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Presidential Signing Statements: A New Perspective

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ARTICLE

PRESIDENTIAL SIGNING STATEMENTS:
A NEW PERSPECTIVE

CHRISTOPHER S. YOO[†]

INTRODUCTION 1802

I. A BRIEF HISTORY OF SIGNING STATEMENTS 1805

 A. *Presidential Practices* 1805

 B. *Judicial Recognition of Signing Statements* 1807

II. CONSTITUTIONAL SIGNING STATEMENTS 1808

 A. *The Propriety of Executive Assessments of the
 Constitutionality of Statutes* 1809

 1. Textual Foundations and the Logic of *Marbury* 1809

 2. The Tradition of Three-Branch
 Interpretation/Departmentalism 1811

 B. *Accepted Forms of Executive Statutory Interpretation in Light of
 Constitutional Concerns* 1812

 1. Constitutional Avoidance 1813

 2. Refusal to Defend the Constitutionality of a Statute 1815

 3. Refusal to Enforce a Statute on Constitutional Grounds 1815

 C. *Constitutional Signing Statements as Form, Not Function* 1818

III. INTERPRETIVE SIGNING STATEMENTS AND THE EQUAL
 DIGNITY PRINCIPLE 1819

 A. *Doctrinal Foundations of the Equal Dignity Principle* 1820

 1. *INS v. Chadha* and the Legislative Veto 1820

 2. *Clinton v. City of New York* and the Line-Item Veto 1821

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3. The Enrolled Bill Doctrine	1822
B. <i>The Implications of the Equal Dignity Principle</i>	1823
C. <i>The Inevitability of Executive Statutory Interpretation</i>	1825
D. <i>Legislative Power Essentialism vs. the Explicit Recognition of the President's Role in the Legislative Process</i>	1828
IV. POLICY ARGUMENTS IN FAVOR OF SIGNING STATEMENTS.....	1830
A. <i>Presidents' Preeminent Role in the Modern Lawmaking Process</i>	1830
B. <i>Different Constituencies/Institutional Considerations</i>	1831
C. <i>Informational Advantages</i>	1832
D. <i>The Limitations of Plural Bodies in Enacting Major Reforms</i>	1833
E. <i>Conservation of Resources</i>	1833
CONCLUSION.....	1834

INTRODUCTION

During the summer of 2006, a newspaper article in the *Boston Globe* precipitated a major debate over President George W. Bush's use of signing statements to register his objections to statutory provisions he was signing into law.¹ The ensuing controversy prompted hearings before the Senate Judiciary Committee,² the appointment of an American Bar Association (ABA) Special Task Force,³ the ABA's adoption of a recommendation opposing the use of signing statements to disregard any laws,⁴ and a new wave of scholarly commentary.⁵

¹ See Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A.1 (claiming that Bush's signing statements had invalidated more than 750 laws). The *Globe* later clarified that Bush had objected to 750 provisions contained in about 125 bills. *For the Record*, BOSTON GLOBE, May 4, 2006, at A.2.

² See *The Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 1 (2006) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary) ("This issue has come into sharp focus as a result of the extensive use by President Bush of signing statements.").

³ See TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS & THE SEPARATION OF POWERS DOCTRINE, AM. BAR ASS'N, REPORT 5 (2006), <http://www.americanbar.org/content/dam/aba/publishing/abanews/1273179616signstaterereport.pdf> [<https://perma.cc/VQ76-Z9MK>] [hereinafter TASK FORCE] ("[I]t was the number and nature of the current President's signing statements which generated the formation of this Task Force . . .").

⁴ See HOUSE OF DELEGATES, AM. BAR ASS'N, RECOMMENDATION 1 (2006), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2006/annual/dailyjournal/20060823144113.aucthcheckdam.pdf> [<https://perma.cc/FKR9-QFSQ>] (opposing the use of signing statements to "claim[] . . . authority or stat[e] the intention to disregard or decline to enforce all or part of a law").

⁵ See generally Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307 (2006); Charlie Savage, *Symposium, Introduction: The Last Word? The Constitutional Implications of Presidential Signing Statements*, 16 WM. & MARY BILL RTS. J. 1 (2007); Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597 (2006).

This allegedly new form of presidential discretion was regarded by many observers as effectively giving Presidents the unilateral power to invalidate statutory provisions that they dislike.⁶ Interestingly, the conclusion of the Bush Administration did not end the controversy. Despite Barack Obama's denunciation of the practice as a Senator and as a candidate for President,⁷ his continued use of signing statements has drawn its share of criticism,⁸ including by the reporter who leveled the original complaint at President Bush.⁹ Although Obama has issued fewer signing statements,¹⁰ he has used

⁶ See TASK FORCE, *supra* note 3, at 22 (condemning the use of signing statements to invalidate particular statutory provisions); see also Mark N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. LEGIS. 363, 366 (1987) (referring to the modern use of signing statements as "an overt attempt to usurp power reserved for the Legislature and the Judiciary"); William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 714 (1991) (arguing that Presidents may use signing statements to control the resolution of "unresolved," politically "contentious" issues).

⁷ See *Obama 2008: Bush Used Signing Statements to Accumulate More Power*, REALCLEARPOLITICS (Apr. 18, 2011), http://www.realclearpolitics.com/video/2011/04/18/obama_2008_bush_used_signing_statements_to_accumulate_more_power.html [<https://perma.cc/Y23L-P5U2>] (quoting then-Senator Obama as stating that he disagreed with Bush's "whole theory . . . that he can make laws as he goes along").

⁸ See, e.g., News Release, Am. Bar Ass'n, *Signing Statements Contrary to Separation of Powers*, Says ABA (Jan. 3, 2012), http://www.americanbar.org/news/abanews/aba-news-archives/2012/08/signing_statementsc.html [<https://perma.cc/XEM7-TLA7>] (reporting that a letter had been sent by the President of the ABA to President Obama expressing the ABA's view that President Obama should issue a veto instead of a signing statement when he disagrees with a law).

⁹ See Charlie Savage, *Obama's Embrace of Bush Tactic Criticized by Lawmakers From Both Parties*, N.Y. TIMES, Aug. 8, 2009, at A16 ("Mr. Obama's willingness to use [signing statements] has disappointed some who had hoped he would roll back the practice, not entrench it."); see also Chris Edelson, *Opinion, Obama's Swap for Bergdahl: A Presidential Power Play?*, L.A. TIMES (June 6, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-edelson-obama-bergdahl-executive-power-20140606-story.html> [<https://perma.cc/NS2A-8DWL>] (arguing that Obama's use of signing statements is contrary to his campaign promises); Humberto Sanchez, *Obama Warned on Signing Statements*, CONGRESS DAILY PM, July 21, 2009, available at GALE Business Insights: Essentials, Doc. No. A204094943 (describing a letter from four Democratic representatives to Obama warning him about his use of signing statements); Karen Tumulty, *Obama Circumvents Laws with 'Signing Statements,' a Tool He Promised to Use Lightly*, WASH. POST (June 2, 2014), http://www.washingtonpost.com/politics/obama-circumvents-laws-with-signing-statements-a-tool-he-promised-to-use-lightly/2014/06/02/9d76d46a-ea73-11e3-9f5c-9075d5508foa_story.html [<https://perma.cc/34A3-9DRF>] (noting that Obama has issued close to thirty signing statements).

¹⁰ According to *The American Presidency Project*, President Obama had issued thirty-three signing statements as of the end of 2014. See John T. Woolley & Gerhard Peters, *Presidential Signing Statements: Hoover–Obama*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/signing-statements.php> [<https://perma.cc/U4CL-592Y>] (listing the signing statements issued by President Obama for each year, from 2009 to 2014).

them in a manner quite similar to that of the previous Administration,¹¹ and his less frequent use of them does not undercut his support for them in principle.¹²

This Article offers a new perspective on Presidents' use of signing statements. Following the dichotomy reflected in the literature, I will analyze signing statements raising constitutional objections and those offering interpretive guidance for ambiguous provisions separately.¹³ With respect to constitutional interpretation of statutes by the executive branch, Presidents have long asserted the authority and obligation to consider constitutionality when executing statutes.¹⁴ The widespread acceptance of the President's power to construe statutes to avoid constitutional problems and to refuse to defend the constitutionality of or to enforce statutes in appropriate cases confirms the propriety of this conclusion.¹⁵ If these fairly uncontroversial forms of executive review are permissible, the arguments against signing statements amount to nothing more than objections to the form in which constitutional review is exercised. Indeed, when the objections are constitutional in nature, the signing statement does little work itself, as it is the Constitution itself rather than the signing statement that invalidates the statute, and there are clear benefits to announcing the constitutional interpretation that will be applied to the statute at the time of enactment.

With respect to interpretive signing statements, I argue that the Supreme Court's precedents regarding the process for enacting statutes laid out in Article I, Section 7, give rise to an equal dignity principle that regards the President as an essential participant in the legislative process whose views as to the proper interpretation of a statute merit the same treatment as the views of congressional committees or individual legislators. This principle is agnostic about the debate over the propriety of considering legislative history when construing statutes. It simply argues that both presidential and congressional legislative history be treated the same. Thus, one can ignore

¹¹ See Jeffrey Crouch et al., *The Law: President Obama's Signing Statements and the Expansion of Executive Power*, 43 PRESIDENTIAL STUD. Q. 883, 885 (2013) (arguing that while President Obama vowed to "break" from Bush's manner of using signing statements, Obama has exercised the power to issue signing statements in much the same way).

¹² See *infra* note 31 and accompanying text.

¹³ See Bradley & Posner, *supra* note 5, at 313-14, 334, 344-45 (dividing signing statements into two types: constitutional signing statements, "in which the president raises constitutional concerns about bills," and interpretive signing statements, in which the President offers an interpretation of a statute); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1191 n.2 (2006) (drawing a similar distinction).

¹⁴ See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 167 (2008) (describing how constitutional concerns led President Jefferson to terminate prosecutions under the Alien and Sedition Acts).

¹⁵ See, e.g., 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 232, 242-43 (1992) (describing how President Jefferson's constitutional objections led him to refuse to defend the constitutionality of the Bank of the United States in *McCulloch v. Maryland*).

both forms of legislative history without violating the equal dignity principle. Conversely, courts that choose to give interpretive weight to legislative history generated by congressional deliberations should give the same weight to signing statements.

The practice of relying on signing statements as guides to interpret statutes also draws support from a number of policy considerations. These include the key role that Presidents play in advancing major legislation, the different institutional capabilities and informational advantages of the executive branch, as well as the need to conserve enforcement resources.

The Article proceeds as follows: Part I offers a brief review of the history of signing statements. Part II examines the Supreme Court's treatment of signing statements as legislative history. Part III discusses the institutional considerations that provide normative support for giving weight to signing statements. Part IV reviews the policy arguments that support giving signing statements interpretive weight.

I. A BRIEF HISTORY OF SIGNING STATEMENTS

Despite the intensity of the attention that signing statements have generated recently, signing statements are in fact an old institution. Prior scholars have already traced the history of signing statements,¹⁶ so I will only sketch the highlights here.

A. Presidential Practices

Most commentators credit James Monroe with issuing the first signing statement when he objected to a law directing how he should appoint military officials.¹⁷ A more prominent early example is Andrew Jackson's objection to

¹⁶ See, e.g., TODD GARVEY, CONG. RESEARCH SERV., RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 1-13 (2012), <https://www.fas.org/sgp/crs/natsec/RL33667.pdf> [<https://perma.cc/76GX-SE47>] (detailing Presidents' historical use of signing statements); LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 134-41 (4th ed. 1997) (same); CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE 101-18 (1998) (same); Memorandum from Walter Dellinger to Bernard N. Nussbaum, Counsel to the President (Nov. 3, 1993), reprinted at 48 ARK. L. REV. 333 app. at 342-46 (1995) (same); see also Christopher S. Kelley, The Unitary Executive and the Presidential Signing Statement 57-68 (2003) (unpublished Ph.D. dissertation, Miami University, Oxford, Ohio), https://etd.ohiolink.edu/!etd.send_file?accession=miami1057716977&disposition=attachment [<https://perma.cc/DF9A-2L92>] (same).

¹⁷ See CALABRESI & YOO, *supra* note 14, at 86 (describing Monroe's statement). Interestingly, one noted scholar has suggested that Thomas Jefferson may have initiated the practice when he issued a press release immediately following the passage of the Embargo Acts, in which Jefferson limited his own statutory discretion. See Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 YALE L.J. 1636, 1685-86 & n.216 (2007)

a provision in an 1830 appropriations bill stating that he would not honor Congress's desire that the road in the Michigan Territory extend all the way to Chicago.¹⁸ John Tyler issued a signing statement indicating his disapproval of certain provisions in a political apportionment bill.¹⁹ This provoked a rebuke from the Speaker of the House, John Quincy Adams, who advised that the extraneous document should be ignored as "a defacement of the public records and archives."²⁰

The next round of prominent signing statements arose during the Civil War and Reconstruction.²¹ For example, Andrew Johnson issued a signing statement objecting to a statute that prevented him from removing Ulysses Grant as General of the Army, required that Grant's headquarters remain in Washington, D.C., and required that all orders be issued through Grant.²² When Grant became President, he also issued signing statements declaring that he would not use federal appropriations to improve rivers and harbors that were purely local, not national, and objecting to an appropriations rider purporting to forbid him from closing certain consulates.²³

Presidents have used signing statements more frequently during the modern era. For example, Gerald Ford and Jimmy Carter routinely issued signing statements protesting the use of legislative vetoes²⁴ and other infringements on the President's power.²⁵ Although some commentators regard Ronald Reagan as having escalated the use of signing statements, he in fact issued fewer signing statements than either Lyndon Johnson or Bill Clinton.²⁶ George W. Bush is similarly criticized for escalating the use of signing statements; however, a closer inspection reveals that he issued fewer signing statements than his near predecessors.²⁷ Although he did issue a

(noting that by "sharply limiting the scope of a recently passed statute," Jefferson may have in fact issued the first signing statement).

18 See CALABRESI & YOO, *supra* note 14, at 104 (describing Jackson's issuance of the signing statement and ultimate victory on the issue).

19 See *id.* at 138 (discussing Tyler's signing statement and the political backlash it provoked).

20 *Id.* (citation omitted).

21 See *id.* at 177 (noting how President Johnson used signing statements to register his disapproval over sections of the Army Appropriations Act).

22 See *id.* (detailing Johnson's objections to this statute).

23 See Memorandum from Walter Dellinger to Bernard N. Nussbaum, *supra* note 16, at 343 (describing the signing statements issued by President Grant).

24 See CALABRESI & YOO, *supra* note 14, at 361, 368-70 (describing the signing statements issued by Ford and Carter, respectively).

25 See MAY, *supra* note 16, at 110-15 (describing other uses of signing statements by Ford and Carter).

26 See Bradley & Posner, *supra* note 5, at 323 tbl.1 (reporting that Reagan issued 250 signing statements while Clinton issued 381); Kelley, *supra* note 16, at app. 3.1 (listing Reagan's signing statements as totaling 276, compared to Johnson's 302 and Clinton's 391). *But see* MAY, *supra* note 16, at 74 tbl.5.1 (placing Reagan's count at 247, Johnson's at 171, and Clinton's at 166).

27 See Bradley & Posner, *supra* note 5, at 323 tbl.1 (listing Bush's signing statements as totaling 132 and placing Clinton at 381).

higher number of signing statements that raised constitutional challenges to statutory provisions, commentators have concluded that the frequency with which he issued such statements was “still not outside the historical norm.”²⁸

In any event, modern complaints about the frequency with which recent Presidents have used signing statements are reminiscent of criticisms leveled at John Tyler for using the veto power more aggressively than had his predecessors.²⁹ The conventional wisdom is that even if more frequent use of the veto is important politically, as a matter of constitutional law, so long as the exercise of the veto power is proper, it remains unproblematic no matter how many times it is exercised.³⁰ So too with signing statements.³¹ Conversely, if the use of signing statements is unconstitutional, the practice would be problematic even if exercised only once.³² Thus, the fact that President Obama has employed signing statements more sparingly than preceding Administrations does not necessarily render his use of the practice any less problematic.

It also bears mentioning that the frequency with which Presidents issue signing statements is determined in part by Congress. For example, a Congress that decides to include a large number of legislative vetoes in the legislation it passes may engender a large number of signing statements in response. In this situation, however, Congress would be the institution responsible for the increase in the use of signing statements, not the President.

B. *Judicial Recognition of Signing Statements*

Since 1899, the Supreme Court of the United States has recognized signing statements as a proper means for the President to “inform Congress by message of his approval of bills, so that the fact may be recorded.”³³ But, in *La Abra Silver Mining Co. v. United States*, the Court stopped short of

²⁸ *Id.* at 324.

²⁹ See CALABRESI & YOO, *supra* note 14, at 136 (discussing the Whig Party’s criticism of Tyler).

³⁰ See, e.g., WILFRED E. BINKLEY, *PRESIDENT AND CONGRESS* 118-20 (1962); ROBERT J. SPITZER, *THE PRESIDENTIAL VETO* 59 (1988) (recognizing that by 1889, arguments that Presidents should exercise the veto only under extraordinary circumstances had become anachronistic and that Presidents’ power to veto a bill for any reason had become essentially unquestioned); LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829-1861*, at 30-33 (1954); Neal E. Devins, *Appropriations Redux: A Critical Look at the Fiscal Year 1988 Continuing Resolution*, 1988 *DUKE L.J.* 389, 411 (recognizing that “the President is unrestrained in his ability to veto . . . bills”); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *GEO. L.J.* 217, 265 (1994) [hereinafter Paulsen, *The Most Dangerous Branch*] (recognizing that the veto power is “generally agreed to be plenary” and that “it has become well-settled that the President has essentially unbridled discretion” in exercising it).

³¹ See Bradley & Posner, *supra* note 5, at 311 (noting that “the relevant question is not how many documents are issued, but the content of the documents”).

³² *Id.* (same).

³³ *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899).

relying on signing statements as a guide to statutory interpretation.³⁴ Later decisions, including some of the Supreme Court's most important opinions on structural government, accorded signing statements some degree of interpretive weight.³⁵

Commentators have questioned how much significance to place on the Court's reliance on signing statements.³⁶ It is clear that some lower courts regard these decisions as endorsing the use of signing statements as guides to statutory interpretation.³⁷ Other commentators have suggested that courts have been more reticent and "have rarely relied on signing statements and have ruled on neither their constitutionality (as executive interpretations that directly contradict legislative mandates) nor the amount of judicial deference they should receive."³⁸

II. CONSTITUTIONAL SIGNING STATEMENTS

Most of the controversy surrounding signing statements has arisen from their use to indicate a President's intention not to enforce a law because of doubts as to its constitutionality. Critics claim that the use of signing statements to register constitutional objections places Presidents in a position to impose their view of the Constitution's meaning unilaterally.³⁹

Misgivings about Presidents' willingness to advance their own constructions of the Constitution appear to be overstated. As this Part details, the Supreme Court has recognized that the Take Care Clause and the Oath Clause obligate Presidents to ensure that all enforcement actions comply with the Constitution's mandates. Moreover, well-accepted doctrines, such as construing statutes to avoid constitutional problems and refusing to defend or

³⁴ See *id.* at 459-63 (construing the Act of 1892 independent of a signing statement).

³⁵ See, e.g., *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (referring to statutory interpretation offered in a presidential signing statement); *Bowsher v. Synar*, 478 U.S. 714, 719 n.1 (1986) (same); *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) (same); see also *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 424 (1996) (relying on a gubernatorial signing statement to construe a state statute); *Haig v. Agee*, 453 U.S. 280, 296 (1981) (deferring to post-enactment presidential interpretations of the Passport Act); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1974) (deferring to presidential interpretations of the War Powers Act included in executive orders).

³⁶ See *Bradley & Posner*, *supra* note 5, at 345 ("It is not clear at this point . . . whether and to what extent courts will give weight to these statements . . .").

³⁷ See, e.g., *United States v. Bishop*, 66 F.3d 569, 584 n.24 (3d Cir. 1995) (noting the *Lopez* Court's use of President Bush's signing statement as a guide to statutory interpretation in order to justify the Third Circuit's following of the same practice); see also *United States v. Castillo*, 460 F.3d 337, 347 (2d Cir. 2006) (discussing President Clinton's signing statement); *United States v. Yacoubian*, 24 F.3d 1, 8 (9th Cir. 1994) (citing a signing statement issued by President Bush); *United States v. Fisher*, 22 F.3d 262, 268 (11th Cir. 1994) (relying on President Bush's signing statement to support the court's analysis).

³⁸ Note, *supra* note 5, at 600.

³⁹ See, e.g., *TASK FORCE*, *supra* note 3, at 23-24.

enforce constitutionally problematic statutes, concede the propriety of the President engaging in such review. More fundamentally, criticisms of signing statements confuse the substance of the action with the form in which it is announced. If a statute is unconstitutional, it is the Constitution itself that strikes it down. The signing statement has no independent legal effect and is simply a different means through which Presidents express their constitutional judgment.

A. *The Propriety of Executive Assessments of the Constitutionality of Statutes*

Presidents' authority and obligation to make their own assessments about constitutionality derive from several sources. These include the text of the Constitution, the reasoning underlying the Supreme Court's recognition of the judiciary's power to assess constitutionality in *Marbury v. Madison*,⁴⁰ as well as the longstanding support for three-branch interpretation of constitutional provisions.

1. Textual Foundations and the Logic of *Marbury*

A strong textual foundation underlies Presidents' authority and obligation to make their own assessment of the constitutionality of statutes. As an initial matter, the Constitution requires that Presidents swear an oath to "preserve, protect, and defend the Constitution of the United States."⁴¹ *Marbury v. Madison* invoked the fact that both judges and members of Congress swear an oath to uphold the Constitution as a basis for both groups' power to judge the constitutionality of statutes.⁴² The same reasoning would appear to apply with equal force to the Executive.⁴³

In addition, Article II, Section 3, of the Constitution places Presidents under the duty to "take Care that the laws be faithfully executed."⁴⁴ This clause has been susceptible to two interpretations.⁴⁵ First, some argue that

⁴⁰ 5 U.S. (1 Cranch) 137 (1803).

⁴¹ U.S. CONST. art. II, § 1.

⁴² See 5 U.S. (1 Cranch) at 180 (noting the importance of the application of the oath requirement to both judges and the legislature).

⁴³ See Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 523 (2012) (arguing that the Oath Clause "forbids the executive from executing unconstitutional [laws]"); Jack Goldsmith & John F. Manning, *The All-Purpose Take Care Clause*, 164 U. PA. L. REV. 1835, 1856 (2016) (arguing that "reading 'Laws' in the Take Care Clause to refer only to statutes [and not the Constitution] would create a structural oddity" given Article II's Oath Clause, which "requires the President to 'preserve, protect, and defend the Constitution'"); Paulsen, *The Most Dangerous Branch*, *supra* note 30, at 257-61 (arguing that the Oath Clause places an obligation on all three branches of government to interpret the Constitution and imposes a particularly strong obligation on Presidents).

⁴⁴ U.S. CONST. art. II, § 3.

⁴⁵ See Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1756 (2016) ("The text of the Faithful Execution Clause frames two aspects of the debate over the

the Take Care Clause obligates Presidents to enforce every statute to the best of their ability.⁴⁶ Second, others argue that because the Constitution supersedes any statute that is inconsistent with it, the Take Care Clause authorizes and obligates Presidents to judge the constitutionality of statutes for themselves.⁴⁷

In addition, the reasoning used by the Supreme Court in *Marbury v. Madison*⁴⁸ to justify recognizing the courts' authority to review the constitutionality of statutes confirms the propriety of according the executive branch the same privilege. *Marbury* recognized that courts bore the responsibility for resolving cases by applying the law to the underlying facts.⁴⁹ Moreover, "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule," including resolving any conflicts between two sets of law.⁵⁰ Because any statute that contradicts the Constitution is void, determining what the law is necessarily requires the ability to determine whether a statute is consistent with the Constitution.⁵¹

All of the rationales that *Marbury* used to support judicial review apply with equal force to the executive branch. Like courts, the Executive routinely

scope of enforcement discretion. . . . [One which is] 'discretion-granting' . . . [and the other which is] 'discretion-limiting.'" (internal citation omitted)); Goldsmith & Manning, *supra* note 43, at 1836 (stating that the Supreme Court has interpreted the Clause "as a source of vast presidential power" but also as "a sharp limitation on the powers of both the President and the other branches of government"); Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1192-96 (2012) (describing two diametrically opposed interpretations of the Take Care Clause).

⁴⁶ See, e.g., Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381, 382 (1986) ("[O]nce a bill has passed through all the constitutional forms of enactment and has become a law . . . the President has no option under article II but to enforce the measure faithfully."); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 693 (2014) (stating that the Take Care Clause "by its terms imposes a law-enforcement duty" on the President); see also *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) (rejecting the argument that "the obligation imposed on the President to see the laws faithfully executed [] implies a power to forbid their execution").

⁴⁷ See, e.g., Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200 (1994) (noting that while the President must "act in accordance with the law," when the law conflicts with the Constitution, the President must use "his independent judgment"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 620-21 & n.349 (1994) (discussing the President's ability to resist the enforcement of "a federal law that he believes violates his constitutional authority"); Devins & Prakash, *supra* note 43, at 532 (arguing that the President is not obligated "to enforce unconstitutional laws or make faithless arguments in their defense"); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 919-20 (1989) (arguing that the Take Care Clause obligates Presidents not to enforce statutes that conflict with the Constitution); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1631-33 (2008) [hereinafter Prakash, *The Executive's Duty to Disregard*] (debunking arguments that the Take Care Clause requires Presidents to enforce statutes they believe to be unconstitutional).

⁴⁸ 5 U.S. (1 Cranch) 137 (1803).

⁴⁹ See *id.* at 170-71 (discussing factual situations where executive discretion must be exercised).

⁵⁰ *Id.* at 177.

⁵¹ See *id.* at 177-79 (declaring that the Court must examine the Constitution in order to resolve conflicts between the Constitution and other laws).

applies the law to the facts of particular cases,⁵² a task that inevitably requires the Executive to determine what the law is. Because this inevitably requires the obligation to assess the constitutionality of a statute, the Executive must possess that power for the same reasons that the courts must.⁵³ Although *Marbury* ringingly declared “[i]t is emphatically the province and duty of the judicial department to say what the law is,” the Court also recognized that “[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule.”⁵⁴ This applies with equal weight to the executive branch.

2. The Tradition of Three-Branch Interpretation/Departmentalism

The longstanding tradition known as departmentalism, or coordinate construction, embraces constitutional interpretation as a task for all three branches of government.⁵⁵ Presidents have long asserted the authority to draw their own conclusions about the constitutionality of statutes, including in some of the most celebrated moments in history.⁵⁶ For example, Thomas Jefferson terminated prosecutions under the Sedition Act because he believed the statute to be unconstitutional.⁵⁷ Andrew Jackson vetoed the recharter of the Second Bank of the United States based on his belief that it was unconstitutional notwithstanding the Court’s decision in *McCulloch v. Maryland*.⁵⁸ Abraham Lincoln similarly based his rejection of *Dred Scott* on his authority to draw his own conclusions about the proper interpretation of the Constitution.⁵⁹

⁵² See Paulsen, *The Most Dangerous Branch*, *supra* note 30, at 243 (“All instances of execution or enforcement of the law involve the application of law to facts.”).

⁵³ See CALABRESI & YOO, *supra* note 14, at 23-24 (discussing the role all three governmental branches play in constitutional interpretation).

⁵⁴ 5 U.S. (1 Cranch) at 177.

⁵⁵ See CALABRESI & YOO, *supra* note 14, at 23-24 (describing departmentalism and explaining how *Marbury* fits with this theory of interpretation).

⁵⁶ See, e.g., GERALD GUNTHER, *CONSTITUTIONAL LAW* 21-24 (11th ed. 1985) (providing a series of historical writings from figures such as Thomas Jefferson, Andrew Jackson, and Abraham Lincoln taking this position in a variety of contexts); Easterbrook, *supra* note 47, at 910-11 (discussing Abraham Lincoln’s assertion of such authority during his inaugural address); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 88-99 (1993) (discussing Lincoln’s opposition to the *Dred Scott* decision and his subsequent refusal to act in accordance with it). For useful compilations of executive, legislative, judicial, and scholarly materials on the subject, see LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 16-32 (3d ed. 2001) and WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 195-284 (1st ed. 1986).

⁵⁷ See CALABRESI & YOO, *supra* note 14, at 67 (“Jefferson ordered the district attorney to cease any prosecution under the Sedition Act.”).

⁵⁸ See *id.* at 98 (quoting Jackson’s Veto Message of July 10, 1832 as stating, “It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by . . . the decision of the Supreme Court. To this conclusion I cannot assent.”).

⁵⁹ See Easterbrook, *supra* note 47, at 911 (discussing Abraham Lincoln’s rejection of the *Dred Scott* decision on substantive due process grounds).

More recently, presidential nonenforcement was highlighted by Bill Clinton's decision not to enforce an appropriations rider requiring the armed forces to discharge all individuals infected with the human immunodeficiency virus (HIV) even if they were asymptomatic because he believed it was unconstitutional.⁶⁰ A similar controversy arose when President Obama decided not to defend the constitutionality of the Defense of Marriage Act (DOMA).⁶¹

It is for this reason that Thomas Merrill has noted that the power of the political branches of government to interpret the Constitution has been endorsed by a veritable all-star list of constitutional scholars, including such luminaries as Alexander M. Bickel, Edward S. Corwin, Philip P. Kurland, Gerald Gunther, Arthur S. Miller, Alan W. Schefflin, Henry P. Monaghan, and Herbert Wechsler.⁶² While congressional enactments bear a strong presumption of constitutionality,⁶³ this presumption cannot be conclusive, otherwise Congress would be the sole judge of constitutionality. If that were the case, Congress could bootstrap itself into justifying its own actions in ways that could disable the Constitution from serving as a check on congressional power.

*B. Accepted Forms of Executive Statutory Interpretation in
Light of Constitutional Concerns*

In addition, the Executive's authority to assess the constitutionality of statutes is implicitly recognized by a large range of widely accepted doctrines. The restraint with which Presidents are expected to exercise this authority confirms rather than contradicts the existence of such authority.

⁶⁰ See Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 1 PUB. PAPERS 226, 227 (Feb. 10, 1996) (indicating that Clinton believed the provision to be an unconstitutional violation of equal protection and that the Attorney General would decline to defend it); see also Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7 (describing the same).

⁶¹ See *United States v. Windsor*, 133 S. Ct. 2675, 2685 (2013) (acknowledging that the Obama Administration's refusal to defend the constitutionality of DOMA created "a complication" to standing); see also Meltzer, *supra* note 45, at 1214 (discussing Attorney General Eric Holder's "letter notifying Congress of the administration's refusal to continue to defend DOMA"); see generally Carlos A. Ball, *When May a President Refuse to Defend a Statute? The Obama Administration and DOMA*, 106 NW. U. L. REV. COLLOQUY 77, 85-94 (2011) (analyzing when a President should refuse to defend a statute in the context of Obama's decision not to defend DOMA); Parker Rider-Longmaid, Comment, *Take Care that the Laws Be Faithfully Litigated*, 161 U. PA. L. REV. 291, 342-61 (2012) (applying a modified framework for presidential nondefense of statutes to President Obama's decision not to defend DOMA).

⁶² See Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 49 n.26 (1993). For an updated list, see CALABRESI & YOO, *supra* note 14, at 436 n.5.

⁶³ See, e.g., *Munn v. Illinois*, 94 U.S. 113, 123 (1877) ("Every statute is presumed to be constitutional.")

1. Constitutional Avoidance

The Supreme Court has long followed the principle that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”⁶⁴ The executive branch has adopted the same practice. As an opinion on signing statements issued by the Clinton Administration’s Office of Legal Counsel (OLC) noted, “[a] signing statement may put forward a ‘saving’ construction of the bill, explaining that the President will construe it in a certain manner in order to avoid constitutional difficulties.”⁶⁵ A subsequent opinion on the separation of powers similarly concludes that “the Executive, like the judiciary, construe[s] statutes so as to avoid constitutional problems.”⁶⁶ The doctrine is invoked in multiple signing statements and OLC opinions.⁶⁷

The doctrine has been the subject of criticism. Permitting constitutional doubt to change the construction of statutes risks creating a penumbral Constitution that forces statutes to give way even when they fall short of outright constitutional violations.⁶⁸ In addition, in cases where Congress may have wanted to enact legislation that pushes against constitutional limits, avoidance may conflict with legislative intent.⁶⁹ And, most importantly for

⁶⁴ Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

⁶⁵ The Legal Significance of Presidential Signing Statements, 17 Op. O.L.C. 131, 133 (1993).

⁶⁶ The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 128-29 n.13 (1996).

⁶⁷ See, e.g., Designation of Acting Director of the Office of Management and Budget, 27 Op. O.L.C. 121, 125 (2003) (discussing constitutional avoidance and the construction of the Vacancies Reform Act); Section 235A of the Immigration and Nationality Act, 24 Op. O.L.C. 276, 282 n.10 (2000) (taking an approach to interpretation that is “consistent with the Supreme Court’s admonition to interpret statutes so as to avoid constitutional questions”); Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995, 20 Op. O.L.C. 253, 265 (1996) (analyzing the issue to “avoid reaching a serious constitutional problem”); Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200 (1994) (“Where possible, the President should construe provisions to avoid constitutional problems.”); Statement by the President Upon Approval of Bill Amending the Mutual Security Act of 1954, 1959 PUB. PAPERS ¶ 171, at 549 (July 24, 1959) (construing amendments to the Mutual Security Act of 1954 to avoid “grave” constitutional issues).

⁶⁸ See Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) (“The practical effect of interpreting statutes to avoid raising constitutional questions is . . . to create a judge-made constitutional ‘penumbra’ that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself.”).

⁶⁹ See HENRY J. FRIENDLY, BENCHMARKS 210 (1967) (“It does not seem in any way obvious, as a matter of interpretation, that the legislature would prefer a narrow construction which does not raise constitutional doubts to a broader one which does raise them.”); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 105 (1997) (noting that constitutional avoidance interpretations are “likely to be different from what the court thinks the legislature intended,” which means that “the court is probably . . . misconstruing the

the purposes of this Article, the avoidance inquiry does not actually relieve decisionmakers of the burden of assessing the constitutionality of statutes,⁷⁰ although it does permit them to address the issue in a less conclusive manner.⁷¹

Other commentators have specifically analyzed assertions of the avoidance canon by the executive branch. Trevor Morrison has noted that the justifications for judicial application of the avoidance canon are based in values of judicial restraint that do not apply to the Executive,⁷² although he acknowledges that the doctrine can be reconstructed as a way to increase enforcement of certain constitutional norms.⁷³ Ernest Young draws a similar conclusion.⁷⁴

To date, these critiques have yet to displace the avoidance canon, and scholarly attempts to analyze its invocation by the executive branch have found ways to reconstruct the doctrine. To the extent that the doctrine retains vitality, it supports the executive branch's authority to assess the constitutionality of statutes. Indeed, the reconstruction of the executive application of the doctrine in terms of enforcing constitutional norms makes this all the more apparent.

statute"); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 898 (2001) ("The [constitutional avoidance] canon wrongly assumes that Congress legislates without ever intending to approach the limits of the Constitution. And it often results in the Court adopting interpretations that the legislative branch could not have foreseen nor intended."); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74 (1995) ("[I]n interpreting statutes so as to avoid 'unnecessary' constitutional decisions, the Court frequently interprets a statute in ways that its drafters did not anticipate")

⁷⁰ See Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 16 (1996) (discussing how courts engage in constitutional adjudication when they invoke the avoidance canon); Schauer, *supra* note 69, at 87 (noting that in cases where "the interpretive preference is supplanted, the constitutional question is not avoided at all"); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1552 (2000) ("[A] judge who construes a statute in such a way as to avoid a constitutional 'doubt' is enforcing the Constitution itself—nothing more, nothing less.").

⁷¹ See Young, *supra* note 70, at 1582 ("To be sure, there is an important difference between deciding that a constitutional argument is nontrivial and actually deciding that issue on the merits.").

⁷² See Morrison, *supra* note 13, at 1198-28 (noting the importance of analyzing the constitutional avoidance canon's "relevance to the executive on its own terms" given that the canon can be thought to "serve[] values peculiar to the federal courts and thus . . . has no direct relevance to the executive branch").

⁷³ See *id.* at 1215 ("[A]lthough the constitutional enforcement theory can be conceived as a means of implementing indirectly certain constitutional norms").

⁷⁴ See Young, *supra* note 70, at 1586-99 (arguing that the avoidance canon reflects a substantive commitment to make invasions of constitutional principles more difficult without making them impossible). *But see* H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313, 1317 (2006) (arguing that executive invocation of the avoidance doctrine favors the expansion of presidential power and should be abandoned).

2. Refusal to Defend the Constitutionality of a Statute

The conventional wisdom is that Presidents have a duty to defend the constitutionality of statutes. Although some commentators have implied that the duty is absolute,⁷⁵ the Justice Department has recognized that Presidents may refuse to defend the constitutionality of statutes under “exceptional circumstances,”⁷⁶ such as when a statute is “transparently invalid”⁷⁷ or “clearly unconstitutional.”⁷⁸ Even the scholarly commentary that strongly supports Presidents’ duty to enforce statutes recognizes that circumstances exist that can justify Presidents’ refusals to defend their constitutionality.⁷⁹

Although these commentators’ views vary with respect to how much latitude Presidents have in refusing to defend the constitutionality of statutes, acknowledging the existence of circumstances under which such a refusal is justified concedes that Presidents possess the authority to assess the constitutionality of statutes. Indeed, the statute requiring the executive branch to notify Congress when it opts not to defend the constitutionality of a statute implicitly confirms Congress’s acceptance of the validity of the practice.⁸⁰

3. Refusal to Enforce a Statute on Constitutional Grounds

Finally, the Justice Department has long regarded as “uncontroversial” that “there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional.”⁸¹ Some

⁷⁵ See Arthur S. Miller & Jeffrey H. Bowman, *Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem*, 40 OHIO ST. L.J. 51, 71-72 (1979) (“[T]he Executive should not be allowed to pick and choose from among constitutional provisions and judicial interpretations thereof: the article II duty of faithful execution of the laws does not give the President any discernible discretion.”).

⁷⁶ Constitutionality of Legislation Establishing the Cost Accounting Standards Board, 4B Op. O.L.C. 697, 698 (1980).

⁷⁷ The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 56 n.1 (1980).

⁷⁸ Recommendation that the Department of Justice Not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984, 8 Op. O.L.C. 183, 194 (1984).

⁷⁹ See, e.g., Gressman, *supra* note 46, at 384 (noting that “[t]he Executive can refuse to defend the constitutionality of a statute when judicial review has been properly instituted”); Aziz Z. Huq, *Enforcing (but Not Defending) ‘Unconstitutional’ Laws*, 98 VA. L. REV. 1001, 1014-16 (2012) (describing “enforcement-litigation gaps” where a President will continue to enforce a statute while refusing to defend it in court because he believes it to be unconstitutional); Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1078 n.14 (2001) (supporting the “practice of ‘enforce but decline to defend’”).

⁸⁰ See 28 U.S.C. § 530D(a)(1)(A)(i) (2012) (requiring the Attorney General to submit a report to Congress when any member of the Justice Department adopts a policy of nonenforcement on constitutional grounds).

⁸¹ Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 199 (1994).

commentators assert that Presidents possess a broad obligation not to enforce statutes they believe to be unconstitutional.⁸²

Even those taking a more restrictive view recognize that Presidents have chosen not to enforce laws they believed to be unconstitutional since the earliest days of the Republic.⁸³ Consequently, they generally concede that nonenforcement is proper under certain circumstances. The easiest case is when the statute is flatly inconsistent with Supreme Court precedent.⁸⁴ Perhaps the clearest example of this is Congress's persistence in enacting legislative vetoes despite the Supreme Court's condemnation of the practice in *INS v. Chadha*.⁸⁵ The Justice Department takes a slightly more relaxed position, permitting nonenforcement in the absence of a clear precedent when it is "probable" that the Supreme Court would reach the same conclusion.⁸⁶ Presidents are also generally afforded greater latitude not to enforce statutes that encroach on their constitutional powers.⁸⁷

Recognizing that it is sometimes proper for Presidents to refuse to enforce statutes concedes the Executive's authority to assess statutes' constitutionality. Variations in the standard that commentators think that Presidents should apply in exercising this authority do not undercut the recognition of the Presidents' authority in this regard.

⁸² See Devins & Prakash, *supra* note 43, at 509 (arguing "[t]here simply is no duty to defend federal statutes the President believes are unconstitutional"); Paulsen, *The Most Dangerous Branch*, *supra* note 30, at 276 (concluding that "[t]he President has independent constitutional power to decline to enforce laws that are contrary to the higher law of the Constitution"); Prakash, *The Executive's Duty to Disregard*, *supra* note 47, at 1616 (asserting that "the Constitution actually requires the President to disregard unconstitutional statutes").

⁸³ See Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 977-79 (1994) (outlining instances from 1789 to 1981 where Presidents have objected to allegedly unconstitutional laws).

⁸⁴ See Johnsen, *supra* note 60, at 46 ("The least constitutionally troubling circumstance for non-enforcement is presented when a provision is clearly unconstitutional as a matter of both executive and judicial interpretation . . .").

⁸⁵ See 462 U.S. 919, 959 (1983) (invalidating the legislative veto); see also Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Autumn 1993, at 286-88 (describing Congress's compliance, or lack thereof, with the decision in *Chadha*).

⁸⁶ See 18 Op. O.L.C. at 200; accord May, *supra* note 83, at 990-96 (concluding that Presidents may refuse to enforce clearly unconstitutional laws so long as they exhaust legislative avenues for redress, defiance represents the sole route to judicial review, and they ensure that judicial review occurs); see also Johnsen, *supra* note 60, at 47 (recognizing that non-enforcement is proper even "when the courts have not addressed a question, but its proper resolution is so clear that there can be no genuine dispute").

⁸⁷ See 18 Op. O.L.C. at 201 ("The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency."); Johnsen, *supra* note 60, at 27 (stating that "the President, no less than the courts, possesses the implicit constitutional authority and responsibility to interpret the Constitution in carrying out his assigned functions").

Some commentators argue that the proper course is for Presidents to veto legislation they deem to be unconstitutional.⁸⁸ Constitutional concerns may arise with respect to statutes signed into law by a prior administration. If so, the current President would not have the opportunity to veto questionable legislation.⁸⁹ Indeed, even if the same President signed the statute, as the OLC noted, “there is no constitutional analogue to the principles of waiver and estoppel.”⁹⁰

In addition, those taking a functionalist approach to separation of powers must acknowledge that the constitutionality of a statute cannot conclusively be determined at any particular moment in time. Instead, it can only be assessed in light of the current conditions, as well as any subsequent reallocations of power. Under these circumstances, it is quite feasible that a statute that seemed constitutional at the time of enactment may later be seen to pose more significant constitutional concerns.

But perhaps the best argument against requiring Presidents to veto all legislation they believe to be unconstitutional is practicality. In an era where large, complex appropriations bills are the norm, using the veto as the sole means for registering constitutional objections seems wholly unworkable.⁹¹

Consider for example Congress’s continuing propensity for enacting legislative vetoes. Presidents would have to veto a large number of statutes, which in turn would deadlock the government. A classic example of this dilemma arose when President Franklin Roosevelt signed the Lend–Lease Act because of its critical importance to the war effort, despite the fact that it

⁸⁸ See, e.g., *The Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, *supra* note 2, at 24–25 (statement of Bruce Fein, Partner, Fein & Fein LLC) (emphasizing that it is the President’s duty to veto a bill he believes to be unconstitutional); TASK FORCE, *supra* note 3, at 20 (noting that “[t]he Constitution . . . limits the President’s role in the lawmaking process to the recommendation of laws he thinks wise and the vetoing of laws he thinks unwise”); Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81, 81 (2007) (arguing that it is the President’s duty to veto bills he believes are unconstitutional).

⁸⁹ See Saikrishna B. Prakash, *The Domestic War*, 115 YALE L.J. POCKET PART 92, 94 (2006), <http://www.yalelawjournal.org/forum/the-domestic-war> [<https://perma.cc/B25G-AVUF>] (“The veto is a wholly inadequate substitute for executive review because Presidents would be forced to execute unconstitutional laws enacted under prior administrations.”).

⁹⁰ 18 Op. O.L.C. at 202; accord Easterbrook, *supra* note 47, at 917 (observing that “[t]o insist that the President’s signature on a bill compels him to enforce the law is to say that with the stroke of a pen a President may eliminate constitutional objections” and that “[n]o one may consent to violate the Constitution, or bind his successor to do so”).

⁹¹ See *id.* at 202–03 (stating that the President is not limited to either a veto or a full execution of a large bill like the Defense Appropriations Act, but instead that he has “authority to sign legislation containing desirable elements while refusing to execute a constitutionally defective provision”); Bradley & Posner, *supra* note 5, at 341 (“[T]he argument that a president must always veto a bill if it has what he believes to be an unconstitutional provision is unrealistic in an age of omnibus legislation . . .”).

contained a legislative veto that he believed to be unconstitutional.⁹² Rather than veto the legislation, President Roosevelt chose to register his objections in a presidential legal opinion that he lodged with the Attorney General.⁹³

President Bill Clinton faced a similar predicament when presented with legislation requiring the discharge of military personnel who were HIV positive.⁹⁴ Constitutional concerns over the provision had already prompted Clinton to veto a prior version of the legislation once.⁹⁵ But, when presented with a similar bill containing the constitutionally objectionable provision—but that also appropriated billions in military funding—the military’s need for the funds appropriated by the legislation led Clinton to sign the bill.⁹⁶ Under these circumstances, permitting Presidents to sign legislation while registering their constitutional concerns may well be more conducive to good government.

C. *Constitutional Signing Statements as Form, Not Function*

Acceptance of the avoidance doctrine and the right of Presidents not to defend the constitutionality of or to enforce statutes implicitly recognizes that Presidents possess the authority to assess the constitutionality of statutes. This power would exist regardless of whether Presidents state their beliefs in a signing statement or not. As Curtis Bradley and Eric Posner have recognized, Presidents possess numerous mechanisms aside from signing statements for allocating enforcement resources and directing subordinates’ execution of the law.⁹⁷ If Presidents may properly refuse to enforce statutes they judge to be unconstitutional, the fact that they choose to announce their intention not to enforce it in a signing statement seems unproblematic.⁹⁸ Quite the contrary, signing statements “promote dialogue and accountability” by providing public information about the President’s views.⁹⁹ To the extent that the statute is not enforced, it is the result of the Constitution, not the signing statement.¹⁰⁰

In other words, many critics of the use of signing statements to register constitutional reservations implicitly base their arguments on the premise

⁹² CALABRESI & YOO, *supra* note 14, at 26, 289.

⁹³ Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV., 1353, 1357-59 (1953).

⁹⁴ See Johnsen, *supra* note 60, at 55 (discussing the statute and Clinton’s predicament).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See Bradley & Posner, *supra* note 5, at 310, 339 (discussing other means at the President’s disposal, including issuing a simple memorandum to subordinates).

⁹⁸ See *id.* at 339 (stating that “it is unlikely that a constitutional signing statement changes the outcome that would result if the bill were instead returned to Congress and then reenacted over the president’s veto”).

⁹⁹ See *id.* at 310.

¹⁰⁰ See *id.* at 338 (arguing that in a signing statement, “the president is not purporting to use his presidential authority to block” a bill, but rather “is claiming that the Constitution itself blocks the law from taking effect”).

that it is the signing statement that is nullifying the statute when it is actually the Constitution itself that is doing the work. Signing statements only pertain to the form of the announcement, not the substance. To the extent that relying on signing statement promotes accountability, prohibiting the use of signing statements is likely to work against the interests of good government rather than in favor of them.

III. INTERPRETIVE SIGNING STATEMENTS AND THE EQUAL DIGNITY PRINCIPLE

As the Supreme Court recognized in *Buckley v. Valeo*, the Framers rejected the “hermetic sealing off of the three branches of Government from one another” envisioned by Montesquieu in favor of a system of checks and balances.¹⁰¹ The shared powers over legislation is defined by Article I, Section 7, Clause 2:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.¹⁰²

The Court has noted that under this provision, “[t]he President is a participant in the law-making process.”¹⁰³ Justice Frankfurter has similarly commented that statutes are “the product of both Houses of Congress and the President.”¹⁰⁴ Indeed, the two principal modern decisions interpreting this clause support according the President the same dignity in the law-making process as the two Houses of Congress.¹⁰⁵

In advancing the equal dignity principle, I need not take sides in the ongoing debate about the propriety of consulting legislative history when

¹⁰¹ 424 U.S. 1, 121 (1976).

¹⁰² U.S. CONST. art. I, § 7, cl. 2.

¹⁰³ 424 U.S. at 121.

¹⁰⁴ *United States v. Lovett*, 328 U.S. 303, 324-25 (1946) (Frankfurter, J., concurring).

¹⁰⁵ *Clinton v. City of New York*, 524 U.S. 417 (1998); *INS v. Chadha*, 462 U.S. 919 (1983).

determining the meaning of statutes. Indeed, critics have leveled a forceful attack on the validity of legislative history as a guide to statutory meaning.¹⁰⁶

To say that the President's views as to the meaning of a statute must be accorded equal dignity as Congress's is not to say that legislative history must be accorded any weight at all. Instead, the co-equal status of the branches in the lawmaking process simply requires that to the extent that congressional views are taken into account, presidential views must be given the same consideration. Thus, one could disregard all forms of legislative history without violating the equal dignity principle.

A. Doctrinal Foundations of the Equal Dignity Principle

1. *INS v. Chadha* and the Legislative Veto

The Court offered its most extensive discussion of the constitutional provision establishing the process for enacting legislation when invalidating the legislative veto (that is, lawmaking without the President's participation) in *INS v. Chadha*.¹⁰⁷ The Court described the provision as the "single, finely wrought and exhaustively considered, procedure" for enacting legislation.¹⁰⁸ Specifically, the same statutory language must be approved by both Houses of Congress (known as the "bicameralism" requirement) and submitted to the President (known as the "presentment" requirement).¹⁰⁹ The Constitution provides that Presidents may either sign the legislation into law, veto it, or permit it to become law without their signature, unless Congress adjourns during that period, in which case the bill does not become law.¹¹⁰ Presidential vetoes may, of course, be overridden by a two-thirds majority of both Houses.¹¹¹

The Constitution thus assigns essential roles in the legislative process to both Congress and the President. Except in the case of a congressional override of a presidential veto, a bill cannot become law without the mutual assent of the House of Representatives, the Senate, and the President. The Court noted that Presidents play an essential role in this process, concluding

¹⁰⁶ See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29-37 (1997) (discussing the dangers of using legislative history in statutory interpretation); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 684-89 (1997) (discussing the textualist critique of using legislative history in statutory interpretation); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 134-39 (2000) (same).

¹⁰⁷ 462 U.S. 919 (1983).

¹⁰⁸ *Id.* at 951.

¹⁰⁹ See *id.* at 946-51 (outlining these requirements).

¹¹⁰ U.S. CONST. art. I, § 7, cl. 2.

¹¹¹ *Id.*

that “[i]t is beyond doubt that lawmaking was a power to be shared by both Houses and the President.”¹¹²

One striking aspect of the Court’s approach is its formalism.¹¹³ Article I, Section 7, Clause 2, creates an elaborate series of steps, each of which is essential to enacting legislation. Under this approach, each step is of equal necessity. It does not suggest giving greater authority to one step over the others.

2. *Clinton v. City of New York* and the Line-Item Veto

Chadha did not necessarily signal a jurisprudential revolution in interpretive methodology. Although some later separation of powers cases followed a formalistic approach,¹¹⁴ others declined to do so.¹¹⁵ At least as far as the legislative process is concerned, however, the Supreme Court’s 1998 decision in *Clinton v. City of New York* made clear that formalism remained the defining approach for interpreting Article I, Section 7, lawmaking process when invalidating the line-item veto (that is, lawmaking without Congress’s participation).¹¹⁶ The Court adhered to the logic of *Chadha*, noting any repeal of legislation must involve both the President and Congress.¹¹⁷ The Court emphasized the importance of strictly following the process established by Article I, Section 7, Clause 2, noting that it was “the product of the great debates and compromises that produced the Constitution itself.”¹¹⁸ Although the Constitution gives Presidents an affirmative role in the legislative process,

¹¹² 462 U.S. at 947.

¹¹³ Indeed, its formalism provides the basis for much of the critique of *Chadha*. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 527 (1992) (arguing that “*Chadha* assumes a wooden and unnecessarily formalist operation of bicameralism and presentment”); see generally Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court’s Legislative Veto Decision*, 1983 DUKE L.J. 789 (1983) (criticizing *Chadha* as overly formal).

¹¹⁴ See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (finding that congressional legislation requiring an Article III court to set aside a judgment violated constitutional separation of powers doctrine); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 277 (1991) (finding an act of Congress to effectively create a veto power over an executive agency, thus violating constitutional separation of powers); *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (finding an act of Congress reserving for Congress itself the power to remove an executive officer to violate constitutional separation of powers doctrine).

¹¹⁵ See, e.g., *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (finding that sentencing guidelines were constitutional and did not violate separation of powers doctrine); *Morrison v. Olson*, 487 U.S. 654, 696-97 (1988) (finding that the statute authorizing independent counsels did not violate separation of powers doctrine); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 858 (1986) (finding that the limited jurisdiction asserted by the Commission did not violate separation of powers doctrine).

¹¹⁶ See 524 U.S. 417, 438-40 (1998) (taking a formalist approach to the interpretation of the requirements of Article I).

¹¹⁷ *Id.* at 438-39.

¹¹⁸ *Id.* at 439.

Presidents cannot unilaterally modify legislation.¹¹⁹ Any deviation would not be “the product of the finely wrought procedure that the Framers designed.”¹²⁰

Together, these decisions embody the proposition that the House, the Senate, and the President each constitute essential actors of the lawmaking process. Just as *Chadha* held that legislation requires the participation of the President, *Clinton v. City of New York* made equally clear that legislation also requires the participation of Congress. A formal interpretation thus indicates that each is a necessary part of the legislative process. The fact that each is equally indispensable strongly favors according each a coequal role.

3. The Enrolled Bill Doctrine

Both *Chadha* and *Clinton v. City of New York* are well known to constitutional scholars and lawyers. But another, less well known, line of cases exists that is equally probative of the formal approach to legislation.

The equivalence of the role played by the President and the two Houses of Congress is also reflected in a legal principle known as the “enrolled bill doctrine,” which has been called “the operative proposition of Article I, Section 7, Clause 2.”¹²¹ After a bill is passed by both Houses of Congress, it is signed by both the Speaker of the House and the President of the Senate in open session, at which point it is called an enrolled bill and is presented to the President.

In the seminal case of *Field v. Clark*, the petitioner attempted to use the official journals maintained by the House and the Senate to show that a section of the bill passed by Congress failed to be included in the enrolled bill that was presented to the President for his signature.¹²² The petitioner claimed that because the language approved by Congress differed from the language signed by the President, the statute did not comply with Article I, Section 7, Clause 2, and thus was not properly considered a valid statute.¹²³

The Supreme Court declined to consider any evidence of what Congress actually enacted outside of the enrolled bill itself, holding that any bill bearing the signatures of the Speaker of the House, the President of the Senate, and

¹¹⁹ See *id.* at 438-40 (stating that the President “may initiate and influence legislative proposals” but also outlining the Court’s reasoning for interpreting constitutional silence on unilateral action by the President as “equivalent to an express prohibition”).

¹²⁰ *Id.* at 440 (internal quotations omitted).

¹²¹ Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 74 (2004). For an insightful analysis of the enrolled bill doctrine, see Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1172-81 (2003).

¹²² 143 U.S. 649, 668-69 (1892).

¹²³ *Id.*

the President of the United States and forwarded to the public archives is “conclusive evidence” of the statute’s validity.¹²⁴

The enrolled bill doctrine thus represents the operational reality of the legislative process in action. In the same manner as *Chadha* and *Clinton v. City of New York*, the doctrine adopts a formal approach to the lawmaking process. This formalism provides further support for treating each House of Congress and the President as coequal actors in the legislative process. Each must approve the language contained in the enrolled bill for proposed legislation to become a law.

B. *The Implications of the Equal Dignity Principle*

Treating all three actors specified in Article I, Section 7, Clause 2, with equal dignity requires giving equal weight to their pronouncements of the meaning of a statute. The fact that Presidents are essential actors in the legislative process provides strong reason to give as much weight to their views of the meaning of a statute as to the views of the House or the Senate. Equal dignity does not require that legislative history receive any consideration. Indeed, the equal dignity principle does not take sides in the debate over the propriety of relying on legislative history when construing statutes. Equal dignity simply requires that presidentially created legislative history be given the same weight as congressionally created legislative history. A court can satisfy equal dignity by ignoring both as a guide to statutory interpretation.

The following thought experiment illustrates this principle nicely. Suppose that the Senate were to propose legislation that would require courts to give controlling weight to the legislative history that it generated and to ignore the legislative history generated by the House of Representatives. Suppose further that the House of Representatives lacked the political will and support to oppose the provision, that the President signed it into law, and that the statute eventually ended up being challenged in court. Would such a statute be constitutional? The simple answer is that that the Constitution gives the House of Representatives a role in the lawmaking process that is coequal with the role given to the Senate.¹²⁵ As a result, any attempt to privilege the views expressed in the Senate’s legislative history over the views expressed in the House’s legislative history would represent the same type of

¹²⁴ *Id.* at 673; *accord id.* at 672 (concluding that the signatures of the House Speaker, the President of the Senate, and the President constitute authentication of the bill’s validity that is “complete and unimpeachable”).

¹²⁵ There are limited circumstances in which the Constitution gives the two Houses of Congress slightly different roles. For example, the Constitution requires that all revenue bills originate in the House. U.S. CONST. art. I, § 7. The Constitution also limits the congressional role in the ratification of treaties to the Senate and not the House. U.S. CONST. art. II, § 2.

denigration of one of the three actors essential to the legislative process that led the Court to invalidate the legislative and line-item vetoes.¹²⁶

The same reasoning would appear to apply to presidential legislative history. Because, in the absence of a veto override, the assent of the President is as essential a part of the legislative process as the assent of the House of Representatives and the Senate, President's understanding of the meaning of statutes is entitled to no less respect than the understanding of the House or the Senate. Any attempt to privilege the views of one legislative actor over another would be unconstitutional.

Some have suggested that the role played by the President in the legislative process is more limited than the role played by the House and the Senate, in that the President lacks the power to change legislation and can only approve or disapprove it.¹²⁷ The problem with this argument is that the same can be said about the House and the Senate. Neither House of Congress has the power to alter a statute without the assent of the other House of Congress and the President. Indeed, the situation faced by Presidents when presented with bill language with which they disagree is little different from the situation confronting the Senate when it is presented with bill language passed by the House with which it disagrees. Although the procedural details differ, in essence, both the President and the Senate face the same choice of either approving or rejecting the proffered language.

Finally, some critics have offered more pragmatic criticisms of presidential legislative history. Some have argued that giving weight to presidential signing statements opens the door to political manipulation, allowing Presidents to substitute their judgment for those of the other actors in the lawmaking process.¹²⁸ Others have argued that presidential signing statements are not generally available to members of Congress or the public at large.¹²⁹

These critiques apply with equal force to all forms of legislative history—including history created by the House and the Senate—and not just to legislative history created by the President. Congressional legislative history has also been criticized for being relatively unavailable to legislators and to

¹²⁶ Arguments that Article I, Section 7, of the Constitution bars consideration of presidentially created legislative history, for example, TASK FORCE, *supra* note 3, at 20 and Garber and Wimmer, *supra* note 6, at 371-75, fail to recognize that the same arguments apply with equal force to legislative history created by congressional committees, conference committees, or individual legislators. Consistency requires treating all types of legislative history equally.

¹²⁷ See, e.g., TASK FORCE, *supra* note 3, at 18-20; Garber & Wimmer, *supra* note 6, at 373-74, 377.

¹²⁸ See, e.g., Popkin, *supra* note 6, at 709 (arguing that "many recent efforts to create presidential legislative history have been politically manipulative").

¹²⁹ See, e.g., *id.* at 715 ("Legislators might . . . be unaware that legislative history is being created and have no opportunity to influence its content.").

the public at large.¹³⁰ Indeed, there are many members of Congress who are unaware of the contents of congressionally created legislative history at the time that they vote on legislation.¹³¹ Furthermore, committee reports and floor statements may represent nothing more than the views of a subset of the entire legislative body¹³² (or perhaps even just their staff¹³³) and may well represent politically motivated attempts to influence future statutory interpretation in directions that may or may not be consistent with the intent of the entire Congress.¹³⁴ Indeed, skepticism about all forms of legislative history has fueled a movement in statutory interpretation toward “textualism,” which would only give the force of law to sources that have complied with the bicameralism and presentment requirements mandated by the Constitution.¹³⁵

A debate over the merits of textualism would exceed the scope of this Article. For now, it suffices to acknowledge that the criticisms of unavailability, nonrepresentativeness, and political motivation that have been leveled at presidential legislative history apply with equal force to congressional legislative history. Thus, to the extent that the critiques of presidential legislative history have bite, they would appear to invalidate all uses of legislative history and not just those originating from the White House.

C. *The Inevitability of Executive Statutory Interpretation*

The legitimacy of presidential statutory interpretation is not only implicit in the President’s role in the legislative process created by Article I, Section 7. It is also inherent in the President’s responsibility to oversee the execution of the law.

Executive functions require the application of the law to particular facts. This necessarily requires agencies to interpret the statutes they are executing. As the Supreme Court noted in *Bowsher v. Synar*, “Interpreting a law enacted

¹³⁰ Cf. *Conroy v. Aniskoff*, 507 U.S. 511, 527-28 (1993) (Scalia, J., concurring) (discussing the effort and resources required to review legislative history before dismissing legislative intent from consideration).

¹³¹ See *SEC v. Robert Collier & Co.*, 76 F.2d 939, 941 (2d Cir. 1935) (noting that “probably very few” members of Congress “know[] what has taken place in committee” when they vote on a bill).

¹³² See *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) (arguing that to assume all Congressmen share the same assumptions when they enact laws is dangerous).

¹³³ See *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring) (stating that case references in committee reports are “inserted[] at best by a committee staff member on his or her own initiative”).

¹³⁴ See Orrin Hatch, *Legislative History: Tool of Construction or Destruction*, 11 HARV. J.L. & PUB. POL’Y 43, 44-45 (1988) (noting a situation in which a statement by a single Senator, which was at odds with the understanding of the majority of members, was inserted into the congressional record without being read on the floor in what was viewed as an attempt to influence future judicial decisions).

¹³⁵ For a defense of textualism, published along with critical essays authored by a number of distinguished legal scholars, see generally SCALIA, *supra* note 106.

by Congress to implement the legislative mandate is the very essence of 'execution' of the law."¹³⁶

Indeed, courts have long accorded executive views of the meaning of statutes special dignity.¹³⁷ The privileged role that the Executive plays in statutory interpretation is manifest in the Supreme Court's *Chevron* doctrine. Gaps and ambiguities in statutes are the inevitable byproduct of either the inability of anyone to anticipate every possible contingency or of a deliberate choice to leave certain issues indeterminate in order to achieve sufficient consensus to enact the legislation.¹³⁸ *Chevron* treats these gaps as implicit delegations to executive agencies to offer their own interpretations.¹³⁹ Moreover, *Chevron* requires courts to accord agency interpretations of the statutes they administer a special dignity: if the language of the statute is ambiguous, courts will not exercise their independent judgment about its proper construction and will instead defer to the agency's interpretation so long as it is reasonable.¹⁴⁰ Such deference is justified by the fact that these agencies are subject to presidential control.¹⁴¹ Even where *Chevron* does not apply, courts may still defer to agency interpretations based on the agency's specialized experience and information.¹⁴²

This is not to say that executive discretion over statutory interpretation is unfettered. "Where a law is plain and unambiguous, . . . the legislature should

¹³⁶ 478 U.S. 714, 733 (1986).

¹³⁷ See *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947) (noting that "construction by the Chief Executive, being both contemporaneous and consistent, is entitled to great weight"); *Penny v. McConaughy*, 140 U.S. 1, 23 (1891) (observing that the "principle that the contemporaneous construction of a statute by the executive officers of the government . . . is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence, that no authorities need be cited to support it"); *Surgett v. Lapice*, 49 U.S. (8 How.) 48, 68 (1850) (deferring to the contemporaneous statutory interpretation of an agency, which had been approved by the Secretary of the Treasury and the President).

¹³⁸ In one celebrated example, the House and the Senate deliberately left the Tenure of Office Act vague as to whether Andrew Johnson could remove the holdover members of Lincoln's cabinet in order to get the statute enacted. CALABRESI & YOO, *supra* note 14, at 179-86. The House impeached and the Senate acquitted based on their divergent understandings of the meaning of the indeterminate language. *Id.*

¹³⁹ See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843-44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

¹⁴⁰ See *id.* at 844-45 (outlining this framework).

¹⁴¹ See *id.* at 865-66 (noting that "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch . . . to make such policy choices"). This reasoning rebuts any suggestions that Congress delegated interpretive authority to the agencies and not the President.

¹⁴² See *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) ("*Chevron* did nothing to eliminate *Skidmore's* holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency" (internal citation omitted)).

be intended to mean what they have plainly expressed, and consequently no room is left for construction.”¹⁴³ Thus, just as “longstanding precedents . . . permit resort to legislative history only when necessary to interpret ambiguous statutory text,”¹⁴⁴ *Chevron* deference also applies only when the statute is silent or ambiguous.¹⁴⁵ That said, Congress is unlikely to be able to shut off all avenues for presidential statutory interpretation completely. Although a legislature might try to leave no ambiguity by specifying every contingency in advance, the inability to anticipate and address every possible contingency makes some degree of interpretation inevitable.

The role of Chief Executive thus permits Presidents to exert considerable influence over the manner in which statutes are interpreted. It would thus seem to matter little whether Presidents’ views about the proper interpretation of a statute are expressed through signing statements or through agency interpretations proffered after enactment. Indeed, banning reliance on signing statements would only deprive the public of advance notice of the Executive’s interpretation of the statute without significantly reducing the President’s ability to influence the way the statute is interpreted.

The Supreme Court has made clear that *Chevron* permits agency interpretations of ambiguous provisions to change over time.¹⁴⁶ Indeed, a change in the proffered construction of a statute over time is what gave rise to the *Chevron* case in the first place.¹⁴⁷ The potential for changes in an agency’s interpretation raises the possibility that a subsequent interpretation might conflict with the interpretation advanced in a presidential signing statement. If the interpretation in a signing statement were to conflict with an agency interpretation, which should prevail?

The relationship between *Chevron* and legislative history has long been recognized to be complicated and unsettled.¹⁴⁸ *Chevron* step one dictates that if Congress has directly addressed the issue in question, the agencies are bound

¹⁴³ *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 399 (1805).

¹⁴⁴ *Bedroc Ltd. v. United States*, 541 U.S. 176, 187 n.8 (2004).

¹⁴⁵ *See* 467 U.S. at 842-43 (describing this interpretive framework).

¹⁴⁶ *See Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (“Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.”); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) (noting that “change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency”).

¹⁴⁷ *See* 467 U.S. at 863-64 (“An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis.”).

¹⁴⁸ *See, e.g.,* Amanda M. Traphagan, *Agency Deference After Home Concrete*, 14 *TEX. TECH. ADMIN. L.J.* 153, 165 (2012) (noting that “[t]he role of legislative history in *Chevron* step one . . . remains fractured”).

by Congress's resolution, and any contrary interpretation is invalid.¹⁴⁹ To the extent that legislative history is properly part of the step-one analysis, any clear interpretations emerging from that legislative history would be binding on the agency.¹⁵⁰ If, however, legislative history is part of the reasonableness determination undertaken at *Chevron* step two, it is quite possible that an agency's preferred interpretation might trump the legislative history.¹⁵¹

Although *Chevron* itself considered legislative history at step one, subsequent Supreme Court cases have not been consistent on this point, and the Supreme Court has never directly addressed the issue.¹⁵² Indeed, the circuits have divided over whether legislative history may be considered at *Chevron* step one.¹⁵³

Fortunately, the equal dignity principle does not require resolution of this issue. Whatever the proper role of legislative history in the *Chevron* analysis, the equal dignity principle requires only that signing statements be accorded the same treatment as congressionally created legislative history. Indeed, to the extent that the content of the signing statement and agency interpretive policy are dictated by the same person, the precise distinction may make little difference.

D. *Legislative Power Essentialism vs. the Explicit Recognition of the President's Role in the Legislative Process*

One of the primary objections to according interpretive significance to signing statements is the claim that legislation is the proper province of Congress.¹⁵⁴ Interestingly, invocations of what might be called *legislative power*

¹⁴⁹ See 467 U.S. at 842 (“If the intent of Congress is clear, that is the end of the matter for the court . . .”).

¹⁵⁰ See Bradley Silverman, *Statutory Ambiguity in King v. Burwell: Time for a Categorical Chevron Rule*, 125 YALE L.J. F. 44, 47 (2015) (“Because *Chevron* is premised on legislative intent, courts should be more willing to examine evidence in *Chevron* analysis Because *Chevron* analysis itself turns on congressional intent, under this approach agencies would merit no deference when that intent is clear in the legislative history.”).

¹⁵¹ *Chevron* treated legislative history as only one factor to be considered under step two, along with the statutory language and policy. 467 U.S. at 859-66. Since legislative history is only one of three desiderata, it clearly does not control the outcome under *Chevron* step two.

¹⁵² See, e.g., *Santiago v. GMAC Mortg. Grp., Inc.*, 417 F.3d 384, 387 n.3 (3d Cir. 2005) (observing that the Supreme Court has not resolved whether legislative history may be considered at *Chevron* step one); *Coke v. Long Island Health Care at Home, Ltd.*, 376 F.3d 118, 127 (2d Cir. 2004) (stating that “the Supreme Court has issued mixed messages as to whether a court may consider legislative history” at *Chevron* step one), *vacated*, 546 U.S. 1147 (2006); *Carpenter Family Invs., LLC v. Comm’r*, 136 T.C. 373, 388 (2011) (noting that “[w]hether legislative history should be considered at step one of the two-step *Chevron* analysis” is still “unresolved”).

¹⁵³ Compare, *Succar v. Ashcroft*, 394 F.3d 8, 31 (1st Cir. 2005) (permitting analysis of legislative history at *Chevron* step one), with *United States v. Geiser*, 527 F.3d 288, 294 (3d Cir. 2008) (prohibiting analysis of legislative history at *Chevron* step one).

¹⁵⁴ See, e.g., Popkin, *supra* note 6, at 709-13 (critiquing “judicial use of presidential legislative history” and arguing that “the President is not a legislator”).

essentialism parallel criticisms of claims that certain powers are inherently executive;¹⁵⁵ that the sharpest critics of broad executive power would raise the same arguments on behalf of broad legislative power is somewhat ironic.

In any event, such claims cannot be squared with the text of the Constitution. As every civics student knows, the Framers rejected the strict separation of powers in favor of a regime of shared powers.¹⁵⁶ The legislative process embodied in Article I, Section 7, Clause 2, represents one of the foremost examples of the system of checks and balances that operationalizes this commitment.

Equally importantly, other constitutional provisions explicitly give the President an active role in the legislative process beyond Article I, Section 7, Clause 2. For example, the Constitution provides that the President “shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.”¹⁵⁷ The first Clause regarding the State of the Union has never been cited by the Supreme Court and has only once been mentioned by a lower court case in an opinion that has since been vacated.¹⁵⁸ The Recommendation Clause clearly accords Presidents a role in the legislative process. Indeed, the use of the word “shall” makes the proposal of legislation obligatory,¹⁵⁹ a conclusion supported by Madison’s notes from the Convention.¹⁶⁰ Furthermore, the Constitution also gives Presidents the power “on extraordinary Occasions” to “convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper.”¹⁶¹ And, of course, the Framers rejected a strict separation of powers in favor of giving Presidents the power to veto legislation.¹⁶²

¹⁵⁵ See, e.g., Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 553-59 (2004) (criticizing the argument that foreign affairs powers are inherently executive).

¹⁵⁶ See, e.g., EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 9 (Randall W. Bland et al. eds., 5th ed. 1984) (describing the abandonment of strict separation of powers in favor of a system of checks and balances); RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 29 (1990) (same).

¹⁵⁷ U.S. CONST. art. II, § 3.

¹⁵⁸ See Alex Hontos, Note, *The Executive Reports, We Decide: The Constitutionality of an Executive Branch Question and Report Period*, 91 MINN. L. REV. 1047, 1059 & n.87 (2007) (discussing the infrequent citation to this clause and citing the later-vacated case).

¹⁵⁹ See J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2081-82 (1989) (describing “the recommendation of measures” as a “duty imposed on the President”).

¹⁶⁰ See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 405 (Max Farrand ed., 1911) (noting a change from the word “may” to the word “shall” in the Recommendation Clause).

¹⁶¹ U.S. CONST. art. II, § 3.

¹⁶² *Id.* art. I, § 7, cl. 2.

Clearly the fact that Article I, Section 1, vests “[a]ll legislative Powers herein granted” to Congress does not mean that legislation is the exclusive province of the House and the Senate.¹⁶³ These explicit acknowledgements of the President’s role in the legislative process explains why some commentators regard the President as the “legislator-in-chief” as well as the commander-in-chief.¹⁶⁴

IV. POLICY ARGUMENTS IN FAVOR OF SIGNING STATEMENTS

Beyond the constitutional arguments, there are policy justifications that support paying special attention to Presidents’ views as to the meanings of statutes. In particular, Presidents’ leadership role in the legislative process, differences in the political constituency that elects Presidents, the executive branch’s distinctive institutional competencies in collecting information and enacting reforms, and the limited nature of enforcement resources support giving the Executive broad authority to decide whether and how a statute should be enforced. Indeed, exercises of discretion not to bring an enforcement action are generally judicially unreviewable.¹⁶⁵

A. *Presidents’ Preeminent Role in the Modern Lawmaking Process*

Giving weight to presidential views about the proper interpretation of statutory provisions draws support from the fact that Presidents have emerged as the primary catalyst of major legislation. In earlier times, Presidents relied on indirect means to influence legislation.¹⁶⁶ That said, early Presidents were quite active in proposing and promoting legislation since the beginning of George Washington’s first term.¹⁶⁷ By the late twentieth century, Presidents had become the driving force behind the legislative process.¹⁶⁸

¹⁶³ *Id.* art. I, § 1.

¹⁶⁴ See generally Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 7 (2002) (arguing that “the President’s constitutional role” is “the Legislator-in-Chief”).

¹⁶⁵ See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (noting that the “presumption is that judicial review is not available” for “[r]efusals to take enforcement steps”).

¹⁶⁶ See FRANK J. GOODNOW, *PRINCIPLES OF CONSTITUTIONAL GOVERNMENT* 121 (William F. Willoughby ed., 1916) (stating that “the failure openly to give to the President constitutional powers by the exercise of which he can influence the passage of legislation . . . has naturally led to the development of somewhat secret and indirect . . . methods”).

¹⁶⁷ See CORWIN, *supra* note 156, at 17 (noting that the first two Presidents “directed the legislative process to a notable extent”).

¹⁶⁸ See ARTHUR MAASS, *CONGRESS AND THE COMMON GOOD* 10 (1983) (stating that “[t]he legislature is not the dominant influence in the legislative process” and that “[t]he President is more influential”); JAMES L. SUNDQUIST, *POLITICS AND POLICY: THE EISENHOWER, KENNEDY, AND JOHNSON YEARS* 489 (1968) (noting that “the major legislative impulses of the 1961-66 period came from a single source—the White House”).

This shift justifies paying attention to Presidents' views on the meaning of legislation. Indeed, the Court has recognized that to the extent the President is one of a bill's primary proponents, the reasons usually given for giving greater weight to the views of a bill's sponsors and floor managers¹⁶⁹ would also support giving greater weight to the President's views.¹⁷⁰

B. *Different Constituencies/Institutional Considerations*

Part of the genius of our Constitution is the decision to design the various institutions of government in a way that reflects different constituencies and different capabilities. The Great Compromise established the House of Representatives to reflect the interests of the large states by determining that in the future its membership would be apportioned by population.¹⁷¹ It was also designed to have "an immediate dependence on, and an intimate sympathy with, the people," by virtue of the direct popular election of its membership to two-year terms.¹⁷² The Senate was designed to represent the interests of the small states, being constituted so that each state would have equal representation.¹⁷³ It was also designed to check the "mischievous effects of a mutable government," which flowed inevitably from "a rapid succession of new members," by having a higher minimum age requirement and by having its members initially selected by State Legislatures for six-year terms, in the hopes of making the body more mature and deliberative.¹⁷⁴

¹⁶⁹ See, e.g., *Lewis v. United States*, 445 U.S. 55, 63 (1980) ("Inasmuch as Senator Long was the sponsor and floor manager of the bill, his statements are entitled to weight."); *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (concluding that "a statement of one of the legislation's sponsors . . . deserves to be accorded substantial weight"); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt"). *But see, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."); *Chandler v. Roudebush*, 425 U.S. 840, 858 n.36 (1976) (declining to give controlling weight to the statements of a sponsor and floor manager when the statement was self-contradictory and inconsistent with the Committee Report).

¹⁷⁰ See *Shapiro v. United States*, 335 U.S. 1, 12 n.13 (1948) (noting that courts are especially apt to defer to an executive interpretation of a statute when "the agency has actively sponsored the particular provisions which it interprets"); *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 549 (1940) (noting that an executive agency's "interpretation gains much persuasiveness from the fact that it was [the agency] which suggested the provisions' enactment to Congress").

¹⁷¹ See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 57, 105-07 (1913) (discussing the interests of large states, the Great Compromise, and proportional membership in the House of Representatives).

¹⁷² THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961).

¹⁷³ THE FEDERALIST NO. 62, at 377 (probably James Madison) (Clinton Rossiter ed., 1961) (discussing this design of the Senate).

¹⁷⁴ *Id.* at 380.

The Presidency, for its part, was designed to reflect national interests.¹⁷⁵ The strong single leader was also necessary to create an Executive that would be more proactive and energetic than the plural Executive established by the Articles of Confederation and that would counterbalance a Congress designed to be more reactive and deliberative.¹⁷⁶ The hope was that the resulting combination would “combin[e] the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form.”¹⁷⁷ Because the President is accountable to a different constituency than either House of Congress, recognizing presidential signing statements as a form of legislative history promises to allow the process of statutory interpretation to gain the benefit of a national perspective.¹⁷⁸

C. Informational Advantages

In addition to representing a different constituency, Presidents enjoy some informational advantages in proposing legislation.¹⁷⁹ The size of the federal bureaucracy and its concomitant ability to employ experts in specific fields may make it better suited to gathering the information needed to support the development of legislation.¹⁸⁰ Presidents may also be better situated to preserve confidentiality.¹⁸¹ Indeed, the Opinions Clause and the State of the Union Clause arguably places Presidents under the obligation to gather and disseminate information relevant to the lawmaking process.¹⁸²

¹⁷⁵ See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58-70 (1995) (discussing why the President is uniquely situated to serve as a representative of the national interest); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2334-35 (2001) (discussing the importance of the President’s “national constituency”).

¹⁷⁶ See THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (drawing the connection between the unitary nature of the Presidency and energy).

¹⁷⁷ THE FEDERALIST NO. 37, at 226 (James Madison) (Clinton Rossiter ed., 1961).

¹⁷⁸ See Sidak, *supra* note 159, at 2090 (asserting that “the President is better able than members of Congress to suppress the desire to appease the parochial interests of any one regional constituency”).

¹⁷⁹ See Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1630-47 (2016) (illustrating the vast amount of information available to the Executive through a case study of a proposed bill). For early statements, see 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 412-13, § 1555 (1833), stating, “From the nature and duties of the executive department, he must possess more extensive sources of information . . . than can belong to Congress” and 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES, pt. 1, app. 344 (1803), stating, “As from the nature of the executive office it possesses more immediately the sources, and means of information than the other departments of government . . .”

¹⁸⁰ See MAASS, *supra* note 168, at 10 (arguing that “the Executive, with its massive professional establishment, is better able to provide [information and expertise] than is the legislature”).

¹⁸¹ See Sidak, *supra* note 159, at 2087 (suggesting that the President might be better suited than Congress to gather sensitive information).

¹⁸² See *id.* at 2086-87 (discussing the “President’s information-gathering responsibilities . . . under the Constitution”).

D. *The Limitations of Plural Bodies in Enacting Major Reforms*

The plural structure of Congress may make it poorly suited to proposing certain types of bold reforms. Groups are always prone to collective action problems that can inhibit their vitality.¹⁸³ While perhaps better at striking compromises that accommodate disparate points of view, legislative bodies are less likely to lead dramatic changes in direction.

The hierarchical nature of the executive branch may make it better suited to coordinate complex legislative proposals and to maintain the discipline to see them through the process.¹⁸⁴ The unitary nature of the executive branch may also give it the accountability and energy needed to push through significant legislative reform.¹⁸⁵

E. *Conservation of Resources*

Finally, accepting presidential signing statements as a form of legislative history can help conserve valuable legislative resources and reinforce the democratic process. Suppose that a statute was susceptible to two interpretations—one of which would render the statute constitutional, while the other might render the statute unconstitutional. It has long been accepted that courts faced with such a situation should adopt the interpretation that avoids constitutional doubts.¹⁸⁶ This rule minimizes the need for courts to render constitutional opinions that would only serve to heighten tensions among the various branches of government. Many presidential signing statements arise in the same posture and adopt the same approach. As noted earlier, when faced with a legislative proposal that might or might not be construed in a constitutional manner, Presidents often issue signing statements noting the potential constitutional problem and stating their intention to construe the statute to avoid it.¹⁸⁷

A similar situation arises at a somewhat lower level when Presidents are confronted with ambiguous bill language—one interpretation of which would be acceptable and the other interpretation of which would prompt a veto. It would seem to me that permitting the President to clarify the ambiguity

¹⁸³ For the classic analysis, see generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1982).

¹⁸⁴ See MAASS, *supra* note 168, at 10 (discussing reasons for the Executive to have leadership over the legislative process).

¹⁸⁵ See *supra* notes 176–177 and accompanying text.

¹⁸⁶ See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))).

¹⁸⁷ See *supra* Section II.B.1.

would be better both for private parties affected by the legislation and for Congress. If unable to clarify the ambiguity, Presidents may have no choice but to send the legislation back to Congress despite the fact that both Houses may well concur with the President's interpretation. To the extent that Congress disagrees with the President's interpretation, presidential legislative history reinforces the democratic process by providing a clearer and more prompt platform from which Congress can offer a clarifying amendment.¹⁸⁸

CONCLUSION

Together these arguments suggest that the use of presidential signing statements as legislative history is both inherent in the system of checks and balances created by our Constitution and may well enhance democracy by promoting better interaction among the branches. It also reflects the reality of the key role that Presidents play in advancing major legislation, the different institutional and information gathering capabilities of the executive branch, and the need to conserve resources. Those who disagree must come to grips with the fact that *INS v. Chadha* and *Clinton v. City of New York* both treat Congress and the President as indispensable actors in the legislative process.

Embracing presidential signing statements as having the same status as congressionally created legislative history does not require endorsement of the use of legislative history in general. The equal dignity principle simply recognizes the President's coequal role in the legislative process and in constitutional interpretation. A categorical decision to ignore all forms of legislative history regardless of source would be as consonant with the equal dignity principle as given all forms the same weight.

¹⁸⁸ Cf. *Chisom v. Roemer*, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting) (arguing that the Court should give words their ordinary meaning to provide "Congress a sure means by which it may work the people's will"); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring) (noting that "it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable"); *United States v. Taylor*, 487 U.S. 326, 345-46 (1988) (Scalia, J., concurring) (echoing these sentiments).