"THE COURT WILL CLEAN IT UP": CONFRONTING THE SPECTER OF POLITICAL BRANCH DERELICTION OF DUTY

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I. INTRODUCTION

"Well: John Marshall has made his decision: *now let him enforce it*."[1] President Andrew Jackson's apocryphal reaction to Chief Justice Marshall's decision in *Worcester v. Georgia*[2] has at once served as a rallying cry to those favoring a strong form of coordinate-branch review and as a warning from those urging judicial supremacy in constitutional interpretation.[3] The former would argue that President Jackson's response is illustrative of a long-held understanding in America that although it may be "emphatically the province and duty of the judicial branch to say what the law is"[4] it is not *exclusively* the Judiciary's province and duty. On the contrary, the political branches have as much right and duty to interpret the Constitution as do the courts.[5] The latter would point to the aftermath of President Jackson's refusal to ensure the faithful execution of the Court's order—the forced relocation of the Cherokees out of Georgia in what became known as the Trail of Tears—

1. *See, e.g.*, 1 HORACE GREELEY, THE AMERICAN CONFLICT: A HISTORY OF THE GREAT CIVIL WAR IN THE UNITED STATES OF AMERICA 106 (1865) (internal quotation marks omitted); 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 219 (1923) (internal quotation marks omitted); *see also* PAUL F. BOLLER JR. & JOHN GEORGE, THEY NEVER SAID IT: A BOOK OF FAKE QUOTES, MISQUOTES & MISLEADING ATTRIBUTIONS 53 (1989) (noting that President Jackson's actual words were: "The decision of the supreme court has fell still born and they find that it cannot coerce Georgia to yield to its mandate").

2. 31 U.S. (6 Pet.) 515 (1832).

3. *See, e.g.*, Ann Coulter, *Starved for Justice*, ANNCOULTER.COM (Mar. 24, 2005), http://www.anncoulter.com/cgi-local/article.cgi?article=47 (using President Jackson's quote to encourage then-Governor Jeb Bush of Florida to reject the court-ordered starvation of Teri Schiavo); Steven Breyer, Associate Justice, Supreme Court of the United States, Boston College Law School Commencement Speech (May 23, 2003), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?filename=sp_05-23-03.html (applauding the evolution of the nation's attitude from one that begat President Jackson's quote to one defined by "widespread acceptance of the final decision even where we . . . believe the decision is wrong").

4. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

5. Concededly, President Jackson was not interpreting the Constitution as much as he was simply defying the Supreme Court. This example is used more to illustrate the dichotomy in thought that arises in the tug-of-war between the branches than to illustrate coordinate-branch review itself.

as evidence of the danger that accompanies disregard for the Court's judgments.[6]

Judicial review, or the ability of a court in the course of deciding a case or controversy to review political branch or state action and determine whether it comports with the Constitution, is a well-accepted and established element of the Judiciary's power. It was explicitly asserted by the Court in *Marbury* and had been practiced by state courts for many years—even before the ratification of the Constitution.[7] The debate since *Marbury* has not focused on the propriety of judicial review but rather on the propriety and the implications of judicial *supremacy*. Judicial supremacy does not necessarily mean that "once the Justices have spoken everyone must submissively lower their gaze and slink home."[8] But it does place the Court squarely in the driver's seat with respect to constitutional interpretation, compels the other branches to pass and execute only those laws that are consistent with the Court's interpretation of the

6. *See, e.g.*, Breyer, *supra* note 3.

7. One especially noteworthy example is *Rutgers v. Waddington*, (New York Mayor's Court, 1784). During the Revolutionary War, the British army authorized Joshua (or Joseph) Waddington to commandeer plaintiff Elizabeth Rutgers's alehouse. After the war, Rutgers filed a trespass suit for damages. The Treaty of Paris seemed to grant an "implied amnesty" for such appropriations, but more importantly, a well-established principle of the Law of Nations granted an occupying force the right to use private property without being subject to damages. This principle had become part of the New York State Constitution in 1777 with the reception of the "common law." In 1783, the New York legislature passed the New York Trespass Act, which purported to authorize damages and under which Rutgers filed her suit. The statute was therefore in direct conflict with the state constitution and the Treaty of Paris. The court thus had the difficult task of reconciling this conflict. In an opinion that would make Chief Justice Marshall (and Sir Edward Coke) proud, Judge Duane threaded the needle as follows. First, "the supremacy of the Legislature need not be called into question; if they think fit *positively* to enact a law, there is no power which can control them." But, when the legislature enacted a *general* statute that has a *specific unreasonable* effect, the court is free to assume that the legislature did not foresee that consequence and so must not have intended for it. The court can then act in equity and not apply the law in this circumstance. In this way, the court was able to find largely for Waddington (and thus for the New York State Constitution and the Treaty of Paris) without defying the state legislature. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 457–58 (1969). This is an example of modern judicial review "in embryo." It is especially interesting to note the reluctance of the court to openly defy the legislature. For comparison, in *Marbury*, Chief Justice Marshall employed similar skill in avoiding an explicit conflict with President Jefferson, while yet asserting the Court's right to judicial review.

8. Larry D. Kramer, *"The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 698 (2006).

Constitution,[9] and rejects any attempt by the political branches to independently interpret the Constitution in lawmaking.[10] Under this interpretive regime, the power to challenge the Court's constitutional interpretation consists largely of public protest of Court decisions, attempts to alter the Court's course by replacing outgoing Justices with new ones with different judicial philosophies, or the exercise of exclusive powers like the pardon power that remain independent of Court control.

Coordinate review (also referred to as departmentalism or coordinate construction) takes direct issue with judicial supremacy, but it has many flavors, making the terms especially susceptible to confusion. At its core, coordinate review vests each of the three coordinate branches of government with authority to interpret the Constitution in performance of its respective duties. Just how much authority each branch has, with respect to the others, is what distinguishes the various flavors of coordinate review. At one end, Professor Michael Paulsen argues that the President not only has the duty and authority to interpret the Constitution in performance of his executive tasks but also that "[t]he Supreme Court's interpretations of treaties, federal statutes, or the Constitution do not bind the President any more than the President's or Congress's interpretations bind the courts."[11] Indeed, under this view, the only precedential value that a court opinion would have is with respect to the parties to the controversy—and even *they* may not obtain the relief ordered if the President disagrees with the Court.[12] Professor Paulsen appears to be somewhat alone in this view of coordinate review. More

9. This view is embodied in the Supreme Court case *Cooper v. Aaron*. 358 U.S. 1, 18 (1958) ("[*Marbury*] declared the basic principle that the *federal judiciary is supreme* in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a *permanent and indispensable feature* of our constitutional system.") (emphasis added).

10. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (rejecting Congress's attempt to interpret its enforcement power under § 5 of the Fourteenth Amendment to require strict scrutiny for laws that burdened religion and instead holding that the Court had the sole power to define substantive rights guaranteed by the Fourteenth Amendment).

11. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law is*, 83 GEO. L.J. 217, 221 (1994).

12. Steven G. Calabresi, *Caeserism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421, 1422 (1999).

common is the view, articulated by Professor Steven Calabresi, that the absence of an enumerated power of judicial review places the text of the Constitution directly "at war with" *Cooper v. Aaron*'s claim to judicial supremacy.[13] But, because "the Constitution [*does* give] the federal courts the power to decide cases or controversies . . . the Courts can, indeed they must, make independent assessments of the constitutionality of any government action that is properly before them."[14] Moreover, "[t]he President is legally obligated to enforce judicial judgments [even] in cases or controversies that he independently thinks are unconstitutional, subject to a rule of clear mistake."[15]

Given these battling conceptions of the interpretive role and methodology of the coordinate branches, the following questions naturally arise: "When a member of Congress votes on a bill, or when the President decides whether to sign it, how should each assess the bill's constitutionality, and what implications should their individual assessments have?" A related question also arises: namely, "What role should the Court's constitutional interpretation play in such an assessment?"

II. COORDINATE RESTRAINT

A. *Defined*

This Essay introduces and argues for a concept that the author calls "coordinate restraint." Coordinate restraint arises out of a theory of coordinate review and is, this Essay will argue, a thoroughly reasonable normative mandate for the political branches. The essence of coordinate restraint is that the Congress, when proposing, debating, and passing laws, and the President, when deciding whether to sign or veto them, ought to give paramount concern to the constitutionality of the proposed legislation. If members of Congress or the President are not convinced that the legislation comports *in toto* with the Constitution, they are under a solemn obligation to *restrain* themselves and not

13. *Id.*
14. *Id.*
15. *Id.* at 1425.

allow the legislation to become law. While being primarily an exhortation to the political branches to exercise such restraint, this Essay also recognizes the reality of the political inertia that has driven the current, less-restrained practice. It therefore proposes one possible solution to political-branch incontinence: a theoretical constitutional amendment that in effect would force the political branches to exercise coordinate restraint.

B. *Coordinate Restraint, Separation of Powers and Federalism*

Coordinate restraint, while arising out of a coordinate-review theory, is distinctly more protective of liberty than pure coordinate review. Because coordinate review assumes an equal right of each branch to interpret the Constitution in performance of its duties and because each branch has an institutional interest to magnify its own sphere, a system of pure coordinate review actually runs the risk of endangering liberty, as the following discussion illustrates.

James Madison's warning that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others"[16] served well to prompt the appropriate checks and balances at the federal level. These checks between Congress, the President, and the Judiciary have been remarkably successful in preventing one branch from overwhelming the other two. However, the Framers underestimated the checks needed to prevent expansion of the federal branches, not with respect to one another, but with respect to the *states* and the *people*. In other words, the "horizontal" struggle for power at the national level is not simply a zero-sum game between the branches because all three federal branches have been able to expand "vertically," taking power from the states and the people to a degree wholly unanticipated by the Framers. Alexander Hamilton's contention that the national government simply would not be interested in

16. THE FEDERALIST NO. 51, at 318–19 (James Madison) (Clinton Rossiter ed., 1961).

regulating in the traditional sphere of the states illustrates this myopia:

> I confess I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of the authorities of that description. The regulation of the mere domestic police of a State appears to me to hold out slender allurements to ambition. . . . The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction. It is therefore improbable that there should exist a disposition in the federal councils to usurp the powers with which they are connected; because the attempt to exercise those powers would be as troublesome as it would be nugatory; and the possession of them, for that reason, would contribute nothing to the dignity, to the importance, or to the splendor of the national government.[17]

As the rise of the administrative state amply demonstrates, the federal government has indeed become intensely interested in regulating within the traditional realm of the states, which has led to a substantial constriction of individual liberty. As the federal government aggrandizes itself with respect to the states and the people, neither coordinate review nor judicial supremacy have proven to be adequate constitutional-interpretation methods in combating this encroachment. Because each branch continues to interpret its own power as broadly as possible and because when the Court asserts its supremacy it rarely does so to protect the states against federal encroachment,[18] something more is needed to stem the vertical encroachment.

What coordinate restraint provides is a simultaneous horizontal and vertical check against aggrandizement of any branch. If, when analyzing proposed legislation, the inquiry begins with "does the constitution itself grant us the power

17. THE FEDERALIST NO. 17, *supra* note 16, at 114 (Alexander Hamilton) (emphasis omitted).

18. *See infra* part III(B).

to do this?" rather than "is this good policy?" or "will the Court let us get away with this?" and the commitment is to refrain from passing even good policy when the constitutional authority is dubious or absent, the political branches preserve liberty while simultaneously relieving the Court of the unenviable choice of either allowing ever more vertical encroachment or slapping down the other branches and thus risking another round of judicial-aggrandizement charges.

C. *Coordinate Restraint, Judicial Supremacy and Arlen Specter*

Although arising out of a coordinate-review framework, coordinate restraint is not necessarily inconsistent with judicial supremacy—especially if Congress and the President treat Supreme Court precedent with deference in their own constitutional analyses. This means that whatever our national constitutional jurisprudence really is in practice (likely something close to judicial supremacy), any excuse for not practicing coordinate restraint cannot be based on any normative claims that constitutional interpretation is or is not the job of the Court. This Essay argues for a practice of coordinate restraint with a high level of deference to Supreme Court precedent, subject (similar to Professor Calabresi's argument) to a rule of clear mistake.

Many will argue that the concept of coordinate restraint is not only obvious but is already the practice in the political branches; in fact, coordinate restraint is an unnecessary truism. Moreover, an exhortation to practice coordinate restraint is offensive because it implies that Congress and the President do not seriously consider the constitutionality of legislation that they propose, debate, and pass. Concededly, Congress and the President clearly *do consider* a bill's constitutionality before signing it into law. But coordinate restraint requires more than simply considering a bill's constitutionality. It is, as mentioned, a practice of giving paramount concern to whether the bill comports *in toto* with the Constitution. In other words, a bill's constitutionality ought to be as important as the policy that the bill aims to advance. Any assertion that Congress places as much emphasis on constitutionality as policy when

introducing, debating, and passing legislation is belied by numerous examples, a few of which are chronicled below. Indeed, the very term "constitutional hook" in the legislative process essentially admits that constitutionality is more of a vestigial afterthought than a primary driving concern.

Even when constitutionality is considered, it has not proven to be the dispositive factor that it ought to be. This was ably demonstrated by Senator Specter immediately after the passage of the Military Commissions Act of 2006. While the bill was being debated, Senator Specter told reporters that he would oppose it because it was "patently unconstitutional on its face."[19] Nevertheless, when the time came to vote, Senator Specter voted for the bill because it had "several good items," and then he cavalierly dismissed the perceived "patent unconstitutionality" by assuring everyone that "the [C]ourt will clean it up."[20] This dereliction of congressional duty is precisely the evil that a rule of coordinate restraint aims to prevent.

Beginning with the constitutional text and history, this Essay analyzes the degree to which coordinate branches of government are actually charged with interpreting the constitution and concludes that a mandate of coordinate restraint is consistent with that charge, even if it has not always been the practice. It offers several reasons why, constitutional mandate aside, coordinate restraint is good policy. It also examines current federal legislative practice and concludes that the indictment above, namely that coordinate restraint is not the practice, is warranted. Finally, the Essay addresses some of the major objections to a proposal of coordinate restraint, proposes a specific solution to facilitate coordinate restraint, and analyzes benefits and weaknesses of that plan.

III. CONSTITUTIONAL TEXT

A. *Oaths of Office*

19. Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush*, WASH. POST (Sept. 29, 2006), http://www.washingtonpost.com/wpdyn/content/article/2006/09/28/AR2006092800824.html (internal quotation marks omitted).

20. *Id.* (internal quotation marks omitted).

After vesting "the executive power" in the President and setting forth the organization of the Executive Branch, Article II, § 1 concludes with the following duty of the President of the United States:

> Before he enter on the execution of his office, he shall take the following oath or affirmation:–"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."[21]

The Oath of Office Clause is noteworthy for several reasons. First, its language explicitly binds the President to "preserve, protect and defend the Constitution." This is critically important because Article II, § 3 charges the President to "take Care that the Laws be faithfully executed"[22] and Article VI makes clear that "the Laws" include, *first and foremost*, the Constitution.[23] So, read together, these three clauses make clear that, in the course of the President's duty to execute the laws of the United States, his primary obligation is to the Constitution.

Presidents and commentators have made the logical inference that "[t]he duty faithfully to execute the Constitution as supreme law might be thought to presuppose a [duty] to interpret what is to be executed."[24] The draft of the Oath of Office Clause submitted to the Committee of Style and Arrangement provides ample support for this idea; it charged the President to act to the best of his "judgment and power,"[25] seeming to imply that a President is duty bound to reject proposed legislation that *in his judgment* is inconsistent with the Constitution—an exercise of coordinate restraint.

Also noteworthy is the location and phrasing of the Oath of Office Clause. Placed before the clauses that lay out the President's power and duties and phrased in limiting terms,

21. U.S. CONST. art. II, § 1.

22. *Id.* art. II, § 3.

23. *Id.* art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land.").

24. THE HERITAGE GUIDE TO THE CONSTITUTION 194 (Edwin Meese III et al. eds., 2005).

25. *Id.*

the Oath of Office Clause seems more logically a limiting rather than empowering clause. As such, it is quite consistent with a practice of coordinate restraint. If we assume that a president must necessarily take *some* action when faced with a piece of pending legislation (as inaction simply leads to the bill's passage) and we assume that the President believes that the bill is constitutionally deficient, the Oath of Office Clause (and the Oath itself) limits the President's power to allow the bill to become law and obligates him to send the bill back to Congress where the objections can be remedied.

Congress and the Judiciary are also "bound by Oath or Affirmation, to support this Constitution."[26] Justice Joseph Story read the Oaths Clause of Article VI to mean that they are "conscientiously bound to abstain from all acts inconsistent with" the Constitution.[27] Such a reading leaves no room for a Senator to vote for a bill he believes is unconstitutional, while blithely assuring the public that "the Court will clean it up."

Justice Story's reading of the Oaths Clause gains further support from the current wording of the oath itself,[28] which was instituted by federal statute in 1884 and which replaced the original version of the oath passed in 1789.[29] The original version was simple: "I do solemnly swear (or affirm) that I will support the Constitution of the United States," and the U.S. Senate itself contends that the Civil War "transformed the routine act of oath-taking into one of enormous significance."[30] Consequently, the oath was altered and expanded during Reconstruction.[31] After a few iterations, Congress settled on the 1884 version, which has

26. U.S. CONST. art. VI, cl. 3.

27. *See* THE HERITAGE GUIDE TO THE CONSTITUTION, *supra* note 24, at 295 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION) (internal quotation marks omitted).

28. 5 U.S.C. § 3331 (2006).

29. An Act to regulate the Time and Manner of administering certain Oaths, ch. 1, § 1, 1 Stat. 23, 23 (1789).

30. For a history of the oath, see *Oath of Office*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm.

31. Vic Snyder, *You've Taken an Oath to Support the Constitution, Now What? The Constitutional Requirement for a Congressional Oath of Office*, 23 U. ARK. LITTLE ROCK L. REV. 897, 908–09 (2001).

been constant ever since.[32] The new version of the oath requires even more exacting fidelity to the Constitution than either the previous oath or the bare text of the Oaths Clause itself. In addition to promising to "support" the Constitution, it requires one to "bear true faith and allegiance to the same."[33] In the course of a legislator's work, the occasional committee report, floor debate, or point-of-order vote on a bill's constitutionality seems insufficient to meet the requirement of "true faith and allegiance" to the Constitution unless it is coupled with a commitment to vote against a bill that the legislator believes is inconsistent with the Constitution. Believing that "[t]he Court will clean it up" is simply not enough.

B. *The Tenth Amendment*

As noted above, the constitutional checks to maintain separation of powers at the federal level have been much more successful than the checks to prevent vertical encroachment of the federal government on the rights of the states and the people. In addition to the belief that the federal government would be uninterested in the realm traditionally governed by the states, the Framers were firmly convinced that the Constitution set up a government of limited and *delegated* powers. As Madison famously noted, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[34] Because of this conviction, the Federalists resisted creating a Bill of Rights, which they argued would actually endanger liberty because under the typical rules of construction[35] forbidding the government from acting in one area might be taken to imply governmental power to act in areas not enumerated. This would be precisely antithetical to the system of limited powers—indeed implying that the federal government was one of general legislative powers. As we know, the Federalists ultimately capitulated and

32. *Id.*

33. *Id.* at 907.

34. THE FEDERALIST NO. 45, *supra* note 16, at 289 (James Madison).

35. Specifically, the rule *expressio unius est exclusio alterius* (the express mention of one thing excludes all others).

supported a Bill of Rights "but only with the Tenth Amendment as a bulwark" against implying that the enumeration of rights altered the scheme of enumerated and limited powers.[36] The Amendment makes clear 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."[37]

The Supreme Court's repeated failure to use the Tenth Amendment as the bulwark it was intended to be is yet more reason to insist upon a regime of coordinate restraint. This Essay does not argue for overturning *McCulloch v. Maryland*.[38] It is clear from the congressional debate over the Bill of Rights that the First Congress rejected attempts to limit the federal government to only those powers "*expressly* delegated"[39] and so *McCulloch*'s reading of implied powers incidental to those powers expressly delegated does not violate the Tenth Amendment. But *McCulloch* did set the stage for real departures from both the text and the original understanding and express intent of the Tenth Amendment. In fact, in 1870, the Court engaged in *exactly* the type of reasoning the Tenth Amendment was intended to prevent:

> [T]hat important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in anyone of those enumerated, is shown *by the amendments*. . . . They tend plainly to show that, in the judgment of those who adopted the Constitution, there were *powers created by it, neither expressly specified nor deducible from anyone specified power, or ancillary to it alone, but which grew out of the aggregate of powers* conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of

36. THE HERITAGE GUIDE TO THE CONSTITUTION, *supra* note 24, at 371.
37. U.S. CONST. amend. X.
38. 17 U.S. (4 Wheat.) 316 (1819).
39. *See* 1 ANNALS OF CONG. 432, 441, 761, 767–68 (Joseph Gales ed., 1834).

> religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.[40]

Seventy years later, the Court dismissed the Tenth Amendment as "but a truism that all is retained which has not been surrendered."[41] The Court's subsequent use of the Tenth Amendment has been unpredictable,[42] making it clear that neither an interpretive regime of coordinate review nor one of judicial supremacy will consistently protect the states and the people from vertical federal government encroachment, without an insistence on true coordinate restraint.

IV. EARLY HISTORY

While the term coordinate restraint may have been coined in this paper, the concept is not new. Our history abounds with examples of Presidents and Congresses independently interpreting the Constitution as they performed their constitutional duties, and in many (although not all) cases, that independent interpretation led them to exercise restraint in legislation. This Essay will not chronicle such instances extensively but will rather provide an illustrative set of examples from our early history to demonstrate the propriety of an exhortation to the current political branches to use coordinate restraint in their legislative functions.

Ratification of the Constitution and election of the First Congress and President brought the nation to a crucial moment. It was now time to set forth the laws and

40. The Legal Tender Cases, 79 U.S. 457, 534–35 (1870) (emphasis added).

41. United States v. Darby, 312 U.S. 100, 124 (1941).

42. *See, e.g.*, Printz v. United States, 521 U.S. 898, 934 (1997) (striking down the Brady Handgun Violence Prevention Act as a violation of the Tenth Amendment); New York v. United States, 505 U.S. 144, 188 (1992) (holding that the Tenth Amendment precluded the federal government from commandeering the New York state legislature in enforcing Low Level Radioactive Waste Disposal Act); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985) (holding that the Tenth Amendment does not bar the Fair Labor Standard Act from applying federal minimum wages to state public employees). These cases only tell part of the story however. Of equal importance are cases implicating Tenth Amendment values where the Court did not explicitly rely at all upon the Tenth Amendment. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 9 (2005) (upholding the seizure by federal agents of marijuana grown in accordance with California state law but in violation of federal law); United States v. Lopez 514 U.S. 549, 551 (1995) (striking down the Gun-Free School Zones Act of 1990 as outside Congress's delegated powers—powers which implicitly reside with the states).

regulations that would govern the country under the Constitution. The First Congress faced this task with a solemn understanding not only of their duties as legislators and constitutional actors but of the precedents they were setting for future Congresses. A review of the debates of that Congress is illuminating. Almost immediately, the First Congress began debating the removal power and spent over a month debating the constitutionality of unilateral presidential removal of officers that had been appointed with the advice and consent of the Senate.[43] Congress's "Decision of 1789," in which it concluded that the President had sole removal power, was such a good example of conscientious and disinterested constitutional deliberation that, 137 years later, Chief Justice Taft relied upon it overwhelmingly as legal support for the Court's opinion in *Myers v. United States*.[44]

The First Congress was similarly assiduous in considering the constitutionality of the first Bank of the United States. Indeed, debates in the House and the Senate consumed much of the 1791 congressional term. In addition, President Washington solicited memoranda from his cabinet members on the proposed bank's constitutionality.[45] Relying heavily upon Hamilton's constitutional interpretation of Congress's "implied powers," Washington ultimately signed the bill that Congress passed,[46] and the Supreme Court upheld the bank's constitutionality in *McCulloch* on reasoning similar to Hamilton's.[47] This early example of coordinate-branch cooperation is compelling evidence that the Framers, many of whom were either in the first Cabinet or Congress, believed that laws ought to be passed only after a thorough and searching review of their constitutionality—the essence of coordinate restraint.

The National Bank provides another well-known historical example of coordinate restraint as well. Despite having been found constitutional by President Washington, Congress,

43. Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 83–84 (1986).

44. 272 U.S. 52, 136 (1926).

45. Brest, *supra* note 43, at 84.

46. Richard J. Dougherty, *Thomas Jefferson and the Rule of Law: Executive Power and American Constitutionalism*, 28 N. KY. L. REV. 513, 517 (2001).

47. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819).

and the Supreme Court, when the Bank's charter eventually lapsed, President Jackson vetoed its rechartering in 1832 because he remained unconvinced that it was constitutional.[48] He remarked:

> The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it . . . . It 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.[49]

It is important to note that this veto was an exercise in restraint and that the concept of coordinate restraint is a ratchet.[50] President Jackson was not taking something that had been held unconstitutional and insisting that his interpretation of the Constitution gave him the right to do it anyway. He was going the other direction, reasoning that the other branches' findings of constitutionality did not absolve him of his duty to independently determine the act's constitutionality. Likewise, coordinate restraint says that a President or member of Congress must exercise restraint if his own inquiry convinces him that the act is not constitutionally authorized.

Returning to the founding period, President Washington, who was acutely aware that his presidency was creating the precedent for all future presidents, issued his first veto to an apportionment bill for the House on April 5, 1792, on purely constitutional grounds.[51] First, the ratios used in apportioning representatives were not consistent across the states. And second, this inconsistency led to eight states having more than one representative per thirty thousand,

48. *See, e.g.*, Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 713 (1985).

49. President Andrew Jackson, Veto Message (July 10, 1832), *in* A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 1145 (J. Richardson ed., 1897).

50. Thank you to Professor John Manning, who so ably pointed out the redundancy of the term "one-way ratchet"—as a ratchet is by definition one-way.

51. *See* 10 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES: MARCH–AUGUST 1792, at 213–14 (Philander Chase et al. eds., 2002).

even though taken as a whole, the total number of representatives did not exceed the constitutional limit of one per thirty thousand.[52] Washington could have simply accepted Congress's interpretation of the Apportionment Clause and signed the bill. His insistence on independently assessing the bill's constitutionality and his resulting veto demonstrated his belief in coordinate restraint.

President Jefferson provides a good example of inconsistency in coordinate-branch constitutionality review. This inconsistency in turn provides a compelling justification for mandating coordinate restraint. The Alien & Sedition Act, passed under President Adams, was controversial not only on policy grounds but on constitutional grounds as well. President Jefferson was so convinced of its unconstitutionality that he pardoned "every person under punishment or prosecution under the [Act]."[53] In a letter to Abigail Adams, he justified the pardon, explaining that:

> The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because the power was placed in their hand by the Constitution. But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power has been confided to them by the Constitution.[54]

This is concededly an exercise, not of the President's legislative role, but of his executive power, specifically the pardon power. But it illustrates the same principal of coordinate restraint. Not being able to veto the bill, as it was already law, President Jefferson took the next available course of action—one of governmental restraint as it relates to individual liberty—and pardoned those whose liberty he believed had been unconstitutionally withheld.

Unfortunately, what is arguably President Jefferson's biggest accomplishment as President, the Louisiana Purchase, is also a perfect example of the behavior this Essay admonishes against. It was believed before, and confirmed since, that the Louisiana Purchase was essential

52. *Id.*
53. Fisher, *supra* note 48, at 712.
54. Dougherty, *supra* note 46, at 521.

for the expansion of the United States and its ongoing independence in world affairs. Unfettered access to the Mississippi River and New Orleans was critical. But Jefferson was also acutely aware that the Constitution lacked any text providing the government with the power to acquire territory. He repeatedly asserted to members of his cabinet that "it will be safer not to permit the enlargement of the Union but by amendment to the Constitution" and that Congress is "obliged to ask the people for an amendment of the Constitution, authorizing their receiving the province into the Union."[55] More directly, he confided to John Dickinson that "[t]he general government has no powers but such as the constitution has given it; and it has not given it a power of holding foreign territory, and still less of incorporating it into the union. An amendment of the Constitution seems necessary for this."[56] And yet when the time came, President Jefferson did not ask for an amendment but merely signed the treaty.[57]

While the Louisiana Purchase was undoubtedly good for the country, the substantive value cannot cure the violation of the Constitution, especially given the lack of any evidence that an amendment would have faced any serious opposition or had any trouble passing. As Thomas Cooley pointed out:

> The poison was in the doctrine which took from the Constitution all sacredness, and made subject to the will and caprice of the hour that which, in the intent of the founders, was above parties, and majorities, and presidents, and congresses, and was meant to hold them all in close subordination. After this time the proposal to exercise unwarranted powers on a plea of necessity might be safely advanced without exciting the detestation it deserved; and the sentiment of loyalty to the Constitution was so far weakened that it easily gave way under the pressure of political expediency.[58]

55. *Id.* at 526 (internal quotation marks omitted).

56. *Id.*

57. *Id.* at 528.

58. EVERETT S. BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE: 1803–1812, at 25 n.27 (2005).

V. CURRENT PRACTICE

It is rightly argued that during the Founding Era, when the contours of the Constitution had yet to be defined, the importance of deep and searching inquiries into the constitutionality of each act was immeasurably higher than it is today, when over 200 years of precedent has defined all but the most obscure back alleys of the Constitution. While this is almost certainly true, it is a mistake to conclude therefore that consideration of a bill's constitutionality is now but a formality, which can be passed off with a mere nod or ignored entirely if the policy objectives of the act are sufficiently compelling. Unfortunately, several recent examples demonstrate that the current practice in the political branches treats the constitutional inquiry in precisely that manner.

A. *Congress*

In 2009, before the Senate passed its version of the healthcare bill, Senator Hatch of Utah, concerned with what he saw as serious constitutional flaws in the bill, proposed an amendment in the Finance Committee that would "allow for an expedited legal review of a potential constitutional challenge."[59] The response to his proposed amendment was perfunctory at best. Senator Baucus, the Chairman of the Finance Committee, simply asserted: "These provisions in the bill clearly are constitutional. I think that is fairly clear."[60] Without further ado, Senator Baucus then proceeded to kill the amendment, stating that such an inquiry was not within the committee's purview.[61] The egregiousness of this dismissal became even more apparent when Senator Baucus later admitted that he had not in fact even read the healthcare bill.[62]

The other Senator from Utah, Bob Bennett, sponsored an alternative to the bill that ultimately passed, called the

59. Matt Canham, *Can Congress Force You to Buy Insurance? Arguments Rage as Senate Bill Passes Procedural Vote,* S.L. TRIB. (Nov. 23, 2009), http://www.sltrib.com/utahpolitics/ci_13838615.

60. *Id.* (internal quotation marks omitted).

61. *Id.*

62. Jordan Fabian, *Key Senate Democrat Suggests That He Didn't Read Entire Healthcare Reform Bill*, THE HILL (Aug. 25, 2010), http://thehill.com/blogs/blog-briefing-room/news/115749-sen-baucus-suggests-he-did-not-read-entire-health-bill.

Healthy Americans Act. Like the bill that the Senate passed, the Healthy Americans Act contained an individual mandate—a requirement that everyone buy health insurance or face a substantial fine. Despite questions that nonpartisan researchers such as the Congressional Research Service raised as to the constitutionality of such a mandate,[63] the bill's sponsors seemed not at all bothered. When asked about the mandate's constitutionality, Senator Bennett indicated that "the constitutional issues never came up" when they drafted the bill and "said he looked at the individual mandate in health care as something analogous to the requirement to have car insurance."[64] Two things become apparent from this exchange. First, the obvious flaw in his analogy—the car insurance mandate is state, not federal, law—demonstrates an unacceptable lack of understanding of Congress's Article I, § 8 delegated powers as contrasted with the general legislative powers of the states. Senator Bennett's response further demonstrates the lackadaisical attitude that has spread to the coordinate branches with respect to constitutional scrutiny. If constitutional issues never came up during the legislative process, how are members of Congress to fulfill their oaths to "bear true faith and allegiance" to the Constitution?

Perhaps less egregious, but certainly no less illustrative, was Speaker Pelosi's response to a reporter who asked her during a press conference to address the constitutionality of the personal mandate. Her response: "Are you serious? Are you serious?"[65] After being assured that the reporter was indeed serious, Speaker Pelosi merely shook her head and proceeded to take a question from another reporter.[66] This response has a few possible explanations. Speaker Pelosi would, of course, explain that the bill's constitutionality was so patently obvious that such a question was a waste of time. But given the doubts raised by the Congressional Research Service, was such a response justified? In a system

63. Canham, *supra* note 59.

64. *Id.*

65. Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans To Buy Health Insurance, Pelosi Says: 'Are You Serious?'*, CNSNEWS.COM (Oct. 22, 2009) http://www.cnsnews.com/news/article/55971 (internal quotation marks omitted); *see also* Canham, *supra* note 59.

66. Cover, *supra* note 64.

where legislators exercise coordinate restraint, such a question ought to be welcomed because it gives the legislator an opportunity to demonstrate to the United States that she has fulfilled her oath of office and has seriously considered the question. Whether or not the provision is in fact constitutional is entirely beside the point, and this Essay makes no claims in that regard. What this Essay does assert is that Speaker Pelosi's response belies her implicit assertion of the bill's constitutionality and in fact indicates either a state of complete ignorance as to the bill's constitutionality or an overt attempt to avoid addressing the question. Neither is consistent with coordinate restraint, or with her oath of office.

To the Senate's credit, it did ultimately take a point-of-order vote on the bill's constitutionality. On December 21, 2009, Senators Hatch and Ensign delivered floor speeches, after which Senator Ensign made a constitutional point of order, forcing a vote that occurred two days later.[67] The vote fell, predictably, along party lines, with sixty votes for its constitutionality. But does the vote really indicate that sixty senators were convinced that the bill was constitutional? Or did it just indicate that sixty senators thought it was good policy and were therefore willing to overlook any unconstitutionality? Unfortunately, it is impossible to tell for certain. It did not play out like the 2006 Military Commissions Act, where, as previously noted, a Senator railed about the bill's patent unconstitutionality before proceeding to vote for the bill. It seems more likely that the Senate simply learned from Senator Specter's mistake and kept any constitutional reservations to themselves. At the very least, Senator Baucus's admission indicates that members of Congress were negligent in failing to even read the bill they passed.

B. *The President*

The 2006 Military Commissions Act and the 2009–2010 healthcare debate are not the only examples of the political branches failing to appreciate their duty to prevent bills of

67. Jeffrey Young, *Senate to Vote on Constitutionality of Healthcare Bill*, THE HILL (Dec. 22, 2009), http://thehill.com/blogs/blog-briefing-room/news/73319-senate-to-vote-on-constitutionality-of-healthcare-bill.

dubious constitutionality from becoming law. Throughout his presidency, President George W. Bush chose the signing statement over the veto as his preferred method of expressing constitutional doubts on legislation. The *Boston Globe* reported in 2006 that Bush had already issued signing statements on over 750 laws in which he identified perceived constitutional deficiencies.[68] While vastly overstating the problem with hyperbolic predictions of the end of democracy,[69] the article does point out some troubling trends. A President most likely does have the power to decline to follow or decline to enforce laws that he is convinced are not constitutional.[70] But this power simply cannot somehow transmogrify into a power to substitute a signing statement for a veto. Such a position conflates the President's *executive* duties with his role in *legislation*. And those roles are crucially separate and distinct. The power to decline to enforce an unconstitutional law comes primarily from a combination of three clauses: the Vesting Clause, which vests him with "the executive power," the Take Care Clause, which obligates him to "take care that the laws be faithfully executed," and the Supremacy Clause, which affirms the Constitution's primacy over statutory law.[71] The duty to veto unconstitutional laws, on the other hand, comes not from these clauses but from the Presentment Clause of Article I, §7—an entirely different Article—which requires

68. Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOS. GLOBE (Apr. 20, 2006), http://www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws/ (behind subscriber wall), *available at* http://www.nytimes.com/2006/04/30/world/americas/30iht-web.0430bush.html.

69. Among the more entertaining hyperbole are quotes from Phillip Cooper, a Portland State University law professor, asserting that "[t]here is no question that this administration has been involved in a very carefully thought-out, systematic process of expanding presidential power at the expense of the other branches of government. This is really big, very expansive, and very significant." *Id.* (internal quotation marks omitted). The article also quotes Bruce Fein, a Deputy Attorney General in the Reagan Administration, as saying that Bush "has declared himself the sole judge of his own powers and then ruled for himself every time"—a practice that "eliminates the checks and balances that keep the country a democracy." *Id.* (internal quotation marks omitted). He also asserted that "[t]here is no way for an independent judiciary to check his assertions of power, and Congress isn't doing it, either. So this is moving us toward an unlimited executive power." *Id.* (internal quotation marks omitted).

70. *See* U.S. CONST. art. II, § 3 ("[T]ake care that the Laws be faithfully executed."); *id.* art. VI, cl. 2 (This Constitution . . . shall be the supreme Law of the Land.").

71. *Id.* art. II, § 1; *id.* art. II, § 3; *id.* art. VI, cl. 2.

that the President either approve and sign a bill or "return it, with his objections to that House in which it shall have originated."[72] The President's role in the legislative process is therefore that of a *gatekeeper*. It occurs prior in time and has a different scope than the President's executive role. This point bears repeating. The President is vested with legislative and executive duties, which are not coterminous. Although they complement one another, they are not interchangeable.

As bad as signing statements are, at least they give the country some indication what the President's views are with respect to the constitutionality of legislation. The only thing worse than issuing a signing statement while signing a bill he believes is unconstitutional, is signing an unconstitutional bill *without* a signing statement but with the intent to simply ignore the law. Such is the course that President Bush's successor, Barack Obama, has chosen to take. As the *New York Times* reported, "Mr. Obama has not issued a signing statement since last summer . . . . Still, the administration will consider itself free to disregard new laws it considers unconstitutional."[73] This practice does not so much conflate the President's executive role with his legislative role as it demonstrates at best a near complete dereliction of the legislative duty assigned to the President and, at worst, an alarming disdain for the constitutional limits on the Executive.

Finally, no analysis of current practice would be complete without mentioning the Bipartisan Campaign Reform Act of 2002 (BCRA), commonly known as McCain–Feingold.[74] On January 21, 2010, the Supreme Court handed down its opinion in *Citizens United v. Federal Election Commission*.[75] *Citizens United* dealt BCRA a severe blow, holding that its ban on independent campaign contributions by corporations, unions, and nonprofit organizations (using general treasury funds) violated the Constitution. In 2007, the Court had held other provisions of BCRA unconstitutional in *Federal*

72. *Id.* art. I, § 7.

73. Charlie Savage, *Obama Takes New Route to Opposing Parts of Laws,* N.Y. TIMES (Jan. 8, 2010), http://www.nytimes.com/2010/01/09/us/politics/09signing.html.

74. 2 U.S.C. §§ 431–442 (2006).

75. 130 S. Ct. 876 (2010).

Election Commission v. Wisconsin Right to Life.[76] That the Court invalidated major provisions of a federal law is of little note—it happens fairly frequently. What is noteworthy is how firmly convinced President Bush was that the bill was unconstitutional. And yet, he signed it. When asked during the 2000 presidential campaign if he believed "a President has a duty to make an independent judgment of what is and is not constitutional, and veto bills that, in his judgment he thinks are unconstitutional," Bush replied emphatically, "I do."[77] He then indicated that he would veto the version of BCRA that was on the table at the time, noting that "I think it does restrict free speech for individuals."[78] But when the time came, President Bush signed the bill, despite still proclaiming its unconstitutionality. His signing statement identified "provisions [that] present serious constitutional concerns" and "questions [that will] arise under the First Amendment."[79] President Bush had particular "reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election."[80] Like Senator Specter, President Bush's signature on a bill he felt was so deeply unconstitutional can only be described as a dereliction of his duties. One may speculate that President Bush saw the Court's decisions in *Wisconsin Right to Life* and *Citizens United* as vindicating his position. More accurately, the decisions condemn him for allowing a law to breach the gate that he knew was constitutionally deficient and that he had the power to stop.

Those wishing to defend modern presidential practice will likely point to the extensive work that the Office of Legal Counsel (OLC) performs as proof that the President takes seriously his duties under the Constitution. This is almost certainly true. But even if a President routinely requests

76. 551 U.S. 449 (2007).

77. Akhil Reed Amar & Vikram David Amar, *Breaking Constitutional Faith: President Bush and Campaign Finance Reform*, FINDLAW'S WRIT (Apr. 5, 2002), http://writ.news.findlaw.com/amar/20020405.html (internal quotation marks omitted).

78. *Id.* (internal quotation marks omitted).

79. *Id.* (internal quotation marks omitted).

80. *Id.*

that OLC assess the constitutionality of bills that are before him, the legal analysis rendered is essentially irrelevant if the President still signs a bill in which OLC has uncovered material constitutional flaws. Coordinate restraint means more than just analyzing the law. It requires a second step of restraint where the law's constitutionality is in doubt.

VI. OBJECTIONS, PROPOSED SOLUTION, & POLICY

A. *Primary Objections*

Two major objections are probably apparent by now. First, assuming that it was in fact a safeguard of liberty, how would a system of coordinate restraint ever be implemented? Second, given the wide variety of ways in which individuals read and interpret the Constitution, what good could such a system possibly do, even if it were feasible to implement? Said another way, what good would coordinate restraint do for those political actors who see constitutionality as merely synonymous with good policy? Both objections are powerful and valid, but both can also be answered.

Implementation could take a variety of forms, but at its foundation, any implementation would require a legislator or the President to certify that the legislation he either voted for or signed comported with the Constitution *in toto*. One method of accomplishing this could be to create a House and Senate Committee on Constitutionality Review. These committees would be tasked with reviewing every bill or joint resolution for constitutionality and would be required to present formal findings on the constitutionality of each provision of the bill. These findings would rely on the constitutional text, history, and Supreme Court precedent, subject to a rule of clear error. Once the findings are submitted, each house would be required to vote on the bill's constitutionality before ever voting on the bill's passage. If a legislator were to vote that the bill was constitutional, he could still oppose the bill on policy, or any other grounds. If, however, the legislator voted that the bill was unconstitutional, he would be prevented from voting to pass the bill. As a result, each legislator would be on record both as to the constitutionality and the wisdom of each bill.

The President's task would change as well. While the President would remain free to issue a signing statement indicating how he interpreted the bill, for purposes of supplementing the legislative history, clarifying provisions he saw as ambiguous, or even to indicate provisions he felt were bad policy and therefore may not be as vigorously enforced as the legislature might prefer, he would be prevented from using a signing statement to indicate his concerns with constitutionality. If the President were convinced that the bill contained any material constitutional defect, he would be obligated to veto the bill and return it to Congress. If Congress thereafter passed the bill over his veto (meaning that two-thirds approved not only of the policy but had certified their conviction that it was constitutional), the President would be obligated to enforce the bill.[81]

B. *Proposed Solution*

It is unlikely that Congress or the President would adopt such rules on their own. After all, the rules would place significant limitations on what they can do. No longer could a senator rail against a bill's perceived "patent unconstitutionality" and yet vote for it because it had some good points. No longer could a Speaker of the House simply dismiss questions of constitutionality with a mere "are you serious." And no longer would the President be able to sign an unconstitutional bill into law, with the assurance that his administration (but not necessarily the next one) would decline to follow or enforce provisions that violated the Constitution.

But these limitations on the behavior of our leaders are precisely the benefits that would accrue to the nation under a system of coordinate restraint. For that reason, a constitutional amendment would likely be required to fully institutionalize a system of coordinate restraint.[82] The text of the amendment would look something like the following:

81. This is obviously subject to the President's discretion as the chief executive officer.

82. Because it so fetters the political branches, such an amendment would certainly not be proposed by the necessary "two thirds of both Houses" set forth in the first clause of Article V. U.S. CONST. art. V, cl. 1. It might however conceivably be proposed via a constitutional convention as required by Article V "on the Application of the Legislatures of two thirds of the several States." *Id.* The state

> **Amendment XXVIII**:
> **§ 1:** No Senator or Representative shall approve a bill or joint resolution for passage, unless he has first, in good faith, attested to the constitutionality of each provision of that bill or joint resolution. The approval of a bill or joint resolution by the President shall constitute the President's attestation that the bill is constitutional in all material respects.
> **§ 2:** If one-third of the members of a House of Congress charge that, as a factual matter, a bill or joint resolution was passed in a manner that made a good faith estimation of constitutionality impossible, the bill or joint resolution shall not leave that house until a formal hearing has been held on the constitutionality of each provision.

Section 1 is a structural limitation. It requires of each member of Congress an attestation of his good-faith belief that the bill is constitutional before the final vote in the chamber. It allows a member of Congress or the President to concede constitutionality and yet vote against a bill on policy grounds but does not allow the converse. Making the attestation separate from the vote on the bill is important because it not only enables the ratchet but also limits the ability of a member of Congress to rail against a bill's constitutionality when his real objection is to the policy.

The words "*that* bill or joint resolution" limits the attestation requirement to the bill or resolution at hand, meaning that if a bill fails and a nearly identical bill comes up in a subsequent congress, that member can change his constitutional attestation. But the good-faith provision incorporates the legal definition of good faith, which would require the member to realistically distinguish the two bills or give some other reasonable explanation for the changed vote.

From the President's perspective, a separate attestation is not required. His signature on the bill is his attestation of constitutionality. This is consistent with the President's current Article I, § 7 duties, neither adding to nor removing from them but rather merely clarifying them. If the

legislatures would seem naturally inclined to make such an application given that they are the most obvious victims of the vertical encroachment discussed. At the very least, state legislators might be spurred by petitions from their own constituents, who have also felt the encroachment of the federal government.

President does not think a bill is constitutional in all material respects, his constitutional qualms are objections within the meaning of Article I, § 7, which are to be returned with the bill to Congress. The term "all material respects" incorporates the legal standard of materiality present in contract and other areas of law, which avoids fettering the President to an unrealistic degree.

Section 2 is the remedial portion—the teeth—of the amendment. It is not intended to give a role to the Court but is rather a structural remedy within the political branches.[83] This section is also crafted to remedy only egregious and objective violations. To begin with, isolated charges by a handful of senators or representatives are not sufficient to trigger the section. A full third of the house is required. Second, only passage of the bill in a manner that "made a good faith estimation of constitutionality impossible" is sufficient. This is an objective question. A senator asking a reporter: "are you serious" is not sufficient. While it raises doubt whether the senator has given much thought to a bill's constitutionality, it does not suggest that a good faith estimation of constitutionality was impossible. On the other hand, a 6,000 page bill that comes out of a committee on Saturday and is passed by the full chamber on Monday is passed in a manner that objectively "made a good faith estimation of constitutionality impossible" because it is simply not possible that members of Congress could read and analyze the constitutionality of a 6,000 page bill in 24–48 hours. Finally, the section does not purport to grant any private individual a right of action, which would merely add

83. This is not to say that the Court would not get involved. While it does balk at the opportunity to get involved when it sees good reasons for leaving resolution to the political branches, *see, e.g.*, Nixon v. United States, 506 U.S. 224 (1993) (holding that the Senate's "sole" power to try impeachments precluded judicial review of the procedure used); Goldwater v. Carter, 444 U.S. 996 (1979) (holding that presidential authority to terminate treaties is a nonjusticiable political question), the Court does certainly decide some rule of law and separation of powers cases. *See, e.g.*, Bush v. Gore, 531 U.S. 98 (2000) (per curiam) (holding that the Florida Supreme Court's call for a statewide recount violated the Equal Protection Clause of the Fourteenth Amendment); Powell v. McCormack, 395 U.S. 486 (1969) (limiting the House's power to refuse to seat a duly elected representative despite Congress's Article I, § 5, clause 1 powers to be the judge of its members' qualifications). Section 2 merely provides that if the Court refuses to get involved, a remedy exists nonetheless.

confusion to the already thorny problem of constitutional standing requirements.[84]

The amendment also does not give any standards of constitutional interpretation. This, too, is intentional. Remedying the problem of legislative and presidential incontinence does not require "constitutionalizing" judicial supremacy. The continuing debate between coordinate-branch review and judicial supremacy is healthy and should probably be allowed to continue. However, as a practical matter, it is worth noting that a good-faith attestation of constitutionality likely will be easier to defend when it is consistent with judicial interpretation of the Constitution.

C. *Secondary Objections Addressed*

The suggestion of a "Twenty-eighth Amendment" of course raises some additional objections. First, in 220 years, we have only amended the Constitution eighteen times: once for the Bill of Rights and then seventeen more times—including Twenty-first Amendment, which we only needed because the Eighteenth Amendment was a mistake that had to be repealed. So what makes this amendment worthy of the nation's attention in a way that we have only really needed sixteen times in 220 years?

The best answer seems to be to combat the inertia of a federal government that has, in some ways, lost its anchor to the Constitution. The alternative of leaving bad legislation for the courts to fix, combined with the ease of issuing a signing statement in lieu of a veto, has made it far too easy for the political branches to ignore their oaths of "true faith and allegiance" to the Constitution. Compounding this problem is at least 140 years of Supreme Court precedent that gives little more than lip service to the Tenth Amendment. These practices have put the federal government on a trajectory that threatens to actualize the Anti-Federalist warning that the states would "dwindle away, and . . . [be] absorbed in . . . the general

84. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) (invalidating a congressionally granted right of action that purported to grant standing in the absence of Court-articulated constitutional standing requirements).

government."[85] Altering such a trajectory should be at least as important to the nation as deferring congressional pay increases until a subsequent congressional election.[86]

The results of the 2010 midterm election plainly reveal the American electorate's keen interest in combating this inertia and in holding elected officials responsible for giving short shrift to the constitutionality of legislation. To begin with, voter anger against the Washington establishment in the months leading up to the election led the Republican Party to unveil their *Pledge to America* in September 2010.[87] In the *Pledge*, Republican lawmakers vowed that if entrusted to govern they would include in every bill a clause explaining the constitutional authority that justifies the bill.[88] Moreover, they pledged to "advance major legislation one issue at a time" without burying unpopular bills in must pass legislation.[89] While the sentiment is laudable, a "Pledge to America" by a political party is as simple to ignore as any other campaign promise. So while the Republican Party correctly read America's disaffection, its *Pledge* does nothing to institutionalize "true faith and allegiance" to the Constitution.

A second objection to the proposed Twenty-eighth Amendment is that such a requirement would likely spell the end of the omnibus bill. If members of Congress and the President were required to attest to every material provision of every bill they signed, passage of an omnibus bill would likely take nearly as long as passing a series of subject-specific bills, thus removing much of the value of the omnibus bill. To this objection, the response is "exactly!" The election of Republican Scott Brown to the U.S. Senate in Massachusetts, the primary defeats of Senators Bennett and Specter, the general success of Tea Party candidates in the 2010 midterm election, and several recent polls all indicate that many Americans (up to 83%) are fed up with the logrolling and pork-barrel spending that omnibus bills make

85. Brutus, *Essay No. I*, N.Y. J., Oct. 18, 1787, *reprinted in* THE ESSENTIAL ANTIFEDERALIST 109 (W.B. Allen & Gordon Lloyd eds., 2002).

86. *See* U.S. CONST. amend. XXVII.

87. A PLEDGE *TO* AMERICA (2010), *available at* http://pledge.gop.gov/resources/library/documents/pledge/a-pledge-to-america.pdf.

88. *Id.* at 7.

89. *Id.* at 33.

possible.[90] Indeed, the 2010 midterm election can be seen as a national repudiation of the "pass laws first, ask about the authority later (or not at all)" mindset that has become endemic to Washington, as the decisive victories of Tea Party-backed senators-elect Marco Rubio, Rand Paul, Mike Lee, and Ron Johnson and the 60-plus seat Republican pickup in the House amply demonstrate.[91]

A related objection is that this would add onerous burdens to the overall lawmaking process, lead to increased gridlock, and ultimately lead to much less "getting done." James Wilson adequately answered this objection in 1791, arguing that efficiency is not necessarily the goal of separation of powers: "It might be supposed, that these powers, thus mutually checked and controlled, would remain in a state of inaction. But there is a necessity for movement in human affairs; and these powers are forced to move, though still to move *in concert*."[92] Said a different way, "what some today call 'gridlock,' [the Framers] would have termed 'stability' and a guard against tyranny."[93]

The limitations placed on the behavior of our leaders are not the only benefits that would accrue from a system of coordinate restraint. When reviewing a federal law, the Supreme Court traditionally grants it a presumption of constitutionality.[94] Despite this presumption, the Court still strikes down a fair number of federal laws. If laws were passed with formal findings on constitutionality, which required the attestation of those who passed the law, this

90. *See, e.g.*, Interview by Neal Cavuto with Senator John McCain (Dec. 14, 2009), *available at* http://video.foxbusiness.com/v/3953493/mccain-outraged-with-pork-barrel-spending (noting by Senator McCain that "Americans are mad as hell about [pork barrel spending] and that's what's part of the Tea Party's situation"); *83% Blame Deficit on Politicians' Unwillingness To Cut Spending*, RASMUSSEN REPORTS (Feb. 4, 2010), http://www.rasmussenreports.com/public_content/business/general_business/february_2010/83_blame_deficit_on_politicians_unwillingness_to_cut_spending.

91. In his victory speech, presumptive House Speaker John Boehner called the election "a repudiation of Washington, a repudiation of big government, and a repudiation of politicians who refuse to listen to the people." *See* David Espo, *GOP Takes the House, Falls Short of Senate* (Nov. 2, 2010), http://news.yahoo.com/s/ap/us_election_rdp (internal quotation marks omitted).

92. 1 THE WORKS OF JAMES WILSON 300 (Robert Green McCloskey ed., 1967).

93. Paulsen, *supra* note 11, at 329.

94. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 190 (1991) (noting that the Court follows this rule "out of respect for Congress, which we assume legislates in the light of constitutional limitations").

presumption of constitutionality would almost certainly be strengthened and the number of laws found unconstitutional would almost certainly decrease.[95] While this is concededly speculative and while there is ample evidence to suggest that the Court jealously guards the primacy of its interpretation of the Constitution,[96] it seems nonetheless implausible that the Court would ignore the sincere efforts of the political branches to more faithfully circumscribe their duties under the Constitution. Apart from a (more-deserved) presumption of validity from the Court, statutes passed under a regime of coordinate restraint seem likely to gain a wider presumption of validity from the public. At the very least, the President and Congress would give the public fewer occasions to criticize them for ignoring the constitutionality question when passing legislation.

VII. CONCLUSION

The general normative assertion that "members of Congress and the President should assess the constitutionality of legislation that they pass" is relatively undisputed and of little practical import. The dispute (and practical importance) becomes greater over questions such as "how much constitutional scrutiny ought they to apply" and "how much scrutiny is really taking place." Constitutional text and early practice suggest that the answer to the first question is that Congress and the President ought to apply *a great deal* of constitutional scrutiny when deciding whether or not to pass legislation. And numerous recent episodes suggest that the answer to the second question is that members of Congress and the President are in fact applying much less scrutiny than they ought. This has resulted in an aggrandizement of the federal

95. At the very least, the presumption would be arguably more deserved than it currently is.

96. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (rejecting Congress's attempt to interpret its enforcement power under § 5 of the Fourteenth Amendment to require strict scrutiny for laws that burdened religion and instead holding that the Court had the sole power to define substantive rights guaranteed by the Fourteenth Amendment); Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[*Marbury*] declared the basic principle that the *federal judiciary is supreme* in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a *permanent and indispensable feature* of our constitutional system.") (emphasis added).

government with respect to the states and the people and a consequent decrease in liberty. Because Congress and the President have tools available to them that facilitate their continued dereliction of duty, it is likely up to the states and the people to enforce a system of coordinate restraint in the form of an explicit constitutional amendment.