

Congress's Power to Block Enforcement of Federal Court Orders

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ABSTRACT: This Article considers the constitutionality and propriety of recent appropriations riders passed by the House of Representatives in response to controversial federal court rulings. The riders prohibit the use of any federal funds for the enforcement of court orders issued in specified cases. These enforcement-blocking provisions raise significant separation-of-powers concerns as between Congress and both coordinate branches of the federal government.

This Article begins by considering both the controversial First Amendment rulings that triggered the enforcement-blocking riders and the potential effect of the riders—namely, to prevent the U.S. Marshals Service from taking any enforcement action against noncompliant parties. Next, this Article considers the substantial separation-of-powers implications of the riders by examining the scope of Congress's power over appropriations, the nature of the Article III "judicial Power," and the Executive's responsibility for enforcing final court orders. Congress may not exercise its appropriations power in a manner that encroaches on the core functions of the coordinate branches of the federal government. However, enforcement-blocking provisions tread close to the heart of the Article III duty to issue final, executable orders. Moreover, they impinge on the Executive's duty or prerogative to enforce final court orders. The implications of Congress's broad conception of its appropriations power and of its power of independent constitutional interpretation could have sweeping and untenable consequences. Thus, this Article concludes that Congress is constitutionally barred from selectively de-funding executive enforcement of final federal court orders.

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I. INTRODUCTION

During the Supreme Court confirmation hearings for Justice Samuel Alito, Senator Patrick Leahy asked then-Judge Alito to opine on the constitutionality of a congressional appropriations bill that would bar the use of federal funds to enforce a particular court decision that reached an unpopular result on an issue of constitutional law.¹ Justice Alito responded: “[T]hat’s a provocative constitutional issue that—I don’t know the answer to it”²

Senator Leahy’s question, while provocative, was not hypothetical. Since 2002, the House of Representatives has included in several appropriations bills provisions that deny the use of any federal funds for the enforcement of specified federal court orders. These enforcement-blocking provisions, which have passed by significant margins in the House only to be stripped from the final legislation, are an increasingly popular and potentially potent tool in the arsenal of those who object to controversial court decisions.³ By directly targeting specific court orders, such provisions pose an immediate challenge to the integrity of the federal courts. By usurping the Executive’s law-enforcement prerogative, such provisions also raise significant separation-of-powers concerns as between the legislative and executive branches. While other political efforts to shape and control the federal judiciary’s composition and jurisdiction have been the subject of ongoing attention,⁴ these enforcement-blocking provisions have received virtually no analysis. Justice Alito was quite right to say that enforcement-blocking provisions present provocative constitutional issues. This Article represents a

1. See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 583 (2006) (question from Sen. Patrick Leahy).

2. *Id.* (statement of then-Judge Samuel Alito).

3. Indeed, on July 26, 2007, the House of Representatives passed, by voice vote, an appropriations rider preventing the enforcement of two federal criminal judgments and sentences issued against two Border Patrol agents convicted of shooting an illegal-alien smuggler. See H.R. 3093, 110th Cong. (1st Sess. 2007). The bill was included as section 702 of title VII of the Commerce, Justice, Science, and Related Agencies Appropriations Act before it was struck. See GovTrack.us, H.R. 3093: Departments of Commerce and Justice, Science, and Related Agencies Appropriations Act, 2008, <http://www.govtrack.us/congress/billtext.xpd?bill=h110-3093&version=ch> (last visited Apr. 2, 2008) (showing the various changes to H.R. 3093). The appropriations rider stated:

None of the funds appropriated in this Act may be used to enforce (1) the judgment of the United States District Court for the Western District of Texas in the case of *United States v. Ignacio Ramos, Et Al.* (No. EP:05-CR-856-KC) decided March 8, 2006; and (2) the sentences imposed by the United States District Court for the Western District of Texas in the case of *United States v. Ignacio Ramos, Et Al.* (No. EP:05-CR-856-KC) on October 19, 2006.

H.R. 3093 § 702.

4. See *infra* note 175 (discussing Congress’s power to shape the federal judiciary).

first attempt to assess the constitutional implications of enforcement-blocking measures and seeks to provide an analytical framework for future congressional debates regarding the constitutionality and propriety of such proposals.

Part II of this Article outlines the factual context of the enforcement-blocking provisions, looking at the controversial First Amendment rulings that triggered Congress's attention and the congressional debates over the proper way to respond to the rulings.⁵ Part II also considers whether enforcement-blocking bills are merely symbolic protests or whether they could, in fact, have a significant effect on the ultimate enforcement of final court orders.⁶

Part III lays the groundwork for an examination of the separation-of-powers issues that arise from enforcement-blocking provisions. Whether such provisions interfere with the separation of powers depends on the delicate interplay between the extent of Congress's power over appropriations,⁷ the nature of the Article III "judicial Power,"⁸ and the Executive's responsibility for enforcing final court judgments.⁹ Part III therefore considers the scope of the coordinate federal branches' powers implicated by enforcement-blocking provisions.

Part IV then considers the constitutionality of enforcement-blocking provisions. From both doctrinal and normative perspectives, it is inconsistent with the separation of powers for Congress to use its appropriations power selectively to block the executive branch from enforcing a federal court order. While such provisions tread close to the heart of the Article III power, they impinge on the Executive's duty or prerogative to enforce final court judgments. Even if each coordinate branch of government should have independent interpretive power vis-à-vis the Constitution, Congress's broad conception of its own power in this regard, in conjunction with its broad appropriations power, appears to have sweeping and untenable consequences.

Accordingly, this Article concludes that, as to cases and controversies properly before the federal courts, the courts must issue final and executable orders. The executive branch likely is required to enforce such orders, at least as to the parties before the court. Finally, Congress is constitutionally barred from selectively de-funding executive enforcement of specified judgments. The increasing willingness of a majority in the House of Representatives to use appropriations riders to block executive

5. *See infra* Part II.A–B.

6. *See infra* Part II.C.

7. *See infra* Part III.A.

8. *See infra* Part III.B.

9. *See infra* Part III.C.

enforcement of federal court orders is not only “provocative,” but also unconstitutional.

II. ENFORCEMENT-BLOCKING PROVISIONS

A. BACKGROUND

On June 26, 2002, news rippled throughout the country that the U.S. Court of Appeals for the Ninth Circuit had found unconstitutional the Pledge of Allegiance’s use of the phrase “under God.”¹⁰ While some defended the court’s decision in *Newdow v. United States Congress* as a sound application of governing Supreme Court precedent,¹¹ many more decried the court’s decision as the product of judicial activism and evidence of the federal courts’ hostility to religion.¹²

Just over a year later, on July 1, 2003, the U.S. Court of Appeals for the Eleventh Circuit decided *Glassroth v. Moore*, holding that the installation and display of a 2.5-ton granite monument of the Ten Commandments in the rotunda of the Alabama State Judicial Building violated the First Amendment’s Establishment Clause.¹³ As with the *Newdow* case, popular opinion was split on the propriety of the court’s decision, with some praising it as a principled application of Establishment Clause jurisprudence¹⁴ and others condemning it as further confirmation of the federal courts’ hostility to religion.¹⁵ Indeed, Alabama State Supreme Court Chief Justice Roy Moore

10. *Newdow v. U.S. Cong.*, 292 F.3d 597, 612 (9th Cir. 2002).

11. See, e.g., Sheldon H. Nahmod, *The Pledge as Sacred Political Ritual*, 13 WM. & MARY BILL RTS. J. 797, 816–17 (2005) (“A powerful argument can be made that the Ninth Circuit got it right on the Establishment Clause merits”); Rob Boston, *One Nation Indivisible?: ‘Under God’ Case at Supreme Court Tests Nation’s Commitment to Church-State Separation, Religious Pluralism*, AMS. UNITED FOR SEPARATION OF CHURCH & ST., Dec. 2003, http://www.au.org/site/News2?page=NewsArticle&id=5294&abbr=cs_ (“[*Newdow*] shows respect for freedom of conscience.” (quoting Americans United for Separation of Church and State Executive Director Barry W. Lynn’s press statement)).

12. See, e.g., David Limbaugh, *Kicking God Further Out the Door*, WASH. TIMES, Sept. 19, 2005, at A16, available at http://www.davidlimbaugh.com/mt/archives/2005/09/new_column_kick.html (concluding that *Newdow* highlights “the judicial activism of the 9th Circuit Court of Appeals and the U.S. Supreme Court in their Establishment Clause jurisprudence”).

13. *Glassroth v. Moore*, 335 F.3d 1282, 1297 (11th Cir. 2003). Alabama Chief Justice Roy Moore ordered the installation of the monument “after the close of business during the evening of July 31, 2001.” *Id.* at 1286. He did not inform the other justices of his intentions, but he did invite an evangelical Christian organization to film the monument’s installation. *Id.* (citation omitted). That same organization sold the video and used part of the raised funds to underwrite Moore’s legal defense. *Id.* (citation omitted).

14. See, e.g., Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1052 (2005) (“[A]s a matter of constitutional law, the case was easy to decide; former Chief Justice Moore’s behavior erased any doubt that his purpose in erecting the monument was to promote religion, specifically Christianity.”).

15. See, e.g., Vine & Fig Tree, *The Unconstitutional and Anti-Christian Decrees of Judge Myron H. Thompson and His War on “The Rule of Law,”* <http://vftonline.org/EndTheWall/thompson.htm> (last visited Jan. 29, 2008) (“Judge Thompson’s opinion flies in the face of the

subsequently refused to obey the Eleventh Circuit's order to remove the monument. He was suspended as Chief Justice, and the associate justices of the Alabama Supreme Court ordered the monument removed from public view on August 21, 2003.¹⁶

The dismay over the decisions in *Newdow* and *Glassroth* found its way to the floor of the U.S. House of Representatives in two types of legislative proposals. First, in response to the Ninth Circuit's refusal to reconsider the *Newdow* decision en banc,¹⁷ the House overwhelmingly passed a resolution "expressing the sense . . . that the ruling in *Newdow v. United States Congress* is inconsistent with the Supreme Court's interpretation of the first amendment and should be overturned."¹⁸

In addition to this hortatory resolution, however, the House took a second, much more interventionist, step: it passed two appropriations riders designed to block the enforcement of the federal court orders in both *Newdow* and *Glassroth*.¹⁹ The two provisions were the work of Representative John Hostettler, then a Republican Congressman from southwestern Indiana.²⁰ Representative Hostettler introduced the riders as amendments to a pending appropriations bill for the Departments of Commerce, Justice,

Founding Fathers and the first 150 years of American history under the Constitution. It represents the arbitrary and tyrannical whim of a man unrestrained by the rule of law.").

16. *In re Roy S. Moore*, Chief Justice of the Supreme Court of Ala., No. 33, at 3-4 (Ala. Ct. of the Judiciary Nov. 13, 2003), available at <http://fl1.findlaw.com/news.findlaw.com/cnn/docs/religion/inremore111303opn.pdf>. Moore was removed from office on November 13, 2003 due to ethics violations. *Id.* at 13.

17. *Newdow v. U.S. Cong.*, 328 F.3d 466, 468 (9th Cir. 2003).

18. H.R. Res. 132, 108th Cong. (2003) (enacted). The U.S. Supreme Court ultimately vacated the Ninth Circuit's opinion because the plaintiff in the case, Michael Newdow, lacked standing to challenge the elementary school's voluntary recitation of the Pledge of Allegiance. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004).

19. While the idea of de-funding the enforcement of court orders has reached a newfound level of popularity, it is not an entirely new idea. In the 1970s, Congress passed a series of appropriations riders prohibiting the Department of Health, Education, and Welfare ("HEW") from ordering busing as a remedy for segregated school districts. The D.C. Circuit upheld the riders, in large part because they left HEW with several alternative means of remedying school segregation. *See Brown v. Califano*, 627 F.2d 1221, 1231-32 (D.C. Cir. 1980) (discussing HEW's remaining options). In 1981, before the Supreme Court's ruling in *Bob Jones University v. United States*, 461 U.S. 574 (1983), the House of Representatives considered an appropriations rider that blocked the IRS from using funds to enforce any court order that prevented racially segregated schools from obtaining tax exemptions. *See* 127 CONG. REC. 18,789-96 (1981); Brief of Congressman Trent Lott Amicus Curiae, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (No. 81-3), available at http://www.j-bradford-elong.net/movable_type/refs/Mozilla_Scrapbook2/lott.bju.amicus.brief.doc (providing the legislative history as support for the argument that "the Court of Appeals for the Fourth Circuit must be reversed"). The *Newdow* and *Glassroth*, provisions mark a resurgence of the de-funding concept and, indeed, go further than the *Califano* riders because they entirely deprive the executive branch of any power to remedy identified constitutional violations.

20. Representative Hostettler lost his bid for reelection in November 2006. *See* Adam Nossiter, *G.O.P. Collapse in Indiana Emblematic of Larger Loss*, N.Y. TIMES, Nov. 12, 2006, § 1, at 28 (discussing Hostettler's loss).

State, and the Judiciary. Each amendment stated that “[n]one of the funds appropriated in [the appropriations bill] may be used to enforce the judgment” of the Courts of Appeals in *Newdow*²¹ or *Glassroth*.²² The *Newdow* amendment passed the House by a 307 to 119 vote, and the *Glassroth* amendment passed 260 to 161.²³ Ultimately, however, both amendments died in the House–Senate Conference Committee and were stripped from the final legislation.²⁴

Representative Hostettler again sought legislation to prevent the enforcement of a federal court order after the U.S. District Court’s January 31, 2005, decision in *Russelburg v. Gibson County*. In *Russelburg*, the U.S. District Court for the Southern District of Indiana ruled that a Ten Commandments monument on the lawn of the Gibson County, Indiana courthouse—located in Hostettler’s own district—violated the Establishment Clause.²⁵ Hostettler initially responded to the District Court’s opinion by writing a letter to President George W. Bush requesting that the President instruct the Department of Justice and the U.S. Marshals Service “not to enforce this or any appellate—including Supreme Court—decision or execute any order that may ask for the removal of this monument by the Executive Branch.”²⁶ After the Justice Department replied that “the [United States Marshals Service] would be required by federal law to comply with any” court order in the *Russelburg* case,²⁷ Hostettler proposed an appropriations

21. H.R. 2799, 108th Cong. § 803 (as passed by House, July 23, 2003) (containing the text of House Amendment 288, which stated: “None of the funds appropriated in this Act may be used to enforce the judgment in *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002).”).

22. *Id.* § 808 (containing the text of House Amendment 296, which stated: “None of the funds appropriated in this Act may be used to enforce the judgment of the United States Court of Appeals for the Eleventh Circuit in *Glassroth v. Moore*, decided July 1, 2003 or *Glassroth v. Moore*, 229 F. Supp. 2d 1067 (M.D. Ala. 2002).”).

23. Press Release, Office of U.S. Representative John N. Hostettler, Hostettler Amendments Prohibit Funds to Enforce Court Decisions Against Pledge, Ten Commandments (July 23, 2003) (on file with the Iowa Law Review).

24. Compare H.R. 2799 § 803, with Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 108, 110–11 (codified as amended at 16 U.S.C. § 1851 (2000 & Supp. V 2005)).

25. See *Russelburg v. Gibson County*, No. 3:03-cv-149-RLY-WGH, slip op. at 9–10 (S.D. Ind. Jan. 31, 2005), available at <http://msl1.mit.edu/furdlog/docs/russelburg.pdf>. The *Russelburg* decision was pending on appeal to the Seventh Circuit when the Supreme Court issued its opinion in *Van Orden v. Perry*, 545 U.S. 677 (2005). The Seventh Circuit then vacated and remanded *Russelburg* for reconsideration in light of *Van Orden*. On September 7, 2005, the District Court ruled that Gibson County’s Ten Commandments display did not violate the First Amendment. See *Russelburg v. Gibson County*, No. 3:03-cv-149-RLY-WGH, 2005 WL 2175527, at *2 (S.D. Ind. Sept. 7, 2005), available at <http://indianalawblog.com/documents/10commandments.pdf>.

26. Letter from John N. Hostettler, U.S. Representative, to George W. Bush, U.S. President (Feb. 17, 2005) (on file with the Iowa Law Review).

27. Letter from William E. Moschella, Assistant Attorney Gen., U.S. Dep’t of Justice, to John Hostettler, U.S. Representative (Apr. 19, 2005) (on file with the Iowa Law Review) (citing 28 U.S.C. § 566(c) (2000)); see also Letter from John N. Hostettler, U.S. Representative, to William E. Moschella, Assistant Attorney Gen., U.S. Dep’t of Justice (June 17, 2005) (on file

amendment in the mold of his *Newdow* and *Glassroth* amendments. The amendment, which was appended to an appropriations bill for the Departments of State, Justice, and Commerce, stated that “[n]one of the funds appropriated in this Act may be used to enforce the judgment of the United States District Court for the Southern District of Indiana in the case of *Russelburg v. Gibson County*, decided January 31, 2005.”²⁸ On June 15, 2005, the House approved the amendment with a vote of 242 to 182.²⁹ As with the *Newdow* and *Glassroth* amendments, however, the *Russelburg* amendment was stripped from the final legislation.³⁰

Even though the *Newdow*, *Glassroth*, and *Russelburg* amendments ultimately did not become law, each commanded a substantial majority in the House of Representatives. In light of these expressions of support and continuing interest by the House in proposals to de-fund the enforcement of federal court orders,³¹ it appears that enforcement-blocking provisions have emerged as a trend that deserves careful analysis.

B. JUSTIFICATIONS AND CRITICISMS

Although enforcement-blocking provisions have garnered a substantial number of votes in the House, there has been a notable paucity of debate regarding the constitutional validity of the provisions. Representative Hostettler’s proposals all were predicated on his conclusion that the federal courts’ judgments in the *Newdow*, *Glassroth*, and *Russelburg* cases were “inconsistent with both the clear intent of the framers and the Christian

with the Iowa Law Review) (urging that “the President would be compelled not to enforce the District Court’s—and subsequent Courts’—decisions regarding *Russelburg v. Gibson County*”).

28. H.R. 2862, 109th Cong. §805 (as passed by House, June 16, 2005) (containing the text of House Amendment 278, sponsored by Representative Hostettler). Although Hostettler’s amendments have precluded the use of “any federal funds” to enforce the targeted court decisions, he has characterized the effect of the amendments as “prevent[ing] any funding from being used by the U.S. Marshals Service” to enforce the decisions. See 151 CONG. REC. H4532 (daily ed. June 15, 2005) (statement of Rep. Hostettler); see also Press Release, Office of U.S. Representative John N. Hostettler, House Passes Hostettler Amendment to Protect Gibson County Ten Commandments (June 15, 2005) (on file with the Iowa Law Review) [hereinafter Hostettler Press Release].

29. See Hostettler Press Release, *supra* note 28.

30. Compare H.R. 2862 § 805, with Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, 119 Stat. 2290 (showing that the amendment was stricken from the final version of the Act).

31. In response to the federal district court’s ruling in *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1131 (S.D. Ind. 2005), that the First Amendment bars specific references to Christianity during invocations before the Indiana State Legislature, Representative Michael Sodrel (R-IN) proposed a bill that would bar the expenditure of federal funds to enforce any court order “relating to the content of speech occurring during the legislative session of a State legislative body, unless such speech constitutes treason, breach of peace, or an admission of guilt of a crime.” H.R. 4776, 109th Cong. (2006); see also *supra* note 3 (describing the July 26, 2007, passage of an appropriations rider barring the enforcement of two criminal judgments and sentences).

heritage of the United States.”³² While acknowledging that the district court’s decision in *Russelburg* was “consistent with more recent Supreme Court decisions,”³³ Hostettler argued that Congress is obligated and empowered to correct the federal courts’ constitutional errors.³⁴ Citing the statute that obligates the U.S. Marshals Service to “execute all lawful writs, process, and orders issued under the authority of the United States,”³⁵ Hostettler also argued that the executive branch is obligated not to execute federal court orders deemed unlawful and unconstitutional by Congress.³⁶

Thus, enforcement-blocking provisions are predicated on a confident view of Congress’s interpretive competence in constitutional matters, a deep skepticism regarding judicial supremacy, and an expansive understanding of Congress’s appropriations power as it relates to the Executive’s law-enforcement prerogative. Upon concluding that three federal court judgments were inconsistent with the Constitution, a majority of the House of Representatives voted to use the appropriations power to correct the erroneous judgments by refusing to fund the judgments’ enforcement by the executive branch.

Representative Hostettler cited three sources to support the idea that Congress is empowered to rectify court judgments it deems erroneous. The first was *The Federalist No. 78*’s characterization of the federal judiciary as “the weakest of the three departments of power,” having “no influence over either the sword or the purse” and the ability to “take no active resolution whatever.”³⁷ The second source was an 1804 letter from then-Chief Justice John Marshall to then-Associate Justice Samuel Chase³⁸ that stated:

32. 151 CONG. REC. H4532 (daily ed. June 15, 2005) (statement of Rep. Hostettler in support of Amendment 278 to H.R. 2862).

33. Representative Hostettler made this assessment prior to the Supreme Court’s decision in *Van Orden v. Perry*, 545 U.S. 677 (2005), which found the display of a Ten Commandments monument on the Texas State Capitol grounds constitutional.

34. 151 CONG. REC. H4532 (daily ed. June 15, 2005) (statement of Rep. Hostettler in support of Amendment 278 to H.R. 2862).

35. 28 U.S.C. § 566(c) (2000).

36. 151 CONG. REC. H4532 (daily ed. June 15, 2005) (statement of Rep. Hostettler in support of Amendment 278 to H.R. 2862).

37. *See id.* (quoting THE FEDERALIST NO. 78, at 433–34 (Alexander Hamilton) (Clinton Rossiter ed., 1999)).

38. *See id.* at H4533. At the time of Marshall’s letter, Justice Chase was facing impeachment by the House of Representatives. *See* Michael J. Gerhardt, *Chancellor Kent and the Search for the Elements of Impeachable Offenses*, 74 CHI-KENT L. REV. 91, 103 (1998). President Jefferson, concerned about Chase’s pro-federalist stance, quietly encouraged the House to impeach him. WILLIAM H. REHNQUIST, GRAND INQUESTS 22–23 (1992). The House delivered articles of impeachment in 1804, ostensibly based on Chase’s conduct in several political trials and his remarks to a Baltimore grand jury. *Id.* at 22. The Senate acquitted Chase at the conclusion of his trial in 1805. Gerhardt, *supra*, at 103. Chase is the only Supreme Court Justice ever to have been impeached.

“I think the modern doctrine of impeachment [of judges] should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than would a removal of the judge who has rendered them unknowing of his fault.”³⁹

Marshall’s biographer, Albert J. Beveridge, characterized Marshall’s idea as allowing “Senators and Representatives to be the final judges of any judicial decision with which a majority of the House was dissatisfied.”⁴⁰ Finally, Representative Hostettler cited a portion of President Andrew Jackson’s 1832 veto message regarding the Bank of the United States:

“Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. . . . The opinion of the Judges has no more authority over the Congress than the opinion of Congress has over the Judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive.”⁴¹

Accordingly, Representative Hostettler argued that the “acquiescence of the Executive Branch to the will of the Judicial Branch is not consistent with” the doctrine of the separation of powers.⁴²

39. See 151 CONG. REC. H4533 (daily ed. June 15, 2005) (quoting Letter from John Marshall, Chief Justice, Supreme Court of the United States, to Samuel Chase, Assoc. Justice, Supreme Court of the United States (Jan. 23, 1804), in 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 177, 177 (1919)).

40. 3 BEVERIDGE, *supra* note 39, at 178. Beveridge characterized Marshall’s proposal as “in direct contradiction to his reasoning in *Marbury vs. Madison*” and “the most radical method for correcting judicial decisions ever advanced . . . Appeals from the Supreme Court to Congress!” *Id.* Other commentators, however, have disagreed with Beveridge’s interpretation. See David E. Engdahl, *John Marshall’s “Jeffersonian” Concept of Judicial Review*, 42 DUKE L.J. 279, 332 (1992). Engdahl notes:

It seems unlikely that Marshall [was advocating] abridging that “finality” of adjudication (in the *res judicata* sense) . . . [but is more likely that he] might have found acceptable an arrangement under which constitutional *questions* could be resolved by a popularly responsible branch, so long as the judges were left independently to adjudicate *cases* in accord with their own understanding of the resolutions thus politically made.

Id.

41. Press Release, Office of U.S. Representative John N. Hostettler, Hostettler Disappointed by Administration’s Unprecedented Decision to Remove Ten Commandments Monument From Public Land (June 17, 2005) (on file with the Iowa Law Review) (quoting Andrew Jackson, Veto Message (July 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 582 (James D. Richardson ed., 1897)).

42. *Id.*

Representative Jerrold Nadler, a Democratic Congressman from New York, was the only member of the House to engage in any floor debate challenging Hostettler's amendments. Nadler characterized Hostettler's *Russelburg* amendment as "subversive in the extreme."⁴³ Paraphrasing *Marbury v. Madison*, Nadler argued:

[I]t is the foundation of law in this country that it is emphatically the duty of the judiciary to say what the law is. . . . To fail to enforce court orders, to arrogate to this body the right to say that we do not like a particular decision . . . therefore we may not enforce the law, is to say that we are no longer a Nation of laws. It is to say that we are no longer a Nation governed by a Constitution.⁴⁴

Thus, the congressional opposition relied heavily on the idea of judicial supremacy and the fear of a slippery slope. Ultimately, however, Representative Hostettler's arguments swayed a substantial majority of the House of Representatives to vote in favor of the enforcement-blocking provisions.⁴⁵

C. POTENTIAL EFFECT

Lest enforcement-blocking provisions be dismissed as symbolic exercises that—even if they were to be enacted—would not substantially affect the enforcement of the court orders at which they are aimed, it is important to explore briefly how court orders are enforced.⁴⁶

43. 151 CONG. REC. H4533 (daily ed. June 15, 2005) (statement of Rep. Nadler).

44. *Id.* Nadler claimed that Hostettler's logic would justify "a bill that says we shall not enforce a decision of the court that says so and so may not go to jail or so and so must go to jail or anything else." *Id.* Nadler concluded by saying:

[C]ourt orders must be enforced, and anyone who says that we shall not spend money to enforce a court order because . . . we do not agree with that particular court order is subversive of liberty, subversive of the Constitution, subversive of every human right, and subversive of the very notion of American liberty and democracy.

Id.

45. *See supra* notes 23, 29 and accompanying text.

46. It is possible that the representatives who voted for these provisions did so more out of a desire to lodge a symbolic protest of the courts' rulings than with the expectation that the provisions would actually become law. *See* Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1354–57 (2006) (suggesting that congressional measures proposed in response to controversial court rulings often are rhetorical efforts to appeal to voters and interest groups rather than genuine attempts to rebuke the courts). Even if this explanation is correct, it neither guarantees that future enforcement-blocking proposals will languish in the Senate nor resolves the difficult constitutional issues that these provisions raise. Moreover, the question of whether the votes were cast as a symbolic protest is different from the question discussed in this Section—namely, whether the provisions themselves are purely symbolic or whether they could have a real effect on the enforcement of court judgments.

Parties ultimately comply with court orders in the vast majority of cases,⁴⁷ even in those most highly contested.⁴⁸ The *Russelburg* case itself is an excellent example of parties' general willingness to comply with court orders: In response to Representative Hostettler's enforcement-blocking proposal, Gibson County officials stated publicly that they had every intention of complying with the district court's order at the conclusion of the appeals process.⁴⁹

The federal courts' ability to generate voluntary compliance with their orders likely reflects a high level of popular respect for the finality of judgments. While this respect is, in large measure, the product of a culture that respects the rule of law,⁵⁰ many scholars attribute litigants' willingness to comply with court orders to the substance of the orders themselves: Court judgments on constitutional matters have popular legitimacy because judges incorporate the "political convictions of the nation into the substance of constitutional law"⁵¹ and act with sensitivity to how citizens will receive their decisions.⁵²

47. See Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 111 (1990) (observing that courts accurately expect that individuals will want to comply with court orders). Indeed, federal contempt citations issued to enforce court orders are relatively rare. Less than 0.5% (536 out of 130,078) of criminal matters on which U.S. Attorneys worked in 2003 involved perjury or contempt. BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004 tbls. 2.1 & 2.2 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfs04.pdf> (noting, additionally, that less than one-half of those charged were prosecuted); see also *Geras v. Lafayette Display Fixtures*, 742 F.2d 1037, 1049 (7th Cir. 1984) (Posner, J., dissenting) ("The contempt power is rarely employed in civil trials. It is rarely employed, period: out of 34,681 federal criminal proceedings begun in the 1983 reporting year, only 42 were prosecutions for contempt." (citation omitted)).

48. For example, when the Supreme Court ordered President Nixon to turn over the incriminating Watergate tapes to prosecutors, he did so immediately. See *United States v. Nixon*, 418 U.S. 683, 713–14 (1974) (rejecting Nixon's claims of executive privilege); see also KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 26 (15th ed. 2004) (noting that, after the Supreme Court rendered its decision, "Nixon announced that he had instructed his counsel 'to take whatever measures are necessary to comply with that decision in all respects'").

49. See Maureen Hayden, *Hostettler's Win in Ten Commandment Fight Puzzles Gibson Officials*, EVANSVILLE COURIER & PRESS, June 16, 2005, at B3.

50. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (calling the rule of law "fundamental"); Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 8 (1997) (outlining elements of the "rule of law," including its efficacy in guiding people's actions as supreme legal authority); cf. Sheldon Ekland-Olson & Steve J. Martin, *Organizational Compliance with Court-Ordered Reform*, 22 LAW & SOC'Y REV. 359, 371 (1988) (attributing institutional resistance to court-ordered prison reform in Texas to "a moral climate" created by prison leaders in which court orders were seen as illegitimate).

51. Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1039 (2004).

52. See Sandra Day O'Connor, *Public Trust as a Dimension of Equal Justice: Some Suggestions to Increase Public Trust*, 36 CT. REV. 10, 13 (1999), available at <http://aja.ncsc.dni.us/courtrv/cr36-3/CR%2036-3%20O'Connor.pdf>. Justice O'Connor noted:

As judges, court administrators and attorneys, we all rely on public confidence and trust to give the courts' decisions their force. We don't have standing armies to

There is, of course, a significant minority of cases in which parties refuse to comply with court orders.⁵³ Such defiance has been seen in all types of cases and litigants—from private citizens, to local governments, to the President himself. For example, in recent years, national security reporters have refused to comply with subpoenas for their testimony regarding information obtained from confidential sources, claiming that the court orders violate the reporter's privilege under the First Amendment.⁵⁴ In the years after *Brown v. Board of Education*, state and local governments across the South engaged in widespread defiance of the Supreme Court's order to integrate public schools with "all deliberate speed."⁵⁵ Alabama Chief Justice Roy Moore adamantly refused to remove the Ten Commandments monument from the Alabama State Judicial Building's rotunda, despite multiple court orders to do so.⁵⁶ During the Civil War, President Lincoln suspended the writ of habeas corpus in defiance of an order issued by the Chief Justice of the Supreme Court in *Ex parte Merryman*.⁵⁷

enforce opinions, we rely on the confidence of the public in the correctness of those decisions. That's why we have to be aware of public opinions and of attitudes toward our system of justice, and it is why we must try to keep and build that trust.

Id.; see also Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 94 n.76 (1998) ("Recognizing the nexus between its authority and public acceptance, the Court is rarely out of step with prevailing mores."); Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1119 n.241 (noting that the judiciary "mostly avoid[s] genuinely counter-majoritarian decisions").

53. Court orders that tend to inspire defiance and contempt often involve an injunction in some form or a specific performance order. See Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 219 (1971) (citing "an order to turn over property to the court or another party" and "a prohibitory order forbidding a demonstration, a march, the continuance of a nuisance, or the violation of a trademark or copyright" as examples of circumstances frequently involving defiance and contempt).

54. See, e.g., *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1145–53 (D.C. Cir. 2006) (affirming a decision holding New York Times reporter Judith Miller in contempt of court for refusing to disclose the identities of her confidential sources); *Wen Ho Lee v. Dep't of Justice*, 413 F.3d 53, 61–64 (D.C. Cir. 2005) (affirming a decision holding four reporters in contempt of court for refusing to disclose the identities of their confidential sources).

55. See *Green v. County Sch. Bd.*, 391 U.S. 430, 438–39 (1968) (noting continuing state-sponsored school segregation after *Brown v. Board of Education* and requiring the state to offer a desegregation plan that "promises realistically to work now"); see also *infra* notes 172–73 and accompanying text (describing the aftermath of *Brown*); cf. *Spallone v. United States*, 493 U.S. 265, 280 (1990) (invalidating a contempt finding against individual city employees and requiring the district court to first impose sanctions against the city itself in an attempt to secure compliance with remedial orders).

56. See *supra* notes 13–16 and accompanying text (discussing the case).

57. *Ex parte Merryman*, 17 F. Cas. 144, 153 (C.C.D. Md. 1861) (No. 9487); see *infra* notes 263–70 and accompanying text. Although President Jackson is famous for saying after the Supreme Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), "John Marshall has made his decision. Now let him enforce it," Jackson in fact was never in a position to defy the Court. The State of Georgia mooted the decision soon thereafter, and the United States was never called upon to enforce the Court's order. See SULLIVAN & GUNTHER, *supra* note 48, at 25.

Faced with defiance, courts have both inherent and statutory powers to hold noncompliant parties in contempt of court.⁵⁸ Upon the presentation of clear and convincing evidence that a party has “violate[d] a definite and specific court order requiring him to perform or refrain from performing a particular act or acts with knowledge of that order,”⁵⁹ a court may punish that party by fine, imprisonment, or both.⁶⁰ Moreover, a court may order a noncompliant party to pay the other party’s costs or may issue writs of attachment or execution.⁶¹

While the threat or imposition of a contempt sanction is sometimes enough to generate compliance with the court’s underlying order,⁶² a contempt citation ultimately is still just words on a piece of paper. To collect a fine, imprison a contemnor, or attach property, a federal court must enlist the aid of the executive branch, namely, the U.S. Marshals Service, whose statutory mandate is to “execute all lawful writs, process, and orders issued under the authority of the United States.”⁶³ Indeed, Rule 4.1 of the Federal Rules of Civil Procedure specifically designates the U.S. Marshals as responsible for service of process of an order of civil commitment on a person held in contempt of court.⁶⁴

The Judiciary Act of 1789 created the U.S. Marshals Service. Section 27 of that Act provided for the appointment of a marshal for each federal judicial district, and instructed the marshal “to execute throughout the district, all lawful precepts directed to him, and issued under the authority

58. See *Shillitani v. United States*, 384 U.S. 364, 370 (1966) (citing *United States v. United Mine Workers*, 330 U.S. 258, 330–32 (1947) (Black and Douglas, JJ., concurring in part and dissenting in part)) (stating that courts have inherent power to enforce lawful orders by civil contempt); *SEC v. Bilzerian*, 112 F. Supp. 2d 12, 16 (D.D.C. 2000) (same); cf. 18 U.S.C. § 401 (2000 & Supp. V 2005) (allowing a court to “punish by fine or imprisonment, or both, at its discretion, such contempt of its authority,” including “[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command”).

59. *Bilzerian*, 112 F. Supp. 2d at 16 (quoting *SEC v. Bankers Alliance Corp.*, 881 F. Supp. 673, 678 (D.D.C. 1995)).

60. See 18 U.S.C. § 401.

61. See FED. R. CIV. P. 70 (empowering a court to enforce a judgment through cost-shifting, writs of attachment, and writs of execution).

62. See, e.g., *In re Grand Jury Subpoenas Duces Tecum*, 78 F.3d 1307, 1309–10 (8th Cir. 1996) (noting that contemnors paid contempt fines and complied with subpoenas issued in conjunction with the “Whitewater” investigation into campaign contributions to President William Clinton); *Reich v. Sea Sprite Boat Co., Inc.*, 64 F.3d 332, 333 (7th Cir. 1995) (noting that the contemnor satisfied the judgment and paid the civil contempt penalty).

63. 28 U.S.C. § 566(c) (2000).

64. See FED. R. CIV. P. 4.1(a)–(b); accord *Bank of Credit & Commerce Int’l (Overseas) Ltd. v. Tamraz*, No. 97 Civ. 4759(SHS), 2006 WL 1643202, at *5–6 (S.D.N.Y. June 13, 2006) (holding a noncompliant defendant in contempt of court and ordering the U.S. Marshals Service to serve and arrest the defendant); *Schmidt v. Joslin*, No. 3-06-CV-0731-B, 2006 WL 1499773, at *2 (N.D. Tex. May 31, 2006) (noting an arrest by U. S. Marshals pursuant to an order holding the arrestee in contempt of court).

of the United States.”⁶⁵ Further, the Act gave each marshal the “power to command all necessary assistance in the execution of his duty.”⁶⁶ The U.S. Marshals Service is part of the executive branch, formally designated as “a bureau within the Department of Justice under the authority and direction of the Attorney General.”⁶⁷ The President appoints a U.S. Marshal for each district,⁶⁸ and employees of the bureau serve at the pleasure of the President.⁶⁹

Today, the U.S. Marshals Service performs a variety of functions, including providing security for judicial officials and witnesses, apprehending fugitives, detaining and transporting prisoners, and managing and disposing of seized and forfeited properties.⁷⁰ Its primary role, however, is “to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals and the Court of International Trade.”⁷¹

Thus, Alexander Hamilton was quite correct when, in *The Federalist No. 78*, he stated that the judiciary must “ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”⁷² When a party refuses to comply with a federal court order and the court issues a contempt citation, the court may have to call upon the U.S. Marshals Service to execute and enforce that sanction.⁷³

65. Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

66. *Id.*

67. 28 U.S.C. § 561(a) (2000); *Cunningham v. Neagle*, 135 U.S. 1, 63 (1890) (“[M]arshals of the United States . . . belong emphatically to the executive department of the government.”).

68. United States Marshals Service, *The Judiciary Act of 1789: Charter for U.S. Marshals and Deputies*, http://www.usdoj.gov/marshals/history/judiciary/judiciary_act_of_1789_8.htm (last visited Mar. 10, 2008) (noting that six days after signing the Judiciary Act of 1789, President Washington appointed marshals for each of the thirteen new federal judicial districts).

69. *See* 28 U.S.C. § 569(b) (2000); *Chabal v. Reagan*, 841 F.2d 1216, 1220 (3d Cir. 1988) (holding that despite assignment to the federal courts, the duties of the U.S. Marshals are “purely executive” and, thus, marshals are still members of the executive branch who the President may dismiss at will).

70. *See* 28 C.F.R. § 0.111 (2007) (listing the activities of the U.S. Marshals Service); *see also* United States Marshals Service, *Major Responsibilities of the U.S. Marshals Service*, <http://www.usdoj.gov/marshals/duties/index.html> (last visited Jan. 29, 2008). The Marshals Service’s budget has grown consistently, and in 2008, the estimated budget for the Service is \$900 million. *See* OFFICE OF MGMT. AND BUDGET, *BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2008*, at 94 (2007), *available at* <http://www.whitehouse.gov/omb/budget/fy2008/budget.html>.

71. 28 U.S.C. § 566(a) (2000).

72. *THE FEDERALIST NO. 78*, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

73. Of course, federal court judgments do have a certain force of their own within the court system itself, even in the absence of voluntary compliance or executive enforcement. For example, courts themselves will accord preclusive effect to previous judgments, thereby barring the re-litigation of already-decided issues and cases. However, for court judgments to avoid becoming mere mantras, repeated case after case and judgment after judgment, and instead to

Accordingly, passing an appropriations rider that bars the use of federal funds to enforce a particular court order is not just a symbolic exercise, but an action that could have a real and substantial effect on both the federal courts and the executive branch. Although an enforcement-blocking provision would not alter the substance of the court order or foreclose the possibility of voluntary compliance, it certainly would alter the parties' incentives and decrease the likelihood of compliance in controversial constitutional cases. Parties would know that, in the face of noncompliance, the U.S. Marshals Service would be affirmatively barred from taking any steps to enforce the judgment or a contempt citation.⁷⁴ Indeed, the ultimate effect of such an appropriations rider would be to shackle the executive branch from enforcing constitutional judgments, to undermine the authority and legitimacy of the federal courts, and to foster greater popular disrespect for the rule of law.

III. FINAL COURT ORDERS AND THEIR ENFORCEMENT: THE RELEVANT POWERS AND RESPONSIBILITIES OF EACH COORDINATE BRANCH

Enforcement-blocking provisions raise substantial separation-of-powers concerns with respect to Congress's relationship to both coordinate branches of the federal government. With respect to the federal courts, Congress is asserting its right to reassess constitutional rulings and to diminish (if not vitiate) the force of a final court order. With respect to the executive branch, Congress is inserting itself into the law-enforcement function by attempting to preclude any enforcement activity on a particular issue. Indeed, these separation-of-powers concerns are heightened exponentially where Congress is attempting to undermine the otherwise-willing cooperation of the other two branches on matters within their constitutional domain—namely, executive enforcement of federal court orders.⁷⁵

Whether Congress has the constitutional power to assert itself in these ways depends upon the answers to several questions. First, is the nature of

impact actual conduct, courts must rely on other actors to comply with or execute their judgments.

74. The enforcement-blocking provisions introduced by Representative Hostettler were written in such broad terms that they fairly could be read as preventing the judiciary itself from taking any steps to enforce its own judgments, e.g., by holding a contempt hearing. Because Representative Hostettler characterized the effect of the provisions as preventing action by the U.S. Marshals Service, however, this Article assumes that to be the primary effect of the provisions. *Cf.* *Wright v. Regan*, 656 F.2d 820, 835 (D.C. Cir. 1981) (construing an appropriations rider only to preclude executive action and not court dispositions in order to avoid the “[t]urbulent issues under our fundamental instrument of government” that the latter would raise).

75. The *Russelburg* amendment is the clearest example of the latter category, as the executive branch had declared its intent to enforce the court's order if called upon. *See supra* note 27 and accompanying text.

the Article I congressional power over appropriations absolute and unconditional? Second, does the Article II executive duty to “take Care”⁷⁶ to enforce the laws require the executive branch to enforce federal court judgments, or, at least, does it give the Executive the prerogative to decide when and how to do so? And third, do the essential attributes of a proper exercise of the Article III “judicial Power”⁷⁷ include the actual enforcement of a final court order as to the parties involved in the case? Furthermore, is the judiciary truly supreme in matters of constitutional interpretation?

This Part analyzes these questions and concludes that Congress’s appropriations power is not unconditional and cannot be exercised to impinge on core functions of the coordinate federal branches.⁷⁸ Because Article III courts must issue final, executable rulings in all cases and controversies,⁷⁹ and because those rulings on matters of constitutional interpretation are supreme and binding,⁸⁰ those core characteristics demand certain responses and accommodations from the coordinate branches of government.⁸¹ The executive branch, if called upon to do so, is likely obligated to enforce federal courts’ orders as to the parties before the court.⁸² Accordingly, Congress is, at the very least, constitutionally prohibited from selectively de-funding such enforcement efforts.⁸³

A. CONGRESS’S APPROPRIATIONS POWER

Article I, Section 9 of the U.S. Constitution states that “[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”⁸⁴ The power of the purse gives Congress “absolute control of the moneys of the United States”⁸⁵ and enables Congress to control government expenditures and to set policy priorities by virtue of resource allocations. Indeed, ever since James Madison declared that “[t]his power over the purse may . . . be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people,”⁸⁶ commentators have emphasized the leverage that the

76. U.S. CONST. art. II, § 3.

77. *Id.* art. III, §§ 1–2.

78. *See infra* Part III.A.

79. *See infra* Part III.B.1.

80. *See infra* Part III.B.2.

81. *See infra* Part III.C.

82. *See infra* Part III.C.2.

83. *See infra* Part III.C.1.

84. U.S. CONST. art. I, § 9.

85. *Hart v. United States*, 16 Ct. Cl. 459, 484 (1880), *aff’d*, 118 U.S. 62 (1886).

86. THE FEDERALIST NO. 58, at 327 (James Madison) (Clinton Rossiter ed., 1999).

appropriations power gives Congress to affect policy and to guide the conduct of the other branches of government.⁸⁷

Every year, Congress considers many appropriations bills,⁸⁸ “which provide funding for . . . general government operations” and programs as well as for each of the major executive and independent agencies.⁸⁹ The executive branch is statutorily prohibited from spending more than Congress appropriates,⁹⁰ and it must use the appropriated funds only for the purposes Congress sets forth.⁹¹ While appropriations bills are pending in the House or Senate, members of Congress can propose limitations riders—amendments to appropriations bills that prohibit the use of appropriated funds for particular purposes.⁹² Limitations riders apply only to the fiscal year to which the appropriation applies and cannot amend or repeal existing law or create new law.⁹³

Congress’s power to control appropriations and to pass limitations riders, while broad, is not unlimited. Longstanding judicial precedent and executive-branch interpretations have articulated constitutional limits on the appropriations power—namely, that Congress may not use its power to circumvent other constitutional prohibitions or guarantees or to impinge on the Constitution’s structural allocations of power.⁹⁴ There have been at least a few occasions in history where Congress arguably has used its

87. See, e.g., Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 457, 464–65, 471–80 (noting that “Congress frequently expresses policy preferences through limitation riders,” but cautioning against this trend on both practical and constitutional grounds); Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CONST. L.Q. 457, 460–61 (1992) (noting Congress’s attempts to use its appropriations power to, inter alia, “deprive former slaves of the right to vote, to protect farm subsidies from executive scrutiny, to prevent the President from making recess appointments, to enter into the conduct of negotiations with foreign powers, and to remove suspected Communists from the federal payroll” (footnotes omitted)).

88. See SANDY STREETER, CONG. RESEARCH SERV., *THE CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION* 12 (2004), available at <http://rules.house.gov/archives/97-684.pdf> (“From FY1977 through FY2005, Congress . . . considered 13 regular appropriations bills and, for FY2006 and FY2007, Congress generally considered 11 regular bills.”).

89. *Id.* at 1.

90. See 31 U.S.C. § 1341(a)(1)(A) (2000) (“An officer or employee of the United States Government . . . may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation . . .”).

91. See 31 U.S.C. § 1301(a) (2000) (“Appropriations shall be applied only to the objects for which the appropriations were made . . .”). This rule is subject to an exception for necessary expenses: “[W]here an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object . . . unless they are prohibited by law.” 6 Comp. Gen. 619, 621 (1927).

92. See, e.g., SANDY STREETER, CONG. RESEARCH SERV., *EARMARKS AND LIMITATIONS IN APPROPRIATIONS BILLS* 2 (2004), available at <http://www.rules.house.gov/archives/98-518.pdf>.

93. *Id.*

94. See *infra* notes 96–106 and accompanying text.

appropriations power in a manner contrary to these principles.⁹⁵ This push-and-pull between the branches indicates ongoing institutional debate regarding the proper scope of the appropriations power. As an overall matter, though, it seems clear that there must be proper limits on Congress's appropriations power and that enforcement-blocking provisions, in particular, contravene those limits.

As a primary matter, Congress may not use its appropriations power to circumvent other explicit constraints on its own conduct. For example, in *United States v. Lovett*, the Supreme Court struck down an appropriations rider that barred the use of funds for the payment of particular federal employees' salaries unless those individuals were re-appointed to their jobs by the President, with the advice and consent of the Senate.⁹⁶ Despite Congress's argument that a "mere appropriation measure" could not be challenged on constitutional grounds,⁹⁷ the Court found that Congress's purpose was to punish the individuals for their political beliefs and, therefore, that the appropriations rider was, in reality, a bill of attainder barred by Article I, Section 9 of the Constitution.⁹⁸ The Court struck down the appropriations rider as unconstitutional and "contrary to the manifest tenor of the Constitution."⁹⁹

The *Lovett* principle easily extends to bar Congress from using its appropriations power toward 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. In the words of one judge who considered *Lovett* in the Court of Claims:

[T]he power of the purse may [not] be constitutionally exercised to produce an unconstitutional result such as a taking of a citizen's liberty or property without due process of law, a conviction and punishment of a citizen for wholly innocent conduct, or a trespass upon the constitutional function of another branch of Government.¹⁰⁰

95. See *infra* notes 107–27 and accompanying text.

96. See *United States v. Lovett*, 328 U.S. 303, 318 (1946) (holding the rider unconstitutional).

97. *Id.* at 313.

98. *Id.* at 313–15 (citing U.S. CONST. art. I, § 9, cl. 2 ("No Bill of Attainder or ex post facto law shall be passed.")).

99. *Id.* (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)); see also Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1385 & n.153 (1980) ("[A]ppropriations acts have been held just as unconstitutional as substantive legislation.").

100. *Lovett v. United States*, 66 F. Supp. 142, 152 (Ct. Cl. 1945) (Madden, J., concurring in the result).

In *Office of Personnel Management v. Richmond*, two members of the Supreme Court reiterated this “*Lovett* principle.”¹⁰¹ In that case, the Court considered a situation in which a federal employee, following an executive-branch official’s erroneous advice, engaged in part-time work that had the effect of disqualifying him from receiving disability benefits under the governing statute.¹⁰² The majority held that, on the facts, the erroneous information did not estop the government from denying the benefits.¹⁰³ A ruling to the contrary, they noted, would be akin to saying that the executive branch could act to appropriate funds in the face of a statute to the contrary.¹⁰⁴ Justice White, joined by Justice Blackmun, concurred to note that Congress’s appropriations power is not as unlimited as the majority had suggested and could not be used to “encroach on the powers reserved to another branch of the Federal Government.”¹⁰⁵

The Justice Department has invoked the *Lovett* principle to critique Congress’s use of the appropriations power. For example, a 1933 Opinion of the Attorney General stated:

Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution. If such a practice were permissible, Congress could subvert the Constitution. It might make appropriations on condition that the executive department abrogate its functions.¹⁰⁶

Despite these articulated limits, Congress on a few occasions has used its appropriations power arguably to encroach on powers reserved to the executive branch or the federal courts. In all but one of these instances, the affected coordinate branch rebuffed Congress’s attempt. For example, even before *Lovett* was decided, President Rutherford B. Hayes vetoed an Army appropriations bill that would have prevented the deployment of the U.S. military for the purpose of “keep[ing] peace at the polls” during

101. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 435 (1990) (White, J., concurring) (noting that the majority did “not state that statutory restrictions on appropriations may never fall even if they violate a command of the Constitution”).

102. *Id.* at 417–18 (majority opinion).

103. *Id.* at 434.

104. *Id.* at 428.

105. *Id.* at 435 (White, J., concurring). Justice White provided an example of such an unconstitutional appropriations bill: “Congress could [not] impair the President’s pardon power by denying him appropriations for pen and paper.” *Id.*; *cf.* *Knute v. United States*, 95 U.S. 149, 154 (1877) (upholding an appropriations rider that limited the President’s ability, after granting a pardon, to refund proceeds from a pardonee’s forfeited property because the pardon power does not extend that far; therefore, the rider did not infringe on executive power).

106. 37 Op. Att’y Gen. 56, 61 (1933); *see also* Todd D. Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 WIS. L. REV. 993, 999–1001 (providing other examples).

congressional elections.¹⁰⁷ In his veto message, President Hayes argued that “[i]t is the right and duty of the National Government to enact and enforce laws which will secure free and fair Congressional elections.”¹⁰⁸ Indeed, Hayes asserted that “it is the duty of the executive department of the Government to enforce” the Fifteenth Amendment and other laws meant to ensure free and fair elections.¹⁰⁹ He would not countenance Congress’s attempt to use its appropriations power to render “the National Government powerless to enforce its own statutes.”¹¹⁰ President Hayes expressed concern that Congress, in passing the appropriations measure, was endangering “the equal independence of the several branches of the Government.”¹¹¹

On at least two occasions, federal courts have declared appropriations riders unconstitutional because the riders infringed on the domain of a coordinate branch of the federal government. In *United States v. Will*, the Supreme Court struck down an appropriations measure that sought to roll back salary increases for federal judges.¹¹² The Court reasoned that the rollbacks conflicted with the Compensation Clause, which explicitly insulates judicial salaries from diminishment.¹¹³

In *National Federation of Federal Employees v. United States*, a federal district court struck down a rider enacted to limit the implementation and enforcement of President Reagan’s National Security Decision Directive 84, which required employees with access to “classifiable” information to sign a nondisclosure agreement regarding classified, and arguably non-classified, information.¹¹⁴ The district court struck down the appropriations rider on separation-of-powers grounds, holding that it encroached on the President’s authority over national security matters.¹¹⁵ Upon review, the Supreme Court avoided ruling on the constitutional merits of the appropriations rider.¹¹⁶ Instead, it found that some aspects of the case had been mooted, so it

107. Rutherford B. Hayes, Veto Message (Apr. 29, 1879), *reprinted in* IX A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4476 (1897) (citation omitted).

108. *Id.* at 4480.

109. *Id.* at 4479.

110. *Id.* at 4480.

111. *Id.* at 4483.

112. *See* *United States v. Will*, 449 U.S. 200, 230 (1980) (holding that the rider violated the Compensation Clause).

113. *Id.* at 230 (holding that a statute effecting a direct diminution of Article III judges’ salaries violated the Compensation Clause, even though the same statute applied to other federal officials as well). The Compensation Clause states that federal judges “shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.” U.S. CONST. art. III, § 1.

114. *See* *Nat’l Fed’n of Fed. Employees v. United States*, 688 F. Supp. 671, 676 (D.D.C. 1988) (describing the executive directive and appropriations rider).

115. *Id.* at 685.

116. *Am. Foreign Serv. Ass’n v. Garfinkel*, 490 U.S. 153, 159–60 (1989).

vacated the district court's decision and remanded the case for further consideration.¹¹⁷

One final example of Congress's use of its appropriations power, arguably in violation of the *Lovett* principle, is found in the passage of the Baxter Amendment. In the 1980s, the Antitrust Division of the Justice Department, under the direction of Assistant Attorney General William F. Baxter, regularly filed amicus briefs advocating the overruling of the Supreme Court's 1911 decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, which held that resale price maintenance constituted a per se violation of the Sherman Antitrust Act.¹¹⁸ In 1984, after the Department had filed one such amicus brief in a pending Supreme Court case, *Monsanto Co. v. Spray-Rite Service Corp.*,¹¹⁹ Congress passed an appropriations rider—the “Baxter Amendment”—that prohibited the use of federal funds for “any activity, the purpose of which is to overturn or alter the per se prohibition on resale price maintenance in effect under Federal antitrust laws.”¹²⁰ Although the rider allowed an executive official to testify before Congress on this topic,¹²¹ its language was broad enough to prevent an executive official from actually proposing statutory amendments in line with the administration's recommendations.¹²² Moreover, it prevented the Department of Justice from advocating the administration's position during oral argument.¹²³

President Reagan signed the bill containing the Baxter Amendment, despite his concern that “[e]ven as narrowly construed . . . the provision potentially imposes an unconstitutional burden on executive officials charged with enforcing the Federal antitrust laws.”¹²⁴ Indeed, the Baxter Amendment arguably ran afoul of the principle of separation of powers as well as the Recommendation Clause, which requires that the President “shall . . . recommend to [Congress] such Measures as he shall judge necessary and

117. *Id.* at 159–60.

118. *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408–09 (1911).

119. See Brief for United States as Amicus Curiae Supporting Petitioners, *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (No. 82-914) (urging the Court not to create a per se violation for certain pricing activities).

120. Act of Nov. 28, 1983, Pub. L. No. 98-166, § 510, 97 Stat. 1071, 1102.

121. See *id.*

122. See *id.*; see also J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2080 (1988) (describing the Baxter Amendment).

123. See Transcript of Oral Argument, *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (No. 82-914), available at http://www.oyez.org/cases/1980-1989/1983/1983_82_914/argument/. At one point in the argument, Justice O'Connor asked the government's advocate whether, “had Congress not adopted the proviso in its appropriation act, [he would] have made possibly a different argument to us today.” *Id.* The attorney responded, “We have not withdrawn part 2(b) of our brief [advocating for the overruling of the *Dr. Miles* decision], Justice O'Connor. Beyond that I would prefer not to deal with that question.” *Id.*

124. Statement on Signing a Fiscal Year 1984 Appropriations Bill, 2 PUB. PAPERS 1627 (Nov. 28, 1983).

expedient.”¹²⁵ Despite President Reagan’s cautionary signing statement, the constitutionality of the Baxter Amendment was never litigated or tested.¹²⁶

Thus, over time, there has been institutional tension regarding the scope of Congress’s appropriations power. On a few occasions, Congress arguably has attempted to use that power to encroach on the activities and prerogatives of the coordinate federal branches. More often than not, the affected branch has pushed back and articulated a limiting principle—what this Article calls the “*Lovett* principle”—for the exercise of the appropriations power. That principle has considerable breadth: Congress may not use its appropriations power to circumvent other textual prohibitions on its own conduct, to infringe on individual liberties, or to encroach on the constitutional duties or prerogatives of a coordinate branch of the federal government.¹²⁷

Although it is easy enough to say that the appropriations power is not absolute, it is more difficult to determine whether enforcement-blocking appropriations riders in fact encroach on core judicial or executive functions. Congress is certainly entitled to set overall funding levels for executive agencies, including the U.S. Marshals Service, and indeed has passed appropriations measures setting a general budget for the Marshals Service in every fiscal year since 1789.¹²⁸ Moreover, it seems readily apparent that Congress has considerable discretion over the upper limits of that budget; it need not provide the Service with a blank check that would enable the Service to take each and every possible measure, regardless of cost, to ensure the execution of each federal court order.

However, a general appropriations bill for the Marshals Service is entirely different in nature from an enforcement-blocking appropriations rider. The former operates at the macro level, affirmatively providing funding for wide-ranging executive enforcement efforts in support of the federal courts. By contrast, the latter attempts to micromanage executive enforcement efforts by selectively de-funding the enforcement of a particular court order. Enforcement-blocking riders raise specific

125. U.S. CONST. art. II, § 3; *see also* Sidak, *supra* note 122, at 2118–28 (evaluating the constitutionality of “muzzling laws,” including the Baxter Amendment, under the Recommendations Clause).

126. The Supreme Court, however, did overrule *Dr. Miles* in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2710 (2007), holding instead that “vertical price restraints are to be judged by the rule of reason.” *Id.* Interestingly, in discussing whether the principle of *stare decisis* mitigated in favor of retaining the *Dr. Miles* rule, the Court quickly dismissed the claim that the Baxter Amendment indicated congressional ratification of the rule. *See id.* at 2724 (stating that the amendment “might demonstrate a different proposition: that Congress could not pass legislation codifying the [*Dr. Miles*] rule and reached a short-term compromise instead”).

127. *See Lovett v. United States*, 66 F. Supp. 142, 152 (Ct. Cl. 1945) (Madden, J., concurring in the result).

128. *See supra* note 70.

constitutional concerns because they have such an immediate impact on both judicial and executive actions and directly target specific rulings.

The *Lovett* principle thus has direct relevance to the constitutionality of enforcement-blocking riders. If Article III requires the federal judiciary to issue final, executable judgments, then Congress may not prohibit the courts from doing so. Likewise, if the executive branch has a constitutional obligation to enforce final court orders, then Congress may not prevent the executive branch from carrying out that duty. Alternatively, if the Constitution vests sole discretion in the executive branch whether to enforce a final court order, Congress may not insert itself into that decision. The next Section addresses these issues.

B. THE ARTICLE III JUDICIAL POWER

1. Finality and Executability as Essential Components of the Exercise of the Judicial Power

Article III of the Constitution vests the “judicial Power” of the United States “in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish.”¹²⁹ The second Section of Article III extends the “judicial Power” to nine categories of “cases” and “controversies” but is otherwise silent as to the precise nature of the “judicial Power.”¹³⁰

Extensive studies of the development of Article III at the Constitutional Convention indicate that the framers conceived of the judicial power as the “authority and obligation, in all matters over which jurisdiction is conferred, independently, finally, and effectually, to decide the whole case and nothing but the case on the basis of legal reasoning, not political expedience.”¹³¹ The federal courts themselves have developed justiciability doctrines in order to define and delimit the central prerogatives of the judicial branch. They have developed separation-of-powers principles that set the parameters for the proper exercise of the judicial power and the range of permissible responses to such an exercise by the coordinate branches.¹³²

129. U.S. CONST. art. III, § 1, cl. 1. Congress, of course, created a system of lower federal courts in the Judiciary Act of 1789. Today, there are thirteen federal circuit courts and ninety-four federal district courts. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 1.4.3, at 24, § 1.4.4, at 27 (5th ed. 2007).

130. See U.S. CONST. art. III, § 2.

131. James F. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 773 (1998); see also 1 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 405 (Philadelphia, Bronson & Chauncey 1804) (“The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties interested in them.”).

132. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (explaining that the “case” and “controversy” requirements of Article III “define the role assigned to the judiciary in a tripartite allocation of

The prohibition on advisory opinions is one of the principal delimitations of the judicial power. Based on Article III's "case" and "controversy" requirement—and its negative corollary, that the judicial power does not extend to anything but a case or controversy—the federal courts require that a case satisfy two basic criteria. First, it must present an "actual dispute between adverse litigants,"¹³³ rather than "abstract, hypothetical, or contingent questions."¹³⁴ Second, there must be a "substantial likelihood that a federal court decision in favor of a claimant will bring about some change or have some effect"¹³⁵ as to the parties before the court. In the typical case, the "change" or "effect" of a court's judgment will be "the award of process or the payment of damages."¹³⁶ Injunctive relief and declaratory judgments can also satisfy this criterion.¹³⁷

The bar on advisory opinions is both a limit on the power of the federal courts and an affirmative indicator of the nature of the judicial power. The first criterion—the presence of an actual dispute—indicates that a proper exercise of the judicial power will settle a controversy between parties by defining their legal rights and obligations. While it is open to debate whether the legal reasoning in a court's opinion is binding,¹³⁸ there is little question that a court's judgment and order as to the parties before it is binding on those parties.¹³⁹ Indeed, as the Supreme Court made clear in *Plaut v. Spendthrift Farm, Inc.*, the Constitution "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them . . . [I]n short, . . . 'a judgment conclusively resolves the case' because 'a "judicial Power" is one to render dispositive judgments.'"¹⁴⁰ Judgments based on constitutional

power to assure that the federal courts will not intrude into areas committed to the other branches of government").

133. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 2.4, at 54 (3d ed. 2006); see also *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (stating that federal courts are powerless to decide questions that will not affect the litigants' rights).

134. *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945) (citations omitted).

135. CHEMERINSKY, *supra* note 133, § 2.4, at 56.

136. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937).

137. See *id.* (finding that declaratory judgment actions have been held to be within the judicial power even though the result of the adjudication may not require a concrete award of process or damages).

138. Compare Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 148, 154 (1999) (advocating the view that judicial opinions, as opposed to judgments, call for deference, but not obedience), with Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371–72 (1997) (advocating the view that judicial opinions carry the same force as judgments).

139. See, e.g., Marc S. Mayerson, *Executability of Article III Judgments and the Problem of Congressional Discretion: United States v. Board of Education of Chicago*, 35 DEPAUL L. REV. 51, 59 (1985).

140. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1989–1990)).

assessments are entitled to no less authority than those based on private legal rights.¹⁴¹

The second criterion—that the federal court’s judgment have the potential to “be carried into effect”¹⁴²—necessarily implies that, to properly exercise the judicial power, a federal court’s decision as to the parties’ rights and obligations must be accompanied by a judgment that is executable.¹⁴³ To be executable, a judgment must “admit[] of specific relief . . . of a conclusive character.”¹⁴⁴ Absent the rendering of an executable judgment, judicial intervention would have no real-world effect and would be tantamount to an advisory opinion. As Justice Johnson put it in 1808, “[t]he term ‘judicial power’ conveys the idea, both of exercising the faculty of judging and of applying physical force to give effect to a decision.”¹⁴⁵ In the words of Chief Justice Taney in *Gordon v. United States*, “[t]he award of execution is a part, and an essential part of every judgment passed by a court exercising [Article III] judicial power. It is no judgment, in the legal sense of the term, without it.”¹⁴⁶ Thus, unless it issues an executable judgment, a federal court is merely acting in an advisory capacity, and is doing so beyond its Article III powers.

Finality and executability are thus two sides of the same coin, and both are essential aspects of a proper exercise of the Article III judicial power. When a federal court issues a judgment that is not final or executable as to the parties before it, it is not exercising the judicial power within the meaning of Article III.

2. Finality in Matters of Constitutional Interpretation

Another aspect of the judicial power allocated to the federal courts by Article III is the power to review the constitutionality of executive and legislative acts. While the power of judicial review is not explicitly set forth in the Constitution, in the landmark case of *Marbury v. Madison*, the Supreme

141. See Post & Siegel, *supra* note 51, at 1035 (“[W]e nonetheless expect constitutional rights to be judicially enforceable to the same extent as are ordinary legal entitlements.”). Post and Siegel suggest that judgments involving constitutional rights should have the same entitlement to finality as judgments involving private legal rights because “we want citizens to hold rights against their government that are as secure and as reliable as the private rights that they hold against their fellow citizens.” *Id.*

142. *Mills v. Green*, 159 U.S. 651, 653 (1895) (stating that judicial power requires “actual controversies by a judgment which can be carried into effect”).

143. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937) (describing the characteristics of an Article III controversy).

144. *Id.* at 241.

145. *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355, 361 (C.C.D.S.C. 1808) (No. 5420) (“The term ‘power’ [in Article III] could with no propriety be applied, nor could the judiciary be denominated a department of [the] government, without the means of enforcing its decrees.”).

146. *Gordon v. United States*, 117 U.S. 697, 702 (1864); see also Mayerson, *supra* note 139, at 62 n.70 (discussing later courts’ acknowledgment or acceptance of Taney’s statement).

Court famously declared that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”¹⁴⁷ The Court invalidated a portion of the Judiciary Act of 1789 that had attempted to expand the Supreme Court’s original jurisdiction beyond that conferred by Article III. The Court emphasized that the “powers of the legislature are defined and limited,”¹⁴⁸ that the “very essence of judicial duty” is to measure acts of Congress against the Constitution,¹⁴⁹ and that “an act of the legislature, repugnant to the constitution, is void.”¹⁵⁰

Of course, judicial review is not necessarily the same as judicial supremacy.¹⁵¹ Departmentalist scholars long have argued that *Marbury*’s principle does not inexorably lead to the conclusion that the federal judiciary has the final say as to the meaning of the Constitution in all settings.¹⁵² Rather, they argue, the coequal and coordinate nature of the three branches of the federal government requires that each branch have independent authority and responsibility for interpreting the Constitution.¹⁵³ Just as the Supreme Court in *Marbury* was not bound by Congress’s view of the Constitution, Congress and the Executive, acting “within [their own] sphere[s],” should not be bound by the Court’s view of the Constitution.¹⁵⁴

Without getting into the merits of this scholarly debate, two things are clear. First, even among departmentalists, few dispute that the federal

147. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Some commentators challenge *Marbury*’s status as a legal landmark. The foundations for and concept of judicial review, they say, were established in the Judiciary Act of 1789. See, e.g., Mark A. Graber, *Establishing Judicial Review: Marbury and the Judiciary Act of 1789*, 38 TULSA L. REV. 609, 610, 612 (2003) (characterizing *Marbury* as merely an “unoriginal defense” of judicial review). Whatever *Marbury*’s pedigree, however, the concept of judicial review itself has proven crucially important.

148. *Marbury*, 5 U.S. at 176.

149. *Id.* at 178.

150. *Id.* at 177.

151. See Devins & Fisher, *supra* note 52, at 91 n.58 (“*Marbury*, of course, did not rule that the Court’s constitutional interpretations were final and definitive; instead, the Court simply declared that it had the power to invalidate unconstitutional Congressional action.”).

152. See, e.g., Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 988 (1987) (rejecting the proposition that “the Court’s constitutional interpretations . . . mea[n] the same as the Constitution itself”); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 225–26 (1994). But see Alexander & Schauer, *supra* note 138 *passim* (defending judicial supremacy on normative grounds).

153. See Meese, *supra* note 152, at 985–86; Paulsen, *supra* note 152, at 228–40; cf. THE FEDERALIST NO. 49, at 282 (James Madison) (Clinton Rossiter ed., 1999) (stating that no branch “can pretend to an exclusive or superior right of settling the boundaries between their respective powers”); THE FEDERALIST NO. 78, at 435–36 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (declaring that judicial review does not “by any means suppose a superiority of the judicial to the legislative power”).

154. Paulsen, *supra* note 152, at 218, 225–26. This, of course, begs the question of precisely what functions fall within the sphere of each branch. See also *id.* at 245 (“[E]ach branch has a power of constitutional review over the constitutional judgments of the others . . .”).

judiciary in fact does have the final say in one particular setting: a final judgment rendered by a federal court—even one predicated on a constitutional ruling—is binding as to the parties before the court itself.¹⁵⁵ Departmentalists frequently invoke President Lincoln as having articulated the premise of coordinate and coequal constitutional review in the course of his debates with Stephen Douglas.¹⁵⁶ Indeed, Lincoln argued that the Supreme Court's *Dred Scott* decision was wrong and that it was not binding on voters or on the coordinate federal branches.¹⁵⁷ Yet, he acknowledged that "in so far as [the Supreme Court] decided in favor of Dred Scott's master against Dred Scott and his family, I do not propose to disturb or resist the decision."¹⁵⁸

Second, as a doctrinal matter, the Supreme Court itself long has asserted its supremacy in constitutional interpretation. The Court most recently vigorously asserted the supremacy of judicial—as opposed to congressional—pronouncements as to constitutional meaning in *City of Boerne v. Flores*.¹⁵⁹ In 1990, the Court held in *Employment Division, Department of Human Resources of Oregon v. Smith* that the First Amendment permits the application of neutral, generally applicable laws to religious practices even when those laws are not supported by a compelling governmental interest.¹⁶⁰ Congress enacted the Religious Freedom Restoration Act ("RFRA") in an attempt to overrule that holding.¹⁶¹ In *City of Boerne*, the Court struck down RFRA, reasserting the judiciary's "power to interpret the Constitution in a case or controversy"¹⁶² and clarifying that Congress's power to "enforce" the

155. See *supra* note 139 and accompanying text; cf. *infra* notes 254–55, 271–75 and accompanying text (discussing the Executive's duty to enforce final judgments and noting only one categorical exception to the view that such a duty in fact exists).

156. See, e.g., Meese, *supra* note 152, at 985.

157. *Id.* (citing Abraham Lincoln & Stephen A. Douglas, Sixth Joint Debate at Quincy, Illinois (Oct. 13, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 255 (Roy P. Basler ed., 1953)).

158. *Id.* (citing Abraham Lincoln, Speech at Springfield, Illinois (July 17, 1858), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 516 (Roy P. Basler ed., 1953)).

159. *City of Boerne v. Flores*, 521 U.S. 507 (1997); see also *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy."); *Dickerson v. United States*, 530 U.S. 428, 432 (2000) ("[A] constitutional decision of this Court . . . may not be in effect overruled by an Act of Congress . . ."); *United States v. Morrison*, 529 U.S. 598, 617 n.7 (2000) ("[E]ver since *Marbury* this Court has remained the ultimate expositor of the constitutional text.").

160. See *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

161. *City of Boerne*, 521 U.S. at 515.

162. *Id.* at 524. Although *City of Boerne* focused on the power of the Supreme Court, there appears to be no reason to distinguish between judgments rendered by the Supreme Court and unappealed final judgments of lower federal courts. See Michael Stokes Paulsen, *The Merryman Power*, 15 CARDOZO L. REV. 81, 82 (1993); *infra* note 192 (discussing *Gordon v. United States*, 117 U.S. 697 app. (1864)). Both the Supreme Court and lower federal courts exercise the same Article III power, and the unappealed final judgment of a lower federal court is the judiciary's

provisions of the Fourteenth Amendment¹⁶³ does not entitle Congress to “chang[e] what the right is”¹⁶⁴ or to “determine what constitutes a constitutional violation.”¹⁶⁵ Rather, the Court declared, that power resides solely with the federal judiciary.

Judicial pronouncements as to the meaning of the Federal Constitution are supreme not only as to Congress, but also as to state officials. The Supreme Court’s authority extends to the review of the constitutionality of state court decisions,¹⁶⁶ state laws, and the actions of individual state officials.

In *Cooper v. Aaron*, the Supreme Court strongly asserted the supremacy of its pronouncements over state actors.¹⁶⁷ After major resistance to the Court’s 1954 ruling in *Brown v. Board of Education (Brown I)*¹⁶⁸ in the Arkansas state legislature,¹⁶⁹ as well as armed confrontations over the integration of Little Rock’s Central High School,¹⁷⁰ the Little Rock School Board sought court permission to postpone implementation of its

final word as to the parties to which the judgment is directed. *See* U.S. CONST. art. III, § 1 (vesting the “judicial Power” in “one Supreme Court” and “in . . . inferior Courts”); *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803) (“The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States . . .”).

163. U.S. CONST. amend. XIV, § 5.

164. *City of Boerne*, 521 U.S. at 519.

165. *Id.*; *see also id.* at 529 (“If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be ‘superior paramount law, unchangeable by ordinary means.’” (quoting *Marbury*, 5 U.S. at 177)). In *City of Boerne*, the Court articulated a test for determining whether a statute is a proper exercise of Congress’s Section 5 enforcement powers: “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *Id.* at 520. RFRA failed to satisfy the “congruence and proportionality” test so articulated. *See id.* at 532.

166. The Court first asserted its authority to review the constitutionality of state court decisions in *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

167. *See Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958).

168. *See Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954) (holding that the Fourteenth Amendment forbids racial segregation in state schools); *see also Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300 (1955) (ordering state officials to make a “prompt and reasonable start toward full compliance” with *Brown I*).

169. *See Cooper*, 358 U.S. at 8–9 (quoting amendment 44 of the Arkansas Constitution, which instructed the state legislature to resist the “[u]n-constitutional desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court”); *see also* ARK. STAT. ANN. § 80-1525 (1960) (relieving school children from compulsory attendance at desegregated schools).

170. *See Cooper*, 358 U.S. at 11 (describing the Arkansas National Guard’s efforts to obstruct desegregation). In September 1957, the Governor of Arkansas dispatched units of the Arkansas National Guard to Little Rock’s Central High School to prevent African American students from entering. *Id.* The students were permitted to enter only after the federal district court entered an injunction and President Eisenhower dispatched federal troops to protect the students. *Id.* at 11–12. Note that President Eisenhower’s intervention to enforce the Court’s decision ultimately demonstrates the dependence of the federal courts on the Executive to enforce their judgments.

desegregation program.¹⁷¹ The Supreme Court rejected the request, declaring that because “the interpretation of the Fourteenth Amendment enunciated by [the] Court in the *Brown* case is the supreme law of the land,” every state legislator, executive, and judicial officer was bound to adhere to that constitutional rule.¹⁷² “If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery’ A Governor who asserts a power to nullify a federal court order is similarly restrained.”¹⁷³

Thus, as a doctrinal matter, *Marbury*, *City of Boerne*, and *Cooper* establish a vision of a muscular federal judiciary that stands strong in the face of federal and state legislative and executive challenges regarding the meaning of the Constitution.¹⁷⁴ Congress’s power to regulate the structure and conduct of the federal judiciary¹⁷⁵ does not extend to the substantive core of the courts’ work—namely, constitutional adjudication. In that realm, the federal courts speak with finality and authority, subject only to their own internal appellate review processes. Although citizens and the coordinate branches of the federal government retain power to correct the federal courts’ reading of

171. *Id.* at 11.

172. *Id.* at 18 (citing U.S. CONST. art. VI); *see also* United States v. Nixon, 418 U.S. 683, 704 (1974) (noting the “responsibility of this Court as ultimate interpreter of the Constitution”); Baker v. Carr, 369 U.S. 186, 211 (1962) (“[T]his Court [is the] ultimate interpreter of the Constitution”); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 375, at 267 (4th ed. 1873) (“[T]here is a final and common arbiter provided by the Constitution itself, to whose decisions all others are subordinate; and that arbiter is the supreme judicial authority of the courts of the Union.”).

173. *Cooper*, 358 U.S. at 18–19 (quoting United States v. Peters, 9 U.S. (5 Cranch) 115, 136 (1809)). Although *Cooper*’s strong language shows that courts also will not tolerate refusals by state governments to comply with their judgments, the aftermath of *Cooper*—and of *Brown I* itself—demonstrates the practical limits of the federal courts’ power and, indeed, the courts’ reliance on the executive branch for enforcement of their decrees. For more than a decade after the Court’s demand for compliance, Southern states made only minimal progress toward school desegregation. In 1968, in *Green v. County School Board*, the Supreme Court declared that “delays [in desegregation] are no longer tolerable” and ordered the school board in question “to come forward with a plan that promises realistically to work, and promises realistically to work *now*.” *Green v. County Sch. Bd.*, 391 U.S. 430, 438–39 (1968).

174. *But cf.* Devins & Fisher, *supra* note 52, at 91–94 (arguing that the Court declares its supremacy out of “fear[] that the political order will ignore its command” or when its constitutional interpretation is “linked with popular outcomes”).

175. The Constitution does, of course, grant Congress substantial power to regulate the federal courts. Congress may decide whether to establish any lower federal courts and also may regulate their jurisdiction. *Compare, e.g.*, Akhil Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1565 (1990) (arguing that Congress has plenary authority to alter or abolish all federal court jurisdiction except that which is within the original jurisdiction of the Supreme Court), and Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 763 (1997) (same), with Lawrence Gene Sager, *Forward: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 89 (1981) (claiming that the structure of the Constitution as a whole limits Congress’s power to withdraw federal court jurisdiction entirely).

the Constitution via the longer-term political processes of constitutional amendment and “[p]artisan entrenchment through presidential appointments,”¹⁷⁶ the shorter-term substantive responses are limited at best.¹⁷⁷ The federal courts will not countenance attempts to supersede their reading of the Constitution.

C. *LEGISLATIVE AND EXECUTIVE RESPONSES TO EXERCISES OF THE JUDICIAL POWER*

Having identified at least two of the core aspects of the exercise of the Article III judicial power—final, executable rulings in all cases and controversies, and the doctrine of judicial supremacy—the next question is how the two other branches of the federal government may respond to final, executable judicial orders in constitutional cases. As a general matter, executive and legislative responses to final court orders based on substantive constitutional rulings must be measured against the value of judicial independence and the doctrine of separation of powers. The “very structure” of the Constitution enshrines the concept of separation of powers by delineating the powers of the three separate branches in Articles I, II, and III.¹⁷⁸

The Supreme Court sometimes has taken a formalistic perspective on separation-of-powers questions, looking primarily to the structural power delegations made in the constitutional text.¹⁷⁹ At other times, the Court has taken a more functional approach, focusing on “the extent to which the [congressional act being challenged] prevents the executive branch from accomplishing its constitutionally assigned functions” and then balancing this burden against the “need to promote objectives within the constitutional authority of Congress.”¹⁸⁰ In cases involving conflicts between Congress and the federal judiciary, the Court has asked whether Congress

176. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068 (2001).

177. U.S. CONST. art. V (setting forth the amending process); *see also* Post & Siegel, *supra* note 51, at 1030 (noting that judicial supremacy does not “prevent citizens from attempting to endow their constitutional beliefs with legal authority” through a constitutional amendment and through electing a presidential candidate who promises to appoint judges with particular constitutional perspectives).

178. *INS v. Chadha*, 462 U.S. 919, 946 (1983).

179. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986) (striking down a portion of The Balanced Budget and Emergency Deficit Control Act of 1985, which gave the Comptroller General power to make budget cuts); *Chadha*, 462 U.S. at 952–53 (striking down the legislative veto as a violation of constitutionally prescribed lawmaking procedures found in the Presentment Clause); *Myers v. United States*, 272 U.S. 52, 163–64 (1926) (striking down a statute that required the President to obtain Senate approval for the removal of postal officials as a violation of the Take Care Clause).

180. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977); *see also* *Morrison v. Olson*, 487 U.S. 654, 691, 695 (1988) (applying this principle to the Ethics in Government Act of 1978).

has undermined the “essential attributes” of the federal courts¹⁸¹ or encroached on their “central prerogatives.”¹⁸²

1. Legislative Responses to Final Court Orders

The Supreme Court’s separation-of-powers cases firmly establish that when congressional legislation undermines either the finality of a court order or the executability of that order, that legislation encroaches on the central prerogatives of the federal judiciary and, thus, violates the principle of separation of powers.¹⁸³ How this general rule is to be applied in any particular case, however, depends on the precise parameters and operation of the statute in question.

In *Hayburn’s Case*, the members of the Court considered an Act of Congress that allowed federal circuit courts to determine the amount of pensions Revolutionary War veterans should receive, but then gave the Secretary of War discretion to either accept or reject the courts’ findings.¹⁸⁴ Five Justices issued statements in their capacities as circuit justices, noting that the statutory scheme impinged on a sphere of activity reserved solely for the judiciary: “[N]either the Legislative nor the Executive branch[] can constitutionally assign to the Judiciary any duties, but such as are properly judicial, and to be performed in a judicial manner.”¹⁸⁵ The flaw with the scheme was that it allowed for final court judgments to be “revised and controlled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts”¹⁸⁶ Accordingly, *Hayburn’s Case* has come to stand for the principle that Congress cannot vest substantive review of the decisions of Article III courts

181. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60–61, 76 (1982) (finding that Congress does not have the power to remove the essential attributes of judicial power from Article III courts and give those attributes to Article I courts); *see also* *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 850–51 (1986) (stating that an Article I court’s constitutional validity depends on the extent to which it “exercises the range of jurisdiction and powers normally vested only in Article III courts,” as well as “the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III”).

182. *Miller v. French*, 530 U.S. 327, 341 (2000) (“[T]he Constitution prohibits one branch from encroaching on the central prerogatives of another”); *see also* *New York v. United States*, 505 U.S. 144, 182 (1992) (stating that the separation of powers is violated when “one branch [of the federal government] invades the territory of another”); *cf.* *Gordon v. United States*, 117 U.S. 697 app. at 700 (1886) (“The judicial power of the United States is in point of origin and title equal with the other powers of the government, and is as exclusively vested in the court created by or pursuant to the Constitution, as the legislative power is vested in Congress, or the executive power in the President.” (internal quotation omitted)).

183. *See supra* Part III.B.1.

184. *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 409 (1792).

185. *Id.* at 410 n.†.

186. *Id.*

in either executive or legislative branch officials, because doing so would permit those branches to assume the judicial power and to “annul a final judgment.”¹⁸⁷

In *Gordon v. United States*, the Court considered the validity of a statute that vested the power to satisfy a final judgment in Congress itself.¹⁸⁸ The statute in question provided that if the Court of Claims, or Supreme Court on appeal, were to enter a final judgment in favor of a claim against the United States, it would fall to the Secretary of the Treasury to request the appropriation of funds to satisfy the judgment, and then to the Congress itself to decide whether in fact to appropriate the funds to satisfy the judgment.¹⁸⁹ Thus, although the statute did not allow either the executive or the legislative branch to revise the substance of the judgment itself, it did give the legislative branch power essentially to nullify the judgment by refusing to satisfy it.¹⁹⁰

The Court found that this was a distinction without a difference and struck the law down. Chief Justice Taney authored an opinion¹⁹¹ in which he argued that the statute operated to prevent the Court of Claims and the Supreme Court in its appellate jurisdiction from exercising the judicial power set forth in Article III.¹⁹² He explained:

[T]he award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any

187. *Miller*, 530 U.S. at 343 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224 (1995)).

188. *Gordon v. United States*, 117 U.S. 697 app. (1864) (opinion issued); see also *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864) (order dismissing case).

189. *Gordon*, 117 U.S. app. at 698.

190. See *id.* app. at 698–99 (discussing the statute’s removal of the court’s power to enter a final judgment).

191. Taney had circulated his draft opinion to his colleagues just before his death. See *id.* app. at 697. The draft was lost and the Court announced only its judgment in the case. *Id.*; see also *Gordon*, 69 U.S. (2 Wall.) at 561 (1864). Taney’s draft was found in 1886 and published in the appendix to the U.S. Reports. See *Gordon*, 117 U.S. app. at 697; see also *United States v. Jones*, 119 U.S. 477, 477–78 (1886) (discussing *Gordon*’s history). The Supreme Court subsequently has treated Taney’s opinion as authoritative. See, e.g., *Plaut*, 514 U.S. at 226; *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86 n.38 (1982); *ICC v. Brimson*, 154 U.S. 447, 484 (1894) (plurality opinion).

192. Although most of the opinion focuses on the judicial power vested in the Supreme Court, Chief Justice Taney made clear that inferior federal courts possess the same judicial power and are “authorized to render a judgment which will bind the rights of the parties . . . and upon which the appropriate process of execution may be issued.” *Gordon*, 117 U.S. app. at 697; see also *supra* note 162 (stating that there is no reason to distinguish between Supreme Court and lower federal court judgments).

operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect.¹⁹³

Thus, by ultimately vesting the decision whether to execute a court judgment in the hands of Congress, the statute allowed “[t]he real and ultimate judicial power [to] be exercised by the Legislative Department, and not by that department to which the Constitution has confided it.”¹⁹⁴ Although *Gordon* itself dealt with judgments issued against the U.S. government, the opinion’s elucidation of the nature of the Article III power is probative beyond that particular factual context.

In *Plaut v. Spendthrift Farm, Inc.*, the Court made clear that the Article III judicial power contemplates the entry of final, binding judgments as to the parties in a case.¹⁹⁵ Therefore, Congress cannot command that courts reopen their final judgments. In 1991, the Court held that litigation brought under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation.¹⁹⁶ Later that same year, Congress added section 27A(b) to the 1934 Act, allowing any lawsuit that had been dismissed after the Supreme Court’s ruling to be reinstated if it would have been timely filed under applicable state law.¹⁹⁷

The Supreme Court considered the constitutionality of section 27A(b) in *Plaut* and concluded that it violated the Constitution’s separation of powers because it required “the federal courts to exercise ‘[t]he Judicial Power of the United States’ . . . in a manner repugnant to the text, structure, and traditions of Article III.”¹⁹⁸ The Article III “‘judicial Power’ is one to render dispositive judgments,”¹⁹⁹ and, thus, the separation of powers

193. *Gordon*, 117 U.S. app. at 702.

194. *Id.* app. at 703.

195. *See Plaut*, 514 U.S. at 240 (holding unconstitutional the law in question that required federal courts to reopen certain previous judgments).

196. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 361 (1991).

197. *See* Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2287 (codified at 15 U.S.C. § 78aa-1 (2000)).

198. *Plaut*, 514 U.S. at 217–18 (quoting U.S. CONST. art III, § 1). The Court examined the history of the colonial period, in which there were several legislative efforts to correct court judgments by vacating the judgments and ordering new proceedings, and concluded that the Framers sought to separate the legislative from the judicial power and to insulate final judgments from legislative revision. *See id.* at 220–21; *see also* THE FEDERALIST NO. 48, at 207 (James Madison) (Clinton Rossiter ed., 1999) (criticizing the legislative department for “drawing all power into its impetuous vortex”); THE FEDERALIST NO. 81, at 452 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (“A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases.”).

199. *Plaut*, 514 U.S. at 219.

requires Congress to respect the finality of federal court judgments.²⁰⁰ “Having achieved finality . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was.”²⁰¹ The Court went on to state, “The separation-of-powers violation here . . . consists of depriving judicial judgments of the conclusive effect that they had when they were announced.”²⁰² The separation-of-powers prohibition “is violated when an individual final judgment is legislatively rescinded for even the very best of reasons, such as the legislature’s genuine conviction . . . that the judgment was wrong.”²⁰³

Hayburn’s Case, *Gordon*, and *Plaut* each dealt with legislative attempts to disrupt court judgments awarding monetary relief. In such situations, it is clear that separation-of-powers principles bar either coordinate branch—Congress or the Executive—from undermining the force of the judgments of Article III courts. When a court renders its judgment and awards monetary relief to a party, the party’s right to the relief becomes “absolute, and it is the duty of the court to enforce” the judgment.²⁰⁴ Thus, an “act of [C]ongress cannot have the effect and operation to annul the judgment of a court already rendered, or the rights determined thereby.”²⁰⁵

The final judgments in *Newdow*, *Glassroth*, and *Russelburg*—the cases targeted by the enforcement-blocking provisions discussed in this Article²⁰⁶—did not award monetary damages, but instead accorded injunctive relief to the plaintiffs. Legislative responses to court judgments awarding injunctive relief have been subject to a different analysis than that articulated in *Hayburn’s Case*, *Gordon*, and *Plaut*. Such statutory initiatives were considered in *Pennsylvania v. Wheeling & Belmont Bridge Co.*²⁰⁷ and, most recently, *Miller v. French*.²⁰⁸

In 1851, the Supreme Court ordered that a low bridge across the Ohio River at Wheeling “be raised or permanently removed” because it obstructed

200. See *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) (“Judgments within the powers vested in the courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.”).

201. *Plaut*, 514 U.S. at 227.

202. *Id.* at 228.

203. *Id.*

204. *Pennsylvania v. Wheeling & Belmont Bridge Co.* (*Wheeling Bridge II*), 59 U.S. (18 How.) 421, 431 (1855).

205. *Id.*

206. See *supra* Part II.A.

207. *Wheeling Bridge II*, 59 U.S. (18 How.) 421.

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

river traffic and therefore constituted a public nuisance.²⁰⁹ Congress then passed a statute that declared the bridge in question to be a “lawful structur[e]” and “post-roa[d].”²¹⁰ After a storm destroyed the bridge and the bridge company rebuilt it, the State of Pennsylvania sought to have the bridge company held in contempt for violating the 1851 injunction.²¹¹ The case returned to the Supreme Court, and the Court held that the original injunction was no longer enforceable due to the supervening statute.²¹² Unlike a final judgment for money damages, which vests a right to those damages in the prevailing party that cannot subsequently be diminished by Congress, a continuing injunction, such as the one entered in 1851, is predicated on the continuing illegality of the barred conduct.²¹³ Because Congress retained the power to modify the underlying law, and used that power to declare that the bridge was a lawful structure, the injunction was no longer enforceable.²¹⁴

In 2000, the Supreme Court again considered the parameters of Congress’s power to modify the law underlying a federal court’s award of injunctive relief. In the early 1980s, a federal district court found that living conditions at the Pendleton Correctional Facility violated the Eighth Amendment and entered an injunction to remedy those constitutional violations.²¹⁵ In 1996, the Prison Litigation Reform Act (“PLRA”) set a new standard for the entry and termination of prospective relief in prison conditions cases.²¹⁶ The statute provided that a party could move to terminate an injunction that did not satisfy the new standard, and that such a motion to terminate would effect an automatic stay of the injunction until a district judge ruled on the motion to terminate.²¹⁷ The automatic stay

209. *Pennsylvania v. Wheeling & Belmont Bridge Co. (Wheeling Bridge I)*, 54 U.S. (13 How.) 518, 519 (1851).

210. *Wheeling Bridge II*, 59 U.S. (18 How.) at 429.

211. *Id.* at 422.

212. *Id.* at 431–32.

213. *Id.*

214. *Id.* at 432. There has been considerable debate concerning whether, after *Wheeling Bridge II*, Congress may modify the law underlying final injunctive relief only when that law involves “public rights” or also when the law involves “private rights.” See Brian M. Hoffstadt, *Retaking the Field: The Constitutional Constraints on Federal Legislation that Displaces Consent Decrees*, 77 WASH. U. L.Q. 53, 73–77 (1999) (surveying cases and commentary in the debate). The scope of this Article does not require a resolution of that debate.

215. *Miller v. French*, 530 U.S. 327, 331 (2000).

216. See 18 U.S.C. § 3626(b) (2000) (“In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervenor . . .”). The constitutionality of § 3626(b) was not at issue in *Miller*. See *Miller*, 530 U.S. at 347 (noting that the Court assumed, “without deciding, that the new standards it pronounces are effective”).

217. See 18 U.S.C. § 3626(e)(2) (“Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during [a limited period] and . . . ending on the date the court enters a final order ruling on the motion.”).

provision was written in such a way as to preclude the district court from exercising its equitable powers to suspend the stay.²¹⁸ It did not, however, purport to overturn the underlying constitutional ruling itself or to permanently deprive the plaintiffs of a remedy for a proven constitutional violation; the district court was free to enter a new remedial decree consistent with the PLRA standard.²¹⁹

In *Miller v. French*, the Supreme Court held that the automatic stay provision did not violate the separation of powers.²²⁰ The Court rejected the contention that the automatic stay involved the direct review of a judicial decision, as in *Hayburn's Case*,²²¹ or constituted a legislative suspension of a final judgment for money damages, as in *Plaut*.²²² The *Miller* Court clarified that “[p]rospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law.”²²³ The automatic stay does not “suspend” a prior final judgment, but “merely reflects the changed legal circumstances—that prospective relief under the existing decree is no longer enforceable.”²²⁴

218. See *Miller*, 530 U.S. at 338 (concluding that, “in the context of § 3626 as a whole[,] . . . Congress intended to prohibit federal courts from” suspending a stay on equitable grounds).

219. See 18 U.S.C. § 3626(b)(3) (allowing a district court to enter a new remedial decree upon finding “that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation”).

220. *Miller*, 530 U.S. at 350.

221. *Id.* at 343.

222. *Id.* at 344. Whereas *Plaut* held that Congress cannot reopen final judgments in suits for money damages, it explicitly distinguished legislation that “altered the prospective effect of injunctions entered by Article III courts.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995).

223. *Miller*, 530 U.S. at 344.

224. *Id.* at 348. The Supreme Court also concluded that the PLRA’s automatic stay provision did not prescribe a rule of decision to a pending case, an act also proscribed by separation-of-powers principles. *Id.* That prohibition was articulated in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). *Klein* sought to recover the value of property seized by the United States during the Civil War under a statute that allowed for recovery upon a showing that the property owner had not given aid or comfort to the Confederacy. *Id.* at 131. While *Klein*’s case was pending, Congress passed a statute providing that if the property owner had received a presidential pardon, the pardon was proof that the property owner had, in fact, aided the Confederacy. *Id.* at 134. The statute overruled the Supreme Court’s holding in *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542–43 (1869), that as a matter of statutory interpretation, pardons should be construed as proof that no aid or comfort had been given. In *Klein*, the Court held that Congress’s intervening statute violated the separation of powers because it attempted to “prescribe rules of decision to the Judicial Department of the government in cases pending before it.” *Klein*, 80 U.S. at 146. The precise scope of *Klein* has been the topic of considerable debate. See generally, e.g., William D. Araiza, *The Trouble with Robertson: Equal Protection, the Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055 (1999); Hoffstadt, *supra* note 214, at 66–69. But the Supreme Court has since made it clear that *Klein* does not prevent Congress from amending

Justice Souter wrote separately.²²⁵ He agreed with the general proposition that Congress can “impos[e] new conditions precedent for the continuing enforcement of existing, prospective remedial orders and requir[e] courts to apply the new rules to those orders.”²²⁶ However, he dissented from the majority’s separation-of-powers discussion. He noted his concern that the district court might not have sufficient time to make the findings required for the entry of a new injunction before the old injunction was extinguished.²²⁷ If so, the *Pendleton* plaintiffs would be left temporarily without a remedy, despite a judicial finding of a constitutional violation.²²⁸ In such a case, Justice Souter noted, there would be “a serious question whether Congress has in practical terms . . . usurp[ed] the judicial function of determining the applicability of a general rule in particular factual circumstances.”²²⁹ The majority did not disagree with this perspective, but deferred:

In this action, we have no occasion to decide whether there could be a time constraint on judicial action that was so severe that it implicated these structural separation of powers concerns. The PLRA does not deprive courts of their adjudicatory role, but merely provides a new legal standard for relief and encourages courts to apply that standard promptly.²³⁰

The injunction in *Miller* was similar to the injunctions in *Newdow*, *Glassroth*, and *Russelburg* in that each was issued upon a federal court’s finding of a federal constitutional violation, not a violation of federal statutory law or common law as in *Wheeling Bridge*.²³¹ Of course, Congress is without power to supersede an Article III court’s final interpretation and application of the Constitution.²³² However, that is not precisely how the PLRA or the enforcement-blocking provisions operate—all of these statutes leave the underlying constitutional ruling intact and instead target the remedies available to the plaintiffs.²³³

applicable law. See, e.g., *Plaut*, 514 U.S. at 218, *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 441 (1992).

225. *Miller*, 530 U.S. at 350–53 (Souter, J., concurring in part and dissenting in part).

226. *Id.* at 351.

227. *Id.* at 351–52.

228. *Id.* at 352.

229. *Id.*

230. *Miller*, 530 U.S. at 350.

231. *Wheeling Bridge II* is distinguishable on this basis, and thus its analysis does not squarely govern the enforcement-blocking provisions passed in response to the constitutional rulings in *Newdow*, *Glassroth*, and *Russelburg*. See generally *Pennsylvania v. Wheeling & Belmont Bridge Co.* (*Wheeling Bridge II*), 59 U.S. (18 How.) 421 (1855).

232. See *supra* Part III.B.2 (analyzing the “judicial Power” in Article III).

233. In each situation, Congress left open the possibility of voluntary action by the defendant to remedy the constitutional violation. However, this does not bring the two

At first blush, it might appear that the Court's approval of the PLRA automatic stay provision places a similar imprimatur on the enforcement-blocking provisions. In fact, however, the two provisions operate in quite different ways and therefore warrant different analyses. Whereas the PLRA allowed for "prompt[t]" entry of a new injunction²³⁴ and therefore imposed at most a temporary interruption to enforcement of prospective relief, the enforcement-blocking provisions would permanently bar the enforcement of a remedy for the underlying constitutional violation. In other words, the PLRA governed only the scope of the remedy, not its existence. Enforcement-blocking provisions, by contrast, target the existence of the remedy and render an enforceable remedy permanently unavailable. Moreover, they do so by imposing constraints not only on the federal courts, but also on the executive branch.

These unique characteristics set enforcement-blocking provisions quite apart from the PLRA automatic stay provision and trigger concerns similar to those Justice Souter articulated in his separate opinion in *Miller*.²³⁵ Enforcement-blocking provisions are an entirely innovative type of legislation. *Wheeling Bridge II* and *Miller* do not provide the governing principles. Rather, the principles of finality and executability set forth in *Hayburn's Case*, *Gordon*, and *Plaut* must inform any analysis of the provisions.

2. Executive Responses to Final Court Orders

There is no similarly lengthy body of separation-of-powers precedent articulating the range of appropriate executive responses to final court orders, although *Hayburn's Case* made it clear that the Executive cannot revisit or revise the substance of final court judgments.²³⁶ In addition, there is a related question whether the Executive either is obligated to enforce specific court judgments or at least has the discretion to decide whether to do so, unimpeded by Congress.

There are two possible sources from which one might infer a constitutional duty of the Executive to enforce specific court judgments. The first possible source is Article II, Section 3's explicit textual command that the President "shall take Care that the Laws be faithfully executed."²³⁷ The second possible source is implied from separation-of-powers principles and from the nature of the Article III judicial power.

If the "laws" referenced in the Take Care Clause include federal court orders, then it would appear that the President has an explicit constitutional obligation to enforce such orders and that Congress may not impede the

situations into alignment. The *Miller* Court did not mention, much less rely on, this possibility in upholding the automatic stay provision.

234. *Miller*, 530 U.S. at 350.

235. *Id.* at 351–52 (Souter, J., concurring in part and dissenting in part).

236. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.† (1792).

237. U.S. CONST. art. II, § 3.

President in carrying out that duty. Indeed, the Supreme Court has been vigilant to keep Congress from encroaching on the Executive's law-enforcement power, reiterating that "it is to the President, and not to the Congress, that the Constitution entrusts the responsibility" to execute the laws.²³⁸

The Take Care Clause is one of several constitutional mandates directed at the President.²³⁹ As a general matter, the President's obligation to perform these tasks is not dependent on congressional action; he need not seek or receive permission to act.²⁴⁰ However, the duty to "take Care that the Laws be faithfully executed" is unique in the sense that the obligation is clear but the content is mutable: the substance of the "laws" changes as Congress acts.²⁴¹ Congress, of course, is free to alter or amend the substance of the "laws" that the Executive is charged with enforcing. However, "once Congress makes its choice in enacting legislation, its participation ends."²⁴²

There is an appealing simplicity in the argument that the "laws" the President is obligated to enforce include the final judgments of the federal judiciary. The term "laws" certainly can be understood to encompass judicial decrees. A dictionary contemporaneous with the framing, *Samuel Johnson's Dictionary*, defined a "law" as "judicial process," as well as a "decree, edict, statute, or custom, publicly established as a rule of justice."²⁴³ "Decree" was, in turn, defined as a "determination of a suit, or litigated cause."²⁴⁴ These definitions have remained stable over time. The current version of the *Oxford English Dictionary* defines "executive" as "the distinctive epithet of that branch of the government which is concerned or charged with carrying out the laws, decrees, and *judicial sentences*."²⁴⁵ Indeed, some scholars have

238. *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (invalidating the provision of federal election law that allowed both the President and Congress to appoint members of the Federal Election Commission ("FEC") because the FEC is an executive agency responsible for enforcing and monitoring compliance with federal election laws).

239. Other presidential duties include giving periodic State of the Union addresses, recommending measures to Congress, receiving ambassadors and other public ministers, and commissioning all of the officers of the United States. *See* U.S. CONST. art. II, § 3. These "immutable duties" contrast with executive prerogatives, in which the Executive may, but need not, engage, such as the ability to pardon, make treaties, or prosecute crimes. *See* LeBoeuf, *supra* note 87, at 463 (explaining that Congress cannot use an appropriations rider to expand its powers).

240. *See* J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1183 (considering the relationship between the President's duties and prerogatives and Congress's appropriations power).

241. *See* LeBoeuf, *supra* note 87, at 464 (describing executive duties as well as Congress's obligation to fund the performance of those duties).

242. *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). Of course, the Executive must act in a manner consistent with congressional intent. *See* *Kendall v. United States ex. rel. Stokes*, 37 U.S. (12 Pet.) 524, 524 (1838).

243. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1785).

244. 1 *id.*

245. 5 THE OXFORD ENGLISH DICTIONARY 522 (2d ed. 1989) (emphasis added).

asserted that the President's "oath to 'preserve, protect, and defend' the Constitution," read in conjunction with the Take Care Clause, gives rise to "an obligation to obey judgments, and where necessary to execute judgments against other people."²⁴⁶

Alternatively, other scholars argue that the Take Care clause is best read not to encompass court judgments. Although there is little evidence in the framing debates about the original meaning and scope of the Take Care Clause,²⁴⁷ the term "laws" as used in Article II is best understood to refer to statutes passed by Congress. Approximately a decade ago, Gary Lawson and Christopher D. Moore specifically considered this issue and concluded that the Take Care Clause is not a source of any executive obligation to enforce court orders. As they point out, the vast majority of constitutional references to "law" or "the laws" . . . clearly mean[] "statutes" passed by Congress.²⁴⁸

Even if the Take Care Clause is best read not to address the Executive's responsibility for enforcing federal court judgments, it might be possible to infer such an obligation from the constitutional structure. As Lawson and Moore suggest, there is an "implicit take-care requirement for judgments that stems from the Article II and Article III Vesting Clauses."²⁴⁹

Several scholars have asserted that the President does, in fact, have a duty to enforce specific federal court judgments, and that this duty flows in some way from the nature of the judiciary's Article III powers. The primary line of reasoning as to why the Executive might be obligated to enforce specific court judgments piggybacks on the Article III analysis articulated

246. John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 372 (1988); cf. William Baude, *The Judgment Power*, 96 GEO. L.J. (forthcoming 2008), available at <http://ssrn.com/abstract=1073942> ("The President's obligation to ensure faithful execution of the law included an obligation to ensure faithful execution of lawful judgments, because judgments were seen implicitly by nearly everybody to have a legal status like the laws under which they were issued."); Paulsen, *supra* note 152, at 277 ("If court decisions constitute 'law' binding on the parties (just as statutes are 'laws' of general applicability), then the branch charged with the faithful execution of those laws is, as Hamilton recognized in *The Federalist No. 78*, the executive branch.")

247. See Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 409–10 & n.216 ("[R]elatively little is known about the original meaning of the Take Care Clause, and there similarly are relatively few cases in which the Supreme Court has discussed its breadth."); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 61–70 (1994) (reviewing the history and structure of the Take Care Clause and noting that "at the founding, the clause received relatively little consideration by practically everyone in the debate"). It might be possible to argue that the creation of the U.S. Marshals Service in the Judiciary Act of 1789, at the same time as the creation of the lower federal courts, suggests that the first Congress understood that there needed to be an executive mechanism for the enforcement of court orders.

248. Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1315 & n.225 (1996) (listing nineteen examples, including Article I, Section 9, Clause 3's prohibition on congressional passage of any ex post facto law).

249. *Id.* at 1318.

above:²⁵⁰ If a proper exercise of the judicial power requires the issuance of a final, executable judgment, and if the judiciary in fact lacks the means actually to execute its judgments, then the Executive must step into the breach and provide the means for the execution of judgments. The same principles that constrain the legislature from acting to reopen final judgments impose on the President “an absolute obligation to obey and enforce judgments issued by the federal courts. . . . Finality means finality.”²⁵¹

Some view this obligation as a simple corollary to judicial supremacy: A federal court’s constitutional ruling is “a binding norm that operates at the level of positive prescription”²⁵² and “obliges executive officials to comply with the law as judicially declared.”²⁵³ However, even a majority of departmentalist scholars, who do not subscribe to the idea of judicial supremacy, agree that the Executive does have some obligation to enforce judgments, at least insofar as they apply to the parties that were before the court. For example, as Judge Frank Easterbrook put it, because “a ‘judicial Power’ is one to render dispositive judgments[,] . . . a judgment conclusively resolves the case” and requires enforcement by the executive branch.²⁵⁴ Other scholars have noted that “there is widespread agreement that the executive has a legal duty to enforce valid final judgments.”²⁵⁵

Actual practice also lends support for the view that the Executive is obligated to enforce specific court judgments when called upon. Although many Presidents have asserted their own interpretive competence in constitutional matters, they traditionally have complied with and/or

250. See *supra* Part III.C.1 (discussing legislative responses to final court orders).

251. Lawson & Moore, *supra* note 248, at 1319; see also Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1425 (1999) (“[Judicial] power . . . was . . . a power finally to resolve actual disputes . . . in such a way that there was a substantial likelihood that a court decision would have some real world effect.”).

252. Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991, 998–99 (1987).

253. *Id.* at 993.

254. Easterbrook, *supra* note 140, at 926.

255. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46 (1993) (stating that this obligation exists “regardless of whether the executive agrees with the legal analysis that forms the basis for the judgment” (citing Easterbrook, *supra* note 140, at 926)); see also Calabresi, *supra* note 251, at 1427 (“[T]he President is legally bound to execute federal court judgments Even Presidents who ardently subscribed to departmentalism have acknowledged the legally binding force and obligation to execute a judicial judgment with which they disagreed.”); Meese, *supra* note 152, at 983 (“[A] constitutional decision by the Supreme Court . . . binds the parties in a case and also the executive branch for whatever enforcement is necessary.”); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 121 (1993) (noting the “increasingly popular” view that “[t]he President must comply with the judgments of the Court in particular cases” but “the President need go no further in following what the Court says”); cf. Devins, *supra* note 87, at 475 (“Limitation riders may run afoul of the Constitution if they prohibit the Executive from implementing final court orders.”).

enforced federal courts' constitutional rulings when called upon. Perhaps the most obvious example of compliance is President Nixon's prompt decision to comply with the Supreme Court's order that he turn over his Watergate tapes.²⁵⁶

Perhaps the most visible example of enforcement of a constitutional decision to which the Executive was not a party was President Eisenhower's decision to mobilize the Army's 101st Airborne Division to desegregate Central High School in Little Rock.²⁵⁷ In the face of Arkansas Governor Orval Faubus's decision to deploy the Arkansas National Guard for the purpose of blocking court-ordered desegregation, President Eisenhower asked his Attorney General, Herbert Brownell, "for advice as to [his] power and duty as President to aid in the execution of the court's orders if obstruction should continue."²⁵⁸ Attorney General Brownell wrote an extensive opinion, arguing that the President had both the authority and the obligation to execute the federal court's desegregation order.²⁵⁹ Brownell began by noting that the federal court properly had jurisdiction to review the Governor's action and to order compliance with its own decrees.²⁶⁰ Citing the Supremacy Clause, Brownell argued that it was the "responsibility of the national Government, through the Chief Executive, to dispel any such forcible resistance to Federal law."²⁶¹ Indeed, Brownell noted, "[t]he Supreme Court has recognized the constitutional power and responsibility which reposes in the National Government to compel obedience to law and order."²⁶²

The most notorious and, indeed, the sole example of a presidential nullification of a court judgment is President Lincoln's defiance of the mandate in *Ex parte Merryman*.²⁶³ President Lincoln suspended the writ of

256. See *supra* note 48 (discussing Nixon's compliance); see also Merrill, *supra* note 255, at 47 (same).

257. See *supra* note 170 (discussing President Eisenhower's decision).

258. President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas, 41 Op. Att'y Gen. 313, 322 (1957).

259. See *id. passim*.

260. *Id.* at 320–21.

261. *Id.* at 324.

262. *Id.* at 326 (citing *Ex parte Siebold*, 100 U.S. 371, 395 (1879), and statutory authority for the President to quell civil disturbances).

263. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). Other presidents have asserted their desire and right to defy the Supreme Court by refusing to execute a judgment, but President Lincoln is the only president actually to do so. See *supra* note 57 (noting President Andrew Jackson's response to *Worcester v. Georgia*); see also Paulsen, *supra* note 152, at 259 & n.159 (discussing President Jackson's veto of the bill rechartering the Bank of the United States and noting that he was not in fact defying or refusing to enforce the Court's judgment in *McCulloch v. Maryland*); Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 50–51 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905) (explaining his decision to exercise the presidential pardon power on behalf of those convicted under the Sedition Act of 1798—even though the federal courts had upheld

habeas corpus on April, 27, 1861.²⁶⁴ Supreme Court Chief Justice Roger Taney then ruled that President Lincoln lacked power to suspend the writ and that John Merryman, a suspected secessionist who had been detained, was “entitled to be set at liberty and discharged immediately from imprisonment.”²⁶⁵ Chief Justice Taney addressed President Lincoln directly in the opinion:

[H]e is to take care that [the laws] be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the constitution. It is thus made his duty to come in aid of the judicial authority . . . ; but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.²⁶⁶

Thus, in Taney’s understanding, the President’s obligation to execute the laws extended to the execution of judicial decrees.

President Lincoln, however, continued to hold Merryman in custody and, in an address to Congress on July 4, 1861, defended the propriety of that decision, and of his initial suspension of the writ, on the merits.²⁶⁷ The next day, his Attorney General, Edward Bates, issued an opinion articulating the legal basis for the President’s noncompliance.²⁶⁸ Bates emphasized the “co-ordinate and coequal” status of the branches of the federal government and asserted that “the system of checks and balances” and “mutual antagonism” would be sufficient to keep the coequal and independent branches “within their proper spheres.”²⁶⁹ He concluded that the executive branch was not bound by the judgments and orders of the judiciary: “If it be true . . . that the President and the judiciary are co-ordinate departments of government, and the one not subordinate to the other, I do not understand how it can be legally possible for a judge to issue a command to the President. . . .”²⁷⁰ Most scholars agree that President Lincoln and Attorney General Bates took the principle of coordinacy too far and that the

the Act’s constitutionality—and writing that “nothing in the Constitution has given [the judges] a right to decide for the Executive, more than to the Executive to decide for them”).

264. See Paulsen, *supra* note 162, at 90.

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

266. *Id.* at 149.

267. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *reprinted in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 421, 430 (Roy P. Basler ed., 1953).

268. 10 Op. Att’y Gen. 74 (1861).

269. *Id.* at 76–77; see also THE FEDERALIST NO. 49, at 281–82 (James Madison) (Clinton Rossiter ed., 1999) (asserting coordinacy of branches); THE FEDERALIST NO. 51, at 288–89 (James Madison) (Clinton Rossiter ed., 1999) (stating that checks and balances will keep each branch in its proper place).

270. 10 Op. Att’y Gen. at 85.

Executive, in fact, is *not* permitted to disregard or refuse to enforce specific court judgments. Indeed, *Merryman* is regarded as an aberration.²⁷¹

Professor Michael Stokes Paulsen, however, regards *Merryman* as a singularly principled stand that proves that the Executive is, in fact, not constitutionally obligated to abide by or to enforce court judgments. Starting from the departmentalist premise that each coordinate branch “has completely independent interpretive authority within the sphere of its powers,”²⁷² Professor Paulsen argues that, just as the President and Congress cannot dictate the resolution of federal court cases, the federal courts cannot dictate to the President “how, when, and whether to execute judgments.”²⁷³ Rather, the “President has independent constitutional power to decline to enforce judgments that rest on an incorrect interpretation of constitutional, statutory, or treaty law.”²⁷⁴ Professor Paulsen notes the untenable consequences (in his view) of an alternative approach:

If the judiciary could, in effect, instruct the executive as to how to enforce the law, and the executive were bound to enforce judgments no matter how clearly they violated the Constitution, then the judiciary would not be weak (as Hamilton claimed [in *Federalist No. 78*]), but very, very powerful. Its judgments . . . would be beyond any check.²⁷⁵

Professor Paulsen, though, stands alone on the question of the Executive’s enforcement obligations. As noted above, some have posited that the Executive has an absolute duty to enforce final court judgments, at least as to the parties before the court.²⁷⁶ Others who have examined this issue have attempted to chart a middle ground between the two extremes.

271. See Merrill, *supra* note 255, at 47 (citing JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 140–50 (1980)); cf. Baude, *supra* note 246, at 61–66 (positing that Lincoln and Bates did not claim the executive power to ignore judgments entered by courts of competent jurisdiction, but rather may have disregarded Taney’s order because Taney lacked the jurisdiction to issue the writ (citing DANIEL FARBER, LINCOLN’S CONSTITUTION 190–91 (2003))).

272. Paulsen, *supra* note 162, at 85; see *supra* notes 153–54 and accompanying text; see also THE FEDERALIST NO. 49, at 282 (James Madison) (Clinton Rossiter ed., 1999) (“The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.”).

273. Lawson & Moore, *supra* note 248, at 1323 (summarizing Paulsen’s thesis).

274. Paulsen, *supra* note 152, at 276; see also Paulsen, *supra* note 162, at 84 (stating that “there is no such thing as judicial supremacy: the President has legitimate constitutional authority to disregard any judicial decree or precedent he chooses”); *id.* at 109 (“[The President] may decline to enforce . . . even specific judgments between private parties whenever, in his independent legal judgment, the court’s ruling is incorrect. . . . The decisions of courts, in any matter requiring executive enforcement, are entitled to such persuasive weight only as the President may think them worth.”).

275. Paulsen, *supra* note 152, at 252.

276. See *supra* notes 246, 251–55 and accompanying text.

Lawson and Moore reject both the position that the Executive is bound to enforce every final court judgment and the position that the Executive has no duty whatsoever in this regard. Rather, they suggest that final court orders generally give rise to an enforcement obligation, except in one rare case: “[T]he President and Congress can refuse to enforce a judgment only in extreme circumstances: only for constitutional error, and only when that error is ‘so clear that it is not open to rational question.’”²⁷⁷ Steven Calabresi has seconded this “clear mistake” approach,²⁷⁸ arguing that it is consistent with the nature of the Article III judicial power, historical practice, and sound policy.²⁷⁹ In the most recent thinking on this issue, William Baude has offered an even more limited exception to the rule that judgments of Article III courts “must be enforced by the executive branch so long as those courts have jurisdiction over the case”:²⁸⁰ The Executive may refuse to enforce *only* judgments rendered without jurisdiction.²⁸¹

Enforcement-blocking provisions prevent the executive branch from enforcing specific final orders of the federal courts. Thus, such provisions certainly appear problematic from the point of view of those who would impose an absolute or near-absolute enforcement obligation on the executive branch. Indeed, they appear problematic even for those who adhere to the Paulsen point of view. Paulsen’s conclusion that the Executive is not obligated to enforce court orders does not preclude the Executive from deciding, in the exercise of his or her discretion, to enforce such orders. Indeed, in light of Paulsen’s emphasis on preserving the Executive’s independent judgment on constitutional matters, it would seem that his argument places squarely in the Executive’s hands the prerogative to execute court orders. Thus, even from Paulsen’s perspective, congressional attempts to block the Executive from enforcing final court orders are still potentially quite problematic because they bar members of the executive branch from exercising their independent judgment to act in coordination with another branch of the federal government.

IV. ENFORCEMENT-BLOCKING PROVISIONS: SEPARATION-OF-POWERS ANALYSIS AND CONCERNS

The enforcement-blocking provisions passed in response to *Newdow*, *Glassroth*, and *Russelburg* were clearly motivated by the House of Representatives’ disapproval of the substance of those rulings and are

277. Lawson & Moore, *supra* note 248, at 1325–26 (citation omitted).

278. Calabresi, *supra* note 251, at 1425 & n.17.

279. *See id.* at 1425–31.

280. *See* Baude, *supra* note 246, at 5. Baude contends that the original understanding of the Article III judicial power, in conjunction with the common law of judgments, indicates that a federal court’s resolution of any “case” or “controvers[y]” within its jurisdiction is necessarily binding on all, including the Executive. *See id.* at 12–37.

281. *See id.* at 32–33.

unvarnished attempts to sap those rulings of any strength. However, the enforcement-blocking provisions are quite innovative. To accomplish their ultimate goal, they use Congress's appropriations power to block executive action and do not directly touch the court judgments themselves. These provisions lack a historical analogue, and therefore it is a challenge to analyze them within the traditional separation-of-powers framework.

The provisions are distinct from congressional acts the Supreme Court considered in prior separation-of-powers decisions. The provisions do not prescribe rules of decision for the courts. While they indicate Congress's disagreement with a court's constitutional rulings, they do not—at least as a technical matter—make Congress an appellate reviewer of a court's decision or even require a court to reopen its final judgment vis-à-vis the parties to the case. But they do undermine the power of a final judgment and compromise its executability. Unless the parties voluntarily comply with the judgment, the court (and the prevailing party) is without recourse and may not enlist the executive branch in enforcement efforts. Thus, other than its persuasive or hortatory value, the judgment lacks any real ability to change the legal positions of the parties in relation to each other. It is only a small step removed from an unconstitutional advisory opinion.²⁸²

Despite the unique characteristics of enforcement-blocking provisions and the lack of a case directly on point, it seems clear that the provisions tread perilously close to the heart of Article III power and raise many of the concerns that have motivated the Court's separation-of-powers jurisprudence.²⁸³ A fair reading of *Plaut*—which vindicated the finality of court judgments even in non-constitutional cases—in conjunction with *City of Boerne* and *Cooper*—which vindicated the supremacy and finality of constitutional rulings by the judicial department—strongly suggests that a provision that seeks to bar permanently the enforcement of an injunction based on a constitutional ruling encroaches on the judiciary's Article III power and thus runs afoul of the doctrine of separation of powers. Indeed, in some ways, the enforcement-blocking provisions seem at least as problematic as other provisions the Court has considered, if not moreso: They target constitutional, rather than statutory, decisions of the federal courts—a difference that implicates judicial review and supremacy in a way that has not heretofore been considered.

However, while enforcement-blocking provisions leave open the possibility of parties' voluntary compliance with court judgments, they completely foreclose the possibility of executive action to enforce a court judgment. If the executive branch is constitutionally obligated to enforce

282. See *supra* Part III.B.1.

283. Cf. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225 (1995) (“Our decisions stemming from *Hayburn’s Case*—although their precise holdings are not strictly applicable here—have uniformly provided fair warning that such an act exceeds the powers of Congress.” (internal citations omitted)).

final court orders,²⁸⁴ then the enforcement-blocking provisions constitute an even clearer assault on the executive branch than on the judiciary. Whether one locates the source of this executive obligation in the Take Care Clause²⁸⁵ or derives it from the nature of the Article III judicial power,²⁸⁶ the enforcement-blocking provisions both contravene textual delegations of power²⁸⁷ and “preven[t] the Executive Branch from accomplishing its constitutionally assigned functions.”²⁸⁸

Even if the executive branch has no obligation to enforce court judgments but does have the prerogative to determine independently whether or not to do so, enforcement-blocking provisions still raise potential separation-of-powers concerns. The *Russelburg* case highlights the problem. In that case, the executive branch declared its intention to enforce the court’s final order.²⁸⁹ By seeking to block the Executive from taking any action in this regard, Congress asserted the power to trump an executive law-enforcement initiative undertaken in support of a decision of a federal court. From a functional separation-of-powers perspective, Congress, by selectively de-funding the Executive’s ability to undertake a single law-enforcement initiative, has so exceeded its policymaking and oversight roles as to encroach on the core executive function.²⁹⁰

At bottom, by passing the enforcement-blocking provisions, the House of Representatives has asserted its own autonomy in matters of constitutional interpretation. However, enforcement-blocking provisions appear to take the departmentalist postulate of coordinacy²⁹¹ to its logical breaking point. They not only assume that Congress’s independence and competence to interpret the Constitution is coextensive with that of the President and the courts; they also assert that when Congress disagrees with the constitutional ruling of a federal court and with the Executive’s independent decision to enforce that ruling, Congress may use its appropriations power to block the other branches’ cooperative efforts and to vindicate its own substantive reading of the Constitution. Because the power of the purse resides with Congress, Congress would always have the last word in the resolution of constitutional controversies. Whatever concerns one might have with giving

284. See *supra* Part III.C.2.

285. See *supra* notes 238–46 and accompanying text.

286. See *supra* notes 248–49 and accompanying text.

287. Cf. *Morrison v. Olson*, 487 U.S. 654, 705–11 (1988) (Scalia, J., dissenting) (applying a formalist separation-of-powers inquiry to independent-counsel provisions of the Ethics in Government Act of 1978); *INS v. Chadha*, 462 U.S. 919, 946 (1983).

288. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977).

289. See *supra* note 27 and accompanying text. It is not clear whether this decision to enforce *Russelburg* is predicated on substantive agreement with the order or on a prudential decision to enforce despite substantive disagreement.

290. Cf. *Miller v. French*, 530 U.S. 327, 341 (2000) (“[T]he Constitution prohibits one branch from encroaching on the central prerogatives of another.”).

291. See *supra* note 272 and accompanying text.

unchecked power to the federal judiciary,²⁹² this view of coordinacy will give dangerous amounts of unchecked power to the legislative branch.

V. CONCLUSION

During his confirmation hearing, Justice Alito wisely deferred on assessing the constitutionality of recent enforcement-blocking provisions passed by the House of Representatives.²⁹³ Such provisions are innovative, potentially powerful, and almost certainly unconstitutional responses to controversial federal court decisions. Congress's appropriations power, although broad, cannot be exercised in contravention of the separation of powers.²⁹⁴ Enforcement-blocking provisions come close to undermining the finality and executability of federal court judgments, in violation of the core power conveyed to the judiciary by Article III.²⁹⁵ Even more critically, the provisions impede the executive branch in the execution of its constitutional responsibility to enforce final court orders, or at least its constitutional prerogative to choose to enforce such orders.²⁹⁶ Whatever one's view of judicial supremacy or departmentalist theory, it seems fair to say that, in order to preserve the essence and structural integrity of each of the three branches of our federal government, Congress should be barred from selectively de-funding the enforcement of final court orders even if it substantively disapproves of the underlying court judgment.

292. See Paulsen, *supra* note 152, at 252.

293. See *supra* note 1 and accompanying text.

294. See *supra* Part III.A.

295. See *supra* Part III.B.

296. See *supra* Part III.C.2.