct. at 2274 (“[I]t suffices that the Government has not established that the detainees’ access to the statutory review provisions at issue [the substantive review provisions of the DTA] is an adequate substitute for the writ of habeas corpus. MCA § 7 thus effects an unconstitutional suspension of the writ.”)

\(^{68}\) 518 U.S. 651 (1996).

\(^{69}\) 74 U.S. (7 Wall.) 507 (1869).

\(^{70}\) Though the Court did this through a quite restrictive, and, to some, implausible reading of the repealing act.
the centrality of Edwin Meese’s speeches in 1985 and 1986 proposing the
Reagan’s Administration call for a ‘jurisprudence of original intent’ as
spurring a still-raging debate over the proper methodology for
constitutional interpretation. Crucially, a focal point of Meese’s first
speech was an assertion of the independent constitutional judgment
doctrine, and so it’s worthwhile to read exactly what Meese was saying on
behalf of the Reagan Administration:

It has been and will continue to be the policy of this
administration to press for a jurisprudence of original
intention. In the cases we file and those we join as amicus,
we will endeavor to resurrect the original meaning of
constitutional provisions and statutes as the only reliable
guide for judgment.

We will pursue our agenda within the context of our written
Constitution of limited yet energetic powers. Our guide in
every case will be the sanctity of the rule of law and the
proper limits of governmental power.

It is our belief that “only the sense in which the
Constitution was accepted and ratified by the nation,” and
only the sense in which laws were drafted and passed,
provide a solid foundation for adjudication. Any other
standard suffers the defect of pouring new meaning into old
words, thus creating new powers and new rights totally at
odds with the logic of our Constitution and its commitment
to the rule of law.\footnote{Edwin Meese III, Speech Before the American Bar Association (July 9, 1985),
Steven G. Calabresi).}

Reading Meese in good faith, one can discern several separable claims,
both explicit and implicit: the Administration could legitimately adopt its
own jurisprudential view of the Constitution, one which might not track
the Supreme Court’s views; the best such view and the one the Reagan
administration was adopting was an original-intent jurisprudence, and the
Administration would do so in cases it filed, amicus briefs, and “within the
context of our written Constitution of limited yet energetic powers, with a
distinct bias against “creating new powers and new rights totally at odds
with the logic of our Constitution.” Though the reaction to Meese centered
on the substantive second claim – for original-intent jurisprudence - the
first and third claims are interesting claims in their own right, and provide
a useful beginning point in considering the doctrine of independent
constitutional judgment, since that is precisely what the first claim is,
while the third claim concerned how the Administration would apply its independent constitutional judgment.\footnote{I do not intend to address the substantive jurisprudential claim for or against original-intent jurisprudence since it is beside the point here.}

There is much to be said for Meese’s first claim, standing by itself. Think about what it would mean to deny the claim that the Presidency could not espouse its own constitutional views. First, an affirmative denial of independent constitutional judgment would be unworkable with respect to several kinds of constitutional issues, the most obvious being political questions. Since one of the basic ideas underlying the political question doctrine is that there are legal areas reserved for judgment of the political branches,\footnote{See, e.g., Baker v. Carr, 369 U.S. 186 (1962)(“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or…the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government…..”); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)(“By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.”)} the Executive branch has to be on its own in developing views on the legal issues therein (and likewise for Congress with respect to political questions in its domain, such as impeachment). Second, the federal judiciary, massive as it is, can only resolve a relatively limited set of questions compared to the innumerable practical legal questions posed by the day-to-day functioning of the federal government (which is almost entirely the Executive branch); since many such questions must at times touch on constitutional issues, the Executive practically must preliminarily judge such questions to carry on its business.\footnote{This observation can take the form of the claim that execution of the law usually involves some level of interpretive or lawmaking activity on the part of the executive. See Mistretta v. United States, 488 U.S. 361 (1989)(Scalia, J., dissenting)(“…a certain degree of discretion, and thus of law-making, inheres in most executive or judicial action).}

Third, assuming that the presidency is a constitutional carrier of popular sovereignty (which to some extent it undoubtedly is), then it’s only appropriate that it espouse a constitutional vision – presumably one that was transparent to and, preferably explicitly approved by, the electorate. Obviously, analogous though not identical reasons can be produced in favor of Congressional independent judgment.

The means question remains. Meese was careful to limit the means for executive constitutionalism in his speech to mechanisms that were indisputably within Executive discretion: amicus briefs (the least
contestable of all – who would claim to dictate what a President should file as the Executive’s view?) and cases filed (again, strongly within the realm of the Executive, in this case strictly within the purview of the Department of Justice as prosecutor for the government). Though Meese suggests that these are not the exclusive means for such judgment to show itself, his speech suggested an unthreatening, from the standpoint of separation of powers, conservatism in construing where such claims might lay – he does emphasize a written Constitution of limited powers and claims a bias against “new powers and new rights”, which if we take Meese at good faith, would clearly apply as well to the powers and rights of the Executive. But independent constitutional judgment need not be as constrained as in the Meese version above, particularly since there appears to be little principled basis on which to determine which constitutional powers may be exercised with independent constitutional judgment and which may not.

Reconsider the ‘easy’ examples of constitutional power used for coordinate legal review by the Presidency that I took from Easterbrook in section b) above: pardons, vetoes, additions, and legislative proposals. Would Meese have been advancing a more controversial platform – again from the standpoint of structural constitutionality - for the Reagan Administration if he had said the President would issue pardons or vetoes, or suggest legislation, or provide additional procedural rights based on original intent jurisprudential views? Again, it helps to see what one would assert to deny the President the ability to use his own constitutional judgment with regard to these powers. The veto power is uniformly seen as plenary with respect to constitutional structure, and it’s almost certain that challenging a veto would be a non-justiciable question. Not to mention that the one area of agreement with respect to the veto power, even before Pres. Jackson’s famous veto of the Bank of the United States, was that the President could veto bills he thought were unconstitutional.  

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Broughton himself distinguishes his project as answering addressing the concern that “if the veto is wholly a matter of presidential discretion, unfettered by any formal constitutional limitations, then it is important to ask whether he should exercise that discretion on any grounds he wishes, constitutional or non-constitutional” – that is, “what should be the proper scope of the President’s discretion...?” *Id.* Broughton’s concerns then are concerns as to how the President should view his own power; e.g. substantive concerns about independent constitutional judgment.

*Id.* at 94.

*See, e.g., THE FEDERALIST NO. 73, AT 443 (Alexander Hamilton).*
The same is true for pardons – consider Justice Field’s view of the pardon power in *Ex parte Garland*\(^78\):

The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions...There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.\(^79\)

Needless to say that proposals for legislation would need to be predicated on independent constitutional judgment, and more so for supererogatory gestures like additional procedure. Sanguinity about the existence and need for independent constitutional judgment in some form may then be justified. Questions still remain, though, regarding the scope and means for such judgment.

Clearly when plenary power or unreviewable discretion is vested in a branch, independent constitutional judgment seemingly must lie, but this, so far, is little more than an analytic defense of legal commonsense. So let us apply the principle to the more interesting and difficult cases. Because the foregoing focus in this section has been on the executive, I shall focus on Congress and its powers of impeachment as a case example.

The House is granted “the sole power of impeachment”, \(^80\) and the Senate is granted “the sole power to try all impeachments.”\(^81\) On solely textual consideration, the powers appear to be plenary – after all, as Chief Justice Rehnquist discussed in *Nixon v. United States*, the Constitution’s use of the term ‘sole’ in this context is unique, and at least presumptively meaningful.\(^82\) The case for Congress having strong independent constitutional judgment here is strong, and the Supreme Court itself appears to have endorsed it.\(^83\) Nevertheless, there appear to be at least four important bounds on the powers, ones that would push *Nixon*’s assertion of an “identifiable textual limit on the authority” grants. First, Article II

\(^{78}\) 71 U.S. 333 (1866).

\(^{79}\) *Id.* at 380-381 (citations omitted).

\(^{80}\) U.S. Const. Art. I. Sec. 2. Cl. 5.

\(^{81}\) U.S. Const. Art. I. Sec. 3. Cl. 6.


\(^{83}\) *Id.* at 235-238 (holding that judicial review of the impeachment processes of the Senate posed a nonjusticiable question.)
appears to place bounds on the power of impeachment over the Executive by providing the permissible grounds for impeachment: the “President, Vice President, and civil officers, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.”\textsuperscript{84} Second, a supermajority criterion is imposed on the Senate: “No person shall be convicted without the concurrence of two thirds of the members present.” Third, the Judiciary is protected by tenure during “good behavior” which seems to imply similar, if vaguer bounds on the impeachment exercised against the Judiciary.\textsuperscript{85} Fourth, the Constitution demands that a Presidential impeachment be presided over by the Chief Justice of the Supreme Court.\textsuperscript{86}

First things first, the Chief Justice’s presiding over a presidential impeachment appears not to be a substantial procedural protection, and there’s good reason to suspect that it may have been inserted to solemnize an occasion and reduce political friction on the event of an impeachment – to borrow the prestige of the Judiciary for the occasion. There are several good reasons to suspect the Chief Justice’s participation could not substantially affect the proceedings. The main one is that presiding over the occasion would not give the Chief Justice power to impose procedural rules; as a textual matter, “Each House may determine the rules of its proceedings”,\textsuperscript{87} and \textit{Nixon} itself rejected a challenge to a Senate rule for impeachment proceedings – Judge Walter Nixon not implausibly objected that the use of a committee to hear evidence was not a ‘trial’ under the Impeachment Clause.\textsuperscript{88} Additionally, consider the incentive structure for a Chief Justice wishing to meddle substantively in the proceeding in favor of the President. If the Senate was leaning towards conviction, it would require 2/3 of its members – also enough to impeach a Chief Justice. Trying to subvert the Senate’s rules, or apply them in a favor disagreeable to the Senate might well qualify in its independent constitutional judgment as not ‘good behavior’, and there seem to be effective bounds on such a determination.

Is the Senate’s independent constitutional judgment on procedural issues on impeachment then beyond review? Interestingly, the concurring opinions in \textit{Nixon} took the trouble to suggest that there might be a border – that some behavior might be beyond the pale. Thus Justice Stevens takes pains to point out that the “Senate is fully conscious of the profound importance of the assignment, and nothing in the subsequent history of the Senate’s exercise of this extraordinary power suggests otherwise” and so he says that “[r]espect for a coordinate branch of the Government

\begin{itemize}
\item \textsuperscript{84} U.S. Const. Art. II. Sec. 4.
\item \textsuperscript{85} U.S. Const. Art. III. Sec. 1.
\item \textsuperscript{86} U.S. Const. Art. I. Sec. 3. Cl. 6.
\item \textsuperscript{87} U.S. Const. Art. I. Sec. 5. Cl. 2.
\item \textsuperscript{88} Nixon, 506 U.S. at 227-228 (discussing Senate Rule XI, the subject of Nixon’s challenge)
\end{itemize}
forecloses any assumption that improbable hypotheticals like those mentioned by Justice White and Justice Souter will ever occur.”

Stevens’s phrasing is quite the double-edged sword: the Senate has behaved well, so we (the Court) will decline to check them out of respect, but Stevens leaves open the possibility that the Court might not do so in the future. Justice White’s opinion points out that “The majority’s conclusion that ‘try’ is incapable of meaningful judicial construction is not without irony. One might think that if any class of concepts would fall within the definitional abilities of the Judiciary, it would be that class having to do with procedural justice” – but, more importantly, White points out that there seem to be cases where the Court could not or would not simply defer – for example if the Senate “adopt[ed] the practice of automatically entering a judgment of conviction whenever articles of impeachment were delivered from the House, it is quite clear that the Senate [would] have failed to ‘try’ impeachments.” Though White and Blackmun concede this would be a “monstrous hypothetical abuse”, it’s not an implausible one in some contexts (one could such a state senate rule in the Jim Crow South), and certainly not impossible. Justice Souter voices the same concern, noting that there might be unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply a bad guy, judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence.

The concurrences all recognize the general problem of setting a scope to the exercise of independent constitutional judgment, and finding it problematic even in a case where they all agree a large degree of judgment is incontestably due. Stevens is the most sanguine, refusing to worry about a power that has always responsibly exercised, but of course there has to be reason for concurring instead of simply joining the Court’s opinion, and his paragraph long explanation suggests what it, perhaps out of the same

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89 Id. at 238 (Stevens, J., concurring)(capitalization emphasis omitted).
90 Id. at 248 (White & Blackmun, JJ., concurring in the judgment).
91 Id. at 246-247.
92 Id. at 247 n.2.
93 Id. at 253-254 (Souter, J., concurring in the judgment)(citations and quotation omitted).
regard it uses as justification for sanguinity, refuses to say on the particular occasion. White, ever the pragmatist, seems to fear the width of independent constitutional judgment possibly conferred by Rehnquist’s reasoning, and worries about a blanche carte that is potentially abusable, and Souter, citing to Bickel,\textsuperscript{94} argues that though “this occasion does not demand an answer”, at some point application of the political question doctrine – here manifesting as respect for Congress’ independent constitutional judgment – may not control, since “[n]ot all interference is inappropriate or disrespectful.”\textsuperscript{95}

The scope of independent constitutional judgment is even trickier with regards to other aspects of impeachment. One difficult area is the two-thirds requirement. The textual requirement is “two-thirds of the members present”. A common-sense reading of this might see little difference between this two-thirds requirement, and one requiring two-thirds of the Senate itself – but then one wonders why the Constitution does not use the latter requirement. Imagine just one troublesome scenario: The House institutes an impeachment of the President which several Senators see as partisan and unjustified, but most do not, and it seems clear from media reports that the Senate will have 75 votes to convict, much more than the apparent needed threshold of 67. A Senator, from the opposing party, Sen. Grandstand, decides to not attend the impeachment trial, which he calls a kangaroo court.\textsuperscript{96} The Senate leadership considers compelling him to attend,\textsuperscript{97} but decides that since they clearly have a quorum at 99 Senators,\textsuperscript{98} they will ignore Sen. Grandstand. The vote comes in and, shocking the nation, there are a bunch of defectors from conviction (each deciding that magnanimity would soothe over potential election problems in “purple” states) leading to an end-tally of 66 votes to convict, and 33 to acquit. The Chief Justice, presiding, is suddenly in a horribly tight spot. Two-thirds of the 99 members present have voted to convict, and they clearly constituted a quorum. But two-thirds of the Senate would not have voted to convict assuming Sen. Grandstand would have voted with the rest of his party in the party-line vote to acquit, as he suddenly loudly and

\textsuperscript{94} Id. at 253
\textsuperscript{95} Id.
\textsuperscript{96} I could complicate the scenario by having the Senate instead have claimed to exclude (though not expel) this member for some reason of qualification, which would call into play the Court through its opinion in Powell v. McCormack, 395 U.S. 486 (1969). The Powell case held that, contrary to the House’s independent constitutional judgment on the matter, the House of Representative’s power to be the judge of the qualifications of its members under Art. I. Sec. 5. was limited to standing the qualifications spelled out in Art. I. Sec. 2. Cf. id. at 548-550. The Congress has not resisted the Court’s judgment in Powell, but it remains an open question as to whether it might attempt to do so on some future occasion.
\textsuperscript{97} U.S. Const. Art. I Sec. 5. Cl. 1 (“Each House…may be authorized to compel the attendance of absent members.”)
\textsuperscript{98} Id. (“…a majority of each [House] shall constitute a quorum to do business.”)
publicly protests that his state is being disenfranchised in his vote not counting because of his mere absence from the chamber. Has the President been convicted? Keep in mind that the media constantly explained that “the Senate needs a two-thirds vote to convict, 67 votes.” – it, like everyone else neither expected the grandstand, nor the end vote count, and the country is rife in an intense controversy. Shall the Senate’s independent constitutional judgment here rule – should it? 99

Or consider the substantive provision that officers, including the President and Vice-President, shall be removed only for treason, bribery, or “high crimes and misdemeanors,” 100 which came up most significantly in the first Presidential impeachment, that of Andrew Johnson. A bit of background will help to understand just how crucial that single phrase came to be. Andrew Johnson after Reconstruction faced a Congress that was not only aligned against him – a circumstance political observers of the current day are familiar with – but aligned against him by orders of magnitude that are difficult to assimilate, if not by the extraordinary way he assumed office after the Civil War, after the assassination of President Lincoln. Consider that the Congress elected in November 1866 had 226 Representatives, 173 of whom were Republicans (76.5% - more than a three-fourths majority!) and 52 Senators, 43 of whom were Republicans (82.7%!). 101 Some would have sought compromise – Johnson responded by persistently and obstreperously using his veto. 102 Not too surprisingly Congress responded

in kind. When a vacancy arose on the Supreme Court in the spring of 1866...[r]ather than allow the president to place his man on the high court, Congress eliminated the seat. To ensure that Johnson would never appoint a judge to the Supreme Court, the legislation provided that the Court

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99 This scenario may remind some unpleasantly of Bush v. Gore, 531 U.S. 98 (2000). I suggest that my scenario would actually probably be much worse, since it would lack even the full imprimatur of whatever legitimacy the Court possesses, and the Court would be hampered in hearing the case by the already-present and public participation of the Chief Justice.

100 See supra note 105.

101 DAVID O. STEWART, IMPEACHED!: THE TRIAL OF PRESIDENT ANDREW JOHNSON AND THE FIGHT FOR LINCOLN’S LEGACY 69 (2009)

102 E.g. id. at 53-54 (“For many, Johnson’s veto of the Civil Rights bill of 1866 would stand as his defining political blunder, setting a tone of perpetual confrontation with Congress that prevailed for the balance of his presidency. That veto, along with his veto of the Freedman’s Bureau legislation and Washington’s Birthday speech [in which the president more or less “embraced the former rebels as patriots and denounced the Radicals as traitors” Id. at 51-52], fundamentally eroded his support among congressional Republicans. For Andrew Johnson, there would be no compromises and no negotiations with his congressional adversaries.”)
would shrink to seven justices when the next vacancy occurred.\footnote{103}

Of course, Congress began to exercise its other powers as well, and began to search for ways to control Johnson. It quickly began passing legislation over Johnson’s futile vetoes, to which Johnson responded with obstructionism including the then-novel use of Attorney general’s opinions which “reasoned away the restrictions” posed on ex-Confederates by the Reconstruction Act, among other things.\footnote{104} Congress, of course passed new versions again over Johnson’s veto.\footnote{105} The most direct move against Johnson, however, was the fateful Tenure in Office Act. The act concerned the long-standing constitutional debate about the power of executive removal, and, unsurprisingly, restricted Johnson from “firing [without concurrence]…any executive official whose appointment the Senate had confirmed in the first place.”\footnote{106} That Johnson would veto the act “was a foregone conclusion” and “[a]s was becoming routine, Congress enacted the bill over Johnson’s veto.”\footnote{107} The Tenure of Office had “an obvious trap…Section 6 of the new law stated that appointments or removals that violated the act were “high misdemeanors”, echoing the “high crimes and misdemeanors” language of the Constitution’s impeachment clause.”\footnote{108}

Interestingly, a Congress that had every political and popular reason to impeach Johnson found itself initially hampered by the “high crimes and misdemeanors” stipulation. The first furtive attempt at impeachment had little focus and became little short of a circus of implausible, unsubstantiated claims against Johnson,\footnote{109} which were so pathetic that even some Radical Republicans could not bring themselves to vote for it, and the “Judiciary Committee had heard enough. On a 5-to-4 vote, it declined to approve impeachment articles.” This was before some of the more flagrant of Johnson’s obstructionist moves, and in a second attempt at impeachment, the 5-4 vote reversed, with the crucial 5th vote reversal (that of Rep. Churchill of New York) being explained by “Johnson’s statements denouncing Reconstruction, the attorney general’s opinions limiting the Reconstruction statutes, Johnson’s veto of the Third Reconstruction Act, the suspension of War Secretary Stanton, and the

\footnote{103 \textit{Id.} at 54.}
\footnote{104 \textit{Id.} at 84.}
\footnote{105 \textit{Id.} at 84-84.}
\footnote{106 \textit{Id.} at 76.}
\footnote{107 \textit{Id.} at 76-77.}
\footnote{108 \textit{Id.} at 77.}
\footnote{109 See \textit{id.} at 81-82. These included such scurrilous charges as a famous detective describing “his actions the previous year to prevent Mrs. Lucy Cobb- ‘a disreputable woman, or, in other words, a woman of the town’ – from visiting the White House” without any evidence of such attempted visits (or any evidence of any of his many other allegations whatsoever, actually).}
ousters of Generals Sheridan and Sickles.” But the House still had to present impeachment charges and this it failed to do so convincingly. Instead, the majority produced an “unfocused, rambling” impeachment report that “wandered from broad denunciations of the president to disorganized factual allegations” and insisted that “no indictable crime need be committed” for an impeachable offense. The minority report was much more effective, particularly in its conclusion that though Johnson “deserves the censure and condemnation of every well-disposed citizen” nevertheless this was insufficient for impeachment and that “[p]olitical unfitness and incapacity must be tried at the ballot box, not in the high court of impeachment.” The weakness of the majority report and strength of the minority report played out in the House vote tallies: fifty-seven in favor, 106 opposed (with 68 Republican defections), and 22 abstentions.

It’s difficult to say who or what could have posed a significant outside challenge to the Congress in this decision. If Congress had chosen a single article of impeachment, be it as vague as the six words “President Johnson has committed high misdemeanors”, and simply had a party-line vote in the House and Senate, it could perhaps have succeeded in impeaching Johnson; at the very least, resistance would have been difficult to justify on behalf of an unpopular president with no electoral mandate. Undoubtedly, it would not have been the most seemly of impeachment trials – it would probably have offended any sense of justice for an observer believing in the need to follow the substantive requirement for impeachment, but in all likelihood it would have been accepted as a necessary evil. Instead, the Congress, applying its independent constitutional judgment, decided – unofficially but certainly definitely to observers of the time – that political unfitness would be insufficient, and when it did finally manage to impeach Johnson, its charge focused above

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110 Id. at 102.
111 Id. at 105.
112 Id. at 103.
113 Id. at 104.
114 Id. at 106. One wonders how this would have played out in the Clinton impeachment if pursued more aggressively.
115 Id. at 111.
116 It has been pointed out to me that had this bald impeachment been attempted, the Supreme Court might have intervened. This, I think is not much of an objection. First, a Congress that was emboldened enough to so remove a President would easily so remove a Supreme Court Justice or 9, and replace them with more amenable persons. (E.g., members of the House or Senate engaging in such activity). Moreover, Johnson would not have been able to rally the military behind him, since he was in this sense hampered by a living war legend who was still in command of the army, and expectantly waiting to himself become President – e.g. Ulysses S. Grant. Even if these realpolitik objections were not sufficient, it’s still more likely than not that the Supreme Court would have, on Bickel-type reasoning, found a political question barring it from consideration, or case or controversy, or the like.
all on Johnson’s unwise and dramatic violation of the Tenure of Office Act. So while Congress refused to impeach on something that was not in its judgment recognizably ‘a high crime or misdemeanor’ it had no hesitation in protecting a very constitutionally shaky Tenure of Office Act by placing in it a provision that its violation would constitute, by its very wording, grounds for impeachment, and little hesitation in carrying through such an implied threat when given the opportunity. Indeed, Congress’s view has more or less carried the day with respect to presidential impeachment.

This conclusion seems neat, but is really quite troublesome. Consider a point made by the first majority report on impeachment that Stewart thoughtfully notes was unfortunately “submerged through much of the impeachment drama.” The majority report spoke of Johnson’s obstructionism and the Congressional responses, referred to the struggle as a whole as a “questionable process” and urged [in favor of impeachment] that the government be delivered into “the hands of those who will recognize the jurisdiction of Congress, and bow respectfully to its authority. This was an apt description of how the bitter contest between Congress and Johnson was distorting the government…rather than use the constitutional impeachment process to remove the man, Congress had altered the structures of constitutional government in fundamental ways…all to limit the mischief that one man could do. Rather than contrive fresh distortions of the government, why not simply get rid of him?

There are some potential problems with this argument, but not very powerful ones. For example, one that comes to mind is that the Presidency is a carrier of popular opinion, and that conflict between the President and Congress might be called for if popular opinion had so deemed it with its selections – but that argument is at its absolute weakest with respect to the unelected (and subsequently unelectable) Johnson. Another is the precedent that such an impeachment would cause in weakening the next precedent – but this concern is at least balanced neatly by the fact that the contortions of the Congress would just as equally affect the next President, if not actually outweighed (consider the Tenure of Office Act in this light). Why shouldn’t acting in such an obstinate and obstructionist manner that Congress felt compelled to fundamentally reconstitute previously)

117 The last attempt at impeachment, after Johnson’s attempt to remove War Secretary Stanton in violation of the Tenure of Office Act, sailed through, 126 to 47, on strictly partisan lines.
118 Id. at 104.
119 Id. at 105.
functioning constitutional understandings be considered “high misdemeanor”? More fundamentally, wouldn’t Congress’s independent constitutional judgment be more honestly and clearly expressed in such a procedure rather than in laying snares in unwise statutes to meet the formality of the phrase? Of course, undoubtedly part of the consideration was the unwillingness of some Republican congressmen to disobey the constitutional stricture as they saw it, and some of it may have been an unwillingness to behave in a way that would seem to the public to be against the constitutional stricture – a kind of indirect expression of popular sovereignty’s effect on independent constitutional judgment. Regardless, one would suspect that whatever the people may have thought of a dubious impeachment proceeding in the abstract, it’s unlikely that Johnson would have garnered sympathy for the reasons adumbrated above.

There is a great deal more to be said about independent constitutional judgment; as the foregoing section has hopefully illustrated, independent constitutional judgment is an incredibly complex topic, and one that resists doctrinaire, dogmatic theses. Thus while a departmentalist might praise the idea of independent constitutional judgment, it’s clear that this could mean anything from reaffirming truths about constitutional practice that are inescapable, to affirming constitutional behavior that is radically self-affirming, and possibly solipsistic. This latter farthest end of independent constitutional judgment is so qualitatively different than what has been discussed before that it deserves special attention, which I shall give to it in the next section, calling such a position constitutional resistance.

D) CONSTITUTIONAL RESISTANCE, FIRST TAKE

What should a constitutional actor do if it believes it has a power under its independent constitutional judgment, and another branch, in exercising its own constitutional powers, denies it? Some examples, real and hypothetical, will help illustrate the problem. Consider the War Powers Resolution [WPR]. The then-incumbent President strongly objected to the passing of the WPR and in fact vetoed it in large part on constitutional grounds, which veto was overcome by congressional override, an increasingly rare occurrence in modern politics. Assume a President believes that every jot and tittle of the WPR is an unconstitutional infringement on his executive power under the Vesting Clause and his power as Commander-in-Chief. What, if anything, should the President do? Follow the WPR as the strongest possible constitutional

\[120\] 50 U.S.C. §§1541-1548.

judgment of the Congress? Go to the courts and challenge the WPR? (This is not usually feasible – the Judiciary will often opt-out of deciding the merits by application of the political question doctrine or standing or the like; if it does so, how should the President interpret its silence?) Ignore the WPR? Even more tendentiously, what if an executive believes that a struck-down law was incorrectly and unconstitutionally stricken down? Should it continue enforcing the law? What if the Executive thinks that granting a petition for habeas corpus would be unthinkable and impair the Executive’s power by placing prisoners who should be under military control into the civil system? Should he defy the courts?

One plausible way to look at the situation might be called “Youngstown for everyone.” Justice Jackson’s classic concurrence in Youngstown proposed a “somewhat over-simplified grouping of practical situations” in which a President’s powers could be challenged, and examining the legal implications of judicial oversight when Congress approved, had no discernible opinion on, or disapproved of Presidential activity, respectively. Jackson reasoned that when the Executive claimed constitutional power, most deference was due to the claim when it was assumed that any indefinite powers of both political branches were aligned in pursuit of a goal (Congress approves) and least when such indefinite powers were opposed (Congress disapproves), and in the latter case referred to the Executive’s power being at “lowest ebb” since any constitutional ability of Congress to limit it would be assumed to be occurring. So perhaps Jackson’s pragmatic epistemology of power could be expanded for all the branches: the Executive should inform its own decisions reached by independent constitutional judgment with deference to a Youngstown-type schema, and likewise for Congress. Of course, such an approach would implicitly disfavor novel power claims, except to the extent to which another branch favored such a claim.

Constitutional resistance favors a diametrically opposed response. It directs each branch to act on solely its independent constitutional judgment, notwithstanding the actions of other constitutional branches. One of the clearest statements of constitutional resistance comes from Prof. Paulsen:

122 This last example does not mean to suggest either Pres. Bush or Obama, but rather Pres. Franklin Roosevelt regarding the alleged Nazi saboteurs in Ex parte Quirin, 317 U.S. 1 (1942). Roosevelt famously said to his Attorney General “I want one thing clearly understood, Francis. I won’t give them up…I won’t hand them over to any United States marshal armed with a writ of habeas corpus. Understand!” By the time the Justices heard the case, six of the eight alleged saboteurs had already in fact been executed. See, e.g., Carlos Vázquez, “Not a Happy Precedent”: The Story of Ex parte Quirin, 2, 8. Of course, Roosevelt did not have to defy a Court which proceeded to rule heavily in his favor.

123 Youngstown Sheet & Tube Co. v. Sawyer [The Steel Seizure Case], 343 U.S. 579, 636-638 (1952)(Jackson, J., concurring)

124 Id.
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.  

I believe that Prof. Paulsen is essentially right about the results of granting 'complete interpretive autonomy' to the Executive Branch. But one thing bears saying that I think Paulsen evades somewhat cagily. He notes that the “finality of judicial decrees is a charade” because “the decisions of courts, in any matter requiring executive enforcement” are only worth their persuasive weight. Under Paulsen’s theory, however, the qualification “in any matter requiring executive enforcement” would be entirely meaningless. Court decrees are never enforced by the judges themselves (indeed, we would rightly see that as a bizarre and possibly pathological form of vigilantism), and to the extent the Marshals are not usually required to enforce a decree, this occurs because it is widely believed that if ordered to do so by the Court they would, and so persons generally obey the courts’ directives – and are so expected to that the power of criminal contempt can be exercised when they do not, even when the legal grounds for the court order were possibly unconstitutional. If persons coming before a court assumed execution would only occur on the independent judgment and acquiescence of the Executive, why would they bother with the middle man? The Judiciary would quickly become an administrative arm of the Executive (if that), and so much for the separation of powers. Consider Scigliano’s scathing dismissal:  

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126 See, e.g., Walker v. City of Birmingham, 388 U.S. 307 (1967)(upholding contempt citation for disobeying injunction later found to be unconstitutional in Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969)). For an excellent criticism of these decisions and analysis of how these decisions helped to fashion particular large-scale American political narratives (and a criticism of such a narrative), see DAVID LUBAN, LEGAL MODERNISM 209-282.  

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The doctrine of coordinate review† is nonetheless finally vitally flawed. Its chief defect, and the one most relevant to our study, is that it is not really a doctrine of coordinate review at all; rather it sets the President over the judiciary and Congress. If the President disagrees with a constitutional decision...he may, under the doctrine, disregard it in exercising his own constitutional powers. Consider what this means in practice...the doctrine of coordinate review gives Congress precious little in permitting it to decide for itself what legislation it can constitutionally enact, if the President may frustrate its execution; and it gives the judicial branch scarcely more if he can, by failure to put laws into operation, prevent the courts from deciding cases or ignoring the decisions they do make. In summary, the doctrine is one of executive supremacy, of the President acting outside of law.127

Proponents of constitutional resistance like Paulsen do, nonetheless, have some strong past constitutional practices to support their interpretive methodology. Chief among these bases are the Merryman case in which President Lincoln ignored the writ of habeas issuing from Chief Justice Taney riding circuit, President Jefferson’s pardons in the face of a Sedition Act held constitutional several times, and President Jackson’s issuance of a constitutional veto in the face of the Bank of the United States which had also been held constitutional several times.128 Each act seems to have been transformative of constitutional practice, and yet also quintessential constitutional resistance. To my mind, arguing that these acts were legal and that this is support for constitutional resistance is circular: alternately, a rejection of constitutional resistance simply invites us to re-evaluate these acts as illegalities or unconstitutional, while nevertheless acknowledging that they transformed constitutional practice. Law is not so inflexible that one cannot say that what was once illegal is now legal, or vice versa; nor is it a one-way ratchet in this regard.

† It should be recalled that Scigliano uses the term ‘coordinate view’ in the expansive sense that includes coordinate legal review, independent constitutional judgment, and constitutional resistance, i.e. for the doctrine that “emphasizes the equality of the three branches of government in interpreting the Constitution. The President, judges, and members of Congress, according to the doctrine, are bound to support the Constitution as they understand it, and not as it is understood by others, when they perform the duties assigned to them.” See also supra note 61 and accompanying text.

127 SCIGLIANO, supra note 61 at 16.

128 More controversially, one might consider the opinion of Pres. James Buchanan that while secession was illegal, his office nevertheless possessed no power to force the states to stay in to the Union, or, from the contrary perspective, Pres. Lincoln’s determination that he could use military power against the South. Regardless of what is said about secession, it is clear that had the Civil War been resolved differently, it would not be a ‘closed question’ that secession is illegal, or at least not one taken seriously.
In any event, since these events were, in a certain sense epic, it may be
difficult to change people’s minds about the fundamental nature, legality,
or value of any of these acts. Regardless, even if the constitutional system
has weathered constitutional resistance before, the fact of such is neither to
make an argument for it being a necessary feature of constitutionalism, nor
a desirable one. Nietzsche’s dictum that what does not kill one makes one
stronger, does not particularly aid one in distinguishing what in the next
instance will or won’t kill.

It may help in this context, then, to engage the argument against
constitutional resistance prospectively instead of retrospectively.
Accordingly, the next Part of this article demonstrates that adopting
constitutional resistance leads to novel constitutional power claims that
can be just as problematic as the Merryman power, if not more so, and that
are potentially disruptive of the separation of powers.

II. A CONSTITUTIONAL POWER CLAIM UNDER CONSTITUTIONAL
RESISTANCE

Constitutional power claims have a certain affinity to the proverbial
Shakespeare plays produced by monkeys at typewriters; eventually, given
enough time, lawyers (usually executive branch lawyers) will make every
possible claim for every possible constitutional power, at every degree of
plausibility, and often, old claims once-vetted come to be repeated. For
instance, the Vesting Clause Thesis, the idea, broadly stated, that “the
Article II Vesting Clause implicitly grants the President a broad array of
residual powers not specified in the remainder of Article II,”129 has been
advanced in various degrees of seriousness from 1793 (by Hamilton)130 to
contemporary foreign affairs law scholarship.131

From the stance of the legal system as whole, the fate of novel
constitutional power claims are well described by theories of
constitutional settlement.132 Such theories typically describe the pattern of
separation-of-powers struggles (archetypically struggles between
Congress and the Executive) as one of attempts by one branch to exercise
either a novel power or an old power in a novel way, which, when both

129 Curtis A. Bradley & Martin Flaherty, Executive Branch Essentialism and Foreign
130 Id.
131 Id. at 548-9 (citing, inter alia, Saikrishna B. Prakash & Michael D. Ramsey, The
Executive Power over Foreign Affairs, 111 Yale L.J. 231 (2001)).
132 See, e.g., Samuel Issacharoff, Meriwether Lewis, the Air Force, and the Surge: The
argues, as several other commentators do in similar ways, that the “roughly hewn
divisions of authority in the Constitution are given operational force by the give and take
of non-judicial actors” and that this give-and take results in institutional accommodations
that will answer in part the question of “what it means to say that one approach or the
other is constitutionally permissible, constitutionally mandated, or constitutionally
prohibited.”
sides come to either an agreement, or one side simply prevails (either in courts or, more importantly for settlement purposes, the court of public opinion), settles into constitutional law/practice that is later recognized as such by the actors and/or the courts. This is, I think, accurate enough as it goes historically, and coheres well with the first three theses of departmentalism I’ve described.

However, constitutional settlement is essentially a descriptive claim—not an explanatory claim or a normative claim. It remains an open question whether constitutional settlement is, so to speak a ‘natural’ feature of American constitutionalism—perhaps ineluctably coming from the structural constraints of the Constitution, such as its division-of-powers schema. Or perhaps constitutional settlement occurs because of background jurisprudential agreements which limit the scope and degree of legal contestation. I suspect the latter is the case, where the jurisprudential agreement, inchoate by its very nature, is an agreement limiting and discouraging adoption of or recourse to constitutional resistance.

Section A considers in detail a relatively novel proposed constitutional power on the part of the Congress—the use of the congressional appropriations power to block a court order. The power is analyzed under a departmentalist framework (as the assumed frame from which such a power is proposed) that adheres to coordinate legal review, independent constitutional judgment, and constitutional resistance. Section B considers what would happen with a similar proposal of the power under only the doctrine of coordinate legal review, and Section C considers what would happen with both coordinate legal review and independent constitutional judgment, but still in the absence of constitutional resistance. The conclusion emerges inescapably that the theoretical posture of resistance leads to constitutional conflict of the highest order.

A. CONGRESSIONAL POWER TO BLOCK UNCONSTITUTIONAL COURT ORDERS – UNLEASHING THE “POWER OF THE PURSE” WITH CONSTITUTIONAL RESISTANCE

Imagine the following scenario. A United States District Court has rendered an order in the case Doe v. United States, written by the eccentric but usually brilliant Judge Arbitrary. The order is predicated on an interpretation of Supreme Court precedent that the bipartisan majority of the Congress (most of whom are, after all, lawyers) examines and disagrees with mightily—in their good-faith interpretation of the Court’s jurisprudence, the decision seems wrong, but appeal seems unlikely to

133 Jackson’s veto is perhaps the simplest case for such constitutional settlement. On the standard account, the veto before Jackson was understood to be exercisable on only explicitly constitutional grounds; afterwards, the practice has ‘settled’ that the presidential veto is essentially discretionary and may be exercised on policy grounds alone.
happen (or unlikely to change things with an informal and relaxed standard of review). They ponder about what check or balance might be available to them. Impeachment of Judge Arbitrary seems awfully harsh, and it would take a lot of time, effort, and political capital that they prefer not to spend.

A junior Representative, however, has a brilliant (?) idea. He thinks back to all his campaign promises to use the “power of the purse” to guide policy and directs his fellow Congressmen to peruse the following constitutional provision in Article I, Section 9: No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time. So, the Representative reasons, it would be perfectly constitutional for the Congress to put limitations on use of Treasury money. Specifically, the Congress explicitly stipulates that none of the appropriations to the U.S. Marshals’ service, and perhaps also none of the military’s appropriations, to be absolutely sure, may be used to enforce Doe. They put the stipulations into the appropriate appropriations bills, they pass both houses, and the President (sympathetic to Congress’s stance, and not wanting to enforce this particular, unpopular court order) signs it, and directs the Marshals’ attention to the provision, ordering them to obey it with an Executive Order. Assume the Marshals comply – was it all constitutional?

It’s a tough question. Sen. Leahy asked a similar hypothetical question to then-Judge Alito at his confirmation hearings, and Alito was stumped. As McAward points out in her article, Sen. Leahy’s question was not quite hypothetical: the House of Representatives had passed such appropriations riders with respect to 2 Circuit Court cases and a District Court case, all of which dealt with unpopular First Amendment decisions, though the riders all died in House-Senate Conference Committee.

McAward concludes that such a power if exercised would be unconstitutional. Her argument, however, is not altogether convincing, and particularly not to a departmentalist. She points out that “As a primary matter, Congress may not use its appropriations power to circumvent other explicit constraints on its power.” Let us assume for the moment that she is correct about this. Assume that such familiar constraints as the Bill of Rights and the Fourteenth Amendment, etc., would all legitimately apply. It is not clear, however, that any of these are explicit constraints on the appropriations power such that they would prevent Congress from refusing to fund the enforcement of a court order.

135 Jennifer Mason McAward, Congress’s Power to Block Enforcement of Court Orders, 93 Iowa L. Rev. 1319, 1321 (2008).
136 Id. at 1323-6.
137 Id. at 1337.
McAward relies on *Lovett v. United States* which established that a similar rider blocking pay for certain federal employees unless reappointed was in fact a bill of attainder, and thus invalid on Constitutional grounds.\(^{138}\) McAward argues that the “Lovett principle easily extends to bar Congress from using its appropriations power towards any otherwise-unconstitutional end, such as impingement on individual rights and encroachment on the structural limits on the power of each coordinate branch of the federal government.”\(^ {139}\)

There are three parts to this argument – the extension of the *Lovett* principle, the impingement of individual rights being unconstitutional, and encroachment on structural limits of the power of each coordinate branch being unconstitutional. Again, assume *arguendo* that McAward is correct about the extension of the *Lovett* principle, assume that individual rights infringement would be unconstitutional, *ceteris paribus*, and let us grant that if Congress *is* impinging on structural limits then it is acting unconstitutionally. The problem is that even granting these things, McAward’s argument begs the question in an important way. The assumption of the hypothetical is that Congress believes the court order at hand to *itself be unconstitutional*. If the Congress is correct, the *Lovett* principle, even as generalized by McAward, cannot apply – the problem is not one of barring Congress from using its appropriations power towards an otherwise-unconstitutional end. Moreover, it seems clear that the question of whether the Judiciary’s power to issue unconstitutional judgments that are binding is at least open, and would be answered by most departmentalists as a flat no.

While it is difficult to say that *Lovett* would apply in blocking Congress from using a power towards a *per se* unconstitutional end, could one rely on the other part of the argument, namely, that the *Lovett* extension would apply regarding the unconstitutional use of powers to encroach on the structural limits of the power of a coordinate branch, in this case the Judiciary? [That is to say, perhaps what makes Congress’ action unconstitutional is the impinging on the Judiciary.] Relying on that argument, one might state that as part of the Article III judgment power, cases have to be final and executed; McAward takes such an approach in her article.\(^ {140}\) Though such a thesis is intuitively appealing, and has been defended at length,\(^ {141}\) I do not believe the argument will work in this context.

First, such an approach assumes the award of such power in Article III must be absolute and that the appropriations power of Article I to not be absolute. But consider *Federalist 78* which argues that the judiciary “must ultimately depend upon the aid of the executive arm even for the efficacy

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\(^{138}\) *Id.* (citing *Lovett v. United States*, 328 U.S. 303,318 (1946)).

\(^{139}\) *Id.* at 1337.

\(^{140}\) *Id.* at 1342-44.

of its judgments,” and note the corresponding lack of independent legal (let alone constitutional) provision for ensuring the execution of judgments. The Judiciary Act of 1789 placed execution squarely where Hamilton thought it should be – in an executive office (the U.S. Marshals). Next, consider Madison’s comments on the appropriations power in *Federalist 58*: “the power over the purse…[is] the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people.” As a matter of original understanding at least, it seems doubtful that the appropriations power was meant to be any less absolute than any other power granted in the Constitution, and a functionalist argument has a difficult time explaining the absence of execution power by the Court that *Federalist 78* claims as a virtue.

Regardless, whatever Article III judgment power might or not might have going for it, attempting to use it to understand the limits of appropriations power would not be very analytically useful since it too begs the separation-of-powers question: deciding which power should prevail indicates how powerful the judgment power is compared to the legislative power of the purse, not vice versa. In all likelihood, it will be a case where only success is successful – perhaps an agreed-upon (or at least accepted) legal-theoretic argument properly placing the powers of each branch.

Imagine then, that the victorious party in a suit whose enforcement was blocked by a Congressional bill denying appropriations either brought a suit against the Marshals, or a suit facially challenging the constitutionality of the provision. The Supreme Court judges the bill to be unconstitutional, and orders the Marshals to perform as in the lower court’s order. Congress, examining the Supreme Court’s order, decides that it’s unconstitutional, and passes an appropriations rider claiming their collective sense of the unconstitutionality of the order, and mandating that none of the Marshals’ budget could be legally used to enforce the Court’s order. This newest bill is itself challenged, and the Supreme Court, recognizing the fundamental challenge to its authority, issues a stinging, *Cooper v. Aaron*-style ruling that proclaims that as a matter of separation-of-powers, the appropriations power cannot be used block the Marshals from enforcing a judicial order.

Several features of the hypothetical should be noted. First, and most importantly, the scenario depicts constitutional stalemate: the Supreme

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142 The Federalist No. 78.
143 The Federalist No. 58.
145 This is also well-described as constitutional hardball (see Mark Tushnet, *Constitutional Hardball*, 37 J.Marshall L. Rev. 523 (2004)) or a Type-III constitutional crisis (see Sanford Levinson & Jack Balkin, *Constitutional Crises*, 157 U. Penn. L. Rev. 707, 737-738 (2009)) (“Type three constitutional crises involve situations in which political actors believe their opponents are taking dangerous and illegal steps...therefore these steps justify – and generally produce – extraordinary forms of struggle and
Court is simply more or less proclaiming that the Congress may not defy it in this particular way, but without enforcement of its proclamation, the statement is, so to say, worth only a bit more than the paper it’s printed on. The order is worth only how much it persuades the Congress, the Executive, or public opinion: no more, no less. The Executive, at this juncture, would essentially be forced to choose between Congressional supremacy over the Judiciary and judicial supremacy over Congress if neither side chose to budge – and given the stakes both sides might not want to budge. Second, the example shows that the power to selectively block court orders, if taken seriously, implies a thesis about the relationship between constitutional resistance and legal supremacy. Since in a strong departmentalist view, each branch reviews the actions of the others for constitutionality (coordinate legal review), under its own standards (independent constitutional judgment), with no weight given to opposing views (constitutional resistance), legal supremacy appears to collapse into a branch’s ability to act in the final instance on its constitutional judgment – Congress is simply asserting that its ability to deny funds is the constitutional bottom line here, so it is legally supreme.

In this model of legal supremacy, the appropriation power would be legally supreme if in the end Congress’ appropriation decision ruled the day, and the judgment power would be legally supreme if the Court won. But in such a scenario the ‘power’ of these legal powers has become, in a very real sense, a political science issue – which actor wins out in public opinion, or public action, certainly not which actor is legally theoretically the ‘most powerful’. As Scigliano pointed out, the real winner in these cases is the executive, who effectively chooses the winner. A slightly different, but equally valid interpretation of the scenario would be that the disputation at heart would revolve around whether the constitutional judgments of the other branches expressed through their own constitutional powers (e.g. Congress’s judgment that a particular court order is unconstitutional and therefore should not be executed, which it cannot be without funding) can be on a legal par with the constitutional judgments of the Judiciary as expressed through the judgment power (that the order is constitutional, and should be executed).

Among other things, the scenario demonstrates effectively that the Supreme Court’s only power is its claim to legal supremacy. It has, without enforcement, no power beyond that of any other citizen: its opinion. Enforcement, however, can arguably be said to be either in the domain of Congress (through appropriations) or the executive (the actual

opposition that go outside the realm of ordinary political jostling and political brinkmanship.

146 It’s worth considering that public opinion considers the power of the purse as the major Congressional prerogative and that backing down from its exercise could be an immense political liability; similar considerations hold for the public’s view of judicial supremacy.
enforcement of the order). Most generally, Congress’s power of the purse gives it the opportunity to exercise constitutional judgment on any activity funded by the Treasury – that is to say, practically any activity undertaken by the federal government. If this is power is admitted to completely dominate – to dictate the terms of the Judiciary’s effective range of action (through selective blocking of court orders), it becomes an illimitable legal weapon – one that could ultimately degenerate the rule of law itself - assuming the American constitutional rule of law is meant to include a judiciary with anything like an equal role to that of the Congress. Of course, this argument applies mutatis mutandis to uses of the purse against the Executive, except insofar as the Executive feels able to strike back by simply ignoring Congress.

B. THE POWER UNDER ONLY COORDINATE LEGAL REVIEW

For a first example, consider: would Congress be able to exercise an appropriations power to block unconstitutional court orders if it accepted coordinate legal review but did not accept independent constitutional judgment or constitutional resistance? Perhaps so, but if so, it would be a result of a conflict characteristic of conventional constitutional settlements. To begin with, Congress might note that there is no binding Court precedent directly on point with regard to that use of its appropriations power. So an attempt to use it, while unprecedented, would not be predictably unconstitutional in such a way as to impugn it [one could, for example array a strong originalist argument in support of the attempt]. The Congress attempts to do so as a method of coordinate legal review. Imagine two different responses on the part of the Supreme Court. In one case, the Supreme Court judges all attempts to use appropriations in such a way to be unconstitutional violations of separation of powers. In the second, the Supreme Court lays out a detailed (and, one would guess, controversial and interesting) opinion declaring that the specific instance was unconstitutional, but laying out a detailed rationale for when it would be permissible – for example, stipulating that it would only be acceptable if the said court order clearly and unambiguously violated on-point Court precedent, and that any such appropriation-blocking attempt would be reviewable by an appellate court.

In the first case, the struggle (if it can be so characterized) is over. If Congress does not subscribe to constitutional resistance, then the Court’s pronouncement is likely definitive and it ceases to attempt using what is now presumptively an unconstitutional power. No constitutional showdown ensues, no degeneracy to the rule of law – the net effect is simply to create a new point of legal doctrine concerning the use of the congressional appropriations power. Congress can continue to judge the court order at hand unconstitutional in its own judgment of the Court’s precedent or of the existing law (coordinate legal review) but does not view the Supreme Court’s decision, even though affirming what it might
see as an unconstitutional court order, as grounds for constitutional resistance.

A few subtle points arise here, which should not be missed. In the scenario so far, the Supreme Court has not said anything about the constitutionality (or lack thereof) of the court order Congress was attempting to block – it merely has adjudicated on the attempt to assert the appropriations power to block it. So Congress might continue to see the court order as unconstitutional (through its good-faith interpretation of the Court’s precedent) but would now see this appropriation-blocking attempt to intervene as unconstitutional. Congress’s not adopting constitutional resistance means in this case accepting the boundaries of power outlined by the court; it means acknowledging that the legitimacy of the Supreme Court’s exercise of its power of constitutional interpretation, even if the specific end that might occur (the original court order Congress tried to block) might be unconstitutional. The rejection of constitutional resistance, in this case, becomes a parallel to the justiciability, case or controversy, and political question doctrines. Just as the Supreme Court does not intervene in some instances where unconstitutional ends might be accomplished with constitutional powers, here, the Congress would similarly cede. None of this implies that Congress could not in this circumstance attempt to correct the problem in the lower court order by using any powers legitimately at its disposal (publicity; appointment/confirmation power exercised with respect to future judges who followed this doctrinal point; lawmaking as an effective overruling of the precedent; constitutional amendment routes, perhaps impeachment). But it need not, since it has no duty to constitutionally resist. And since Congress acknowledges the Court’s legal supremacy in interpretation, the Court’s declaration that for separation of powers reasons the Congress did not have a particular power would simply be definitive.

Similarly, the second case, wherein the Supreme Court acknowledges the power but places limitations on its exercise, also does not produce a constitutional showdown. This power, now shaped and approved by the Court, is not constitutional resistance to the Court since the Court itself would not claim as unassailable a court decision made on what were, *ex hypothesi*, by its own precedent unconstitutional grounds. The net effect of the power would be either to enable Congress to exercise an intermediate level of legal review, subject ultimately to the Supreme Court’s review, or, interpreted slightly differently, create an opportunity for Congress to directly challenge court orders without traditional standing (possibly a reason why the Supreme Court might reject the assertion of the power flatly).

In both cases, a different way of settling the controversy remains. Since we are stipulating that Congress does not accept constitutional resistance, the Supreme Court could simply make a ruling directly on the merits of the original case. Assuming this judgment was consistent with
the Court’s own jurisprudence (so that internal criticism that the order was unconstitutional by the Court’s own jurisprudence would have no bite), this would settle the issue. Whether Congress had the power or not to begin with would remain unsettled but since the stipulation for Congress’ exercise of the power was that it believed the court order constitutional, and now has definitive judgment that it is not, it would have to recall the appropriation attempt. The combination of no strong independent constitutional judgment and no constitutional resistance would mean that opposition would end once the Court’s clearly exercised constitutional judgment supported the court order.

C. THE POWER UNDER COORDINATE LEGAL REVIEW AND INDEPENDENT CONSTITUTIONAL JUDGMENT

Imagine then the adoption of two of the stronger departmentalist theses, but not the adoption of constitutional resistance. In the appropriations example, Congress decides it can legally review the court order, and that it can act on its own understanding of constitutionality, and in its best judgment, this includes the power to selectively block court orders by appropriation. Consider the possible responses from the Supreme Court hypothesized above.

If the Supreme Court deems the practice of blocking court orders by appropriations itself unconstitutional there will be more of a problem than in the situation above. The Congress feels constitutionally enabled to its own constitutional judgment, and in its judgment the Supreme Court is wrong as a matter of constitutional interpretation. But now the extent of the struggle will turn crucially on the issue of what Congress sees, in its constitutional judgment, as the role of the Supreme Court. For example, Congress might well believe both that the Supreme Court is constitutionally wrong on this issue, but that the Supreme Court’s judgment power would bind it in this case, or bind it on certain matters (say, separation of powers) but not on certain others (say issues touching on powers of Congress that do not only involve separation of powers issues). In either of these cases, Congress could cogently both disagree and accept the Court’s limiting of its power. It might perhaps make periodic attempts to reassert the power, and would especially and legitimately exert itself to block judicial nominees who would uphold this doctrine. But it would neither see its difference in constitutional judgment as legitimating ignoring the Supreme Court’s order or judgment, nor legitimating continuing to fight the judgments (as in the endless back-and forth described in Part I-A).

Were the Supreme Court to grant Congress the power subject to constitutional constraints, the situation would be somewhat more complicated. If the Congress’s constitutional judgment to coincide with the Supreme Court’s constitutional judgment with respect to the constraints on the appropriations power, then the Congress would certainly
exercise it. It would exercise it in a different manner than in Part II-A above, though, because subject to the constraints on the power, it might well attempt to block a court order it believed to be unconstitutional, and would feel justified if it followed constraints placed on it by the Court. But these constraints would not necessarily speak to the constitutional merits of the case Congress was attempting to block. Without independent constitutional judgment, Congress would only attempt to block cases it saw as unconstitutional by the Court’s lights. In this case, with independent constitutional judgment, it would block cases it saw as unconstitutional by its own judgments.

Without a belief in constitutional resistance, however, the Supreme Court would eventually have the last say by simply ruling on the merits of the case. As long as the Congress saw the Supreme Court’s exercise of power in this case as constitutional (which it would only do on structural grounds – without constitutional resistance, the result would not necessarily bear on the exercise of the power), then it might disagree with the Court and yet still yield.

The most puzzling part of the analysis of a constitutional actor’s behavior with independent constitutional judgment and coordinate legal review but without constitutional resistance concerns the conceptual boundaries between independent constitutional judgment and constitutional resistance. What if, for example, Congress’s independent constitutional judgment is that the Supreme Court’s judgment on separation of powers issues is not binding on other constitutional actors? If it wanted to disregard the Court’s judgment about its abilities, is this independent constitutional judgment, constitutional resistance or both?

There may not be a meaningful difference between independently constitutionally judging another branch to lack any power of legal finality in a given action, and constitutional resistance. Constitutional resistance is an attempt to treat an activity by another branch as resistible because unconstitutional by one’s lights – it is to say that presumably-unconstitutional activity cannot be constitutionally final. Thus there may not be much analytical difference between constitutionally resisting and believing that another branch’s exercises of its particular powers are always in principle checkable. At that point, even if there is no per se belief in constitutional resistance, the effect of independent constitutional judgment has the substance of constitutional resistance.

Nevertheless, the above sections demonstrate that there are examples in which coordinate legal review and independent constitutional judgment could still exist and not engender crisis. The problem, then, must be constitutional resistance itself.

CONCLUSION – ON CONSTITUTIONAL RESISTANCE
Why is constitutional resistance such a problem? One way to answer is to realize that as a practical matter (though not always transparently at the theoretical level), constitutional resistance is offering radically different answers to classical and very deep questions in constitutional law, and perhaps in law generally. Some of these questions are: is finality itself a constitutional value or legal value? Is finality a part of constitutional power? Is official discretion a constitutional value? Does unconstitutionality continue to taint all the way up? Some of these questions have explicit conventional answers, and some rather more implicit answers, but it would not be difficult to claim that most American lawyers would more or less converge in answering the questions.

Naturally, the Judiciary has been more frequently engaged in answering these questions than the other branches, and much of its thinking can be found in Article III doctrine. The political question doctrine, justiciability requirements, standing, the case/controversy requirements, comity, and other Article III-derived doctrines suggest, for example, that political discretion in the other branches is a constitutional value sometimes and that unconstitutionality does not continue to taint all the way up – or perhaps that finality, comity, and the separation of powers values protected by these doctrines outweigh the constitutional values possibly at stake in cases where the doctrines apply. That is to say, Article III doctrine at its most profound suggests that there are incommensurable constitutional values, and that often constitutional actors, the Judiciary most of all, are forced to prioritize some such values over others.

Constitutional resistance instead puts primacy on the constitutionality of the action, not the power or the actor exercising it; finality is trumped by unconstitutionality. There is something very intuitively appealing about this prioritization. It emphatically denies inconsistency in constitutionality – declares that constitutional powers are not powers if not constitutional. This rationale would, of course, operate mutatis mutandis to reject much of Article III jurisprudence; constitutional resistance would see the courts’ refusal to, say, adjudicate “political questions” as simply abdication of its own responsibilities to weigh in on the legal propriety of actions of the other branch. Constitutional resistance, properly understood, is constitutional intransigence – the abandonment of deference. One could hardly be a consistent strong departmentalist who believed in constitutional resistance and believe in strong judicial restraint, at least not without relying strongly on extra-constitutional rationales (perhaps political theory rationales). Insofar as departmentalists truly assert constitutional resistance, there would be little or no justification for the judiciary, as itself a coordinate branch, not to assert itself coordinate by aggressively reviewing both the Congress and the Executive. Rational-basis review, executive privilege, and other such doctrines would make little sense without the supposition that other branches’ constitutional judgments or their constitutional exercises of power deserve weight as
their judgments, which supposition is exactly what constitutional resistance rejects.

Read for all its implications (not simply the attractive vision of a stronger executive or a stronger Congress), constitutional resistance is hard to justify. It not only uproots huge swaths of conventional separation-of-powers and Article III jurisprudence, but is difficult to justify on both originalist and functionalist grounds. On functional grounds, given the analysis of Part I above, constitutional resistance engenders legal theories that effectively make either political branch supreme over the Judiciary, and possibly push the balance of power even more towards the Executive. On originalist grounds, the simple assumption that the Constitution is designed to establish and preserve a meaningful balance between the branches and meaningful separation of powers, makes constitutional resistance difficult to justify.

This all leads to an unusual, but strong justification for judicial supremacy. The usual arguments against judicial supremacy hinge on democratic discomfort with leaving legal finality in the hands of an unelected group of 9 men – as Lincoln put it in his First Inaugural Address:

> The 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 instant they are made in ordinary litigation between parties in personal actions 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.

But a constitutional order cannot infinitely guard against abuses from its pivotal actors – at a certain point, the values of deference and finality must be more important than allowing aggressive oversight from the other branches. We are thus faced with two evils: constitutional resistance and judicial supremacy. The evils of judicial supremacy have been well documented, but departmentalists have not yet given nearly enough thought to the possibility that the evils of constitutional resistance may well outweigh those of judicial supremacy.

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