TO PRESERVE, PROTECT, SUPPORT OR DEFEND: THE ROLE OF THE BRANCHES IN DETERMINING CONSTITUTIONALITY

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I. INTRODUCTION

> No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it, is included.[1]
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> James Madison
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> This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which it enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.[2]
>
> Chief Justice John Marshall

These words, spoken by two great American patriots, describe the difficulty of a federalist government and summarize a problem that has plagued federal courts from the beginning of the nation: what can the federal government do and how can it do it?[3] In defending the so-called "necessary and proper clause," President Madison notes that Congressional power is not strictly limited to the words directly enunciated in the Constitution, but instead that Congress must have implied power to implement and exercise the enumerated powers.[4] That being said, Chief Justice Marshall's words are profound and prophetic – we are a government of limited power, though the scope of that power is often undefined.[5] Over time the Supreme Court has become the final interpreter of the scope of those powers under the constraints of the Constitution.[6] Each branch of the government, however, should partake in constitutional analysis. Occasionally, there is evidence that this

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[1] THE FEDERALIST NO. 44, at 289 (James Madison) (Garry Wills ed., 1982).

[2] McCulloch v. Maryland, 17 U.S. 316, 405 (1819).

[3] *See generally* Gibbons v. Ogden, 22 U.S. 1 (1824) (discussing the general principles of federalism).

[4] THE FEDERALIST NO. 44, *supra* note 1.

[5] *McCulloch*, 17 U.S. at 405.

[6] *See, e.g.*, Eric J. Segall, *Why I Still Teach Marbury (and so should you): A Response to Professor Levinson*, 6 U. PA. J. CONST. L. 573, 578-79 (2004).

constitutional analysis occurs, through legislative history, presidential veto statements, or presidential signing statements, but this evidence is neither consistent nor transparent to the citizenry of the nation.[7] More often than not, there is a lack of evidence that it occurs at all.

In 1996, for example, Congress passed the Defense of Marriage Act ("DOMA").[8] DOMA § 2 declared, that no state would be required to recognize same sex marriages simply because another state recognized these marriages, and § 3 defined the terms "marriage" and "spouse" for all federal law and regulation purposes.[9] DOMA was referred to the Committee on the Judiciary in the House of Representatives, which identified the two primary purposes of DOMA as "defend[ing] the institution of traditional heterosexual marriage" and "protect[ing] the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions."[10] The Committee did note, however, that the legislation set forth four government interests: (1) defending and nurturing traditional marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and self-governance; and (4) preserving scarce government resources.[11] In analyzing the bill, the Committee noted that it was a direct response to the impending action of Hawaiian courts towards recognizing same-sex marriage.[12] With regard to the purposes, the Committee affirmed that the Full Faith and Credit clause of the Constitution could result in legal issues amongst the states that had differing definitions of marriage.[13] While the Committee reports point to the potential problems that the legislation was attempting to avoid, nowhere in the report does it address the authority for Congress to pass this legislation.[14] Article I, Section 8 of the Constitution does not include any power for Congress to create this type of legislation or definition unless it falls under the Necessary and Proper Clause or the

[7] *See, e.g.*, Gibbons v. Ogden, 22 U.S. 1, 1 (1824) (discussing the enactment of the Commerce Clause); The Presidential Signing Statements Act, S. 1747, 110th Cong. §§ 2(4), 2(6) (2007) (explaining reasons why courts had sporadically used presidential signing statements as sources for interpretation); Veto of the Food, Conservation, and Energy Act, H.R. 2419, 110th Cong. (2008) (enacted) (statement of President George W. Bush discussing the "serious constitutional concerns" of the bill). While this statement did not outline those concerns, it does indicate that some constitutional evaluation was done.

[8] United States. v. Windsor, 133 S. Ct. 2675, 2682 (2013).

[9] *Id.* at 2683; Defense of Marriage Act, H.R. 3396, 104th Cong. § 3 (1996) (declaring that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

[10] Defense of Marriage Act, H.R. REP. NO. 104-664, at 2 (1996).

[11] *Id.* at 12.

[12] *Id.*

[13] *Id.* at 8.

[14] *Id.*

Commerce Clause.[15] While the Supreme Court did not find that Congress had exceeded its authority, it was the Court that addressed the scope of authority, without reference to any Congressional action or statement.[16] It is unclear from either the committee reports or the Supreme Court opinion whether Congress performed any analysis related to the scope of its power.

It is a rare event that legislation is passed by Congress outside the scope of its authority, and then signed by the President.[17] Even so, from the founding of our nation through the present, at least 172 pieces of legislation that were passed by Congress and signed by the President were later declared unconstitutional by the Supreme Court of the United States.[18] In general, the legislation has been deemed unconstitutional either because the subject matter was outside the enumerated powers of Congress or because the legislation was properly passed under some constitutional authority but in violation of another provision of the Constitution.[19]

This article briefly explores the legislative authority of Congress and the President, both the nature and the scope of that authority. The article then looks at current constitutional analysis: where, and how, it may occur in each branch of the government. The article then reviews legislative attempts to influence that process. Specifically, the article looks at the Line-Item Veto Act, the Presidential Signing Statements Act, and the Enumerated Powers Act. Finally, the paper argues that it is the responsibility of each branch to cooperate to clarify the nature of the constitutional authority for federal actions, and to develop a more thoughtful and transparent analysis of legislation. This would allow the judicial branch to interpret the scope of Congress' powers, rather than waste time evaluating the legislation to determine whether it has a strong foundation in the constitution prior to addressing the scope issue when faced with challenges to legislation.

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[15] U.S. CONST., art. I, § 8. When the Supreme Court heard this case, it did note that Congress had passed legitimate laws relating to marriage as it related to federal programs. *See, e.g. Windsor*, 133 S. Ct. at 2690.

[16] *Windsor*, 133 S. Ct. at 2691-92, 2695.

[17] LIBRARY OF CONGRESS: ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES, *available at* https://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-10.pdf. According to the Supreme Court database, 14 acts not listed were declared unconstitutional between 2009-2016. *See* Spaeth et al., Supreme Court Database 1 (2016), *available at* http://www.supremecourtdatabase.org. A review of Supreme Court slip opinions after *Johnson v. United States*, 135 S.Ct. 2551 (2015), shows that no more acts of Congress have been declared unconstitutional through *Voisine v. United States*, 136 S.Ct. 2272 (2016).

[18] Spaeth, *supra* note 17.

[19] *See, e.g.*, United States. v. Windsor, 133 S. Ct. 2675, 2682 (2013).

II. CONSTITUTIONAL POWERS IN THE LEGISLATIVE PROCESS

A. The Article I, Section 8 Powers of Congress

Article I, Section 8 of the Constitution grants powers to Congress, some as seemingly narrow as the power to "establish post offices and post roads" and others as potentially broad as the power to "regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."[20] These enumerated powers limit Congress' ability to act, reserving other actions to state or local governments.[21] The exact breadth of those Congressional powers, however, is left to interpretation.[22] History has left the breadth of those enumerated powers to the discretion of the Supreme Court of the United States, through its power of judicial review.[23]

In addition to the struggle over the scope and limits of the enumerated powers, Congress, the executive branch, and the courts have had to evaluate what sort of power is given to Congress under the Necessary and Proper clause.[24] The final clause in Article I, Section 8 gives Congress the power "[t]o make all laws which shall be necessary and proper for carrying into [e]xecution the foregoing [p]owers, and all other [p]owers vested by this Constitution in the [g]overnment of the United States, or in any [d]epartment or [o]fficer thereof."[25] This Necessary and Proper clause has been the subject of much discussion in legal journals over the years.[26]

In the 44th Federalist paper, James Madison described the public outcry against the Necessary and Proper clause as an outcry of form over substance.[27] Madison argued that the substance of the clause, to delegate

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[20] U.S. CONST. art. I, § 8, cl. 3, 7 (regarding the postal offices and commerce).

[21] *See* U.S. CONST. amend. X.

[22] *See, e.g.*, *Gibbons*, 22 U.S. at 34 (discussing the breadth of national power compared to state power); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36 (1937) (declaring that activities with a close relationship to interstate commerce may be regulated by Congress); Wickard v. Filburn, 317 U.S. 111, 124 (1942) (declaring that intrastate activities that impact interstate commerce may be regulated); Heart of Atlanta Motel v. United States, 379 U.S. 241, 355 (1964) (declaring that the Civil Rights Act of 1964 was a valid exercise of Congressional commerce power despite no evidence that Congress even contemplated that as the source of authority for the bill).

[23] *See infra* Part II.C.

[24] U.S. CONST. art. I, § 8, cl. 18. *See generally* Celestine Richards McConville, *The (Not so Dire) Future of the Necessary and Proper Power after National Federation of Independent Business v. Sebelius*, 24 WM. & MARY BILL RTS. J. 369 (2015) (discussing recent Necessary and Proper analysis).

[25] U.S. CONST. art. I, § 8, cl. 18.

[26] An online search through the LexisNexis found almost 1000 law review articles containing the terms "Necessary and Proper" and "constitutional authority."

[27] THE FEDERALIST NO. 44, *supra* note 1.

some unspecified but needed powers to Congress, was essential.[28] He then reasoned that any objection to the clause must be about the manner in which the powers were delegated.[29] Madison posited four possible forms of interpretation: first, to prohibit any power not expressly delegated (copying the Articles of Confederation and essentially strangling Congress); second, to enumerate a complete list of powers which might be considered necessary and proper; third, to clarify "necessary and proper" by stating exactly what is *neither* necessary *nor* proper; or fourth, to remain silent on the issue and leave interpretation of Congressional power to future construction and inference.[30] The basics of Madison's arguments were that the Necessary and Proper clause was nothing more than an explicit grant of Congress's legislative power under the Constitution.[31]

Even so, just two years after Madison left the presidency, the Supreme Court declared that Congress has power beyond the strict reading of Article I, Section 8.[32] In *McCullough v. Maryland*, the Court upheld Congressional power to create a national bank based on its power under the Necessary and Proper Clause to "lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies."[33] In his discussion, Chief Justice John Marshall remarked, "[a]mong the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described."[34] Since that landmark decision, the scope of the enumerated powers has been addressed on a case-by-case, or power-by-power, basis. As such, analyzing the extent of the powers is something that has been, and should be, done by all three branches of government.

B. The Article I, Section 7 Powers of the President

The powers of the President and the Executive Branch are primarily outlined in Article II of the Constitution.[35] The veto power of the President, however, does not exist in Article II of the Constitution, but

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28 THE FEDERALIST NO. 44, *supra* note 1.
29 THE FEDERALIST NO. 44, *supra* note 1.
30 THE FEDERALIST NO. 44, *supra* note 1.
31 THE FEDERALIST NO. 44, *supra* note 1.
32 *See McCulloch*, 17 U.S. at 405-07.
33 *Id.* at 407, 411-12.
34 *Id.* at 406.
35 *See* U.S. CONST. art. II.

instead exists in Article I, Section 7, under the powers of Congress.[36] Article I, Section 7 states:

> 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. . ."[37]

In the Supreme Court's well-known "Presentment Clause" case, *Immigration and Naturalization Serv. v. Chadha*, Chief Justice Burger wrote that the founders of the nation believed that presentment to the President was "so imperative that [they] took special pains to assure that [it] could not be circumvented."[38]

A plain reading of this provision would indicate that, if the President does not approve the entire piece of legislation, he or she must veto it and send it back to Congress to address the problematic passages within the legislation.[39] If, for example, Congress passes a spending bill that includes provisions for a "bridge to nowhere," and the President does not wish to sign the bill, the President should veto the entire bill and send it back to Congress noting the disapproval of that one provision.[40] Congress then must decide to amend the bill, draft a new bill, or override the veto with the required two-thirds of the majority.[41] Supporting this reading, President Washington specifically stated that the Presentment Clause of Article I, Section 7, required him to either "approve all the parts

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[36] U.S. CONST. art. I, §7, cl. 2.

[37] U.S. CONST. art. I, §7, cl. 2.

[38] INS v. Chada, 462 U.S. 919, 946-47 (1983).

[39] Clinton v. City of New York, 524 U.S. 417, 440 n.30 (1988) (citing 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940)).

[40] *See* Ronald D. Utt, *The Bridge to Nowhere: A National Embarrassment* (2005), available at http://www.heritage.org/research/reports/2005/10/the-bridge-to-nowhere-a-national-embarrassment. The genesis of the discussion comes from a section of a budget bill in the 109th Congress. *See, e.g.*, Transportation, Treasure, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act of 2006, Pub. L. No. 109-15, § 186 (2005); *Clinton*, 524 U.S. at 440 n.30 (citing 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940)).

[41] As of August 18, 2016, the most recent veto override was under President George W. Bush. President Bush vetoed H.R. 6331, entitled, "Medicare Improvements for Patients and Providers Act of 2008." The bill was introduced in Congress on June 20, 2008, presented to the President on July 10, 2008 after passing both the House and Senate. President Bush vetoed it on July 15 and both houses of Congress voted to override the veto that same day. *See, e.g.*, *Actions Overview of H.R.6331*, CONGRESS, *available at* https://www.congress.gov/bill/110th-congress/house-bill/6331/actions. In the history of the United States, only 110 of 2570 vetoes (4.28%) have been overridden. *See Summary of Bills Vetoed*, SENATE, *available at* http://www.senate.gov/reference/Legislation/Vetoes/vetoCounts.htm.

of a Bill, or reject it *in total*."[42] However, if the President signs the legislation into law and there is a challenge to that law, then the judicial branch enters the discussion to assess the constitutionality.

C. The Article III, Powers of the Judiciary

Article III of the Constitution established the Judicial Branch and outlined its power to include "all [c]ases, in law and equity, arising under this Constitution, the [l]aws of the United States, and [t]reaties made, or which shall be made, under their [a]uthority"[43] The Constitution does not include any discussion of the judiciary's role in interpreting federal law. That came from an early, and very famous, Supreme Court opinion.[44]

In the politically charged *Marbury v. Madison*, Chief Justice John Marshall was faced with a terrific dilemma.[45] President Adams had appointed Marbury to a federal judgeship.[46] Marbury's commission was not delivered prior to President Adams leaving office and President Jefferson taking office.[47] Jefferson did not want the commission delivered and, in fact, made his own judicial appointments.[48] Marbury asked the Court for a writ of mandamus; thus, forcing Jefferson's Secretary of State, James Madison, to deliver the commission.[49] If the Court granted the writ and Madison ignored it, then the Court had no way to enforce the writ, thus, rendering the Court less powerful than the other branches of government.[50] At the same time, the Court wanted it known that Madison was in violation of Marbury's rights, quite possibly because the members of the Court were all appointed by Adam's political party.[51]

In *Marbury*, Marshall was very clear that Marbury was legitimately appointed and should receive his commission as a judge.[52] Once he established that Marbury had been wronged when denied his commission,

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[42] *Clinton*, 524 U.S. at 440 n.30 (citing 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940)).

[43] U.S. CONST. art. III, § 2, cl. 2.

[44] Marbury v. Madison, 5 U.S. 137 (1803).

[45] *See* Symposium, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553, 573 (2003).

[46] *See* Symposium, *Marbury v. Madison and the Revolution of 1800: John Marshall, the Mandamus Case, and the Judiciary Crisis, 1801-1803*, 72 GEO. WASH. L. REV. 289, 291-344 (2003).

[47] *Id.* at 292.

[48] *Id.*

[49] *Id.* at 289.

[50] *See* Mark A. Graber, *Legal Scholarship Symposium: The Scholarship of Sanford Levinson: Establishing Judicial Review: Marbury and the Judicial Act of 1789*, 38 TULSA L. REV. 609, 639 (2003).

[51] *Id.* In fact, Marshall was Adams Secretary of State when the appointments were made.

[52] *Marbury*, 5 U.S. at 167-68 (1803).

Marshall analyzed the constitutionality of the procedural law, passed by Congress and signed by the President, which gave original jurisdiction to the Supreme Court to issue a writ of mandamus.[53] Marbury had asked the Court to utilize this jurisdiction to issue the writ and force Secretary of State Madison to deliver the commission. Justice Marshall determined that Congress did not have authority to pass the law, because it attempted to alter the constitutional jurisdiction of the Supreme Court, a power not granted to Congress in the Constitution.[54] This original proclamation of judicial review may be the foundation for the theory that the Legislative Branch makes the laws, the executive branch enforces the laws, and *the judicial branch interprets the laws*.

III. CONSTITUTIONAL ANALYSIS IN THE THREE BRANCHES

The President, members of Congress, and Justices of the Supreme Court all take oaths to support and uphold the Constitution.[55] That being the case, the members of each branch should perform a constitutional analysis before taking any action to ensure that they are working within the limits of their authority. Members of Congress should not introduce legislation without first analyzing the constitutionality of the legislation. The President should not sign legislation without some constitutional analysis, either. The Supreme Court then has (under our current system) the final word on whether the constitutional interpretation by the President and Congress was correct.[56] Without any input from the other branches, the Supreme Court must analyze which provision, if any, authorizes the federal action, and then evaluate the parameters of that constitutional provision to determine if the action falls within the scope of that power. If there are no challenges to federal action, the Supreme Court never performs that analysis. Under our current system, analysis by the legislative and executive branches is sporadic at best.

A. Congressional Analysis

At least occasionally, it is clear that Congress performs a constitutional analysis as bills are debated and discussed. For example, in *United States v. Morrison*, the Supreme Court pointed to legislative

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[53] *Id.* at 174-76.

[54] *Id.* at 173-76.

[55] *See* U.S. CONST. art. II, § 1, cl. 8; U.S. CONST. art. VI, cl. 3; 28 U.S.C. § 453 (2016). The words of the oaths vary, with the President's oath being directly scripted in the constitution and the others being scripted by statute. The essence of all the oaths is essentially a promise to support the principles of the constitution and a faithful execution of the duties of the office as set forth in the constitution, and perhaps even the constitutionally passed statutes.

[56] *Marbury*, 5 U.S. at 167-68 (1803).

history to demonstrate that Congress was relying on its Commerce Clause power in passing the Violence Against Women Act.[57] In *Sabri v. United States*, the Court reviewed a statute passed by Congress making it a crime to bribe officials of entities that receive a certain level of federal funds.[58] Justice Souter again used legislative history to determine that Congress intended to enact the law under its spending power in Article I, Section 8.[59] In declaring the Religious Freedom Restoration Act unconstitutional as applied to state and local governments, the Court referred to legislative history to determine the basis for congressional authority – the Fourteenth Amendment.[60] Even when the constitutional analysis is performed and legislative history gives some insight in to the powers contemplated by Congress, the legislative history only gives the opinion of one or a few members of Congress and is not the official position of the Congress.[61] Still, it may provide some evidence of a constitutional analysis.

Of course once Congress passes legislation, with or without any constitutional analysis, the legislation moves to the executive branch, where the president then takes action.[62]

B. Executive Analysis

Upon receiving legislation from Congress, the President must address the bill.[63] In theory, the President receives legislation from Congress, analyzes it for constitutionality, and signs or vetoes the bill

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[57] *Morrison*, 529 U.S. at 607 (2000).

[58] Sabri v. United States, 541 U.S. 600, 602 (2004).

[59] *Id.* at 606.

[60] City of Boerne v. Flores, 521 U.S. 507, 516 (1997) ("Congress relied on its Fourteenth Amendment enforcement power in enacting the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the States."). *See* Religious Freedom Restoration Act of 1993, S. Rep. No. 103-11, at 13-14 (1993); H. R. Rep. No. 103-88, at 9 (1993).

[61] *See, e.g.*, Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2805 (2008); Exxon Mobil Corp. v. Allapath Services, 545 U.S. 546, 568-69 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.").

[62] U.S. CONST. art. I, § 7, cl. 2.

[63] *Id.*

based on that analysis.[64] Commonly, there is no indication that the President has conducted any constitutional analysis.[65] In some circumstances, though, evidence of this analysis appears when a President vetoes legislation and explains constitutional concerns.[66] Even when a President demonstrates some analysis, the President is not required to have a constitutional reason or purpose for a veto and may veto bills for purely political reasons.[67] Presidents have used "presidential nullification" to ignore, or to direct that the Department of Justice not enforce, provisions that they deem unconstitutional, though there may not be evidence of constitutional concerns in these situations.[68] Presidents have issued signing statements to send a message to Congress that they are willing to sign the bill, but are not going to enforce certain provisions that, in their analyses, are unconstitutional.[69] While this may

[64] *See*, John T. Pierpont, Jr., *Checking Executive Disregard*, 84 ST. JOHN'S L. REV. 329, 331-32 (2010).

[65] *See* John C. Eastman, *Judicial Review Of Unenumerated Rights: Does Marbury's Holding Apply In A Post-Warren Court World?*, 28 HARV. J.L. & PUB. POL'Y 713, 735 (2005). *Contra*, Statement by President Barack Obama, Office of the Press Secretary (Mar. 11, 2009) (stating that H.R. 1105 is "a legitimate constitutional function, and one that promotes the value of transparency, to indicate when a bill that is presented for Presidential signature includes provisions that are subject to well-founded constitutional objections."), *available at* http://www.whitehouse.gov/the_press_office/

Statement-from-the-President-on-the-signing-of-HR-1105/ [hereinafter *Statement by President Obama*]. For more information on signing statements and their description of the constitutionality of bills, *see generally*, Jeremy Seeley, *How the Signing Statement Thought it Killed the Veto; How the Veto May Have Killed the Signing Statement*, 23 BYU J. PUB. L. 167 (2008); Ronald A. Cass & Peter L. Strauss, *Symposium: The Last Word? The Constitutional Implications of Presidential Signing Statements: The President Signing Statements Controversy*, 16 WM. & MARY BILL OF RTS. J. 11, 12 (2007). *See also, e.g.*, *Note: Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597 (2006); Todd Garvey, CONG. RESEARCH SERV., Presidential Signing Statements: Constitutional and Institutional Implications (2012).

[66] *See* Michael T. Crabb, *"The Executive Branch Shall Construe": The Canon of Constitutional Avoidance and the Presidential Signing Statement*, 56 KAN. L. REV. 711, 713 (2008) (discussing the Article I, Section 7 veto requirements).

[67] Between the founding of the nation and August 18, 2016, Presidents have vetoed a total of 2,571 bills. Of those, 1,066 were pocket vetoes (where the President takes no action on the bill but cannot return it to Congress within the required 10 days because Congress is not in session). Therefore, 1,505 bills have been vetoed by Presidents and sent back to Congress. *See History, Art, and Archives, U.S. House of Representatives*, PRESIDENTIAL VETOES, http://history.house.gov/Institution/Presidential-Vetoes/Presidential-Vetoes/. Of those 1,505, it is not known how many were vetoed based on constitutional concerns and how many were based on purely political reasons. Some pundits argue that several recent vetoes were politically motivated. *See, e.g.*, Anthea Mitchell, *10 Most Important Presidential Vetoes in Recent History*, THE CHEAT SHEET (Mar. 21, 2015), http://www.cheatsheet.com/politics/10-presidential-vetoes-that-shaped-recent-american-history.html/?a=viewall.

[68] *See* Pierpont, *supra* note 64, at 329.

[69] *See, e.g.*, Seeley, *supra* note 65.

be a longstanding practice, presidents have been required to provide Congress with a report of laws that the executive branch will not enforce due to constitutional questions or concerns.[70] There is some disagreement in the literature as to the date of the first official signing statement, but there is some agreement that President Monroe issued it.[71] Even though signing statements have been used for a variety of reasons during the last 200 years, they have become somewhat controversial and often discussed in law review articles.[72]

Specifically, the presidential signing statement is an executive communication to Congress about legislation.[73] Signing statements may serve many functions, including expressing gratitude to Congress for successfully passing important legislation, criticizing Congress for not going far enough, offering interpretations of the legislation, and explaining how the executive branch will implement the legislation.[74] Some signing statements have been used to express concerns about constitutionality and to acknowledge that the President will not enforce particular provisions.[75] This allows the President to avoid a veto while expressing concern about constitutionality.[76]

These statements often give deference to Congress and do not affirmatively declare that a bill is unconstitutional, but instead indicate that the President will choose to interpret the bill and enforce the law so that it does not infringe upon any presidential constitutional power.[77] In March 2009, President Barack Obama wrote, "it is a legitimate constitutional function, and one that promotes the value of transparency, to indicate when a bill that is presented for Presidential signature includes

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[70] 28 U.S.C. § 530D (2016).

[71] *See* Crabb, *supra* note 66, at 713 (stating that the first signing statements were in 1819 and 1822); Dolly Kefgen, *Signing Statements, History and Issues*, 17 THE OAKLAND J. 93, 94 (2009) (declaring 1822 as the official date of the first signing statement).

[72] *See* Crabb, *supra* note 66, at 717.

[73] Crabb, *supra* note 66.

[74] *See* Curtis A. Bradley and Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENTARY 307, 308 (2006) (discussing the uses of signing statements by Presidents); Kristy L. Carroll, *Whose Statute Is It Anyway?: Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes*, 46 CATH. U.L. REV. 475, 475-76, 489 (1997) (arguing that the historical use of signing statements was highly symbolic and congratulatory and stating that Presidents may use signing statements to indicate constitutional defects).

[75] *See* Carroll, *supra* note 74, at 489 (stating that Presidents may use signing statements to indicate constitutional defects).

[76] *See* Carroll, *supra* note 74, at 489.

[77] *See Statement by President Obama*, *supra* note 65 (President Obama declaring that "it is a legitimate constitutional function, and one that promotes the value of transparency, to indicate when a bill that is presented for Presidential signature includes provisions that are subject to well-founded constitutional objections.").

provisions that are subject to well-founded constitutional objections."[78] Thus, presidential signing statements do indicate, at times, that some constitutional analysis is occurring.

Scholars opposed to signing statements containing any indication that parts of the law will not be enforced argue that the selective enforcement of a signed law is a constitutional violation of the Presentment Clause and gives the President excessive legislative powers.[79] Since as early as 1979, Congress has required the executive branch to inform it whenever the executive branch implements a formal or informal policy to not enforce a law.[80] Federal law states that the Attorney General of the United States shall inform Congress if any officer of the Department of Justice establishes a policy to not enforce, not apply, or not administer any provision of federal statute, rule, or regulation.[81] Between May 8, 1979 and December 4, 2014, 114 of these so-called 530D letters have been sent to Congress from the executive branch.[82] Included in this list is the February 23, 2011 letter from Attorney General Eric Holder to Speaker of the House John Boehner informing the House that the United States government would refrain from defending the constitutionality of DOMA in the *Windsor* case.[83] In that letter Attorney General Holder states that the executive branch determined that DOMA violated the Fifth Amendment and so the branch would not support or defend it in court.[84]

Clearly, the executive constitutional analysis by courts in their interpretation of the constitutionality of a law is an interesting and tricky subject, and one of much debate.

C. Judicial Analysis

When the Supreme Court announced the policy or theory of judicial review in *Marbury*, the Court relied heavily on the direct text of the Constitution.[85] Through the present era of the Court, Justices look to the

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[78] *Id.*

[79] *See, e.g.*, Carroll, *supra* note 74, at 478-79.

[80] Letters Submitted to Congress Pursuant to 28 U.S.C. §503D, U.S. DEPT. OF JUSTICE, http://www.justice.gov/oip/letters-submitted-congress-pursuant-28-usc-530d [hereinafter *Letters Submitted to Congress*].

[81] 28 U.S.C. § 530D (2002).

[82] *Letters Submitted to Congress*, *supra* note 80.

[83] Letter from Eric Holder, U.S. Attorney General, to The Honorable John Boehner, Speaker of the U.S. House of Representatives, (Feb. 23, 2011), *available at* http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/02-23-2011.pdf.

[84] *Id.*

[85] *Marbury*, 5 U.S. at 174-75.

text as a starting point to determine constitutionality.[86] For example, in 2003, the Court decided *Eldred v. Ashcroft*.[87] In *Eldred*, Congress extended the length of copyright protection under the intellectual property power in Article I, Section 8, Clause 8.[88] A number of businesses that routinely used material that had fallen out of copyright protection and fallen in to the public domain challenged the increase as outside the power of Congress.[89] The plaintiff's argument was that the extension, and the history of continuing the extension, created unlimited copyright protection, where Article I grants Congress the power to protect intellectual property "for limited Times."[90] The Court reviewed the text of the Constitution, particularly the term "for limited Times," and determined that the extension still had an end; thus making the term limited and within the power granted in Article I.[91]

It is perhaps more common for the Court to have to look beyond the text of the Constitution to the breadth and interpretation of that text; in particular, the Court repeatedly has had to mark boundaries on constitutional powers. One prevalent example throughout history is the debate on the scope of the Commerce Clause.[92] For approximately two hundred years, the Supreme Court consistently expanded the scope of Congress' power under the Commerce Clause.[93] In 1824, the Supreme Court heard its first major Commerce Clause case.[94] In *Gibbons v. Ogden*, the Court faced a conflict between a federal agency giving exclusive rights to navigate the waters between New York and New Jersey and the same rights being given to someone by the state of New York.[95] Once the Court resolved that the navigation between the two state boundaries would be commerce among the states, the Court held that the federal power to regulate commerce among the states preempts the state ability to also do so.[96]

In what may be seen as the ultimate expansion of the Commerce Clause powers, during World War II, the Supreme Court held that a farmer could be fined for consuming wheat grown on his own farm because the sum total of the wheat consumed and the wheat sold by the

86 *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 199 (2003).
87 *Id.* at 186.
88 *Id.* at 192-93.
89 *Id.* at 193.
90 *Id.* at 198.
91 *Id.* at 199-207.
92 U.S. CONST. art. I, § 8, cl. 3.
93 U.S. CONST. amend. X.
94 *Gibbons*, 22 U.S. at 1.
95 *Id.* at 1-3.
96 *Id.* at 221.

farmer exceeded federal regulations limiting the production of wheat.[97] Arguments that the wheat consumption was purely local in nature and not interstate commerce failed; as the Court stated:

> The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce . . . .[98]

Following *Wickard*, it appeared that Congress had expansive power under the Commerce Clause so long as a hypothetical impact on interstate commerce could be found.[99] It was not until 1995 that the Supreme Court surprised Congress (and legal scholars) when it found that the Gun Free School Zone Act ("GFSZA") exceeded that power.[100] Given the Court's history of expanding the power, Congress could not have known, or guessed for that matter, that the Supreme Court would not find the GFSZA within the Commerce power. Within the next five years, the Court used similar reasoning to hold portions of the Violence Against Women Act unconstitutional.[101]

However, in 2005, the Court considered whether the Controlled Substances Act ("CSA") exceeded Congress's power under the Commerce Clause as applied to the intrastate use and cultivation of marijuana.[102] In *Gonzales v. Raich*, the Court noted that the "similarities between this case and *Wickard* are striking."[103] The Court went on to find that there was an established illegal market for the drugs, and that the purpose of the CSA was to regulate that market by manipulating supply and demand.[104] As such, Congress was regulating commerce, albeit illegal commerce, in passing the CSA; therefore, the Act fell within the powers of Congress.[105] In the dissent, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Thomas, noted that the role of the Court is to adequately define the powers of Congress to protect the ability of the states to govern in the traditional spheres of health and welfare.[106] Based

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97 *Wickard*, 317 U.S. at 130-31.

98 *Id.* at 124 (citing United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).

99 *See Heart of Atlanta Motel*, 379 U.S. at 261-71 (holding that the Civil Rights Act of 1964 was a valid exercise of the Commerce Power, without any indication that the Congress relied on the Commerce Power when drafting, discussing and passing the act).

100 *Lopez*, 514 U.S. at 551.

101 *Morrison*, 529 U.S. at 627.

102 *Raich*, 545 U.S. at 5.

103 *Id.* at 18.

104 *Id.*

105 *Id.* at 26.

106 *Id.* at 42-43 (O'Connor, J., dissenting).

on her reading of precedent, Justice O'Connor argued that the activity in the case, was beyond the reach of federal regulation.[107] However, Justice O'Connor's analysis did not prevail and the outer limit of the Commerce Clause power remains in a state of flux.[108]

In recent cases, the Supreme Court has indicated that it will give great deference to an act of Congress and presume constitutionality absent clear evidence of a constitutional violation. For example, in *McConnell v. Federal Election Commission*, Justices O'Connor and Stevens reaffirmed that the Court has an obligation to avoid addressing questions of constitutionality when possible.[109] In quoting earlier cases the Justices stated, "[w]hen the validity of an act of the Congress is drawn in question, and . . . 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."[110] This concept of constitutional avoidance further demands that the Court not address a constitutional issue unless it is necessary. Chief Justice Roberts, dissenting in the *Boumediene v. Bush*, noted, "[o]ur precedents have long counseled us to avoid deciding . . . hypothetical questions of constitutional law. . . . This is a 'fundamental rule of judicial restraint.'"[111] A lack of analysis by the President and the Congress may lead to a necessary interpretation or analysis of constitutional issues that could otherwise be avoided. This, in addition to the unfounded deference, creates unnecessary work and a risk of constitutional absenteeism.

The principle of constitutional avoidance is based on the assumption that the members of Congress are constitutionally aware and are upholding their oath.[112] However, Professor Eastman, director of The Claremont Institute Center for Constitutional Jurisprudence, argues that Congress is ignoring the issues with constitutional authority because that authority belongs to the courts.[113] However, according to Professor Eastman, the courts also are ignoring the issue to some extent, through deference to the Congress. As such, neither the courts nor Congress is really protecting or defending the constitution.[114] Recently, in *Boumediene*, the Court supported this supposition by stating, "[t]he usual

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107 *Id.* at 51 (O'Connor, J., dissenting).

108 *Gonzales*, 545 U.S. at 42 (O'Connor, J., dissenting).

109 McConnell v. Fed. Election Commn., 540 U.S. 93, 180 (2003), overruled by Citizens United v. Fed. Election Commn., 558 U.S. 310 (2010).

110 *Id.* (quoting Crowell v. Benson, 285 U.S. 22, 62, (1932)); *see also* Boos v. Barry, 485 U.S. 312, 331, (1988); New York v. Ferber, 458 U.S. 747, 769 (1982).

111 Boumediene v. Bush, 128 S. Ct. 2229, 2281 (2008) (Roberts, C.J., dissenting).

112 Eastman, *supra* note 65.

113 Eastman, *supra* note 65, at 736.

114 Eastman, *supra* note 65, at 736.

presumption is that Members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one; and the Judiciary, in light of that determination, proceeds to its own independent judgment on the constitutional question when required to do so in a proper case."[115] Justice Scalia, in dissent noted, "We have frequently stated that we owe great deference to Congress's view that a law it has passed is constitutional."[116]

The problem created by this deference is that the Court essentially gives Congress permission to not perform any constitutional analysis. There are at least two potential solutions to this problem. First, the Supreme Court could apply a less deferential standard to legislation passed by Congress and signed by the President. This option still relieves the Congress and the President from their duties and oaths. Second, and preferably, Congress could more clearly enunciate its constitutional analysis and the President could then either concur or disagree with that analysis. To achieve this result, either the Court could attempt to force Congress to apply constitutional analysis, setting up a battle between the branches, or Congress could self-regulate, and apply constitutional analysis on its own accord. During the last twenty years, Congress has occasionally attempted to address these issues through legislation – either attempting to change the authority of the president or attempting to increase accountability of the Congress.

IV. LEGISLATIVE INTERVENTIONS IN THE EVALUATION PROCESS

Congress has attempted to address concerns over constitutional analysis and the legislative process on a number of occasions. In one instance Congress attempted to give the President more legislative power through the line-item veto.[117] Congress also tried to limit the executive power to influence constitutional interpretation by banning federal courts from using Presidential signing statements as a source of constitutional analysis.[118] Finally, Congress repeatedly has attempted to increase its own accountability by requiring each bill to articulate the specific source of authority in the Constitution.[119] This section looks briefly at each of

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115 *Heller*, 128 S. Ct. at 2243.

116 *Id.* at 2296 (Scalia, J., dissenting).

117 *Clinton*, 524 U.S. at 436, 442-448 (1998). Though the Court did not rule on this specific issue, the Court did note that they received extensive information on the issue of delegating legislative power to the President.

118 *See* S. 1747, 110th Cong. (2007). An identical bill was introduced to the House of Representatives on October 10, 2007.

119 *See* H.R. 292, 105th Cong. (1997); H.R. 1018, 106th Cong. (1999); H.R. 175, 107th Cong. (2001); H.R. 384, 108th Cong. (2003); H.R. 2458, 109th Cong. (2005); H.R. 1359, 110th Cong. (2007), H.R. 450, 111th Cong. (2009), H.R. 125, 112th Cong. (2011), H.R. 109,

these attempts.

A. The Line Item Veto Act

In an attempt to avoid full vetoes by the President, an early intervention to the current process entailed the creation of the line item veto, where the President could essentially divide legislation presented to him or her and "sign" particular sections.[120] The line item veto principle stemmed from an argument between the executive and legislative branches of the government related to the appropriation of funds by Congress and the refusal of the executive branch to spend those funds.[121] According to legislative history, President Jefferson first refused to spend monies allocated by Congress, asserting that the executive branch has some discretion in executing the laws passed by Congress.[122] In April 1996, Congress passed, and President Clinton signed, the Line Item Veto Act officially authorizing this veto process.[123] This statute allowed the President to negate or modify three types of legislative action after signing the bill into law: dollar amounts for any item that is considered discretionary spending by the executive branch, the dollar amount of any new direct spending, or any temporary tax benefits passed by Congress.[124] After President Clinton invoked the line item veto to cancel several provisions of two different bills, several organizations filed a suit, asking the court to declare the Line Item Veto Act unconstitutional.[125] In 1998, the United States Supreme Court did so, stating that the process was in direct conflict with the presentment powers as outlined in Article I, Section 7.[126] According to the Court, allowing the President to modify

113th Cong. (2013) and S. 109, 114th Cong. (2015). Senate bills also were introduced in the 110th, 111th, 112th and 113th Congress. *See* S.3159, 110th Cong. (2007), S.1319, 111th Cong. (2009), S. 1248, 112th Cong. (2011) and S. 1404, 113th Cong. (2013). The bill has been cosponsored over time by as few as 34 Representatives and as many as 73. In 2008, for the first time, an identical bill was introduced in the Senate with 23 sponsors. *See* S. 3159, 110th Cong. (2008). This bill was introduced by Senator Tom Coburn of Oklahoma with 22 co-sponsors. In all, the sponsors represent 18 different states.

120 *Clinton*, 524 U.S. at 420-21.

121 S. COMM. ON THE BUDGET, LEGISLATIVE LINE ITEM VETO ACT, Government Printing Office, S. REP. NO. 104-10, at 6 (1995), *available at* https://www.congress.gov/104/crpt/srpt10/CRPT-104srpt10.pdf.

122 *Id.* at 2.

123 *Clinton*, 524 U.S. at 420-21.

124 *Id.* at 436.

125 *Id.* at 425-26. Immediately after the Line Item Veto was passed, several members of Congress who had voted against it also filed suit to have it declared unconstitutional. The Supreme Court held that the members of Congress did not have standing to sue. *Id.* at 421. This second case was brought by hospitals, cities, unions and farming cooperatives who alleged harm by the veto of the specific provisions.

126 *Id.* at 421.

or negate sections of a statute gave the President legislative authority.[127] The constitution limits the President's legislation-related powers to presenting to Congress for consideration and either signing or vetoing legislation presented to him or her after passing the legislative process.[128] The Line Item Veto Act was declared unconstitutional because it allowed the President to modify or negate parts of legislation already enacted in to law by signature.[129] The appropriate method for handling such issues is for the President to veto the entire piece of legislation while sending a statement to Congress with the reasons for the veto, outlining the constitutional concerns and inviting Congress to either correct or delete those concerns and resubmit the bill.

B. The Presidential Signing Statements Act

On June 29, 2007, Senator Arlen Specter of Pennsylvania introduced S. 1747: The Presidential Signing Statements Act of 2007.[130] In this bill Senator Specter referred to the Article I, Section 7 power of the President to either sign or veto a bill.[131] He then noted that several presidents have issued signing statements to accompany their signature of a bill.[132] Senator Specter then postulated that courts have used these signing statements as a source of authority in interpreting the Acts of Congress.[133] He argued that this use of signing statements is problematic for several reasons. First, because it is merely the opinion of the President, it does not have the authority as a source of interpretation.[134] In addition, the use of signing statements by courts is neither consistent nor predictable, creating great uncertainty in the interpretation of the statutes.[135] After reciting the problems with the use of signing statements, the bill definitively forbid the use of any presidential signing statement by federal or state courts as a source of authority in determining whether an act of Congress is constitutional.[136] The bill also required courts to allow Congress to participate in any case regarding the constitutionality of a statute for which a presidential signing statement was issued to clarify the

127 *Id.* at 438.

128 *Clinton*, 524 U.S. at 438.

129 *Id.* at 448.

130 S. 1747, 110th Cong. (2007). An identical bill was introduced to the House of Representatives on October 10, 2007. That bill was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties.

131 S. 1747 § 2, ¶ 1.

132 *Id.* ¶¶ 2-3.

133 *Id.* ¶ 4.

134 *Id.* ¶ 5.

135 *Id.* ¶ 6.

136 S. 1747 § 4.

Congressional perspective on the question.[137] In sum, the bill requires that Congress be allowed to justify its passage of a statute. The bill was referred to the Committee on the Judiciary and never came forth.[138]

C. The Enumerated Powers Act – A Lesson in Accountability and Transparency

In 1997, Arizona representative John Shadegg introduced a bill entitled The Enumerated Powers Act.[139] This legislation has been introduced during each successive Congress; however the bill has consistently been referred to committee and has expired at the end of each term of Congress.[140] It may be that the committees to which the bill was referred let it die due to issues requiring more immediate attention. It is also possible that the committee members did not want to force Congress to perform a constitutional analysis. Furthermore, members of the committees have been satisfied with the status quo – letting the court system bear the burden, responsibility, and power of determining constitutionality.

The current version of this bill requires that, "Each Act of Congress, bill and resolution, or conference report thereon or amendment thereto, shall contain a concise explanation of the specific authority in the Constitution of the United States relied upon as the basis for enacting each portion of the measure."[141] The Act itself contains a statement of constitutional authority.[142] Per the author of the bill, the authority comes from Article 1, Section 5, clause 2 which reads, "Each House may determine the Rules of its Proceedings, punish its Members for disorderly

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137 *Id.*

138 *Actions Overview of S. 1747*, CONGRESS, *available at* https://www.congress.gov /bill/110th-congress/senate-bill/1747/all-actions?q={%22search%22%3A[%22 signing+statements%22]}&resultIndex=3.

139 *See* H.R. 292, 105th Cong. (1997).

140 *See* H.R. 292, 105th Cong. (1997); H.R. 1018, 106th Cong. (1999); H.R. 175, 107th Cong. (2001); H.R. 384, 108th Cong. (2003); H.R. 2458, 109th Cong. (2005); H.R. 1359, 110th Cong. (2007); H.R. 450, 111th Cong. (2009); H.R. 125, 112th Cong. (2011); H.R. 109, 113th Cong. (2013); S.109, 114th Cong. (2015). Senate bills also were introduced in the 110th, 111th, 112th and 113th Congress. *See* S.3159, 110th Cong. (2007); S.1319, 111th Cong. (2009); S. 1248, 112th Cong. (2011); S. 1404, 113th Cong. (2013). The bill has been cosponsored over time by as few as 34 Representatives and as many as 73. In 2008, for the first time, an identical bill was introduced in the Senate with 23 sponsors. *See,* S. 3159, 110th Cong. (2008). This bill was introduced by Senator Tom Coburn of Oklahoma with 22 co-sponsors. In all, the sponsors represent 18 different states. The current version of the legislation, S. 109, 114th Cong. (2015) has been referred to the Senate Committee on Rules and Administration. The current version of the bill was introduced in the Senate by Senator Dean Heller of Nevada, with no cosponsors.

141 S. 109, 114th Cong. § 102a(a) (2015).

142 *Id.* § 3.

behaviour, and, with the Concurrence of two thirds, expel a Member."[143] Unlike prior versions, the current version explicitly states that citation to the spending clause, the necessary and proper clause, and the general welfare clause in the Constitution does not satisfy the requirement.[144] The current version also prohibits the use of the Commerce Clause for anything other than the regulation of buying or selling goods or services.[145]

A law's effect as written does not render a bill unconstitutional or unenforceable without its statement of authority. Instead, it creates a procedure for lawmakers to force clarification on the authority for the law. More importantly, if the bill were to pass, and if lawmakers used the point-of-order procedure, bills would gain transparency and clarity. This bill would help the President complete his constitutional analysis before signing and allowing the courts to focus on the scope of powers rather than relying on legislative history (if it exists) to determine the source of authority for the bill.

V. THE MOST APPROPRIATE APPROACH TO CONSTITUTIONAL ANALYSIS – THE MORE INFORMATION THE BETTER

With their oaths of office, the President, Justices of the Supreme Court, and members of Congress vow to preserve, protect, support, and defend the Constitution.[146] A part of that duty should be to interpret and analyze their actions, as well as the actions of branches where they hold constitutional checks and balances. This section will look at the legislative process from start to finish and outline the most transparent and effective process for informing the analysis.

First, as the legislature works through the legislative writing and approval process, both the House of Representatives and the Senate may leave behind a legislative history that demonstrates the issues how they have been resolved in the past. The requirement of the Enumerated Powers Act should be in place to help guide interpretations, in addition to the thoughts of individual members of Congress as a source of analysis.

The passage of The Enumerated Powers Act could result in several changes in the legislative process, from the introductory discussions on a bill to the passage and presentment to the President, from the President's signature to any evaluation done in the courts. While it is impossible to know whether the law would impact the number of bills before Congress,

143 U.S. CONST. art. I, § 5, cl. 2.

144 S. 109, 114th Cong. § 102a(c) (2015).

145 *Id.*

146 *See supra* note 50 and accompanying text. The text of each oath is slightly different but contain same the basic premise.

it is possible that the bills that are before Congress will be more focused. In addition, the bills will be more transparent for evaluation by the President and the courts.

The requirement to outline the source of authority for its actions will indicate to courts, and to the general population, that the members of Congress are mindful of the limited powers in the Constitution. Additionally, it also will help focus the courts on the nature of the dispute – the boundaries of Congressional power under particular clauses of Article I, Section 8.

Given that Congress often passes enormous bills with multiple issues in them, there is a risk that the members of Congress will simply list as many powers as might apply to a massive piece of legislation. The Enumerated Powers Act, as most recently introduced, requires a "concise explanation of the specific authority in the Constitution of the United States relied upon as the basis for enacting each portion of the measure."[147] In order to be effective, the Enumerated Powers Act should be amended and passed with two possible provisions. One possible provision would clarify that massive bills addressing a plethora of issues under a variety of Congressional powers either is forbidden. Another possible provision would require that the source of the power for each different issue be specifically identified in the bill or in an appendix to the bill. This law has the potential to create a more focused view of the role of the Congress as its members look for authority for their actions. These possible provisions would add a clause to the bills may cause members of Congress to reflect on their own beliefs in our system and the purpose of the Constitution. As a member votes for a bill, he or she would be voting not only for the substance of the bill, but also publicly stating and reaffirming his or her belief in the proper interpretation of the Constitution. In addition, by declaring the source of authority for the bill, Congress could focus the contents of the bill to items within that authority. Bills would become more focused on topic instead of broad pieces of legislation with multiple issues and pork.[148]

In enunciating the authority under which actions are taken, Congress also has an opportunity to shape the Constitution. As courts review laws there would be an articulated interpretation of the Constitution as opposed to an assumption that lawmakers considered a law's constitutionality. If Congress is thoughtful and long-sighted in its interpretations of the Constitution, the courts may determine that the reasonable interpretation

147 S. 109, 114th Cong. § 102a(a) (2015).

148 Pork refers to money spent on pet projects of members of Congress. *See* Sharyl Attkisson, *Group: Nearly $20B In Pork In Fiscal '09*, CBS NEWS (Apr. 14, 2009, 6:17 PM), *available at* http://www.cbsnews.com/stories/2009/04/14/eveningnews/main4945339.shtml.

is worthy of affirmation. For example, had Congress been more specific in the legislation discussed in the *Morrison* case, the court may have been receptive to discussion that violence against women does indeed impact commerce. Instead, the Court was forced to look to the unofficial statements in the legislative history to determine that the Commerce Clause was the purported power.[149] Had Congress specifically stated that the bill was passed under the Commerce power, the legislative history would have had even more impact as the Court could look at the discussions in favor of passing the legislation under the Commerce power to determine the rationale for the interpretation of that clause.[150] In addition to the Court having access, The Enumerated Powers Act asks Congress to be thoughtful about its belief in the purpose and meaning of the Constitution and to set forth those beliefs where people can find them and review them. The Act makes Congress' interpretations more accessible by requiring that the interpretation be articulated.[151]

More accessible interpretations do not necessarily mean final interpretations. Obvious problems would result if Congress were the final interpreter of the Constitution. First, this situation would render the concept of the veto nearly useless. Should the President veto legislation that he or she believes is unconstitutional, Congress would simply reply that the legislation is constitutional under its interpretation. The legislation then would stand as legitimate. The impact on the judiciary would be similar; if the courts found a law unconstitutional, Congress would just reply that it is constitutional because they articulated their power for passing it. Under this hypothetical scheme where Congress has ultimate authority to determine the scope of its own power, the courts never could declare legislation passed by Congress as unconstitutional. As soon as a court would declare a statute unconstitutional, the Congress simply asserts that the majority of the Congress interpreted the Constitution so that the legislation was constitutional and the courts would be overruled. Even stranger, if the Congress puts forth in the legislation a statement that the legislation is within its own interpretation of its powers, then no court could even entertain a challenge. Further concerns exist as to the desirability of a political body to be the final interpreter – as each election creates turnover in seats and possibility in control, the interpretation of the constitution could change. These

149 *Morrison*, 529 U.S. at 607.

150 Because Senators or Representatives would have discussed the constitutional power as part of the debate on the legislation, arguments that the legislation was a legitimate use of the Commerce power would have persuaded at least a majority of the floor and thus could be seen as more legitimate than mere statements that the law might be legitimate under certain powers.

151 S. 109, 114th Cong. § 102a(a) (2015).

problems also exist should the President be seen as the final interpreter.

Second, as the President receives legislation from Congress, he or she must sign the bill into law or veto it and send it back to the Congress for further consideration.[152] Should the President sign the legislation without comment, one may be able to assume that the President acknowledges that the legislation is within the stated powers of Congress and that the President agrees with the Congress on its interpretation of the breadth of that power. The President could go further and declare agreement with the Congressional interpretation of its powers and endorse the activity as a constitutional activity.

In the case of a veto, the President is constitutionally required to inform Congress of the reasons for the veto.[153] If the reason is related to constitutional interpretation, the President should clearly articulate how his or her interpretation may differ from that of Congress, especially if the power is specifically set forth in the legislation per the Enumerated Powers Act. If the bill contains provisions that the President does not believe are constitutional, then the President should feel free to so note, even if he or she signs the bill in to law. The President could continue the recent trend and sign legislation with a signing statement that indicates where the President feels that Congress may have gone beyond its power or clarifications on how the President intends to interpret the legislation so that it does not go beyond the powers of Congress. Again in this situation the President would have the specific clause in the bill to address the powers of Congress. The President then should be able to set the priorities of the executive branch, which may include a decreased priority to prosecute and enforce laws for which the President has expressed constitutional concerns. Regardless of the President's position, any statement on the constitutionality would give the Supreme Court at least two official declarations of interpretation as opposed to the current system where the Court relies primarily on precedent and academic discussions from law review articles.[154]

Just as Congressional power to enunciate the final interpretation of constitutional powers would negate certain presidential powers, final interpretation by the President would virtually negate the veto override. Once a president determined that the legislation was unconstitutional, and

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152 U.S. CONST. art. I, § 7, cl. 2.

153 *Id.*

154 On January 21, 2009, one day after being inaugurated, President Obama signed an Executive Order related to the releasing of the records of prior presidents, making them easier to access and setting forth a process for prior presidents to object. *See* Exec. Order No. 13,489, 3 C.F.R. 13489 (2009), *available at* http://www.whitehouse.gov/the_press_office/ExecutiveOrderPresidentialRecords/.

vetoed the legislation, Congress would be powerless to override the veto. Even if the super-majority voted to override, the legislation would still be deemed unconstitutional because of the President's role as final interpreter. Like the legislative concerns over politics, presidential interpretation is highly subject to politics. First term presidents may interpret the Constitution in light of the impact on reelection. Since elections are every four years, it is questionable whether constitutional stability would exist. Without being the final interpreter, the President still would have an opportunity to influence the discussions about the Constitution in the courts.

Finally, when a law is challenged, the federal judges and Justices have the authority to interpret the Constitution.[155] Judges and Justices should be allowed to use any resources at their disposal to guide them in their understanding and interpretation of the law. The proper death of the Presidential Signing Statements Act supports this notion.[156] Judges and Justices should look to legislative history to determine the intent of Congress in passing the legislation, the comments of the President in any signing statement, and secondary sources such as the discussions and interpretations offered by legal academics and others in academic publications. Using all of the resources available will assist the judiciary in analyzing the scope of any disagreement about the constitutionality of a statute and address more robustly the arguments as judges and Justices make their final interpretations.

Having these declarations from the legislative and executive branches could result in cleaner opinions and more open discussion about the purpose and meaning of the Constitution. Judges analyzing the constitutionality of statutes would have a starting point in the text of the legislation itself. The courts could look directly at the source of authority under which Congress was purporting to pass legislation and focus on the scope of that power. The judicial discussion would focus not on whether Congress had authority to pass the legislation at all, but whether Congress misinterpreted the Constitution in analyzing the constitutional provision.

The Enumerated Powers Act does not attempt to change the Court's ability to interpret the Constitution.[157] For example, in *Morrison*, the Congress broadly identified Article I, Section 8, as the source of its authority to pass the Violence Against Women Act.[158] In subsequent lawsuits, the lawyers for the United States and the lower courts looked to

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155 U.S. CONST. art. III, § 2, cl. 1.

156 *See supra* Part IV.B.

157 S. 109, 114th Cong. § 102a(a) (2015). This requires Congress to articulate its authority but the bill does not state that the courts must accept that articulation.

158 *Morrison*, 529 U.S. at 607.

legislative history to determine that Congress meant the Commerce Clause as its source of authority.[159] Had the Congress been more specific, as the Enumerated Powers Act would require, the lawyers and Courts would not have had to even go to the legislative history to determine which power Congress was purporting to exercise. Instead, the courts could begin with the heart of the argument – whether Congress correctly interpreted the breadth and scope of that power. In *Morrison*, the Court first had to identify the Commerce Clause and then move to the discussion where it found that the Congressional interpretation of the Commerce power was incorrect.[160] The Court specifically pointed to the appearance that Congress was so broadly defining interstate commerce to include all activity as interstate commerce so that the federal government would become the sole regulating body.[161] The crux of the Court's opinion is that Congress misinterpreted the Commerce Clause to allow the passage of the Violence Against Women Act and that the Court was clarifying the boundaries of the power.[162] This role of the court was not changed because Congress had set forth, at least generally, evidence that a constitutional analysis had occurred.

Given that there is room for disagreement in interpretation of the Constitution, the final question to answer is the question of finality or supremacy. Though in the early days of our nation it was not clear that any branch should be a final interpreter, the Court's role has been to provide final interpretation to the provisions of the Constitution.[163] Given the problems discussed above with giving the executive and legislative branch final authority, it should remain clear that the Court is still the proper place for finality.

Since federal judges and Supreme Court Justices are appointed for life, they are able to focus on the Constitution and its meanings more easily than those who are more susceptible to the political will of the people. In addition, because the Justices hold their appointments typically for longer than Presidents or a majority of legislatures, the philosophies and interpretations are likely to change slower than if elected officials were the final interpreters.[164] As Alexander Hamilton said in the seventy-eighth Federalist Paper, "It is far more rational to suppose that the courts were designed to be an intermediate body between

159 *Id.*

160 *Id.* at 607-19.

161 *Id.* at 614.

162 *Id*. at 627.

163 *See* Segall, *supra* note 6.

164 *See* Christopher L. Eisgruber, *Marbury, Marshall and the Politics of Constitutional Judgment*, 89 VA. L. REV. 1203, 1228 n.14 (2003) (postulating that even when the Court is political, its politics differ greatly from those of elected officials).

the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority [than to assume that the legislature should be the constitutional judge of its own actions]."[165] Hamilton further pointed out that the role of the judge is to interpret the law and that the constitution is a "fundamental law."[166] The Court would be better able to focus on interpretation if the Congress is more specific with its statements of authority and if the President is clear in his support or disagreement with those statements.

VI. CONCLUSION

The political and judicial leaders of our nation have sworn to uphold, protect, support, and defend the Constitution of the United States. As such, each branch of government has a responsibility to ensure that the actions taken are within the bounds of constitutional authority. This is not always an easy task as the number of laws declared unconstitutional may show.[167] It is often broad in language and leaves room for interpretation. Because of this, each branch has a duty to perform an analysis and interpret the Constitution in a transparent way. The passage of the Enumerated Powers Act will increase transparency at the Congressional level. The use of signing statements by the President to share his or her interpretation also will inform the courts and the public about the posture of the executive branch toward the breadth of the constitutional powers. Finally, the use of this information by the courts, with the ultimate authority of the courts to adopt, modify, or reject the interpretation of either Congress or the President, will create a more transparent and balanced discussion about the meaning of the Constitution.

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165 THE FEDERALIST NO. 78 (Alexander Hamilton) (Garry Wills ed., 1982).

166 *Id. See also*, Samuel R. Olken, *The Ironies of Marbury v. Madison and John Marshall's Judicial Statesmanship*, 37 J. MARSHALL L. REV. 391, 408 (2004).

167 *See supra* note 17 and accompanying text.