

Winter 2011

# Signing Unconstitutional Laws

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## Recommended Citation

Baude, William (2011) "Signing Unconstitutional Laws," *Indiana Law Journal*: Vol. 86: Iss. 1, Article 6.  
Available at: <http://www.repository.law.indiana.edu/ilj/vol86/iss1/6>

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# Signing Unconstitutional Laws<sup>†</sup>

WILLIAM BAUDE<sup>\*</sup>

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*It has become fairly common for Presidents to sign laws that they think are unconstitutional, at least in part. Some scholars argue that this is unconstitutional. Others defend it, but on pragmatic grounds, as if one cannot afford to be a constitutional formalist in today’s government.*

*Both sides are wrong. In a wide range of cases, there is nothing wrong with signing unconstitutional laws. Indeed, it is required. Yet the President must exercise this power responsibly. He must have other constitutional duties that justify signing the remainder of the bill into law, and he must be prepared to use his other powers to prevent the unconstitutional provisions from being executed. President Richard Nixon’s decision to sign the Voting Rights Act of 1970 is one example, as are many of President George W. Bush’s maligned signing statements.*

*At the same time, this conclusion need not be grounded in pragmatic disregard of the Constitution. Defenders of the practice wrongly treat it as a question of political decision making justified by constitutional necessity, and they have also failed to articulate adequate legal rules for when the President may sign an unconstitutional law. So the Constitution can be saved from the formalists: formalism provides a principled justification for signing unconstitutional laws and a legal test for when the President may do so. We are not forced to choose between*

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<sup>\*</sup> Associate, Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP; Yale Law School, J.D., 2007; University of Chicago, B.S., 2004. All views expressed here are of course my own. Thanks to Michael Bern, Amanda Butler, Samuel Bray, Josh Chafetz, Craig Chosiad, Kristen Eichensehr, Chad Flanders, Heather Gerken, Ashley Keller, Marin Levy, Jaynie Lilley, Stephen Lilley, Michael McConnell, Steven Menashi, Judith Miller, Jonathan Mitchell, Alex Potapov, David Pozen, Michael Rappaport, Richard Re, Stephen Sachs, Emily Schleicher, Mark Shawhan, Hanah Volokh, and members of the U Street Legal Workshop for astute comments that relentlessly questioned many of those views.

*a President who is obligated to veto crucial legislation and one who places expediency over constitutional principle.*

#### INTRODUCTION

Hardly anybody expects the President to stand on principle any more—or if so, only on the wrong ones.

It has become fairly common for the President to sign laws that he thinks are unconstitutional, at least in part. While common, it is also controversial. Critics have argued that it is unconstitutional for the President to sign a law if he thinks it is even partly unconstitutional.<sup>1</sup> And signing unconstitutional laws is defended only with embarrassment—as “a triumph of expediency over principle”<sup>2</sup>—or with the sentiment that one simply cannot afford to be a constitutional formalist in today’s government.<sup>3</sup> Thus, the battle has been pitched between those who think that the President ought to stand on principle and veto every unconstitutional bill and those who think that constitutional formalism should give way to a more pragmatic or evolving approach to the Constitution.

Both sides are wrong. In a wide range of cases, there is nothing wrong with signing unconstitutional laws. These cases involve constitutional tradeoffs between the President’s duties to prevent unconstitutional laws from taking effect, and his affirmative duties to enforce the Constitution. The President also must exercise this power responsibly: he must both have other constitutional duties that justify signing the remainder of the bill into law, and he must be prepared to use his other powers to prevent the unconstitutional provisions from being executed. The President may—indeed, must—sign unconstitutional laws in these circumstances.

At the same time, this conclusion need not be grounded in pragmatic disregard of constitutional formalism. It is not up to the President to decide when “expediency” ought to “triumph . . . over principle.”<sup>4</sup> Defenders of the practice are wrong to treat it as a question of political decision making justified by constitutional necessity or modern reality—or as an issue to which the Constitution is indifferent. Nor have they articulated adequate legal rules for when the President may sign an unconstitutional law. This Essay provides a principled justification for signing unconstitutional laws and a legal framework for when the President may do so. The practice is in fact controlled by constitutional law, not an exception to it.

The argument proceeds as follows. First, as a matter of constitutional law, the President’s duties are more complicated than have been assumed. There is simply

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1. *E.g.*, Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81 (2007); Michael B. Rappaport, *The President’s Veto and the Constitution*, 87 NW. U. L. REV. 735, 766–83 (1993) [hereinafter Rappaport, *Veto*] (making a related argument); Michael B. Rappaport, *The Unconstitutionality of “Signing and Not-Enforcing,”* 16 WM. & MARY BILL RTS. J. 113 (2007) [hereinafter Rappaport, *Signing*] (same); *infra* notes 15–16.

2. Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1361 (1953).

3. *See infra* note 31; *see also* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 917 (1990) (acknowledging this practice without defending it).

4. Jackson, *supra* note 2, at 1361.

no constitutional provision, and no plausible interpretation of the President's oath, that flatly forbids signing unconstitutional bills into law. Instead, there is a more general, overarching duty to preserve and enforce the Constitution. But the President has several different tools for accomplishing that overarching duty, not just the veto. This means that the practice is not flatly forbidden. But it does give rise to constitutional risks, which the President must take seriously.

Second, the President's broad duty to enforce the Constitution frequently *requires* him to help pass legislation—especially in the national-security and individual-rights contexts. When faced with legislation that will further those constitutional duties, the President has an obligation to pass the law, especially if a veto is not likely to produce an appreciably better proposal.

The President's duty to sign unconstitutional laws arises when these circumstances intersect: the President is faced with a partly unconstitutional law that also contains provisions that are constitutionally required. At that point, nothing flatly forbids him from signing the law, and there are constitutional risks on both sides of the decision. He must consider the tradeoffs in terms of constitutional consequences. Sometimes those tradeoffs will lead him to believe that he must sign the bill, even though part of it is unconstitutional. Several Presidents in recent memory have been faced with such circumstances, and this Essay argues that they were right to sign the unconstitutional bills.

Part I discusses the prevailing views—absolutism on the one hand, expediency on the other. Part II examines the text and structure of the Constitution, and shows that there is no categorical duty to veto unconstitutional bills, although signing such a bill is not something the President may do lightly. Part III further argues that nothing unconstitutional *happens* until an unconstitutional law is enforced. Part IV discusses the President's affirmative responsibilities and the tradeoffs they entail.

Two prefatory notes are appropriate. First, methodology: this Essay assumes that the text and structure of the Constitution (and where known, original history) provide its meaning—a methodology I call “formalist.” There are no apologies for this, but even nonformalists should keep reading. Hardly anybody thinks that the text and structure of the Constitution are wholly irrelevant, so methodological objections should go to weight, not admissibility. Moreover, the chief advocates of a duty to veto are formalists,<sup>5</sup> so the larger point of this Essay is about the possibilities of formalist constitutional interpretation. When formalists line up behind an interpretation of the Constitution that is simultaneously impractical and incorrect, they do formalism no favors. The Constitution can be saved from the formalists: we are not forced to choose between a President who is obligated to veto crucial legislation and abandoning formalism altogether.

Second, perspective: this Essay analyzes signing unconstitutional laws from the point of view of the signer, the President. People who believe that, for example, the Patient Protection and Affordable Care Act<sup>6</sup> is unconstitutional might understandably be upset with the President for signing it into law. But so far as we know, *he* thought it was constitutional. My subject is the President who thinks a bill is unconstitutional and signs it anyway (i.e., who is alleged to have deviated from

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5. Prakash, *supra* note 1, at 93; Rappaport, *Signing*, *supra* note 1, at 114.

6. Pub. L. No. 111-148, 124 Stat. 119 (2010).

his own principles).<sup>7</sup> I shall argue that some Presidents have indeed committed such a deviation, but fewer than suspected or alleged.

### I. THE RECEIVED VIEWS

In 2007, the *William and Mary Bill of Rights Journal* published a symposium on presidential signing statements, with several articles focusing on the related question of whether the President may sign a law that he believes contains unconstitutional provisions. The most thorough treatments were critical of the practice.

One author, Professor Sai Prakash, argued that “[the President] acts contrary to his constitutional obligations when he ushers into law bills that he regards as unconstitutional.”<sup>8</sup> This is because he “violates the Constitution should he allow the unconstitutional bill to become law.”<sup>9</sup> This is true even if a bill merely contains one potentially unconstitutional provision amidst a great many important and necessary ones.<sup>10</sup>

Prakash claimed support from early executive practice, writing: “early Presidents shared the belief that the Constitution imposed upon them a duty to veto unconstitutional bills.”<sup>11</sup> The principal examples are that President Washington (and later President Jefferson) thought the President was duty-bound to examine the constitutionality of a bill before signing it, and that Presidents Madison and Monroe vetoed bills on what they described as compelled constitutional grounds.<sup>12</sup> If it is true that these acts all stemmed from a belief that the Constitution categorically forbids the President to sign unconstitutional laws,<sup>13</sup> that is good reason to condemn the practice.<sup>14</sup>

This absolutist view has broad appeal. A much-discussed American Bar Association task force report condemning presidential signing statements took a similar stance, arguing that “[t]he Founding Fathers . . . expected [the President] to

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7. Cf. TOM STOPPARD, *THE REAL THING* 75 (1984) (“You shouldn’t have done it if you didn’t think it was right.”).

8. Prakash, *supra* note 1, at 81–82.

9. *Id.* at 83.

10. *Id.* at 84–85.

11. *Id.* at 84.

12. *Id.* at 84–86.

13. It is not necessarily so. See *infra* text accompanying notes 182–193; cf. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 183 (2005) (“Early practice did not go so far as to oblige the president to veto whenever he deemed any of a bill’s provisions unconstitutional.”).

14. Compare *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) (grounding constitutional interpretation in “the practice of the government” and “[a]n exposition of the constitution, deliberately established by legislative acts”), with Letter from James Madison to N.P. Trist (Dec. 1831), in 4 *LETTERS AND OTHER WRITINGS OF JAMES MADISON*, 211 (J.B. Lippincott ed., 1867) (“There has been a fallacy . . . in confounding a question whether precedents could expound a Constitution, with a question whether they could alter a Constitution.”), and Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 13–14 (2001). See also William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1823 (2008).

veto even ‘urgent’ bills that he believed were unconstitutional in part.”<sup>15</sup> Others have expressed a similar view.<sup>16</sup>

Another participant in the symposium, Professor Michael Rappaport, offered a similar, more limited challenge. In his view, it is permissible for the President to sign unconstitutional laws only so long as he also intends to enforce them unflaggingly: Presidents have traditionally (and correctly) claimed the power and duty to disregard laws that they believe are unconstitutional, stemming from their independent ability to interpret the Constitution.<sup>17</sup> According to Rappaport, so long as the President claims any such authority, he must also veto unconstitutional laws that come across his desk.<sup>18</sup> The two powers are a bundled set. Under this view, signing unconstitutional laws is justified only when the President gives up his right to decide what “unconstitutional” means.

Whether the President has independent enforcement authority or not is a topic that so oversaturates the journals that I will not attempt to prove everything from scratch. I share the increasingly conventional wisdom that the President must interpret the Constitution for himself, and must not enforce laws he believes violate it.<sup>19</sup> And the Presidents who have signed laws they thought unconstitutional have not denied that they possessed independent interpretive authority, so they are all condemned by Rappaport’s theory. For present purposes, therefore, Rappaport’s critique assumes a force similar to Prakash’s.<sup>20</sup>

Why do the absolutists think it is unconstitutional to sign unconstitutional laws? Two reasons. One argument is that signing unconstitutional laws is inherently unconstitutional. Under this view, there is something in the Constitution or the constitutional oath that flatly forbids the President from putting his name to something unconstitutional.<sup>21</sup> The other argument is that even if it is not unconstitutional in and of itself, it is forbidden as a sort of reckless disregard for the Constitution in the future. As Rappaport puts it, “the President’s approval of a bill places it on the books and therefore creates the risk that it will be enforced by

15. AMERICAN BAR ASSOCIATION, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE: RECOMMENDATION 23 (Aug. 2006) [hereinafter ABA REPORT], available at <http://www.abanet.org/op/signingstatements>; see also *id.* at 1, 19.

16. *United States v. Munoz-Flores*, 495 U.S. 385, 409 (1990) (Scalia, J., concurring in the judgment) (“The President, after all, is bound not to sign an improperly originated . . . bill by the same oath that binds us not to apply it . . .” (emphasis omitted)); T.J. Halstead, Congressional Research Service, *Presidential Signing Statements: Constitutional and Institutional Implications*, at 14 (Sept. 17, 2007), available at <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>.

17. Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008).

18. Rappaport, *Signing*, *supra* note 1; Rappaport, *Veto*, *supra* note 1, at 766–83.

19. Baude, *supra* note 14, at 1810–11 n.13 (citing sources).

20. Indeed, the President’s independent power to interpret the Constitution buttresses my argument that he may sign unconstitutional laws. But even if one does not share that assumption, it does not change the basic argument, although it may alter the calculus of which laws he must sign. See *infra* Part IV.D.

21. Prakash, *supra* note 1, at 83–84.

executive and judicial officials who believe it is constitutional or enforceable.”<sup>22</sup> If the President has any independent constitutional judgment, he must “veto the provision and not take the risk it will be enforced.”<sup>23</sup>

Members of the symposium who did not condemn the practice in categorical terms defended it on practical grounds. For example, Professors Cass and Strauss argued that “[i]n a world of large, complex laws,” as a matter of “practical political reality,” the duty to veto is unrealistic.<sup>24</sup> Rather, “[t]he President . . . might well decide that, on balance, a law is beneficial, even if he believes that one or more provisions violate constitutional strictures.”<sup>25</sup> Professor Nelson Lund did briefly observe that “[a] President could take the plausible formalist position that an unconstitutional statutory provision is not a law no matter who may have purported to enact or approve it,”<sup>26</sup> but then relied almost exclusively on practical conclusions in describing the situations in which the President might sign unconstitutional laws.<sup>27</sup> Professor Lund analogized this to judicial reliance on precedent, noting accurately that “very few would seriously maintain that courts are *always* obliged to strike down statutes they think are unconstitutional, even in the face of thoroughly settled precedent.”<sup>28</sup>

Similarly, Professor Akhil Amar has argued that the President can sign unconstitutional bills out of “collegiality.” He writes,

[c]onsiderations of collegiality might even induce a president to add his name to a generally sound and desperately needed bill with a minor constitutional flaw, especially if the president deemed the constitutional question a close one in his own mind—much as a modern Supreme Court justice might sometimes join an opinion of the Court that does not perfectly express his individual view on certain minor points.<sup>29</sup>

All of these arguments share a different set of common premises—that signing unconstitutional laws is justified not on formalist grounds, but practical ones. And when the authors explain the limits of the President’s power to sign unconstitutional laws, it is in pragmatic or practical terms<sup>30</sup>—an approach echoed by many others who have abandoned the hard-line view.<sup>31</sup> (I do not mean to say

22. Rappaport, *Signing*, *supra* note 1, at 121; *see also* Prakash, *supra* note 1, at 90–91; Rappaport, *Veto*, *supra* note 1, at 774.

23. Rappaport, *Signing*, *supra* note 1, at 121.

24. Ronald A. Cass & Peter L. Strauss, *The Presidential Signing Statements Controversy*, 16 WM. & MARY BILL RTS. J. 11, 21–22 (2007).

25. *Id.* at 22.

26. Nelson Lund, *Presidential Signing Statements in Perspective*, 16 WM. & MARY BILL RTS. J. 95, 101 (2007).

27. *Id.* at 101–07.

28. *Id.* at 102 (emphasis in original).

29. AMAR, *supra* note 13, at 184.

30. *E.g.*, Cass & Strauss, *supra* note 24, at 23–25.

31. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 341 (2006) (“[W]e believe that the argument . . . is unrealistic in an age of omnibus legislation . . . .”); Memorandum from Walter Dellinger, Assistant Attorney Gen., Dep’t of Justice, to Bernard N. Nussbaum, Counsel to the President

that “practical” or “functional” arguments cannot also be constitutional arguments. And of course one could also try to justify signing unconstitutional laws by some methodology that is neither formalist nor pragmatic.) Moreover, all of them appear to believe that signing unconstitutional laws is discretionary. None argue that the same circumstances that *allow* the President to sign unconstitutional laws *require* him to do so.

All of the premises are wrong. (1) There is no “don’t-sign-unconstitutional-bills” clause, and there is no other reason to think that signing unconstitutional laws is inherently unconstitutional. (2) While signing unconstitutional laws can be risky, the President is sometimes permitted, and even required, to take those risks. And (3) the considerations that go into that risk calculus can be grounded in constitutionally based formalism; they need not be pragmatic or functional. I explain why below.

## II. THE PRESIDENT’S POWERS AND DUTIES

An examination of the text and structure of the Constitution reveals two principles. There is simply no provision that categorically forbids signing unconstitutional laws. But there are provisions that require the President to be careful when signing unconstitutional laws, and to do so only for good reasons.

### A. *The Lack of a Categorical Rule: Text*

We should start with the Constitution itself. Nothing in the Constitution actually says that the President must veto unconstitutional bills. The Signing and Veto Clauses, the Presidential Oath Clause, and the Take Care Clause all set forth the President’s powers and duties in making and enforcing law, but they contain no categorical duty to veto.<sup>32</sup>

Take them in turn: Article I, Section 7, explains how a bill becomes a law. After each house of Congress passes a bill, it is presented to the President. “If he approve he shall sign it,” and it becomes a law.<sup>33</sup> “[I]f not he shall return it, with his Objections” and Congress is given a chance to override those objections by supermajority vote.<sup>34</sup> Such disapproval of a bill is of course known as a veto,<sup>35</sup> although the text does not use that term. If the President neither signs nor returns the bill, it is deemed signed or vetoed by default, depending on whether Congress has adjourned.<sup>36</sup>

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(Nov. 3, 1993), *available at* <http://www.usdoj.gov/olc/signing.htm>; David Barron, Walter Dellinger, Dawn Johnson, Neil Kinkopf, Marty Lederman, Chris Schroeder, Richard Shiffrin, & Michael Small, *Untangling the Debate on Signing Statements*, Geo. Faculty L. Blog (July 31, 2006), [http://gulcfac.typepad.com/georgetown\\_university\\_law/2006/07/thanks\\_to\\_the\\_p.html](http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html) (“[E]ven if one thinks that it would be good policy for the President to veto all bills containing unconstitutional provisions, it will never happen.”).

32. U.S. CONST. art. I, § 7; *id.* art. II, § 1; *id.* art. II, § 3.

33. *Id.* art. I, § 7.

34. *Id.*

35. See NOAH WEBSTER, 2 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (unpaginated).

36. U.S. CONST. art. I, § 7.



The only hint that there are any constitutional rules about how the President exercises this function are the references to “approv[al]” and “Objections.” The text presupposes that the President will review a proposed bill on some normative basis and have some reasons for deciding not to sign it. But there is simply no provision for what those reasons might be. The Veto Clause tells the President what to do if he objects—not when to object.

Article II, Section 3 requires the President to “take Care that the Laws be faithfully executed.”<sup>37</sup> This provision does require the President to “faithfully execut[e]” the Constitution, which is part of “the supreme Law of the Land.”<sup>38</sup> It is thus the source of the President’s duty not to *enforce* unconstitutional laws. But there is no logical reason for the President’s duty not to enforce unconstitutional laws to carry over to his decision whether to *sign* them in the first place. So long as an unconstitutional law is not actually *executed*—not treated as law by any government official—but merely placed, unenforceable, into the Statutes at Large, it is hard to see how the Take Care Clause is offended.<sup>39</sup>

The same is true of the presidential oath: before taking office, the President must swear or affirm that he will “faithfully execute the Office of President of the United States, and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States.”<sup>40</sup> The faithful-execution half of the oath simply requires the President to execute his office. That office is defined by the Constitution (and perhaps by implementing statutes). If nothing else in the definition of the President’s office requires him to veto unconstitutional laws, then the faithful-execution oath does not either.

That leaves the President’s obligation to “preserve, protect and defend.” First of all, it is worth noting that this oath is not absolute. It is explicitly qualified, “to the best of my Ability.”<sup>41</sup> While the history or purpose of this qualification has not been examined much,<sup>42</sup> it facially expresses two countervailing points: on one hand the President must do his best to uphold, enforce, and preserve the Constitution. He may not declare his actions good enough if he could be doing better. At the same time, perfect preservation and protection may well be impossible in the real world. Some constitutional problems may simply be outside of the President’s jurisdiction.<sup>43</sup> Other times, the President may simply be mistaken or uncertain about what the Constitution demands. Or it may be impossible to avoid some measure of a constitutional violation because two constitutional requirements are in

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37. *Id.* art. II, § 3.

38. *Id.* art. VI.

39. For expansion of this argument, see *infra* Part III.A.

40. U.S. CONST. art. II, § 1.

41. *Id.*

42. A rare exception is *Morning Edition: Where Does the Oath of Office Come from?* (NPR Broadcast Jan. 14, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=99323353> (interview with Marvin Pinkert, Executive Director of the National Archives Experience); see also 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 422, 427, 575, 599 (Max Farrand ed., rev. ed. 1966) (recording earlier drafts).

43. Baude, *supra* note 14, at 1809–11.

conflict.<sup>44</sup> When perfect preservation of the Constitution is impossible, the oath does not demand it.

And what do preserving, protecting, and defending require? The opposites are allowing something to be destroyed or damaged.<sup>45</sup> But how does an unconstitutional law damage the Constitution? The Constitution, after all, is supreme, and preempts ordinary laws that are repugnant to it. At a *practical* level, the Constitution might not be preserved if unconstitutional laws are widely enforced; but the practical problem is addressed by ensuring that the unconstitutional law is not executed. And at a more *metaphysical* level, the Constitution takes care of itself automatically.

### B. The Lack of a Categorical Rule: Structure

Lest that last assertion seem like mere wordplay, it can be confirmed by a deeper look at the Constitution's more general structure.<sup>46</sup> The Constitution is supreme to all other law. It is the instrument by which authority was delegated from the people to the agents who are allowed to govern them, and the agents lack power to exceed or transgress that delegation of authority. That supremacy is the premise of *Marbury v. Madison*'s widely accepted structural inference that "a legislative act contrary to the Constitution is not law," and therefore is void.<sup>47</sup>

Nor was that concept of voidness invented by *Marbury*—it had been a part of Anglo-American legal theory for a very long time,<sup>48</sup> and was also a longstanding principle of the review of corporate authority.<sup>49</sup> The basic principle was that laws that were unconstitutional were "repugnant" to the Constitution,<sup>50</sup> and that the Constitution "displaced" any such unconstitutional laws to the extent of that repugnancy.<sup>51</sup> That displacement is why the President must "take Care that" unconstitutional laws are not enforced.<sup>52</sup> And it also explains why formalism imposes no categorical duty to veto—as a matter of *legal* authority, the fact that an unconstitutional law has been placed on the books is simply irrelevant. It might mistakenly be enforced, but there is no reason it should be.

A corollary of this historical rule of displacement-and-repugnancy is that laws that are *partly* unconstitutional are only *partly* unenforceable. That is, the unconstitutional applications of a law are effectively severable from the

44. See *infra* Part IV.A–B.

45. See WEBSTER, *supra* note 35 (unpaginated entries for "preserve," "protect," and "defend").

46. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 802–12 (1999).

47. 5 U.S. (1 Cranch) 137, 177 (1803); see Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 755–77 (2010) (discussing and defending this view).

48. PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 101–02, 202–08 (2008).

49. Mary Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 508–09 (2006).

50. *Id.*

51. Walsh, *supra* note 47, at 762–66.

52. U.S. CONST. art. II, § 3; Baude, *supra* note 14, at 1810–11 & n.13; Prakash, *supra* note 1.

constitutional applications.<sup>53</sup> Even in *Marbury* itself, the Court did not invalidate every section of the Judiciary Act—only the section that conferred impermissible jurisdiction.<sup>54</sup> That corollary will prove critical: the times that the President may sign an unconstitutional law are when the law contains other provisions that are constitutional and crucial.<sup>55</sup>

And what about popular legitimacy? It might seem as if the passage of unconstitutional laws at least casts a shadow on the Constitution's status as widely-recognized supreme law. But unconstitutional laws that are *treated* as unconstitutional—that are not followed and not enforced—are quite unlikely to have that effect, as we will shortly see at greater length.<sup>56</sup>

The constitutional structure also provides occasion to compare the obligations of the different branches of government. Proponents of the absolutist view have argued by analogy, saying that if members of the legislature cannot vote for unconstitutional bills, and the judiciary cannot decide to uphold unconstitutional laws, the President must be absolutely forbidden to sign them.<sup>57</sup> Similarly, Andrew Jackson argued that “[i]t is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.”<sup>58</sup> But that assertion pays inadequate attention to the different structural roles of each branch.

The judiciary's role differs the most. The core of the judge's task is deciding cases,<sup>59</sup> and the President's task when presented with a bill is very different from a judge's role in deciding a case. For hundreds of years, a judge's duty in deciding a case has been understood as the duty to apply the law of the land to the situation before him.<sup>60</sup> Judicial review is a corollary of that view of the judicial role. Applying the law means applying *all* the law, and in a system of constitutional supremacy, that means that the Constitution displaces any law repugnant to it.

What about collegiality? Is it permissible for “a modern Supreme Court Justice,” as Akhil Amar suggests, to “sometimes join an opinion of the Court that does not perfectly express his individual view on certain minor points.”<sup>61</sup> Once again, the answer comes from a focus on the judicial role. As I have shown in earlier work, the core of the judicial power is issuing judgments, not writing opinions.<sup>62</sup> If that is right, and if judges are bound to apply the law as they see it, then “collegial”

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53. Walsh, *supra* note 47, at 762–66.

54. *Id.* at 739 (discussing *Marbury*, 5 U.S. (1 Cranch.) at 176–80).

55. See generally *infra* part IV (discussing such laws and giving examples).

56. See *infra* Part III.A.

57. Prakash, *supra* note 1, at 91–92; Rappaport, *Signing*, *supra* note 1, at 117.

58. Andrew Jackson, Veto Message (July 10, 1832), reprinted in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 567 (James D. Richardson ed., 1897).

59. Baude, *supra* note 14, at 1826–27.

60. HAMBURGER, *supra* note 48, at 103–16.

61. AMAR, *supra* note 13, at 144.

62. Baude, *supra* note 14, at 1844–45; see also Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126–27 (1999).

compromise might indeed be justifiable on “minor points” in “an opinion of the Court” so long as the compromise does not actually go to the Court’s judgment itself.

This is pretty much the modern practice. Surely it is common for a judge to put his or her name to an opinion with reasoning he or she does not entirely share. Under modern practice, judicial opinions are written by committee, and it is (understandably) considered a judicial virtue to be able to produce an opinion endorsed by a majority of the court. But *judgments* issued by multi-member appellate courts rarely leave room for minor compromise—the case is affirmed or reversed (or remanded or dismissed). And compromise over judgments is (rightly) extremely rare.<sup>63</sup>

In contrast to judges, the President does not exactly *apply* law—constitutional or otherwise—when deciding whether to veto a bill. He *makes* law. The veto is not a judicial verdict about what the law requires—it is a decision about what kind of law to make. Furthermore, the judiciary’s involvement with a case is largely over once it decides the case and issues a judgment; but the President’s decision to sign a bill is only the first of several decisions—application and enforcement will come much later. So, little can be inferred from the judicial oath.

There is a closer analogy to members of Congress.<sup>64</sup> Like the President, they make law rather than applying it to concrete cases. So their obligation to support the Constitution might well allow them to vote for unconstitutional bills just as the President can sign them. But there are some important differences that may make it less likely for them to be justified in voting for an unconstitutional law. As we will see, when the President is faced with an unconstitutional bill, he has many other tools to protect the Constitution instead of the veto, so he can mitigate the effects of an unconstitutional bill.<sup>65</sup> In contrast, members of Congress may rarely be in a position where they can vote for an unconstitutional bill with confidence that the Constitution will still be preserved—unless it is a bill that is so plainly unconstitutional that the President will never enforce it or the Supreme Court will strike it down.<sup>66</sup> It may therefore be rarer that conscientious members of Congress could vote for unconstitutional bills.

### C. Constitutional Risks

So there is no basis for a *categorical* duty to veto unconstitutional laws. But is that enough? After all, the President’s broader obligations include not only enforcing the laws (including the Constitution) on a case-by-case basis, but ensuring that the Constitution is preserved and protected. And Prakash and

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63. Hartnett, *supra* note 62, at 138–40 (discussing John M. Rogers, “I Vote This Way Because I’m Wrong”: *The Supreme Court Justice as Epimenides*, 79 KY. L.J. 439 (1991)).

64. For the classic exploration, see Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); see also Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587 (1983).

65. See *infra* Part II.C.

66. See Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281 (2008) (exploring this scenario).

Rappaport have argued that signing unconstitutional laws is unconstitutionally risky, even if it is not unconstitutional per se.<sup>67</sup>

Now, the President has many tools besides the veto to keep unconstitutional laws from being enforced, even after he has signed them into law. Most crucially, he can refuse to enforce them and refuse to apply them in the performance of any of his duties.<sup>68</sup> And this controversial power aside, the executive can make clear his view that the law is unconstitutional, and may well persuade courts and others to agree. Even if they do not agree, the President can still refuse to enforce it in future cases;<sup>69</sup> if the law has criminal consequences, the President can also grant pardons and reprieves to mitigate those consequences.<sup>70</sup> And if the law proves too dangerous, the President can also urge Congress to get rid of it<sup>71</sup>—perhaps even forcing Congress’s hand by threatening to veto other important legislation.<sup>72</sup> It is a mistake to assume that the President’s choices are limited to “veto” or “wholeheartedly enforce.”

But even with this range of tools, it is still true that signing unconstitutional laws is risky.<sup>73</sup> Maybe this President will not enforce the law, but who can be sure that future Presidents will share the current President’s constitutional scruples?<sup>74</sup>

Another serious risk is that judges will apply the statute even if it is unconstitutional. Of course if a law really is unconstitutional, judges should disregard it and refuse to enforce it. But the President cannot guarantee that others will share his enlightened views. This is the problem that Gary Lawson has called “stipulating the law.”<sup>75</sup> The parties before a court cannot stop it from interpreting the law as it thinks best—even if they both agree on what the law says. So, for example, even if a criminal defendant argues that a statute is unconstitutional and the government prosecutor agrees, there is still a risk that the court will disagree with them both.

The example is not hypothetical. Consider the fate of 18 U.S.C. § 3501, a statute designed by Congress to overrule *Miranda v. Arizona*.<sup>76</sup> While the President

67. Prakash, *supra* note 1, at 90–91; Rappaport, *Signing*, *supra* note 1, at 121; *see also* Rappaport, *Veto*, *supra* note 1, at 774.

68. *See* Prakash, *supra* note 1.

69. Baude, *supra* note 14, at 1844–45.

70. U.S. CONST. art. II, § 2, cl. 1.

71. *Id.* § 3 (“He shall from time to time . . . recommend to [Congress’s] Consideration such Measures as he shall judge necessary and expedient.”); *see* Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 41–63 (2002).

72. Charles L. Black, Jr., *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS. 87, 95–97 (1976) (discussing how the threat of a veto enhances the President’s bargaining power).

73. I dismiss, however, the risk that “a President who believes that some statutory provision is void may decide that he should enforce it out of a sense that the issue should be resolved by the courts.” *Id.* at 90. If he really thinks it unconstitutional, *he should not do that*. *See infra* Part IV.D. And if he behaves that way, he is not going to pay any attention to my analysis or Prakash’s.

74. *See* Prakash, *supra* note 1, at 90.

75. Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. (forthcoming 2011) (manuscript at 27–31), available at <http://ssrn.com/abstract=1677014>.

76. 384 U.S. 436 (1966).

repeatedly attempted to keep the judiciary from applying the statute,<sup>77</sup> the executive branch could not help but bring prosecutions to which § 3501 was relevant. And in such cases, the President could not stop the judiciary from deciding for itself whether the statute applied.<sup>78</sup> On that basis, one court of appeals ultimately applied the statute and overruled *Miranda*, although the decision was ultimately overruled by the Supreme Court.<sup>79</sup> *Miranda* survived, but, for its supporters, the episode illustrates the riskiness of letting an unconstitutional statute creep onto the statute books.

To be sure, courts do *sometimes* refuse to decide constitutional questions when the parties agree on the answer, and thus let the parties “stipulate the law.”<sup>80</sup> And Lawson argues that the courts might well be right to do so.<sup>81</sup> But as he acknowledges, stipulating the law is not the norm.<sup>82</sup> The President therefore must bear in mind the risk that a court will disagree with his judgment of unconstitutionality.

For some statutes, the President’s refusal to enforce them will ensure that a court never has the opportunity to hold them constitutional. For example, there can be no criminal prosecution unless the executive branch decides to bring one,<sup>83</sup> so a statute that unconstitutionally creates a crime generally cannot be enforced without its consent. But for other statutes (as with § 3501 above) the President cannot entirely stop them from surfacing in otherwise valid prosecutions. Moreover, the United States will not always even be a *party* to a case that involves an unconstitutional law—such as a civil lawsuit between two private parties or a lawsuit involving a state. The United States does have the statutory right to be notified of and intervene in any federal case “wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question.”<sup>84</sup> But that statute is frequently forgotten by

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77. See Paul Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175, 203–22 (1999).

78. *Davis v. United States*, 512 U.S. 452, 464–65 (1994) (Scalia, J., concurring) (“The Executive has the power (whether or not it has the right) effectively to nullify some provisions of law by the mere failure to prosecute—the exercise of so-called prosecutorial discretion. And it has the power (whether or not it has the right) to avoid application of [18 U.S.C.] § 3501 by simply declining to introduce into evidence confessions admissible under its terms. But once a prosecution has been commenced and a confession introduced, the Executive assuredly has neither the power nor the right to determine what objections to admissibility of the confession are valid in law.”).

79. *Dickerson v. United States*, 166 F.3d 667, 672 (4th Cir. 1999) (“[T]he Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it.”), *rev’d on other grounds*, 530 U.S. 428 (2000).

80. Lawson, *supra* note 75, at 29–30.

81. *Id.* at 41–43.

82. *Id.* at 31.

83. See *United States v. Cox*, 342 F.2d 167, 170–72 (5th Cir. 1965); *id.* at 190–96 (Wisdom, J., concurring specially); *Confiscation Cases*, 74 U.S. 454, 457 (1868); *cf. Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184, 2187–89 (2010) (Roberts, C.J., dissenting).

84. 28 U.S.C. § 2403(a) (2006).

courts and parties,<sup>85</sup> and it does not apply if neither party “draw[s] in question” the law’s constitutionality.<sup>86</sup>

Another risk is that there may only be limited remedies if officers mistakenly enforce the unconstitutional law. Under modern doctrine, one of the chief remedies for a constitutional violation by a government officer is the right to sue that officer for violating the Constitution.<sup>87</sup> But any monetary recovery against that officer can be blocked by the doctrine of qualified immunity. And courts regularly award qualified immunity to officers sued for enforcing a potentially unconstitutional statute so long as a *court* has not yet said that it is unconstitutional.<sup>88</sup>

At least one court has carried that presumption even further. Consider the Second Circuit’s recent decision in *Amore v. Novarro*.<sup>89</sup> There, a police officer arrested Mr. Amore for violating a loitering statute that had been held unconstitutional eighteen years earlier.<sup>90</sup> Even though the unconstitutionality of the statute was therefore “clearly established” by judicial decision, the court of appeals *still* concluded that the officer could not be sued for damages, because he had relied on the statute “on the books.”<sup>91</sup>

*Amore* may prove to be an aberration. After the Court’s initial decision, the state of New York finally repealed the unconstitutional statute (perhaps because of another pending lawsuit where the state had been held in contempt of court for leaving the statute on the books).<sup>92</sup> And as the court eventually acknowledged, other circuits had *not* awarded qualified immunity when the law on the books had clearly been established as unconstitutional.<sup>93</sup> But even after receiving a petition for rehearing and an amicus brief from civil rights groups, the panel continued to defend its original ruling.<sup>94</sup> (It also attempted, with debatable success, to distinguish

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85. See, e.g., Oklahoma *ex rel.* Edmondson v. Pope, 516 F.3d 1214, 1215–16 (10th Cir. 2008) (“At oral argument, neither party even seemed aware that this requirement existed.”); *In re Young*, 82 F.3d 1407, 1412–13 (8th Cir. 1996); Wallach v. Lieberman, 366 F.2d 254, 256–57 (2d Cir. 1966).

86. 28 U.S.C. § 2403(a) (2006).

87. See 42 U.S.C. § 1983 (2006) (as interpreted by *Monroe v. Pape*, 365 U.S. 167, 172–87 (1961)); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); see also *Butz v. Economou*, 438 U.S. 478, 500–01 (1978) (equating immunities under § 1983 and *Bivens*).

88. E.g., Connecticut *ex rel.* Blumenthal v. Crotty, 346 F.3d 84, 103–04 (2d Cir. 2003); Roska *ex rel.* Roska v. Peterson, 328 F.3d 1230, 1251–53 (10th Cir. 2003); Grossman v. City of Portland, 33 F.3d 1200, 1209 (9th Cir. 1994); Malachowski v. City of Keene, 787 F.2d 704, 714 (1st Cir. 1986).

89. (*Amore I*), 610 F.3d 155 (2d Cir. 2010), amended on rehearing by *Amore v. Novarro (Amore II)*, No. 08-3150-cv, 2010 WL 3960574 (2d Cir. Oct. 12, 2010).

90. N.Y. PENAL LAW § 240.35(3), invalidated by *People v. Uplinger*, 447 N.E.2d 62 (N.Y. 1983).

91. *Amore I*, 610 F.3d at 155.

92. *Amore II*, at \*7 n.15, \*9 n.20 (citing Joel Stashenko, *Albany Catches Up With Courts, Repeals Voided Loitering Laws*, N.Y. L.J., Aug. 4, 2010).

93. *Amore II*, at \*8 (citing *Baribeau v. City of Minneapolis*, 596 F.3d 465, 478–479 (8th Cir. 2010); *Leonard v. Robinson*, 477 F.3d 347, 358–361 (6th Cir. 2007)).

94. See generally *Amore II* (issuing amended opinion with same result on rehearing).

the myriad cases to the contrary.)<sup>95</sup> If the *Amore* doctrine becomes widespread, signing unconstitutional statutes could shield other executive actors from responsibility for plainly unconstitutional conduct. And even if it does not, it illustrates the danger of depending on courts to safeguard constitutional rights.<sup>96</sup>

So by signing an unconstitutional law, the President does create a risk of future violations of the Constitution. And were that the only consideration, Rappaport and Prakash might well be correct in urging the President to err on the side of caution by vetoing unconstitutional bills.<sup>97</sup> But it is not. In many cases, bills deal with more than one subject, contain some provisions that are constitutional and some that are potentially not, and therefore pose tradeoffs. In many cases, those tradeoffs allow the President to sign the bill.

When the only positive tradeoffs that come from a bill are purely matters of policy, the risks that come from signing an unconstitutional law are hard to justify under the President's oath—just as a trustee who takes an oath to protect a group of children could not place them in harm's way in exchange for a large sum of money, whether given to him or donated to his favorite charity.<sup>98</sup>

On the other hand, in many cases—far more than are commonly appreciated—there are constitutional obligations on both sides of the equation. That is, the President is presented with bills that he has some amount of constitutional *obligation* to see enacted, so there are constitutional values on both sides of the bill. He need not, and cannot, adopt a stance of pure risk aversion. Part IV will explore those circumstances and discuss when the President may and *must* sign unconstitutional bills.

### III. WHEN ARE LAWS UNCONSTITUTIONAL?

One premise of the foregoing analysis of the President's role is that the critical moment is when an unconstitutional law is executed—that what matters is whether the Constitution is actually enforced in practice (and therefore whether unconstitutional laws are in practice disregarded). That premise derives both from the Take Care Clause (which is concerned with “execution”) and the presidential oath. But because that premise is critical, it is worth defending in further detail.

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95. *Id.* at \*23–25.

96. A truly responsible executive would have taken greater measures to ensure that the statute was not enforced in the first place. Indeed, *Amore* separately sued the City of Ithaca for its failure to adequately train its officers not to enforce the unconstitutional law. That lawsuit remains pending and may well succeed. *See id.* at \*9 (“*Amore* ‘may be richly entitled to a recovery on that cause of action.’” (quoting *Rohman v. N.Y.C. Trans. Auth.*, 215 F.3d 208, 218–19 (2d Cir. 2000))).

97. Prakash, *supra* note 1, at 90–91; Rappaport, *Signing, supra* note 1, at 121; *see also* Rappaport, *Veto, supra* note 1, at 774.

98. Bills that have absolutely no constitutional problems can still create constitutional risks. For example, nearly every new federal officer might some day go on to violate the Constitution in the course of executing his duties. How to treat constitutional risks that do not come from signing unconstitutional laws is outside the scope of this Essay.



## A. "On the Books"

As we have seen, there is some risk that an unconstitutional law "on the books" might eventually be enforced, but that is a risk that the President can mitigate. Some skeptics might go further: even if the President ensures that nothing unconstitutional ever actually *happens*, isn't it still a problem for him to let an unconstitutional law be put "on the books" when he could stop it?

The answer is no. To be sure, notice is important. By long tradition<sup>99</sup>—and perhaps constitutional right<sup>100</sup>—the law is published. This allows people to know what they are expected to do. But the Statutes at Large and the U.S. Code do not have constitutional status. Indeed, those "books" are full of statutes that are widely known to be partly or wholly unconstitutional.

For example, Congress did not repeal the federal ban on flag burning after it was struck down in *United States v. Eichman*,<sup>101</sup> and it still sits in the U.S. Code.<sup>102</sup> *United States v. Booker*<sup>103</sup> held that the mandatory Federal Sentencing Guidelines were unconstitutional, but the text of Title 18 still purports to make them so.<sup>104</sup> There is no reason to think that Congress has been acting unconstitutionally in failing to repeal such statutes once the Supreme Court holds them unconstitutional.

Indeed, if there were some *constitutional* problem with allowing an unconstitutional law to sit, unenforceable, "on the books," the President would presumably be required to try to have them all repealed. So far as I know, nobody believes that he is obligated to attempt this feat. And with good reason.

The laws written in those books are all understood to be subject to judicial and presidential review. Imagine that every law passed by Congress included a footnote saying, "this statute does not apply in any circumstances in which it would be unconstitutional for it to apply." Surely, signing such a law could not be unconstitutional. As written, the law is constitutional by definition!<sup>105</sup>

But reality is not much different. Congress does not bother including such a footnote when it passes legislation, because it literally goes without saying. Just as if that footnote were included, every statute "on the books" is effectively limited by the Constitution, and everybody knows it. That is a direct consequence of constitutional supremacy.<sup>106</sup>

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99. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*45–46.

100. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("All are entitled to be informed as to what the State commands or forbids.").

101. 496 U.S. 310 (1990).

102. 18 U.S.C. § 700 (2006).

103. 543 U.S. 220 (2005).

104. 18 U.S.C. § 3553(b)(1).

105. For examination of a similar hypothetical see Larry Alexander, *There Is No First Amendment Overbreadth (But There Are Vague First Amendment Doctrines); Prior Restraints Aren't "Prior"; and "As Applied" Challenges Seek Judicial Statutory Amendments*, at 3 (forthcoming 2011), available at <http://ssrn.com/abstract=1658106>.

106. U.S. CONST. art. VI; see also *United States v. Velez*, 586 F.3d 875, 879 n.3 (11th Cir. 2009) (Barkett, J.) (noting that there is "no need for a statutory exemption" for unconstitutional applications because the Constitution is "sufficient to exempt" them); Alexander, *supra* note 105, at 3 ("[T]he hypothetical amendment is already a part of every

By signing an unconstitutional law and putting it “on the books,” the President is not concluding that it will always be constitutional in every application; he is just putting the constitutional questions aside for a future day.<sup>107</sup> So nobody should infer too much from a law’s presence “on the books.”

And if notice is the constitutional problem, the veto is not the solution. When a President signs a partly unconstitutional law, he can make his own constitutional views known through a signing statement. That way, nobody misinterprets his approval of the bill as a whole with an approval of every piece of it. This will discourage others (especially within the executive branch) from trying to enforce it, and give fairer warning to those who wish to know the law.<sup>108</sup> That is why so many scholars ultimately came out in *favor* of signing statements (at least in principle), calling them “a *good* thing.”<sup>109</sup> As they explained,

“[i]f the President has decided to decline to enforce a statute because it’s unconstitutional . . . then it is much better that he tell the Congress and the public of his intentions, rather than keep it secret, because in that case the checks and balances of the constitutional system can be set to work.”<sup>110</sup>

Similarly, signing statements serve to counter any symbolic objections to placing an unconstitutional law on the books. Imagine the President signs a bill while simultaneously saying, “now, to be clear, Chapter Two of this law is unconstitutional, and I am signing it only because I am confident that I and my successors will never enforce it, and the courts would disregard it in the unlikely event that it was enforced. Moreover, I am only willing to take the risk of placing it on the books because Chapter One does something very important—indeed, it helps me fulfill some of my other constitutional duties.” It is hard to see what harm (other than the risk that it will be improperly enforced) could come from placing an unenforceable law on the books under such circumstances.

### B. *The Subjects of the Constitution*

One other potential objection emerges from a very recent article by Professor Nicholas Rosenkranz. Rosenkranz argues that in many cases the Constitution is violated at the very moment Congress passes a law, regardless of whether that law is ever executed (or executed improperly) by the President.<sup>111</sup> He does not directly

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statute. For Article VI of the Constitution . . . already accomplishes what the hypothetical amendment accomplishes.”)

107. *Cf.* *United States v. Munoz-Flores*, 495 U.S. 385, 397 (1990) (“[S]aying that a bill becomes a ‘law’ within the meaning of [Article 1, Section 7] does not answer the question whether that ‘law’ is *constitutional*.” (emphasis in original)).

108. *See, e.g., The Impact of the Presidential Signing Statement on the Department of Defense’s Implementation of the FY 2008 National Defense Authorization Act: Hearing of the Oversight and Investigations Subcomm. of the H. Armed Serv. Comm.*, 110th Cong. 13–14 (2008) [hereinafter *Presidential Signing Statement Hearing*] (statement of Nicholas Quinn Rosenkranz).

109. Barron et al., *supra* note 31 (emphasis in original).

110. *Id.* (emphasis omitted).

111. Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV.

address the topic dealt with here—whether the President is therefore obligated to veto those laws and so prevent the constitutional violation from occurring. But if correct, his analysis has important implications for mine. If a constitutional violation occurs at the moment Congress passes a law, the President’s other tools (like nonenforcement, pardon, and publicity) cannot make up for his failure to veto—it would be too late to fix the constitutional error.

According to Rosenkranz, any time Congress violates the Constitution, it does so at the moment it passes the unconstitutional law.<sup>112</sup> He further argues that a large number of potential constitutional violations (including all violations of the First Amendment and all laws in excess of Congress’s enumerated powers) are such congressional violations.<sup>113</sup> More of Professor Rosenkranz’s work on this subject is still forthcoming,<sup>114</sup> so a full critique of his theory may be premature. But on the basis of what he has published so far, I have my doubts.

First, take the assertion that, “as a matter of simple temporal logic,” if Congress has violated the Constitution, “it must be that the moment of violation was when Congress made the law.”<sup>115</sup> Rosenkranz acknowledges that “after the law is made, it may go on to have pernicious effects—particularly when it is executed,”<sup>116</sup> but he points out that the original legislators may be gone from Congress: “[i]t makes no sense to say that *they* violated their oaths and violated the Constitution *at the moment of enforcement*, from their beds, or their graves.”<sup>117</sup>

Yet it is not so nonsensical. Rosenkranz earlier analogizes constitutional violations to violations of the criminal law,<sup>118</sup> and the analogy is revealing. There are plenty of acts whose criminality turns on their subsequent effects. For example, it is a federal crime to commit assault (in certain jurisdictions) “resulting in serious bodily injury.”<sup>119</sup> How serious the resulting injuries are depends on events that occur after the assault itself—on how long the victim bleeds, when she receives medical attention, and so on.<sup>120</sup>

Similarly, as the Supreme Court recognized long ago in *Diaz v. United States*, a person has not committed murder until the victim dies of his wounds, even if that death is long after he is battered by his attacker.<sup>121</sup> The same is true under the common law.<sup>122</sup> In other words, there is *no rule* that a violation of the criminal law can only be committed at the moment the defendant acts. It is not at all apparent why a statutory violation of the Constitution must be different.

1209, 1225 (2010).

112. *Id.*

113. *See id.* at 1275–76.

114. *Id.* at 1212; *id.* at 1288 n.327.

115. *Id.* at 1225 (emphasis omitted).

116. *Id.* (emphasis omitted).

117. *Id.* (emphasis in original).

118. *Id.* at 1212 n.9 and accompanying text.

119. 18 U.S.C. § 113(a)(6) (2006); *United States v. Martin*, 528 F.3d 746, 751 (10th Cir. 2008) (upholding a conviction under § 113(a)(6)).

120. *See Martin*, 528 F.3d at 749 (describing gruesome consequences of untreated injuries).

121. 223 U.S. 442, 449 (1912) (“At the time of the trial for the [assault and battery] the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense.”).

122. 4 BLACKSTONE, *supra* note 99, at \*197–98.

Consider the Free Speech Clause, which Rosenkranz examines at length. We know that a law violates that clause when it “abridg[es]” the freedom of speech.<sup>123</sup> Imagine a law that clearly purports to prohibit protected speech, and which (the President explains) therefore cannot be applied to certain conduct and accordingly will not be enforced. Imagine further that nobody is punished for their protected speech and (thanks to the President’s promises not to enforce it) that nobody is deterred from speaking. Surely nobody’s freedom has been abridged<sup>124</sup> and no constitutional violation has occurred. In contrast, if another President eventually takes office and decides to enforce the statute, then the freedom of speech will be abridged for the first time, and the law will be unconstitutional for the first time. Just like “assault resulting in serious bodily injury,” a law “abridging the freedom of speech” must be judged by the ill effects it has—that is, by whether any freedom is actually abridged by the law.

And even if Rosenkranz *were* correct that constitutional prohibitions addressed directly to Congress can be violated only at the moment of enactment, I am dubious of his further claim that laws exceeding Congress’s enumerated powers have such characteristics.<sup>125</sup> The First Amendment says that “Congress shall make no law” violating its dictates.<sup>126</sup> But as Rosenkranz acknowledges, this is not true of the enumerated powers, which are “grant[s] of power rather than . . . restriction[s] on power, so, strictly speaking . . . cannot be ‘violated’ at all.”<sup>127</sup>

Rosenkranz goes on to argue that when Congress “*exceed[s] its power* under the Commerce Clause,” it “*violate[s] the Tenth Amendment.*”<sup>128</sup> But the Tenth Amendment, unlike the First, is not addressed to any branch of government in particular. It simply says that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>129</sup> If Congress passes a law that would exceed its powers, but the law is never enforced, how has it offended the States’ “reserv[ation]” of power? And if such a law *is* enforced, why is it the passage of the law, rather than its enforcement, that is the constitutional problem? Rosenkranz’s thesis is not proven.<sup>130</sup>

And in the end, the implications for my analysis are just a matter of scope. If I am wrong on this issue, it will go to which unconstitutional laws the President may sign, not whether there are any. By contrast, even if I am right about the flaws in

123. U.S. CONST. amend. I.

124. Even somebody who is not Holmes’s “bad man,” and therefore feels a moral obligation to obey the law, O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459–61 (1897), ought to feel no obligation to obey a law that he knows and has been told is unconstitutional.

125. Rosenkranz, *supra* note 111, at 1273–88; *see also infra* Part IV.A (discussing and defending President Nixon’s decision to sign such a law).

126. U.S. CONST. amend. I.

127. Rosenkranz, *supra* note 111, at 1275.

128. *Id.* (emphasis in original).

129. U.S. CONST. amend. X.

130. In many respects, Rosenkranz’s thesis also appears to be inconsistent with the treatment of the severability issue in the early days of the Republic. *See generally* Walsh, *supra* note 47, at 755–77; *see also supra* notes 48–55 and accompanying text.

Rosenkranz's analysis of the Free Speech Clause and the enumerated powers, there might be some constitutional violations that could be consummated by passage of a law alone—perhaps a bill granting a title of nobility, or one purporting to establish, purely symbolically, an official religion.<sup>131</sup> If such laws exist, I do not argue that the President is justified in signing them.

#### IV. CONSTITUTIONAL RESPONSIBILITY

So the President may sign unconstitutional bills in theory, but may not do so lightly. By allowing a bill to comply with the Constitution's *procedural* requirements for becoming law—even if it does not comply with the Constitution's *substantive* requirements—the President does increase the risk that it will be applied to produce unconstitutional results in the future. If not by him, perhaps by a successor, by a subordinate, by a court. While nothing flatly forbids the President from taking such risks, the President's constitutional oaths surely do not allow him to court those risks needlessly.

Yet weighty constitutional concerns can justify the risky (but constitutional) practice of signing a bill that contains some unconstitutional provisions. There are many situations where the President is constitutionally *required* to pass a law that is partly unconstitutional.

Our Constitution is mostly a charter of structural rules and negative liberties.<sup>132</sup> It generally forbids the government from doing things but does not require it to take affirmative action. But there are important exceptions to that general rule, and it is a mistake to assume that the government never has a constitutional obligation to improve the status quo.<sup>133</sup> More often than is widely appreciated, the Constitution does require the government to take action. In such cases, signing a new bill may be the best realistic way to preserve, protect, and defend the Constitution, even if that bill also has potentially unconstitutional applications. This is not the same thing as suggesting that it is okay to violate the Constitution in times of great necessity. Remember, there is no “don't-sign-unconstitutional-bills” clause, so signing an unconstitutional bill does not violate the Constitution *per se*. The point of this analysis is to explain why a sensible President would ever have a constitutional *reason* to sign an unconstitutional bill, especially in light of the constitutional risks entailed by doing so.

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131. *Contra* U.S. CONST. art. I, § 9; *id.* amend. I. Thanks to Stephen Sachs for this observation.

132. David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 886 (1986) (concluding that generally “the Constitution is a charter of negative rather than positive liberties” (quoting *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.))).

133. I discuss important examples *infra* Part IV.A–B; *see also* Currie, *supra* note 132, at 872–76 (canvassing exceptions). But I am sure this discussion raises more questions than it answers. A more exhaustive defense of the government's constitutional obligations to legislate, and an attempt to reconcile that accounting with the fundamental principles of limited government and private ordering, must await a future work.

*A. Nixon's Constitutionalism*

An example may help. Consider President Richard Nixon's decision to renew the Voting Rights Act in 1970. The Voting Rights Act of 1965<sup>134</sup> was enacted in response to a long campaign by the Southern states to evade the Fifteenth Amendment's requirement that voting rights not be abridged on account of race.<sup>135</sup> The Act radically restricted states' abilities to establish literacy tests and the like, and it established an administrative pre-clearance scheme to forbid some jurisdictions from concocting new measures without prior approval by the Department of Justice or a federal district court.<sup>136</sup> In short, the Act was designed to eliminate what Congress believed to be widespread violations of the Constitution.

By 1970, there was evidence that the Act was doing just that,<sup>137</sup> but some provisions of the Act would soon effectively expire.<sup>138</sup> There was also reason to worry that the constitutional problems would recur if these portions were not renewed. Jurisdictions formerly covered by Section Five would be freed to go back to their old ways, or to invent new ones accomplishing the same evil ends. As the Court has observed, "the States were creative in 'contriving new rules' to continue violating the Fifteenth Amendment" even "in the face of adverse federal court decrees."<sup>139</sup>

So Congress extended the old Act by passing the Voting Rights Act of 1970 and presented it to President Nixon.<sup>140</sup> As long as the Act was an "appropriate" provision to enforce the Fifteenth Amendment's voting rights,<sup>141</sup> failing to extend it would itself be a constitutional problem—thousands and thousands of voters would have their constitutional rights violated without it. A President bound to take care that these rights be protected could hardly ignore this when contemplating the bill on his desk.

However, the new Act also contained a provision lowering the minimum voting age from twenty-one years old to eighteen.<sup>142</sup> The provision applied not only in

134. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

135. See *Nw. Austin Municipality Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2508–09 (2009); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 310–11 (1966); ALEXANDER KEYSAR, *THE RIGHT TO VOTE* 105–11 (2000).

136. Voting Rights Act of 1965 (discussed in *Nw. Austin*, 120 S. Ct. at 2509–10).

137. See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1784–85 n.151 (2007).

138. See *Nw. Austin*, 129 S. Ct. at 2510 ("As enacted, [sections] 4 and 5 of the Voting Rights Act were temporary provisions. They were expected to be in effect for only five years."). The Act did not have an explicit sunset provision, but it banned literacy tests and then terminated coverage after they had been gone for five years. Voting Rights Act of 1965 § 4(a).

139. *Nw. Austin*, 129 S. Ct. at 2508–09 (quoting *Katzenbach*, 383 U.S. at 335).

140. See Act of June 19, 1970, Pub. L. No. 91-285, 84 Stat. 314 (extending the Voting Rights Act of 1965). For a summary see ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 31–42 (1987).

141. U.S. CONST. amend. XV, § 2.

142. § 302, 84 Stat. at 318; see also Jenny Diamond Cheng, *Uncovering the Twenty-Sixth Amendment*, 18–24 (2008) (unpublished Ph.D. dissertation, University of Michigan) (on file with University of Michigan Library), available at <http://deepblue.lib.umich.edu> (detailing

congressional elections, where it could arguably be justified under Congress's Article I authority,<sup>143</sup> but to all state elections as well. Such a dramatic revision of state election law could not be justified under any of Congress's powers.

President Nixon recognized this. Calling the voting-age provision "an unconstitutional assertion of Congressional authority in an area specifically reserved to the States," he had contacted House leadership after the Senate appended it to the Voting Rights Act of 1970.<sup>144</sup> He had urged the House to eliminate it and to pass a constitutional amendment instead: although Nixon "strongly favor[ed] the 18-year-old vote,"<sup>145</sup> he thought that its inclusion rendered the bill partly unconstitutional. It also risked creating a crisis during the 1972 election, and damaging the credibility of Congress's Fourteenth and Fifteenth Amendment legislation in the eyes of the Court.<sup>146</sup> These objections were to no avail.

So when the Voting Rights Act of 1970 was passed by Congress, it contained a number of provisions enforcing the Fifteenth Amendment, and a voting-age provision that exceeded Congress's enumerated powers. With no line-item veto, the President had to either sign it into law and thus put his name to a provision that he thought violated the Constitution, or veto it and thus permit violations of the constitutional rights of thousands of black voters.

The text and constitutional structure supply the framework for analyzing the problem, but not an obvious answer to this dilemma. The Constitution tells the President that he must preserve the Constitution as best he can—it does not tell him how to triage when he cannot do so perfectly. That is a matter that has to be committed to his judgment about the best use of his constitutional powers. Nixon chose to sign the Act rather than veto it<sup>147</sup>—a difficult choice given the concerns he had outlined in his letter to the House, but in hindsight the right one. The Supreme

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legislative history of this provision).

143. U.S. CONST. art. I, § 4, cl. 1.

144. Letter to House Leaders Supporting a Constitutional Amendment to Lower the Voting Age, 1970 PUB. PAPERS 401, 401 (Apr. 27, 1970). "The President was supported in this view by the testimony of two senior Department of Justice officials—Deputy Attorney General Richard Kleindienst and Assistant Attorney General William Rehnquist." Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1081 n.33 (2001).

145. Letter to House Leaders Supporting a Constitutional Amendment to Lower the Voting Age, 1970 PUB. PAPERS 401, 401 (Apr. 27, 1970); *see also* Cheng, *supra* note 142, at 63.

146. Letter to House Leaders Supporting a Constitutional Amendment to Lower the Voting Age, 1970 PUB. PAPERS 401, 402–04 (Apr. 27, 1970); *see also* Cheng, *supra* note 142, at 20 ("If the votes of 18-year-old citizens were disregarded as invalid, an election might be thrown into the House of Representatives. This uncertainty and confusion would arise at the very time when the Nation can ill afford to await the outcome of protracted litigation, and even worse, be divided by it." (quoting Voting Rights Act Amendments of 1969, 116 CONG. REC. 6877, 6947 (1970) (statement of Sen. Hruska))). *But see* JOSH CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 162–92 (2007) (defending legislative privilege of resolving disputed elections).

147. Presidential Statement on Signing the Voting Rights Act of 1970, 1970 PUB. PAPERS 512 (June 22, 1970).

Court struck down the unconstitutional part of the statute,<sup>148</sup> and the next year a constitutional amendment solved the problem permanently.<sup>149</sup> All of this was accomplished without sacrificing constitutional rights of black voters. President Nixon is an unlikely exemplar of presidential constitutionalism, but this time he nailed it.

### B. Other Examples

It would be a mistake to dismiss this example as an oddity. The President has other important affirmative obligations to preserve and enforce the Constitution. These can also justify signing unconstitutional bills.

For example, the federal government must “guarantee to every State . . . a Republican Form of Government and . . . protect each of them against Invasion.”<sup>150</sup> This obligation is positive, not merely negative; it is not enough for the President to refrain from overthrowing state governments or invading the states himself.<sup>151</sup> The Constitution requires him to protect against invasions by others, and to ensure that their republican governments remain intact. So when the President believes that a measure is necessary to win a war in which American territory is threatened, he not only believes that measure is wise, he also believes that it is required by his constitutional obligations to “protect” the states “against Invasion.”<sup>152</sup>

This suggests that when Congress passes an important national security<sup>153</sup> measure that contains a few provisions that are potentially unconstitutional, the President can be justified in signing it. If he signs the law, an unconstitutional provision might be enforced in the future. If not, an invasion might succeed or a republican government might be overthrown. It is hard to lay out a complete calculus of these constitutional risks,<sup>154</sup> but it is implausible that the President is *always* required to risk an unconstitutional invasion by vetoing a bill with an unconstitutional provision.

The portion of the recent signing statements controversy that condemned President George W. Bush for signing laws he viewed as unconstitutional<sup>155</sup> can be assessed in this light; for example, in late 2001, the President signed an intelligence

148. *Oregon v. Mitchell*, 400 U.S. 112 (1970). The Solicitor General informed the Court that the President thought the statute was unconstitutional, while also providing an argument for upholding the statute. Waxman, *supra* note 144, at 1081–82.

149. U.S. CONST. amend. XXVI.

150. *Id.* art. IV, § 4; *see also* Currie, *supra* note 132, at 865 (noting that this is an affirmative obligation).

151. *See, e.g.*, 113 CONG. REC. 32959, 32961 (Nov. 19, 1987) (statement of Rep. Conyers) (“[W]e not only have the power to act, we have the duty to act. The Constitution does not say we ‘may.’ It says that we ‘shall’ guarantee to every state a republican form of government.”). *See generally* THE FEDERALIST NO. 43, at 225–26 (James Madison) (George W. Carey & James McClellan eds., 2001).

152. U.S. CONST. art. IV, § 4.

153. I use the phrase “national security” in the technical sense of a law helping to prevent invasions or to protect republican governments.

154. *See infra* Part IV.D (discussing some of the parameters).

155. *See, e.g.*, ABA REPORT, *supra* note 15, at 15–18.



appropriations bill.<sup>156</sup> He explained that it “authorize[d] appropriations to fund United States intelligence activities, including activities essential to success in the war against global terrorism.”<sup>157</sup> At the same time, one provision required the executive to report intelligence matters to Congress more extensively than he thought proper.<sup>158</sup> According to the President, this requirement “in some circumstances, would fall short of constitutional standards,” and therefore would not be applied.<sup>159</sup> By signing the bill while planning to disregard this provision, the President concluded that his duty to protect the country against invasion outweighed the small danger of allowing the potentially unconstitutional reporting requirement to sit ignored in the Statutes at Large.

Similarly, the President signed a three hundred billion dollar appropriations bill that he said would “provide[] the resources needed to continue the war against global terrorism, [and] pursue an effective missile defense,”<sup>160</sup> but that also imposed some potentially unconstitutional restrictions, such as notification requirements.<sup>161</sup> Another appropriations bill provided “essential funding to support America’s war on terrorism” and allowed the President “to meet the diplomatic requirements stemming from the September 11th attacks,”<sup>162</sup> but also “purport[ed]” to “interfere with the President’s constitutional authority to conduct the Nation’s foreign affairs.”<sup>163</sup> This pattern recurred throughout many of the unconstitutional laws he signed.<sup>164</sup>

One can dispute the President’s judgment in these cases. Perhaps the provisions were not really unconstitutional, or perhaps the constitutional needs for these

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156. Presidential Statement on Signing the Intelligence Authorization Act for Fiscal Year 2002, 37 WKLY. COMP. PRES. DOC. 1834 (Dec. 28, 2001).

157. *Id.*

158. See Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 305, 115 Stat. 1394, 1398–99 (2001).

159. Presidential Statement on Signing the Intelligence Authorization Act for Fiscal Year 2002, 37 WKLY. COMP. PRES. DOC. 1834 (Dec. 28, 2001).

160. Presidential Statement on Signing the Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, 38 WKLY. COMP. PRES. DOC. 46 (Jan. 10, 2002).

161. See *id.* at 47–48.

162. Presidential Statement on Signing the Foreign Operations, Export Financing and Related Programs Appropriations Act, 38 WKLY. COMP. PRES. DOC. 49 (Jan. 10, 2002).

163. *Id.* at 50.

164. See, e.g., Presidential Statement on Signing the Department of Homeland Security Appropriations Act, 2007, 42 WKLY. COMP. PRES. DOC. 1742 (Oct. 4, 2006); Presidential Statement on Signing the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 39 WKLY. COMP. PRES. DOC. 1549 (Nov. 6, 2003); Presidential Statement on Signing the Department of Defense Appropriations Act, 2003, 38 WKLY. COMP. PRES. DOC. 1834 (Oct. 23, 2002); Presidential Statement on Signing the Enhanced Border Security and Visa Entry Reform Act of 2002, 38 WKLY. COMP. PRES. DOC. 822 (May 14, 2002). In some cases, the President may have chosen to “construe” the problematic provisions in a special way, rather than to disregard them. *Presidential Signing Statement Hearing*, *supra* note 108, at 2–6 (statement of Nicholas Quinn Rosenkranz). I do not regard the difference as material.

security measures were not as serious as he said.<sup>165</sup> But my point is that his arguments were correct in *form*, and if his premises were correct, he acted properly in signing the laws even though he thought them unconstitutional. The unconstitutional provisions that he signed largely affected the executive branch directly, and would not be enforced against the President's wishes without a concerted effort by other branches. In contrast, not signing those laws (he believed) would have jeopardized the military's ability to defend our borders as the Constitution requires.

Judgments of this sort are not new either. Consider Andrew Johnson's decision to sign the 1867 Army Appropriations Act<sup>166</sup> despite believing that it "deprive[d] the President of his constitutional functions as Commander in Chief" and "denie[d] to ten States . . . their constitutional right to protect themselves."<sup>167</sup> He felt that the bill contained "necessary appropriations" which he would be "compelled to defeat" if he vetoed it.<sup>168</sup> Johnson therefore signed it despite the constitutional problems and used his other executive powers to mitigate the parts he thought unconstitutional.<sup>169</sup>

That is not all. Beyond the duty to protect the country, the Constitution's amendments are teeming with individual rights that the federal government has the power to protect—such as the Fourteenth Amendment (and the Bill of Rights it incorporates),<sup>170</sup> and four voting rights amendments.<sup>171</sup> That power to protect implies responsibility: the Constitution obligates the President to take care that the Constitution is faithfully enforced, and to actively preserve and protect the Constitution. The President is thus obligated to take care that those rights-protecting provisions are enforced by protecting the people's constitutional rights.<sup>172</sup>

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165. For example, some have claimed that the threat to America's borders was not as strong as the Executive Branch appeared to believe. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 554–55 (2004). *But see* Boumediene v. Bush, 128 S. Ct. 2229, 2276–77 (2008) (“[N]either the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.”); JACK L. GOLDSMITH, *THE TERROR PRESIDENCY* 71–72 (2007).

166. Army Appropriations Act, ch. 170, 14 Stat. 485 (1867).

167. Andrew Johnson, Protest to the House of Representatives (Mar. 2, 1867), reprinted in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 58, at 472.

168. *Id.* The necessity was unexplained.

169. See Josh Chafetz, *Impeachment and Assassination*, 95 MINN. L. REV. 347, 404–05 (forthcoming 2010).

170. U.S. CONST. amend. XIV; On incorporation, see AMAR, *supra* note 13, at 386–90; Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: “Privileges and Immunities” as an Antebellum Term of Art*, 99 GEO. L.J. (forthcoming 2011) (manuscript at 57), available at <http://ssrn.com/abstract=1561183>; McDonald v. City of Chicago, 130 S. Ct. 3020, 3058 (2010) (Thomas, J., concurring).

171. U.S. CONST. amends. XV, XIX, XXIV, XXVI.

172. To be sure, it is very rare for *courts* to find a constitutional violation in the government's failure to act. See generally Currie, *supra* note 132. But the very premise of presidential responsibility is that the President is guided by principles even if courts will not

The extent of this obligation of course depends on how broadly the Fourteenth Amendment sweeps. Some scholars argue that the Amendment obligates the federal government to guarantee a right to education,<sup>173</sup> or a broad set of welfare rights.<sup>174</sup> The correctness of such interpretations determines the extent of the President's authorization and obligation to enforce those rights (and to sign unconstitutional laws if necessary to do so). But even under a narrower conception, the President surely must act to guarantee the equal protection of the laws or (as Nixon did) the equal right to vote.<sup>175</sup>

### C. Unredeemable Laws

Of course, sometimes there is no good reason to sign an unconstitutional bill. For one example, there was little justification for President Bush's decision to sign the Bipartisan Campaign Reform Act, which limited the freedom to contribute to political parties or to run certain political advertisements too close to an election.<sup>176</sup> Acknowledging that the Act "present[ed] serious constitutional concerns" under the First Amendment, the President nonetheless decided to sign it and leave the mess to the courts to sort out.<sup>177</sup> (Ironically, the Supreme Court then deferred to the constitutional judgment of the political branches, leaving the freedom of speech thoroughly abridged for many.)<sup>178</sup>

President Bush did not suggest that a countervailing constitutional obligation justified taking this risk. Even those who think Congress should more aggressively regulate private spending in elections do not usually suggest that private spending is *constitutionally* problematic, nor did he.<sup>179</sup> And while the President did praise the

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force him to be.

173. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 367–99 (2006); cf. Presidential Statement on Signing the Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act, 2002, 38 WKLY. COMP. PRES. DOC. 50 (Jan. 10, 2002) (signing educational bill with unconstitutional provisions).

174. See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

175. These examples are not exhaustive. Another is President Lincoln's belief that he had a "constitutional duty" to preserve the Union by fighting the Civil War. Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 706–07 (2004) (book review) (emphasis omitted).

176. Bipartisan Campaign Reform Act of 2002 [hereinafter BCRA], Pub. L. No. 107-155, 116 Stat. 81 (2002).

177. Presidential Statement on Signing the Bipartisan Campaign Reform Act of 2002, 38 WKLY. COMP. PRES. DOC. 518 (Mar. 27, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/03/20020327.html>.

178. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 137 (2003), *overruled in part by Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010), *reaff'd in part by Republican Nat'l Comm. v. Fed. Election Comm'n*, 130 S. Ct. 3544 (2010).

179. There is no evidence that the President disagreed with the conventional wisdom that neither the First Amendment nor the Equal Protection Clause limits private action. See generally *Lloyd v. Tanner*, 407 U.S. 551, 567 (1972); *The Civil Rights Cases*, 109 U.S. 3, 17 (1883); Lillian Riemer BeVier & John C. Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1588082>.

decision to raise the individual contribution limit, he did not suggest that the new limits were of such overriding constitutional importance as to justify the other unconstitutional provisions.<sup>180</sup> So if the President took seriously his duty to preserve the people's rights to freedom of speech and thought that the Act was constitutionally problematic, he should have vetoed it.<sup>181</sup> Signing it was a dereliction of constitutional duty.

The same is true of the historical examples given by Professor Prakash.<sup>182</sup> Consider Madison's veto of internal improvements legislation and Monroe's veto of the Cumberland Road.<sup>183</sup> The entire bills were challenged as exceeding the federal government's enumerated powers. There were no permissible pieces that might be constitutionally justified, and there was no presidential duty to justify passing the bill either—no threatened invasion of the states and no constitutional rights at stake. So the episode did not have the characteristics that justify signing unconstitutional laws; no other method of presidential review would be better than a veto, and there was no presidential duty that would justify signing the bill if it was partly unconstitutional. The Presidents were right to feel obligated to veto these bills.<sup>184</sup>

This is even more true of President Washington. When confronted with the fateful proposal to create a national bank, Washington wrote that it was his "duty to examine" the constitutional objections to the institution before proceeding.<sup>185</sup> Of course, Washington concluded that the bill was constitutional and signed it. But

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180. Presidential Statement on Signing the Bipartisan Campaign Reform Act of 2002, 38 WKLY. COMP. PRES. DOC. 517 (Mar. 27, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/03/20020327.html>; see also *id.* at 518 ("This legislation . . . does represent progress . . . [and] improves the current system of financing for Federal campaigns . . .").

181. Of course, depending on which provisions of the Act the President thought unconstitutional, it is possible that his faith in the courts may eventually be vindicated. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 913 (2010); *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 689 (D.C. Cir. 2010); *Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 4 (D.C. Cir. 2009). But see *Republican Nat'l Comm. v. Fed. Election Comm'n*, 698 F. Supp. 2d 150, 153 (2010), summarily *aff'd*, 130 S. Ct. 3544. But even what vindication has come has been slow. *Contra* BCRA § 403(a)(4), 116 Stat. 81 at 113–14 (requiring courts "to expedite to the greatest possible extent" challenges to the BCRA).

182. Prakash, *supra* note 1, at 84–86.

183. See James Madison, Veto Message (Mar. 3, 1817), reprinted in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 58, at 569; James Monroe, Veto Message (Mar. 4, 1822), reprinted in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 58, at 142; Prakash, *supra* note 1, at 84–86. For more background, see DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829, at 260–66 (2001) (discussing the internal improvements veto); *id.* at 279–81 (discussing Cumberland Road).

184. That is, assuming that their constitutional objections were accurate. But see, e.g., CURRIE, *supra* note 183, at 278, 280–81 (questioning Monroe's objections to the Cumberland Road bill).

185. Prakash, *supra* note 1, at 84 (quoting Letter from George Washington to Alexander Hamilton (Feb. 16, 1791), in 31 THE WRITINGS OF GEORGE WASHINGTON 215 (John C. Fitzpatrick ed., 1939)).

“[a]rguably,” Professor Prakash suggests, “there would be little point in Washington conducting an extensive consideration of the constitutional question if he did not believe that he had to veto the bill if he ultimately concluded that it was unconstitutional.”<sup>186</sup> He draws a similar inference from the response of Washington’s advisors: “the very fact that all three opinions Washington received . . . only considered the constitutionality of the bank perhaps suggests that these gentlemen understood that Washington had no choice if he found the bank unconstitutional.”<sup>187</sup>

The inference is misplaced. First, the fact that a President decides to determine the constitutionality of a law before signing it does not imply that he thinks the question of constitutionality necessarily trumps all other considerations. He might simply feel duty-bound to make an informed decision and consider all relevant factors before signing, without intending to treat one of those factors as overriding. Indeed, Washington had earlier said that he “walk[ed] on untrodden ground”<sup>188</sup> and that because he expected his actions “to establish a Precedent, it is devoutly wished on my part, that these precedents may be fixed on true principles.”<sup>189</sup> So it is no surprise that, at a minimum, he would act deliberately.

More importantly, as with the Cumberland Road, the constitutional objection to the bank bill was that Congress lacked the power to create the corporation at all;<sup>190</sup> if valid, that objection made the bill unredeemable.

All of these examples confirm that Presidents sometimes must veto *particular* bills, and they are also consistent with the modern theory that there is no *categorical* duty to veto. The historical examples rarely speak to the modern issue, perhaps because it did not come up much.<sup>191</sup> The President’s affirmative obligations to sign bills have increased dramatically with the passage of the Fourteenth and Fifteenth Amendments, and “[s]ubstantive riders on appropriations bills and other devices to evade the President’s veto power are more popular than ever.”<sup>192</sup>

An examination of political practice cannot always distinguish between subtly different interpretations of the Constitution.<sup>193</sup> Here, the practice is enough to strongly suggest that there was some class of unconstitutional bills that had to be

186. *Id.*

187. *Id.* at 85–86.

188. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801*, at 4 n.7 (1997) (quoting Letter from George Washington to Catherine Macaulay Graham (Jan. 9, 1790), in 30 *THE WRITINGS OF GEORGE WASHINGTON* 496 (John C. Fitzpatrick ed., 1939)).

189. Letter from George Washington to James Madison (May 5, 1789), in 2 *THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES* 216–17 (W. Abbott ed., 1987).

190. CURRIE, *supra* note 189, at 78–80.

191. One exception is Andrew Jackson, who vetoed a bank bill he plainly thought unredeemable, but also expressed the President’s obligation to veto in more absolutist terms. Jackson, *supra* note 58, at 567 (discussed in Prakash, *supra* note 1, at 86 n.22); see also *supra* note 58 and accompanying text.

192. Eugene V. Rostow, *President, Prime Minister or Constitutional Monarch?*, 83 *AM. J. INT’L L.* 740, 743 (1989).

193. *Cf.* Baude, *supra* note 14, at 1831–34.

vetoed, but those scattered examples alone may not be enough to tell us what that class is.

#### *D. Constitutional Consequentialism*

It is probably impossible to lay out a completely determinate test for how the President should weigh these factors in deciding whether to sign a partly unconstitutional bill; and after all, the decision is ultimately committed to his constitutional judgment. But it is still possible to outline the most important considerations.

Such a bill must also be at least *partly constitutional* before the President can sign it. If the bill is unconstitutional in every application of every part, then there is nothing redeeming about it.<sup>194</sup> The President's oath does not permit him to sign a bill because he likes the unconstitutional parts and plans to help them take effect. It must be that he has reason to pass the other parts of the bill, and cannot help that they come bundled to unconstitutional parts.

Such a bill must be not only partly constitutional but *partly required*. While the act of signing an unconstitutional bill does not itself violate the Constitution, it does create a risk that the newly-signed parts will later be (improperly) enforced. There must be countervailing constitutional considerations—not merely non-constitutional policy concerns—to justify taking that risk.

The President must of course consider the *size of the risk*. A bill that has unconstitutional provisions that are quite likely to be enforced is much harder to justify than a bill whose unconstitutional application is extremely unlikely. Similarly, the President must consider the *magnitude and importance of the possible violations*, although it does not necessarily follow that he must follow a strict mathematical rule in comparing them.

In weighing these factors, the analysis must be dynamic, not static. Congress and the President are repeat players, so by vetoing an unconstitutional bill the President may be able to get Congress to repass the bill without the impermissible portions, or to back down more frequently in the future.<sup>195</sup> Or in other cases, excessive vetoes might cost him much of his constitutional credibility with Congress.<sup>196</sup> The point is that the risks must be analyzed over the long run.

(Some readers will notice a factor that is *not* listed: A few authors have suggested that it is somehow better if the President does not actually *sign* an unconstitutional bill but rather permits it to become law without a signature under the default provisions of Article I, Section 7.<sup>197</sup> But under the logic of my argument, it does not matter whether the President tries to keep his hands clean in this fashion. If an unconstitutional law is nonetheless justifiable, the President has nothing to be ashamed of, and may as well sign it. If an unconstitutional law does

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194. *Accord* Barron et al., *supra* note 31; Cass & Strauss, *supra* note 24.

195. Thanks to Hanah Volokh for stubbornly insisting on this point.

196. *See* DAVID O. STEWART, IMPEACHED: THE TRIAL OF ANDREW JOHNSON AND THE FIGHT FOR LINCOLN'S LEGACY 321 (2009); Chafetz, *supra* note 169, at 401–02.

197. AMAR, *supra* note 13, at 184; Ross A. Wilson, Note, A Third Way: The Presidential Non-Signing Statement 34–35 (Apr. 21, 2010) (unpublished manuscript), *available at* <http://ssrn.com/abstract=1593862>.

not have constitutional benefits that outweigh its constitutional risks, the President has no right to be passive.)

To be sure, several of the foregoing factors provide standards, not rules, and admit a great deal of discretion. They are consequently hard to enforce: Judges might strike down a statute that is unconstitutional, but they will not order the President to veto one, and the people themselves (to whatever extent they care) would have a hard time supervising the application of such a malleable test. But legal frameworks can be important even when they do not come with regimes of adjudication or punishment. The President can take the Constitution seriously in executing his office (and historically he has).

One other potential complaint about the malleability of these factors is that in practice the President will naturally interpret them to simply replicate his nonconstitutional policy preferences. As Fred Schauer has argued, “it is hardly clear, except as opportunistic political rhetoric, that we really expect our political leaders to follow the law when following the law conflicts with simply doing the right thing.”<sup>198</sup> But even if this is so, a final important factor is not so malleable: Regardless of how the President decides *which* unconstitutional bills to sign, he must also do what he can to *mitigate* the risks he creates. That is, a President who signs an unconstitutional bill is not allowed to simply enforce it like any other. He has an array of tools to ensure that unconstitutional laws do not get enforced, and he is supposed to use them. There may well be circumstances in which the President is justified in deferring to the constitutional judgments of other branches out of institutional concerns. Maybe he does not always have to pardon every prisoner whose original conviction was constitutionally flawed.<sup>199</sup> Maybe he is sometimes justified in permitting or instructing the Solicitor General to put forward lawyers’ arguments in defense of unconstitutional statutes.<sup>200</sup> But when the President signs an unconstitutional law, he must be particularly punctilious about mitigating the danger he has created. The President need not use his veto when he has other, better tools for fulfilling his oath. But if he does not use those either, it suggests that he just does not care that much about the Constitution.

#### CONCLUSION

Just last spring, Justice Scalia warned us against interpreting the Constitution to perfectly supply everything we need from it: “[t]he Constitution . . . is not an all-purpose tool for judicial construction of a perfect world . . . .”<sup>201</sup> We must be just as wary of the reverse—assuming that yesterday’s formalisms are inadequate for today’s government.

The stakes are real. Those who think that there is a categorical duty to veto unconstitutional bills think that President Nixon should have vetoed the Voting Rights Act of 1970, and that future Presidents must veto important war measures if they contain an unenforceable and therefore unimportant legislative veto.

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198. Frederick Schauer, *Ambivalence About the Law*, 49 ARIZ. L. REV. 11, 16 (2007).

199. See John Harrison, *Pardon as Prerogative*, 13 FED. SENT’G REP. 147, 147 (2001).

200. See Waxman, *supra* note 144, at 1077–78, 1083.

201. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1494 (2010) (Scalia, J., dissenting); accord Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

Fortunately, the Constitution does not create such a trap. While the President is obligated to review the constitutionality of bills that are presented to him, and sometimes to veto them, the Constitution does not present a categorical rule. In a particular class of important cases—such as where national security or civil rights are at stake—the President better fulfills his oath to the Constitution by signing unconstitutional laws.

There is also a broader lesson about what we remember and what we forget. We are all too eager to remember the long list of things the President *must not* do. We more easily forget that there are many things that he *must* do. Our Constitution does not create a passive President, and we should not make him into one.