

# The Executive's Duty To Disregard Unconstitutional Laws

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*Recent Presidents have claimed a power to disregard statutes that they deem unconstitutional, prompting critics to make an array of arguments against these assertions. As a matter of text, the Faithful Execution Clause supposedly bars such non-enforcement. As a matter of history, the English Parliament specifically prohibited a royal discretionary power to disregard statutes. Moreover, American Presidents did not exercise a power to disregard unconstitutional laws until almost a century after the Constitution's creation. Taken together, these arguments are said to refute the regal pretensions of modern Presidents. This Article serves as an antidote to such claims, while sharpening our understanding of the proper Executive Branch stance towards unconstitutional statutes. The critics are correct in supposing that the President lacks a discretionary power to disregard unconstitutional statutes; instead, the Constitution is best read as obliging the President to disregard statutes he regards as unconstitutional. First, the Constitution never empowers the President to enforce unconstitutional statutes. He no more has the power to enforce such statutes than he has power to enforce the statutes of Georgia or Germany. Second, the President's duty to preserve, protect, and defend the Constitution requires the President to disregard unconstitutional statutes. When the President enforces a statute he regards as unconstitutional, he violates the Constitution no less than if he were to imprison citizens without hope of trial. Third, the Faithful Execution Clause requires the President to choose the Constitution over unconstitutional laws, in the same way that courts must choose the former over the latter. Consistent with these understandings, John Adams and Thomas Jefferson argued that executives could not enforce unconstitutional laws. Indeed, President Jefferson halted Sedition Act prosecutions on grounds that the Act was unconstitutional. According to Jefferson, his duty to defend the Constitution barred him from executing measures that violated it.*

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#### INTRODUCTION

Imagine a law that peremptorily directs the President to imprison young Muslim males in contravention of the prohibition against bills of attainder.<sup>1</sup> Must the President jail them, thereby faithfully executing the bill of attainder? Or imagine a statute that bars presidential pardons.<sup>2</sup> Would issuing a pardon in defiance of this statute make the President guilty of unfaithful law execution?

Recent Chief Executives have claimed the power to disregard unconstitutional statutes,<sup>3</sup> thereby contemplating a practice that one might call “Executive Disregard.” In sometimes defiant tones, Presidents have announced an unwillingness to abide by or to enforce unconstitutional laws. George W. Bush has been particularly assertive in declaring his refusal to execute numerous statutory provisions he regards as unconstitutional.<sup>4</sup>

Critics have cried foul, asserting that the Constitution’s text prohibits Executive Disregard. If the President could ignore a statute, whatever his reasons, he would not be ensuring faithful law execution, as the Constitution requires.<sup>5</sup> Sophisticated critics also make historical arguments based on English and American practice.<sup>6</sup> In the late seventeenth century, the English Parliament expressly barred the Crown from exercising the powers to suspend and dispense with the law.<sup>7</sup> This bar suggests to some that the American Executive likewise must lack these powers, for the President was meant to be weaker than the English Monarch. Moreover, one scholar has claimed that President James

1. See U.S. CONST. art. I, § 9, cl. 3.

2. See U.S. CONST. art. II, § 2. In *Ex parte Garland*, the Court held unconstitutional a statute that limited the effect of presidential pardons. 71 U.S. (4 Wall.) 333, 380 (1866).

3. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 335 (2006); see *id.* at 322, 323 tbl.1 (citing statistics on presidential signing statements expressing concern about statutes on constitutional grounds).

4. See *id.* at 312. There is a question of whether President Bush has actually refused to enforce the statutory provisions he has deemed unconstitutional. See *id.* at 332.

5. See, e.g., CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF “UNCONSTITUTIONAL” LAWS: REVIVING THE ROYAL PREROGATIVE 16–18 (1998).

6. See, e.g., *id.* at 3–8.

7. Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.) (“That the pretended Power of suspending of Laws, or the Execution of Laws, by regal Authority, without Consent of Parliament, is illegal. That the pretended Power of dispensing with Laws, or the Execution of Laws, by regal Authority, as it hath been assumed and exercised of late, is illegal.”).

Buchanan was the first to exercise the power of Executive Disregard, some seventy years after the Constitution's ratification.<sup>8</sup> That earlier Presidents never disregarded laws suggests that they did not believe they could do so, or so the argument goes.<sup>9</sup> Finally, critics claim that rule of law considerations strongly suggest that the Constitution forbids Executive Disregard because the Constitution famously establishes a rule of law and not of men.<sup>10</sup> Executive Disregard supposedly perverts this principle because it makes paramount one man's constitutional sensibilities. In sum, the claimed power to disregard unconstitutional statutes strikes critics as an assertion of regal power manifestly incompatible with our republican Constitution.

The critics are right. To say that the President has a *power* to ignore unconstitutional laws is to imply that the President has discretion. It suggests that the Constitution permits him to decide whether to enforce a statute that he regards as unconstitutional. If the President executes a law that he believes is unconstitutional, he has merely chosen not to exercise a discretionary power. Such a choice is no more significant than a decision not to exercise his power to convene Congress or a determination not to submit legislative recommendations. This conception of Executive Disregard—imagining it as an unconstrained power exercisable at the President's whim—is surely mistaken.<sup>11</sup>

Far from vesting him with a discretionary Executive Disregard power, the Constitution actually *requires* the President to disregard unconstitutional statutes. This duty arises from three sources. First, the Constitution does not authorize the President to enforce unconstitutional laws. At the founding, such laws were seen as null and void, *ab initio*. Because unconstitutional laws were nullities, they supplied no law for the President to enforce. Necessarily, he could have no power or duty to enforce them. Under the original Constitution, the President had no more power or duty to execute unconstitutional laws than he had to execute the laws of the states or other nations. Second, the President's duty to disregard unconstitutional laws arises from his unique constitutionally prescribed oath: he must "preserve, protect and defend" the Constitution.<sup>12</sup> He does none of those things when he executes an unconstitutional statute. To the contrary, he violates his constitutional oath when he enforces a law he regards

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8. See, e.g., MAY, *supra* note 5, at 127, 130.

9. See *id.* at 130 (stating that "the historical record does not support an originalist argument for presidential defiance based on early governmental practices").

10. See generally TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, AM. BAR ASS'N, REPORT 5, 20, 25, 27 n.77, 28 (2006), available at [http://www.abanet.org/op/signingstatements/aba\\_final\\_signing\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf) [hereinafter ABA TASK FORCE] (making repeated statements that Executive Disregard is a threat to the rule of law).

11. For a defense of a discretionary power to disregard, see Presidential Authority To Decline To Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199, 200 (1994) (memorandum from Assistant Attorney General Walter Dellinger) [hereinafter Presidential Authority] (claiming the President has "authority" and "may" disregard unconstitutional statutes).

12. U.S. CONST. art. II, § 1.

as unconstitutional.<sup>13</sup> Because the Constitution effectively obliges the President to do no constitutional harm, he cannot execute unconstitutional laws. Third, per the Faithful Execution Clause, the President must take care to faithfully execute the laws.<sup>14</sup> The Supremacy Clause famously makes clear that the Constitution is “the supreme Law of the Land.”<sup>15</sup> Taken together, these two Clauses prohibit the President from taking actions that violate the Supreme Law that he is obliged to faithfully execute. Hence, in a number of different ways, the Constitution requires the President to disregard unconstitutional statutes.

President Thomas Jefferson made these very arguments regarding the infamous Sedition Act. Jefferson said his “oath to protect the constitution” required him to “arrest [the] execution” of the Sedition Act at “every stage.”<sup>16</sup> Hence when Jefferson assumed office, he not only pardoned those convicted of Sedition Act violations, he also ordered his district attorneys to terminate ongoing Sedition Act prosecutions because he realized that he could not permit the continued enforcement of a law he believed was unconstitutional.<sup>17</sup>

What of the claim that the Faithful Execution Clause obliges the President to attend to (and not to arrest) the execution of *every* federal act? Jefferson squarely rejected this reading of the Clause. He believed that the Faithful Execution duty did not apply to a “nullity,” that is, an unconstitutional law.<sup>18</sup> Jefferson noted that his “obligation to execute what was law, involved that of not suffering rights secured by valid laws, to be prostrated by what was no law.”<sup>19</sup> Hence the first President to confront the question of whether to enforce a statute he believed was unconstitutional felt duty-bound to disregard it.

This Article explores various theories of Executive Disregard, arguing that the President has a duty to disregard statutes he believes are unconstitutional. Part I lays out several theories of Executive Disregard,<sup>20</sup> including the claim

13. The same must be said of federal treaties. Assuming that treaties can be self-executing, the President cannot enforce treaty provisions that he regards as unconstitutional. The duty to safeguard the Constitution bars him from executing statutes, treaties, or anything else that he regards as unconstitutional.

14. U.S. CONST. art. I, § 1.

15. U.S. CONST. art. VI.

16. Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), in 1 THE ADAMS-JEFFERSON LETTERS 274, 275–76 (Lester J. Cappon ed., 1959).

17. Cf. Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON 57–58 n.1 (Paul Leicester Ford ed., 1897) (discussing Jefferson’s pardon of William Duane from his conviction under the Sedition Act).

18. *Id.* at 58 n.1.

19. Letter from Thomas Jefferson to Wilson Cary Nicholas (June 13, 1809), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 17, at 253, 254.

20. There have been many scholarly treatments discussing whether the President may (or must) disregard unconstitutional laws. See generally MAY, *supra* note 5; David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 61 [hereinafter Barron, *Constitutionalism*]; Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990); Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381 (1986); John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 336, 368–386 (1998); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objec-*

that the Constitution forbids that practice. Part II considers text and structure and contends that the Constitution imposes a general Executive Disregard duty. It also explains how Executive Disregard is different from the more familiar Judicial Review. Part III explores English and American history, including the largely obscure episode of Jefferson's refusal to enforce the Sedition Act. Part IV addresses what steps the President<sup>21</sup> must take to satisfy his duty to disregard unconstitutional statutes.<sup>22</sup>

### I. THEORIES OF EXECUTIVE DISREGARD

At first blush, one might assume that only two theories have any plausibility: either the President must disregard all unconstitutional statutes or he must enforce all statutes, even those he believes are unconstitutional. After further

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*tionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373 (1994); Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1994); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217 (1994); Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 766-83 (1993); Peter L. Strauss, *The President and Choices Not To Enforce*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 107; Christine E. Burgess, Note, *When May a President Refuse To Enforce The Law?*, 72 TEX. L. REV. 631 (1994).

More recently, the American Bar Association's Task Force on Presidential Signing Statements and the Separation of Powers Doctrine issued a report that apparently condemned the practice of Executive Disregard. See ABA TASK FORCE, *supra* note 10, at 19 (arguing that the President cannot dispense with or suspend any law for any reason). A more careful reading, however, suggests that the Task Force took many positions that seemed to condemn the practice but refrained from actually doing so. Instead, the Task Force condemned signing statements for claiming the power to disregard unconstitutional statutes without actually condemning the practice of Executive Disregard. See Posting of David Barron et al. to Georgetown Law Faculty Blog, [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) (July 31, 2006) [hereinafter Posting of Barron et al.].

21. When this Article discusses the President's duty to refrain from enforcing unconstitutional statutes and his ability to reach judgments about the Constitution's meaning, these references should be read against the backdrop of modern Executive Branch legal practice in which the President calls upon the constitutional and legal expertise of others within the Executive Branch and often defers to their constitutional judgments. Hence when this Article speaks of the President making constitutional conclusions, it should be understood that modern Presidents typically will rely upon the legal expertise of others. Section IV.C briefly discusses when it is appropriate for the President to adopt the reasoning of executive underlings and when such adoption is unwarranted.

22. When dealing with a potentially sweeping subject matter and a space constraint, one ought to narrow the ambit somewhat. Difficult questions arise about how best to satisfy the Executive Disregard duty. For instance, should the President be an originalist or embrace the idea of a living Constitution? Likewise, what standard of review should he apply? Perhaps the President should disregard only those statutes he believes are *clearly* unconstitutional. This Article does not consider these interesting questions.

Furthermore, this Article makes no claims regarding a related topic in the news: whether the President may sign a statute that he believes contains unconstitutional provisions. Rather it only considers whether the President may (or must) disregard statutes that have become law, regardless of when or how they may have become law. For a discussion of this quite different topic, see generally Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81 (2007).

reflection and a perusal of the literature, it is apparent that one can imagine any number of theories relating to Executive Disregard, each with its own nuances. A brief discussion of some of these theories is in order. The immediate aim of this discussion is not to endorse or condemn any of these theories, but to capture a sense of the many possibilities. Depending upon whom one consults, the Constitution bars, permits, or requires Executive Disregard.

#### A. EXECUTIVE DISREGARD AS AN UNCONSTITUTIONAL PRACTICE

It is fitting to start with a theory that may have some current appeal. As noted earlier, some may suppose that the Constitution bars Executive Disregard. To begin with, the Constitution expressly requires the President to take care that the laws be faithfully executed.<sup>23</sup> Because the Faithful Execution Clause contains no express exception for laws that Presidents regard as unconstitutional, some claim that the President has no choice but to enforce such laws.<sup>24</sup> A categorical refusal to enforce laws that the President regards as unconstitutional would be the epitome of unfaithful law execution.

Another set of clues supposedly pointing to the same conclusion comes from the President's veto power.<sup>25</sup> The veto enables Presidents to erect a significant obstacle to the enactment of unconstitutional legislation. When a President receives a bill that he regards as unconstitutional, he may express constitutional (and other) objections and return it to the originating chamber.<sup>26</sup> Absent a veto override, which requires two-thirds support in both chambers, the bill never becomes law. Reading the Constitution to authorize Executive Disregard, however, would grant the President a second bite at the constitutional apple. He could veto a bill on constitutional grounds and subsequently raise the exact same objections after the veto override. Indeed, Executive Disregard would seem to make a veto issued on constitutional grounds superfluous because the President could always decide to disregard unconstitutional provisions whether or not he initially vetoed the entire statute. Even worse, it would make veto overrides pointless, at least where the veto was issued solely for constitutional reasons. Members of Congress would know that even if they overrode a veto, the President would disregard the enacted law. Finally, an Executive Disregard power would essentially give the President a power akin to a line-item veto because the President often would disregard only portions of a statute, leaving the rest intact. Because the Constitution's veto is meant to be an all-or-nothing proposition,<sup>27</sup> Executive Disregard must be unconstitutional.

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23. U.S. CONST. art. I, § 1.

24. See, e.g., ABA TASK FORCE, *supra* note 10, at 19 ("Because the 'take care' obligation of the President requires him to faithfully execute all laws, his obligation is to veto bills he believes are unconstitutional. He may not sign that into law and then emulate King James II by refusing to enforce them.").

25. See U.S. CONST. art. I, § 7.

26. *Id.*

27. See *Clinton v. City of New York*, 524 U.S. 417, 439–40 (1998). See generally Rappaport, *supra* note 20, at 771.

A final textual argument might rest on the absence of text. One might argue that the Constitution never authorizes Executive Disregard. Because the Constitution is built upon the enumerated powers principle, if it never grants the President an Executive Disregard power, the President has no such authority. Under this view, the President can no more disregard statutes than he can resolve judicial cases or choose the Speaker of the House.

Buttressing these textual arguments is the structural intuition that Presidents would become overbearing and dangerous if they had some power of Executive Disregard. A President might refuse to enforce all manner of beneficial statutes that he deemed unconstitutional. Presidents favoring originalist readings of the Constitution might refuse to enforce statutes founded upon an expansive view of congressional power, such as welfare and environmental laws. Presidents with progressive leanings might refuse to enforce statutes safeguarding religious liberty and property rights.

Perhaps most ominously, Presidents might decline to abide by statutes that are meant to constrain presidential authority. Citing a duty to disregard unconstitutional statutes, a President might elude all manner of constraints that Congress imposed upon presidential power.<sup>28</sup> Indeed, such complaints have been made against President George W. Bush.<sup>29</sup> When Congress has tried to tie his hands, the President has declared an unwillingness to abide by such statutory limitations on the grounds that they are unconstitutional.

Given the real potential for an unconstrained President, some contend that rule of law considerations militate against any form of Executive Disregard.<sup>30</sup> American constitutions were built upon a rule of law foundation. If the Chief Executive may disregard unconstitutional laws, however, the Constitution would seem to create a government of men and not law. One man, the President, could dictate what would *not* be law.

Finally, those opposed to Executive Disregard draw upon history to make their case. Citing English history, some scholars have supposed that Presidents cannot have a power to disregard unconstitutional statutes, for if they had such a power, Presidents would be able to suspend the execution of the laws.<sup>31</sup> This power was expressly denied to the English Crown by the Bill of Rights.<sup>32</sup> Some argue that the idea that the President has a power expressly denied to the English Crown is implausible. These critics conclude that the Constitution should not be read as authorizing, much less requiring, Executive Disregard.

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28. I have previously argued that Congress lacks a generic power to regulate presidential powers. See Saikrishna Prakash, *Regulating Presidential Power*, 91 CORNELL L. REV. 215 (2005) (reviewing HAROLD KRENT, *PRESIDENTIAL POWERS* (2005)). For a somewhat contrary view, see Harold Krent, *The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383 (2006).

29. See generally ABA TASK FORCE, *supra* note 10.

30. See *id.* at 5, 20, 25, 27 n.77, 28.

31. MAY, *supra* note 5, at 3–8.

32. Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.).



## B. DISREGARDING A STATUTE A COURT HAS DECLARED UNCONSTITUTIONAL

Suppose a district court strikes down a federal statute on the grounds that it is unconstitutional. Thereafter, the Executive Branch faces a choice: should it continue to execute the law that the court has struck down as unconstitutional? If the Executive Branch continues to believe that the law is constitutional, it may continue enforcing it. Indeed, there is a rich literature describing the Executive Branch practice of non-acquiescence—that is, a decision to enforce a court's judgment in favor of a particular party coupled with a refusal to employ the court's rationale in future cases.<sup>33</sup> More importantly, the Supreme Court has held that non-mutual collateral estoppel does not apply to the federal government.<sup>34</sup> Even if Citizen A prevails against the government on constitutional issues 1, 2, and 3, Citizens B through Z cannot collaterally estop the government from relitigating those issues. Therefore, even after the issuance of a final judgment based on the conclusion that a law is unconstitutional, the Executive Branch may continue to enforce that law against others.

Alternatively, if the executive agrees with a court that a statute is unconstitutional, the executive may decide to stop enforcing the statute. When the President chooses to stop executing a law that a court has held unconstitutional because he now agrees that the statute is unconstitutional, he has engaged in Executive Disregard. To be sure, this exercise of Executive Disregard has been influenced by the court's opinion. Yet any plausible conception of Executive Disregard does not rest on the notion that the Executive Branch must reach its constitutional conclusions independent of the wisdom emanating from other organs of the federal government, state officials, the academy, and the people. That a court's opinion has influenced the President does not detract from the fact that the President had a choice to make and elected to stop enforcing a statute he no longer regarded as constitutional.

Some might agree that the President may stop enforcing a statute that a court has deemed unconstitutional and yet deny that this decision is a form of Executive Disregard. Rather the President merely enforces the court's judgment. The court has struck down the statute and thereby rendered it unenforceable. When the President ceases to enforce the statute, he merely recognizes that the statute can no longer be enforced. Hence there is no Executive Disregard in this situation.

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33. This executive non-acquiescence can take the form of either intercircuit or intracircuit non-acquiescence. Intercircuit non-acquiescence is the decision not to apply the law of one federal circuit court in cases that are within the jurisdiction of other cases. Hence even if the Ninth Circuit has held that a particular environmental statute does not regulate a particular pollutant, the Environmental Protection Agency may continue to act as if the statute does regulate the pollutant in areas outside the jurisdiction of the Ninth Circuit. See Patricia M. Wald, "For the United States": *Government Lawyers in Court*, LAW & CONTEMP. PROBS., Winter 1998, at 107, 125. Intracircuit non-acquiescence is the more controversial of the two. Essentially the government decides not to adhere to the logic of a court's opinion in all future cases. See *id.*; Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 687 (1989).

34. *United States v. Mendoza*, 464 U.S. 154, 162 (1984).

This argument makes too much of a judicial colloquialism. Courts and commentators frequently speak of “striking down” an unconstitutional statute. This language perhaps suggests that the court has both struck the statute from the code books and cast the statute into some nether region. In truth, neither actually happens. After a court decides a particular federal statute is unconstitutional, nothing is physically done to the original Act, the Statutes at Large, or the U.S. Code. No portion of any of these is struck or lined through in consequence of the judicial decision. Instead, the particular court merely has decided to pay no attention to the putative law on the grounds that that law is an unenforceable nullity. The statute, however, remains enforceable and the Executive may continue enforcing it, hoping that another court will conclude that the statute is constitutional after all.<sup>35</sup>

This conclusion is deducible from the earlier discussion. As noted earlier, under current doctrine the executive may elect not to acquiesce to a judicial decision striking down some statute as unconstitutional. That is to say, the executive may continue to try to enforce a statute that a court regards as unconstitutional, at least against people other than those who prevailed on the issue in court. This continued enforcement is only possible because the statute “struck down” actually remains “on the books” with the potential for further enforcement. The executive continues to enforce the law in the hope that another court might come to a different conclusion regarding its constitutionality.

As noted earlier, no one objects to the mild form of Executive Disregard that occurs whenever the Executive Branch elects to discontinue enforcing a statute after a court declares it unconstitutional. The lack of protest may arise from a general failure to recognize that this decision is a form of Executive Disregard. Many perhaps incorrectly assume that the Constitution rather clearly bars executive enforcement of a statute that some court, somewhere, has refused to enforce. But if that is so, the Supreme Court and the Executive Branch seem unaware of this principle.

This narrow version of Executive Disregard is limited precisely because it supposes that executive non-enforcement is possible only when some court, either federal or state, has held, either as a preliminary or final matter, that some statutory provision is unconstitutional. Where there is no such opinion, Executive Disregard is forbidden.

#### C. DISREGARDING STATUTES SIMILAR TO THOSE A COURT HAS DECLARED UNCONSTITUTIONAL

When a court concludes that a particular statute is unconstitutional and the executive agrees, the Executive Branch sometimes will choose not only to

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35. In this volume of *The Georgetown Law Journal*, Will Baude comprehensively discusses the proper, limited effect a judgment should have on the Executive Branch. *See generally* William Baude, *The Judgment Power*, 96 *GEO. L.J.* (forthcoming Aug. 2008).

refrain from enforcing the statute declared unconstitutional, but will also decline to enforce similar statutes. In this situation, the President accepts the constitutional reasoning underlying the court's opinion and applies the opinion's *ratio decendi* to other laws.

Consider this hypothetical: The Supreme Court issues *INS v. Chadha*<sup>36</sup> and, not surprisingly, the Executive Branch concludes that the Court correctly held that the particular legislative veto at issue was unconstitutional. The question arises whether to abide by legislative vetoes found in other laws. Suppose a statute grants the Defense Secretary the power to make a provisional decision and also grants a congressional chamber the authority to negate that decision. And suppose that the Defense Secretary actually has made a decision and the House has "vetoed" the decision. Must the Defense Secretary "execute" the legislative veto provision by treating his decision as if it were nullified? Under this form of Executive Disregard, the answer is no. The Defense Secretary, with the President's backing, may disregard the legislative veto exercised by the House.

The point is that because the President agrees with the *Chadha* Court's reading of the Constitution, he may apply the *Chadha* rationale to still other statutes, even though those statutes were not before the Court in *Chadha*. Indeed, Presidents regularly declare that they will not enforce legislative vetoes on the grounds that such vetoes are unconstitutional after *Chadha*.<sup>37</sup>

The claim is generalizable. Once the President agrees with a court that has struck down some statute as unconstitutional, the President may refuse to enforce similar statutes on the same grounds of unconstitutionality. The scope of this form of Executive Disregard turns on how eager and willing the President is to discover similarities between the statute struck down and other statutes. In a particularly assertive and "weak" argument, President Clinton concluded that an HIV/AIDS testing program was unconstitutional on the grounds that it was inconsistent with Supreme Court precedent.<sup>38</sup>

In any event, the President clearly engages in Executive Disregard when he reads an opinion, agrees with its rationale, and then cites that rationale as a reason to disregard other statutes he deems unconstitutional. Once again, the fact that there is a choice illuminates the possibility of Executive Disregard. If the President believed that a court got it wrong, nothing would prevent the President from enforcing statutes that he continued to believe were constitutional. The decision to implement the constitutional rationale of a particular opinion in similar situations reflects a choice to concur with the *ratio decendi* that underlay those opinions.

Consider the scenario from a different perspective, and the point becomes

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36. 462 U.S. 919 (1983).

37. See MAY, *supra* note 5, at 76, 78–79.

38. See H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. CHI. L. REV. 365, 380–83 (1998). Though he believed the statute was unconstitutional, Clinton said he would enforce it. *Id.* at 381. Yet he also claimed he would not defend the statute's constitutionality in court. *Id.*

clear. The Supreme Court issues *Chadha* and the constitutionality of a different legislative veto comes before a district court. When the district court “strikes down” the legislative veto provision (that is, chooses to ignore an exercised legislative veto), it has engaged in judicial review, even though *Chadha* is already established precedent. Similarly, notwithstanding *Chadha*, a President who refuses to enforce a legislative veto provision on the grounds that he believes the provision is unconstitutional has likewise engaged in Executive Disregard.

#### D. DEFENSIVE EXECUTIVE DISREGARD

One might suppose that the President may disregard statutes only when he believes that they unconstitutionally infringe upon his constitutional powers. For instance, if a statute forbids the President from vetoing legislation, he may nonetheless issue vetoes if he believes that the veto prohibition is unconstitutional.

This form of Executive Disregard—call it Defensive Executive Disregard—is both more limited and more expansive than the previous conceptions. It is more limited in that it supposes that Executive Disregard can only be exercised to defend against encroachment upon presidential power. Thus, the President could not decline to enforce statutes that infringe upon the constitutional rights of individuals because, under this view, such laws do not simultaneously infringe upon any presidential power or duty. Nor could the President disregard statutes that he felt exceeded the scope of federal power and thereby usurped the powers reserved to the states.

Defensive Executive Disregard is more expansive in that no judicial opinion need serve as a catalyst. In the absence of any judicial opinion, a President might choose to disregard a statute that, in his view, infringes upon his constitutional powers. Indeed, this form of Executive Disregard conceivably might be exercised in the face of contrary judicial understandings. For instance, even if a court holds that a statute regulating presidential power is perfectly constitutional, a President might conclude that the statute unconstitutionally infringes upon his powers and choose not to disregard its constraints.

This form of Executive Disregard lacks a basis in constitutional text, for nothing in the Constitution suggests that executive powers should or ought to receive special protection. Instead, this version likely reflects certain structural conceptions. Presumably, the underlying intuition is that each branch must be able to protect itself against the encroachments of the others. Though the veto permits some presidential self-defense, it is not a completely effectual check on congressional encroachments. The main threat to presidential power comes not from newly enacted legislation presented to the President, but from the vast corpus of law that predates any particular President’s ascension to office. The veto power provides no assistance to an incumbent President confronted by extant statutes that abridge presidential power.

For some, Defensive Executive Disregard has a certain appeal because it is

limited to a particular subset of statutes and because some imagine the President should be able to engage in a limited form of constitutional “self-help.” Consequently, Executive Disregard, rather than being a general means of reviewing the constitutionality of legislation, becomes somewhat tamed by the requirement that the relevant statutes must impinge upon presidential power. This conception parallels the more limited conception of judicial review that sometimes attracts critics of judicial review.<sup>39</sup>

Another reason for the appeal of Defensive Executive Disregard is that some have argued that when Presidents transfer office to their successors, they must make sure that the office is not encrusted with all manner of encumbrances.<sup>40</sup> The theory is that Presidents must not sacrifice structural principles and constitutional powers in order to achieve policy or partisan goals. If prior occupants have surrendered some of the President's constitutional powers, then their successors have a constitutional duty to revive those powers, notwithstanding contrary federal statutes.<sup>41</sup> If one embraces this sort of narrative, Defensive Executive Disregard may seem like a natural corrective.<sup>42</sup>

#### E. A DISCRETIONARY POWER TO DISREGARD

During the Clinton Administration, Office of Legal Counsel chief Walter Dellinger endorsed what is best described as a multi-factor test designed to justify a Discretionary Power To Disregard. In an opinion letter, Dellinger argued that if “the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.”<sup>43</sup> But even when these two factors converge, the President must decide whether to disregard the supposedly unconstitutional statute. He should consider the “effect of compliance with the provision on the constitu-

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39. See, e.g., Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 59 (2000) (suggesting that judicial review of statutes infringing judicial power may have a firmer constitutional basis than judicial review more broadly).

40. See David Greene, *Missing Man in the Filibuster Fight*, NPR.ORG, May 19, 2005, <http://www.npr.org/templates/story/story.php?storyId=4659584> (“Time after time after time, administrations have traded away the authority of the president to do his job. We’re not going to do that in this administration. The president’s bound and determined to defend those principles and to pass on this office, his and mine, to future generations in better shape than we found it.” (quoting Vice President Dick Cheney)).

41. This theme of Presidents who try to recapture lost or bartered away presidential powers is a familiar one. For instance, though early-twentieth-century Presidents may have been instrumental in the creation and legitimization of the legislative veto, see Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Autumn 1993, at 273, 277–78, late-twentieth-century Presidents’ administrations (Carter’s and Reagan’s) argued that the innovation was unconstitutional. *Id.* at 284–85.

42. Such a reaction is by no means guaranteed. As discussed in section I.A, those who deny that the President can disregard *any* statute might be especially perturbed by the specter of Presidents who disregard statutes meant to limit presidential power. Because these sections discuss different perspectives, it is hardly surprising that people have different intuitions about the desirability of Defensive Executive Disregard and, indeed, any form of Executive Disregard.

43. Presidential Authority, *supra* note 11, at 200.

tional rights of affected individuals and on the Executive Branch's constitutional authority,"<sup>44</sup> whether enforcement or disregard would best secure Supreme Court review,<sup>45</sup> and whether judicial review would be available at all if the President took particular enforcement (or non-enforcement) decisions.<sup>46</sup>

Crucial to this multi-factor balancing test is the Supreme Court's supposedly "special role" in resolving constitutional disputes.<sup>47</sup> Sometimes the President's fidelity to the Constitution and to the Court's special role will oblige him to enforce statutes that he believes are unconstitutional as a means of securing judicial review. Other times, constitutional fidelity will require him to disregard statutes, say where judicial review is impossible or is only possible if the President disregards the statute. In no small measure, under the Dellinger framework, decisions about Executive Disregard should be viewed as a means of bringing matters to the Judiciary for ultimate resolution.

When the President concludes that he should enforce a statute that he regards as unconstitutional, his administration should investigate possible violations and bring enforcement actions and/or criminal charges against alleged law breakers. Should a citizen or state contest the constitutionality of the underlying statute, the President is free to concede the statute's unconstitutionality to the court, leaving it to others to defend the statute's constitutionality.<sup>48</sup> In this way, the President would be doing just enough to ensure judicial review of the statute's constitutionality without having to say anything that would tend to suggest that the statute actually is constitutional.

The multi-factor test seems designed to do three things. First, it checks Executive Disregard by imposing the precondition that the President believe that the Supreme Court would judge the statute unconstitutional. Second, it ensures that the Judiciary's views play a central role in the constitutional analysis, both by making the Supreme Court's supposed views crucial to the inquiry and by suggesting that the President take steps to secure a judicial opinion. Third, it never *obliges* the President to disregard any laws. Instead, it grants the President discretion to choose whether to enforce laws that he believes are unconstitutional and that he believes a court would find unconstitutional.

This version of Executive Disregard may resonate with some because it builds upon a widespread sense that the Supreme Court plays a special role in discerning and enforcing the Constitution. If Presidents always acted upon their constitutional judgments, even when they conflicted with the Supreme Court's

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44. *Id.* at 201.

45. *Id.*

46. *Id.* Others have endorsed similar multi-factor balancing tests. *See, e.g.,* Barron, *Constitutionalism*, *supra* note 20; Johnsen, *supra* note 20, at 43; Posting of Barron et al., *supra* note 20.

47. Presidential Authority, *supra* note 11, at 200.

48. Still, Congress might defend its statute. *See, e.g.,* United States v. Lovett, 328 U.S. 303 (1946) (allowing Congress to defend a statute's constitutionality when the Executive Branch declined to do so).

wisdom, then the President's constitutional views would, in many cases, be the final word.<sup>49</sup> This theory also appeals to some because it conceives of Executive Disregard as a discretionary power to be wielded judiciously. When factors suggest that Executive Disregard is appropriate, the President *may* choose to disregard the unconstitutional statute; he is under no obligation to do so.

#### F. A GENERAL DUTY TO DISREGARD UNCONSTITUTIONAL STATUTES

Under a theory that supposes that the President has a duty to disregard, the President must refuse to further or aid and abet unconstitutional measures even when those measures take the form of a statute. So if Congress enacts a law that denies the freedom of speech to governmental critics, and if the President believes that the statute is unconstitutional, the Executive Branch must disregard the statute. Likewise, if a statute requires the government to take property without compensation, the President must disregard the statute. Believing that the Constitution bars uncompensated takings, the only constitutional course open to the President is to refuse to enforce the takings statute because seizing property pursuant to the statute would violate the Constitution and the President cannot participate in the violation.

The arguments in favor of a general duty of Executive Disregard can be stated relatively succinctly (further elaboration can be found in the next Part). Under the Presidential Oath Clause, the President must take an oath to "preserve, protect and defend" the Constitution.<sup>50</sup> Per the Faithful Execution Clause, which requires him to "take Care that the Laws be faithfully executed,"<sup>51</sup> the President has a duty to enforce federal law, including the Constitution.<sup>52</sup> Taken together, these provisions indicate that the President cannot decide to violate the Constitution nor carry into execution the unconstitutional measures of others. Instead they require him to defend and execute the Constitution. Finally, the President lacks either a power or a duty to enforce unconstitutional laws. Nothing in the Constitution either grants a discretionary power to enforce unconstitutional statutes or obliges the President to execute such laws.

Though this form of Executive Disregard is broader than the other forms outlined above, it too has limits. Crucially, the President would have a duty of Executive Disregard only when the Executive Branch is called upon to enforce a statute. In other words, where no executive enforcement is necessary, Executive Disregard is irrelevant. For instance, if a statute regulates the relationship of two private parties and does not require any federal enforcement of the statute,

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49. For instance, if no one had Article III standing to challenge the President's decision not to enforce a particular statute, the President's constitutional reading—that the statute was unconstitutional—could not be reviewed in court.

50. U.S. CONST. art. II, § 1.

51. U.S. CONST. art. II, § 3, cl. 4.

52. The Supremacy Clause makes the Constitution law and hence triggers the Faithful Execution duty. *See* U.S. CONST. art. VI, cl. 2.

there would be no occasion for Executive Disregard.<sup>53</sup> Likewise, the Executive could not engage in Executive Disregard where a federal statute modified state law, for in this scenario no federal executive enforcement would be necessary.<sup>54</sup> Such limits exist because this form of Executive Disregard merely posits that the President may not enforce unconstitutional laws. Executive Disregard, of whatever sort, does not read the Constitution as requiring the President to ensure that no one ever violates the Constitution.<sup>55</sup> It is, after all, a somewhat passive theory of *disregard*.

This catalog of theories relating to Executive Disregard by no means exhausts the possibilities. Christopher May, one of the most learned critics of Executive Disregard, reluctantly stomachs an extremely narrow version of an Executive Disregard power.<sup>56</sup> Others with particular constitutional commitments might favor theories of Disregard that advance their preferences. For instance, just as there are theories of judicial review that grant special status to cases involving alleged deprivation of individual rights, one can imagine versions of Executive Disregard that give special status to the President's reading of individual rights. Moreover, one might conclude that the President may exercise more than one form of Executive Disregard discussed above. One might combine Defensive Executive Disregard with expansive readings of judicial opinions and claim that the President may (or must) engage in Executive Disregard whenever it is necessary to defend executive power *and* whenever he believes a court would strike down the relevant statute.

## II. THE FOUNDATIONS AND CONTOURS OF AN EXECUTIVE DISREGARD DUTY

The plethora of seemingly plausible Executive Disregard theories might leave some rather dubious about any assertion that the Constitution says anything conclusive about Executive Disregard. Are the widely divergent views about

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53. Imagine a statute that regulated private property disputes in the territories and the District of Columbia. Suppose the statute seemed to take property from A and give it to B. Even though the President might have constitutional concerns about this statute, any refusal to enforce the statute is of no moment because the President is uninvolved in its immediate execution. At most, the President would be involved in the execution of a judicial judgment. But then the President would be enforcing the judgment and not actually enforcing the underlying law. *See* Baude, *supra* note 35 (discussing President's duty to enforce judgments even where he disagrees with legal conclusions that underlie judgment).

54. *See* U.S. CONST. art. I, § 4, cl. 1 (providing that Congress may override the states' laws relating to elections for federal legislators).

55. Given the wording of the President's oath, one might suppose that the President must play a far more active role in precluding constitutional violations. *See* U.S. CONST. art. II, § 1, cl. 7 ("I do solemnly swear (or affirm) that I will faithfully execute the Office of President . . . and will to the best of my Ability, preserve, protect and defend the Constitution . . ."). For instance, maybe the President ought to aggressively halt violations of the Constitution as a means of preserving, protecting, and defending the Constitution, even where his agency is not required to carry out the violation. As should be clear, this Article does not discuss this broader conception of the duty arising from the President's oath.

56. *See* MAY, *supra* note 5, at 144 (non-enforcement is only permissible as a means of securing judicial consideration of the constitutional merits).



Executive Disregard illustrative of the common tendency to discover one's preferences in the Constitution's recesses? This Part contends that a consideration of constitutional text and structure indicates that Presidents have a generic duty to disregard unconstitutional statutes. It ends by comparing and contrasting Executive Disregard with its more well-known counterpart, judicial review.

#### A. CONSTITUTIONAL TEXT

Despite the textually plausible claim that the Constitution says nothing definitively about Executive Disregard one way or the other, I argue here that the Constitution's text and structure actually enshrine a duty to disregard federal statutes that violate the Constitution. That is to say, the President must take care *not to faithfully execute* unconstitutional laws. This section also considers constitutional text that might militate against claims that the President has a power or duty to engage in Executive Disregard.

##### 1. Why Text Favors the Duty To Disregard

The Executive's Duty To Disregard arises in a number of ways. First the duty arises by implication. If one concludes that nothing in the Constitution affirmatively requires the President to enforce unconstitutional statutes<sup>57</sup> and, if one supposes that the Constitution never empowers him to enforce unconstitutional statutes, then the President simply has no authority to enforce unconstitutional statutes. In other words, given the absence of a duty to enforce unconstitutional statutes and the lack of any constitutional power to enforce such laws, the President is powerless to enforce unconstitutional statutes.

This conception of Executive Disregard perhaps appeals to those who are wary of broad claims of executive power. Under this conception, the Duty of Executive Disregard is really a duty to refrain from enforcing statutes not committed to his execution, be they unconstitutional statutes or the laws of a different sovereign. The President can no more enforce unconstitutional statutes than he can pardon state offenses or veto state legislation. The President is powerless to enforce unconstitutional statutes in the same way that he is constitutionally incapable of enforcing the statutes of other sovereigns.

Second, an Executive Disregard duty arises from the Constitution's text. To begin with, the Constitution requires the President to take an oath to "preserve, protect and defend the Constitution"<sup>58</sup> and thereby imposes an obligation on all Presidents to safeguard the Constitution. The presidential oath forbids the President from enforcing unconstitutional statutes. If the President enforced unconstitutional statutes, he would be a participant in a constitutional violation, rather than acting to defend the Constitution. This understanding of the oath actually reads the oath relatively narrowly, as merely commanding the President

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57. The next section argues that the Faithful Execution Clause never requires the President to execute unconstitutional laws. *See infra* section II.A.2.

58. U.S. CONST. art. II, § 1, cl. 7.

to do no constitutional wrong.<sup>59</sup>

Similarly, the Faithful Execution Clause<sup>60</sup> points to the same conclusion. The Faithful Execution Clause requires the President to faithfully execute federal law. The Supremacy Clause makes clear that the Constitution is applicable federal law.<sup>61</sup> As Judge Frank Easterbrook argues, the intersection of these Clauses yields a presidential duty to prefer the Constitution over unconstitutional federal laws, in exactly the same way that the federal and state courts must disregard unconstitutional federal laws in deference to the Constitution.<sup>62</sup>

Rather than supposing the President has a duty to disregard unconstitutional statutes, some might be tempted to conclude that the President has an Executive Disregard power. This would be a discretionary power that the President could elect to exercise as he thinks the circumstances warrant. Indeed, Presidents have sometimes acted as if they have a power to disregard unconstitutional statutes that they can wield opportunistically to achieve political or policy ends.

The chief difficulty with this discretionary conception of Executive Disregard is that nothing in the Constitution seems to grant a discretionary disregard power. Neither the Presidential Oaths Clause nor the Faithful Execution Clause seems to impose discretionary duties that can be invoked (or ignored) at the President's whim. Indeed, as we have seen, if these Clauses have relevance to the question, they seem to require, rather than merely permit, Executive Disregard. While the pardon power<sup>63</sup> surely grants the President an ability to disregard unconstitutional penal statutes, that power cannot justify a broad discretionary power to disregard all unconstitutional statutes. Article II, Section 1's grant of executive power is a possible candidate for a discretionary non-enforcement power. But once we consider the Vesting Clause's contours, it grants powers (such as foreign affairs powers and law execution powers)<sup>64</sup> that have nothing to do with the idea of choosing not to defend the Constitution for

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59. The presidential oath might plausibly be read as requiring more of the President. The oath arguably requires much more because it seems to require the President to prevent any violations of the Constitution for otherwise the President is not acting to "preserve, protect and defend the Constitution." *Id.* For instance, if the President believes some state law unconstitutionally infringes upon the rights of criminal defendants, perhaps his oath requires him to take steps to preclude the enforcement of that state statute. Indeed, if the President stands idly by while such constitutional violations occur, he does not seem to be "defend[ing]" the Constitution. Instead he seems more a passive observer of assaults on the Constitution. This conception of the presidential oath is beyond the scope of this Article.

60. See U.S. CONST. art. II, § 3, cl. 4.

61. See U.S. CONST. art. VI, cl. 2.

62. See Easterbrook, *supra* note 20, at 919; see also Letter from Nicholas Quinn Rosenkranz, Assoc. Professor of Law, Georgetown Univ. Law Ctr., to John Conyers, Chairman, Comm. on the Judiciary, U.S. House of Representatives (Mar. 17, 2007) (included in appendix to *Presidential Signing Statements Under the Bush Administration: A Threat to Checks and Balances and the Rule of Law?: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 118, 119–20 (2007), available at [http://www.fas.org/irp/congress/2007\\_hr/signing.pdf](http://www.fas.org/irp/congress/2007_hr/signing.pdf)) (making the same point).

63. U.S. CONST. art. II, § 2.

64. See generally Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701; Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

reasons of personal or partisan expediency. In short, there seems to be no sound textual foundation for the claim that the President has a discretionary power to disregard unconstitutional statutes.

## 2. Textual Objections to the Duty To Disregard

Those who regard Executive Disregard as an unconstitutional practice make their own textual arguments. The next two sections consider whether the Faithful Execution and Presentment Clauses bar Executive Disregard. Properly understood, neither Clause casts serious doubt on the duty to disregard.

*a. The Faithful Execution Clause as an Explicit Bar.* As noted earlier, some scholars argue that the Faithful Execution Clause expressly precludes Executive Disregard. Under this Clause, the President must “take Care that the Laws be faithfully executed.”<sup>65</sup> Because the Clause contains no exception for unconstitutional laws, it requires that the President ensure that all laws are executed, or so the argument goes. If the President could disregard federal laws, of whatever sort, he would be an unfaithful executor, precisely what the Clause explicitly forbids.

This reading of the Clause suffers from two flaws. First, it too quickly assumes that the Clause references both constitutional and unconstitutional laws. Yet there is little reason for this assumption. After all, when the Faithful Execution Clause references “Laws,” everyone understands that the Clause only references federal laws, even though it lacks the adjective “federal.” Similarly, by “Laws,” the Clause encompasses only those acts that are constitutional. An unconstitutional act is not a “Law[]” at all because such act might simply have been understood as void *ab initio*, thus never having the status of law. Hence the Clause might require the President to faithfully execute constitutional federal laws and not impose any duty *vis-à-vis* unconstitutional federal statutes.

We might benefit by drawing comparisons with other constitutional provisions that reference “laws.” At various places in Article I, Section 8, the Constitution expressly mentions “Laws”—bankruptcy laws, necessary and proper laws, and so on.<sup>66</sup> No one assumes that these provisions permit Congress to make *unconstitutional* laws. For instance, Congress cannot argue that the power to make bankruptcy laws is the power to make unconstitutional bankruptcy laws, such as a bankruptcy law that gives those who speak in favor of government policies a special liquidation preference. The power to make “uniform Laws” of bankruptcy implicitly excludes the power to make unconstitutional bankruptcy laws. Similarly, the Supremacy Clause references “Laws” that will be part of the supreme law of the land.<sup>67</sup> No one supposes that because the Supremacy Clause references “Laws” without adding the adjective “constitu-

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65. U.S. CONST. art. II, § 3, cl. 4.

66. *See* U.S. CONST. art. I, § 8.

67. U.S. CONST. art. VI.

tional,” that the Supremacy Clause therefore dictates that unconstitutional laws must be regarded as part of the supreme law of the land.

The simple point is that when the Constitution uses the word “laws” in other provisions, the Constitution is generally understood to mean “*constitutional* laws.”<sup>68</sup> If that is true for most other provisions, it should be equally true with respect to the “Laws” referenced in the Faithful Execution Clause. At a minimum, critics of Executive Disregard must do more to show that the Faithful Execution Clause somehow compels the President to enforce unconstitutional laws.

The second mistake with the critics’ reading of the Faithful Execution Clause stems from its clause-bound nature. Critics tend to read the Faithful Execution Clause in isolation, not taking care to read the Clause in conjunction with other constitutional provisions.<sup>69</sup> When we look beyond that Clause, a more complicated picture emerges. To begin with, as noted earlier, the interaction between the Supremacy and Faithful Execution Clauses casts severe doubt on the idea that the President must enforce unconstitutional laws. The Faithful Execution duty arguably extends to the Constitution itself because the Supremacy Clause expressly makes the Constitution the law of the land.<sup>70</sup> But if the Faithful Execution Clause extends to unconstitutional laws as well, the President would be in the untenable position of having to enforce both the Constitution and unconstitutional laws. Reading the Constitution as imposing two mutually conflicting duties makes little sense. Far better to read the Faithful Execution Clause as requiring the President to faithfully execute *constitutional* laws and not as imposing a duty to execute whatever laws that Congress has enacted, including those that are unconstitutional.

Finally, as discussed earlier, the President alone must take a constitutional oath “to preserve, protect and defend the Constitution of the United States.”<sup>71</sup> This duty bars the President from violating the Constitution himself or aiding and abetting the violations of others, for when he takes either measure, he is not preserving, protecting, and defending the Constitution. He is instead either attacking the Constitution or aiding in its violation. Yet if we read the Faithful Execution Clause as implicitly requiring the President to execute unconstitutional laws, his execution of such laws would serve to breach the Constitution and not preserve it. Given that an alternative, plausible reading of the Faithful Execution Clause is available, that more narrow reading of the Faithful Execu-

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68. The one exception to this reading of “laws” may be the arising under jurisdiction of Article III. See U.S. CONST. art. III, § 2. If the arising under jurisdiction only referred to constitutional laws, then when people brought cases on the basis of federal statutes, the courts might have to, *sua sponte*, determine whether the statute was constitutional in order to determine if they had jurisdiction to hear the case. In other words, the constitutionality of federal statutes might become a jurisdictional matter that the federal courts would be forced to consider each time a case arose under a federal statute.

69. See ABA TASK FORCE, *supra* note 10, at 19.

70. U.S. CONST. art. VI.

71. U.S. CONST. art. II, § 1.

tion Clause ought to be preferred over one that reads the Constitution as requiring the President to take actions that violate his unique oath.

*b. The Presentment Clause as an Implicit Bar.* Perhaps recognizing that the Faithful Execution Clause may not require the President to enforce unconstitutional laws, opponents of Executive Disregard also rely upon supposed implications said to arise from the Presentment Clause.<sup>72</sup> Properly understood, the latter Clause in no way forbids Executive Disregard.

*i. The Veto as the Sole Means of Acting upon Constitutional Objections.* Some assert that because the President may veto legislation, he may not disregard any bills that have become law.<sup>73</sup> The theory is that because individual Presidents have an obvious opportunity to raise constitutional objections when Congress presents a bill, presentment must be the only occasion to raise such objections. When presented with a bill containing an unconstitutional provision, the President may, should, or must veto the bill. Once a bill becomes law, however, the time for constitutional quibbles is over. If a President signed into law a bill that contained an unconstitutional provision, all Presidents must enforce or abide by that provision. Furthermore, should Congress override a President's veto, the President (and his successors) must enforce that legislation even if the President's objections were of constitutional dimension. Indeed, if the President could cite the Constitution as a reason not to enforce particular statutes, it would make the veto superfluous, or so the argument goes. In other words, if the President may or must disregard unconstitutional statutes, there is no reason to veto statutes on grounds that they are unconstitutional because the President could simply ignore the bill after it became law. Even worse, Executive Disregard would make any veto override an empty gesture because, even after the Congress overrode a veto based on constitutional grounds, the President could still disregard the statutory provisions he regarded as unconstitutional. Why bother overriding a presidential veto based on constitutional grounds if the President may ignore the resulting statute anyway? For all these reasons, some suppose that the Constitution should not be read as permitting Presidents to have two bites at the constitutional apple—one at presentment and one at the enforcement stage.

Executive Disregard hardly makes the veto superfluous. That the President may veto legislation for any reason, including constitutional reasons, does not mean that the President lacks an altogether different duty to disregard unconstitutional statutes. The veto power is time-bound, broad, and final. It is time-bound in that it can only be exercised at presentment. It is broad in that the veto can be exercised for any reason whatsoever, personal, political or constitutional. It is potentially final in that a veto, if not overridden, precludes a bill from becoming

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72. U.S. CONST. art. I, § 7.

73. See MAY, *supra* note 5, at 29.

law. No one can execute or enforce a vetoed bill that never became law. In contrast, the effects of disregarding a statute are narrow and possibly temporary. While Executive Disregard can be invoked at any time after a bill becomes law, it can only be used when the President has constitutional objections. Policy disagreements with a law, no matter how substantial, are wholly inadequate reasons and hence trigger no duty. To the contrary, when the President merely has policy disagreements with some laws, the Faithful Execution Clause requires him to enforce such laws. Moreover, the exercise of Executive Disregard may be incapable of rendering a final decision on the constitutional merits of a statute. Even if President B concludes some statute enacted during the tenure of his predecessor is unconstitutional, Presidents C through Z must enforce the same statute if they believe it to be constitutional.<sup>74</sup> Unlike a veto, Executive Disregard does not preclude any future President from coming to rather different conclusions about the constitutional merits of some law.

Finally, Executive Disregard does not render veto overrides mere nullities. When vetoes are based on policy considerations, a veto override clearly creates law and the President must enforce the resulting statute precisely because he has no constitutional objections. When vetoes are based on constitutional difficulties, a veto override once again makes the bill into law, at least for those who disagree with the President's constitutional analysis. First, parties might be able to seek judicial consideration of presidential non-enforcement; the President will enforce any judgments secured by the parties seeking judicial relief. Second, members of Congress might criticize, impeach, and remove the President and his subordinates for their failure to enforce a statute that members of Congress regard as constitutional. Finally, future Presidents might disagree with the current President's constitutional analysis and if they do, they will enforce the law that resulted from the congressional override. Hence overriding a veto can be quite meaningful even if the incumbent President will disregard the supposedly unconstitutional provisions in the statute resulting from the override.

Consider a somewhat analogous situation. Suppose the Supreme Court concludes that a federal statute is unconstitutional. Imagine that Congress disagrees and reenacts the statute, thinking that reenactment will demonstrate the current Congress's sense that the statute actually is constitutional. When presented with a new case, the Court will likely declare the reenacted statute unconstitutional.

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74. Whenever presidential administrations confront legal questions previously addressed by their predecessors, there is the question of whether they ought to defer to the statutory and constitutional judgments of their predecessors. For instance, Presidents C–Z might apply the policy of stare decisis to the constitutional decisions of President B. Hence they might conclude that even though they believe that certain statutory provisions are constitutional they should nonetheless continue President B's decision not to enforce those same provisions. Though this is not the place to discuss the policy of stare decisis, it is important to note that presidential administrations make many legal decisions, including many constitutional ones, all of which might benefit from decision of a successor President to apply stare decisis to some or all of such decisions.

Nonetheless, Congress's reenactment will not be rendered meaningless because Congress will have expressed its belief that the statute is constitutional. Expressions of constitutional differences are not pointless merely because other branches might choose to continue to adhere to their prior constitutional analyses and conclusions.<sup>75</sup>

Because the veto power and Executive Disregard apply at separate stages, have dramatically different scopes, and have distinct effects, Executive Disregard hardly renders the veto superfluous.<sup>76</sup> The veto will continue to have independent significance even if one accepts a duty of Executive Disregard because the veto is the only means of acting upon non-constitutional objections and is the only means of precluding future Presidents from reaching different conclusions about the constitutionality of some statute.

*ii. Executive Disregard as a Forbidden Line-Item Veto.* Making a slightly different argument, some argue that if the President could choose to disregard unconstitutional provisions of statutes, he would effectively enjoy a line-item veto.<sup>77</sup> The President could disregard provisions he regarded as unconstitutional, even when those provisions were an integral part of a complex and interrelated statutory scheme. Some argue that because the Constitution does not grant the President a line-item veto,<sup>78</sup> the Constitution should not be read as implicitly granting such authority to the President via a power to disregard unconstitutional provisions of statutes.

This argument confuses the practice of Executive Disregard with the very different concept of a line-item veto. Whenever the President concludes that some statutory provision is unconstitutional, the President must engage in a severance analysis of the type that courts engage in when they conclude that a particular statutory provision is unconstitutional.<sup>79</sup> Sometimes the President,

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75. For instance, Congress's broader interpretation of the Free Exercise Clause, as reflected in the Religious Freedom Restoration Act (RFRA), was not rendered pointless merely because the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), adhered to the narrow conception of free exercise enunciated in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). Notwithstanding the Supreme Court's unwillingness to enforce RFRA, Congress's expression of disagreement with the *Smith* free exercise test was useful and meaningful.

76. Similar points were made at Philadelphia by delegates who wished to put judges on a council of revision that would wield a veto. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 94–95, 97, 104, 108–12 (Max Farrand ed., 1966). Even though judges would have a chance to declare statutes unconstitutional when deciding cases, arming some judges with a share of the veto gave them a rather different power to prevent something from becoming law for any reason. See *id.* at 109 (comments of Rufus King, arguing against the proposal). In particular, judges could use policy preferences as a reason to veto some proposed legislation, something that they could not do in their capacity as judges. See *id.* at 97–98 (arguing against the council of revision, Elbridge Gerry stated that it was contrary to the nature of judges' duties "to make them judges of the policy of public measures").

77. See ABA TASK FORCE, *supra* note 10, at 18.

78. See *Clinton v. City of New York*, 524 U.S. 417, 421 (1998).

79. See, e.g., *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684–97 (1987) (severing unconstitutional legislative veto provision from other provisions); see also Lars Noah, *The Executive Line Item Veto and the Judicial Power To Sever: What's the Difference?*, 56 WASH. & LEE L. REV. 235 (1999) (considering

like the courts, will conclude that Congress would have wanted the entire statute rendered unenforceable when he regards a key portion of a statute as unconstitutional (and hence unenforceable). He will reach this conclusion whenever Congress expressly provides that severance is impossible (by including an “inseverability clause”<sup>80</sup>) or when his best reading of the statute suggests that inseverability is what Congress intended. When the President concludes that severance is forbidden, the President cannot continue to enforce other statutory provisions included in the statute containing the unconstitutional provision(s). In other words, where severability is impossible, there will be nothing like a line-item veto.

Other times the President, like the courts, will conclude that Congress would have wanted the constitutional remainder enforced. When courts refuse to enforce an unconstitutional statute but permit the rest of the statute to remain enforceable, no one imagines that the courts have exercised a line-item veto. This is true even though the statute enforceable after judicial review is, in some sense, one that Congress never enacted. The same conclusion follows when the President engages in Executive Disregard and concludes that Congress would not have wanted the entire statute rendered a nullity merely because part of it was deemed unenforceable by the President. This is not a line-item veto but just a consequence of all forms of review of the constitutionality of legislation, be it judicial review or Executive Disregard.

Furthermore, as noted earlier, exercises of Executive Disregard neither preclude some statute from appearing in the Statutes at Large nor efface a supposedly unconstitutional statute from the U.S Code. Whatever a particular President concludes about the constitutionality of a statute, future Presidents may reach radically different conclusions. In sharp contrast, a true line-item veto never permits future Presidents to enforce a provision line-item vetoed for constitutional reasons. Once vetoed (and not overridden), the lined-out provision can never be treated as law. To say that Executive Disregard somehow grants the President a line-item veto is a gross oversimplification.

In any event, Congress has the ability to eliminate this supposed line-item veto problem. In particular, Congress has the power to bar executive severance of a statute and thereby preclude even the semblance to a line-item veto. If Congress is fearful of Executive Disregard, for whatever reason, it can enact statutes that provide that anytime someone (either the courts or the Executive Branch) chooses not to enforce some provision of a larger statutory scheme on the grounds that the provision is unconstitutional, the whole scheme is not enforceable. Such inseverability clauses are commonly meant to handle the aftermath of judicial invalidation of some statutory provisions.<sup>81</sup> There is no

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the parallels between judicial severance and the Line Item Veto Act enacted during the Clinton administration).

80. See generally Israel E. Friedman, Comment, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903 (1997) (discussing courts' dealings with inseverability clauses).

81. See *id.* at 903.



reason to suppose that Congress could not provide that such clauses also would be applicable to all exercises of Executive Disregard. In this way, Congress could preclude exercises of Executive Disregard even appearing like a line-item veto.

Moreover, Congress can create different severability rules: an inseverability rule applicable to Executive Branch decisions that some portion of a statute is unconstitutional and a more forgiving severability rule applicable to judicial invalidation of statutory provisions. Evincing confidence in the Judiciary's constitutional conclusions, Congress might be more willing to adopt a severability provision that allows the remaining provisions to remain enforceable even should a court strike down one or more provisions. Exhibiting far less confidence in the President's conclusions, Congress can provide that should the President declare part of the statute unconstitutional the entire act must fall because no part is severable from the rest. If Congress provides that a statute is inseverable whenever the President regards part of the statute as unconstitutional, the President will have to regard the entire statute as void and often will lose statutory sections that he favored. Congress might wish to enact a strict inseverability clause applicable to exercises of Executive Disregard if it believes either that the President's constitutional judgments are simply mistaken or if it imagines that politics have infected those judgments.

The more general point is that the President's power to veto supplies no reason for believing that the Constitution forbids Executive Disregard. In part this stems from the rather significant differences between Executive Disregard and the veto. But it also stems from the fact that nothing in the veto provisions hints, much less indicates, that the President can raise and act upon constitutional objections only at presentment. The veto arguments against Executive Disregard read too much into the recesses of the Presentment Clause.

More generally, the veto arguments fail to recognize that without Executive Disregard, the President will be compelled to enforce statutes he regards as unconstitutional merely because some Congress, at some time, enacted such statutes. That statute might have been enacted over a presidential veto, by a lame-duck Congress as a parting "gift" to the incoming President of another party, or by a Congress during some perceived emergency. The veto, as much as it serves as a roadblock to unconstitutional legislation, hardly serves as a perfect barrier. Executive Disregard permits the President to complement the veto power in defense of the Constitution and in satisfaction of his oath and his faithful execution duties. In contrast, regarding the veto as the only presidential means of fending off unconstitutional legislation ensures that Presidents will fall victim to past unconstitutional follies.

#### B. CONSTITUTIONAL STRUCTURE

Arguments sounding in constitutional structure likewise favor the duty to disregard. As discussed below, Executive Disregard puts the President on something of the same footing as ordinary citizens and ensures that there are

multiple mechanisms in place designed to prevent or check constitutional violations.

### 1. Why Structure Favors the Duty To Disregard

First, the ability to disregard statutes merely grants the President the self-help remedy available to all citizens and hence places the President on an equal footing. For instance, a citizen who believes that a statute is unconstitutional because it forbids her from discussing politics can flout the law and cheekily complain that Congress has stifled speech. More generally, citizens may choose to defy all manner of statutes that they believe are unconstitutional. While some might decry this defiance as lawlessness, that assumes the very question in dispute. After all, a defiant citizen will no doubt claim that the unconstitutional statute is no valid law at all and hence her actions were not unlawful.

Of course, there may be consequences for citizens who engage in what we might call "Citizen Disregard."<sup>82</sup> The private citizen who violates a supposed federal law may be prosecuted, and if a court concludes that the underlying statute is constitutional, the private citizen will be found guilty. Her act of constitutional interpretation, however, will form no part of the offense. She can be punished for doing the criminal act proscribed, but not for reaching constitutional conclusions that the court deems mistaken. Indeed, if she triumphs on the constitutional claim, she cannot be separately charged with having the temerity to act on her constitutional interpretation. The Constitution does not make it illegal to defy unconstitutional statutes and it seems obvious that Congress could not make it a separate crime to disregard such laws.

The Constitution should be read as granting the President the same ability as ordinary citizens to disregard unconstitutional statutes. Hence, if a statute bars the President from criticizing Congress, the President may defy that law. He may condemn Congress, because in so doing he violates no true law. Because the law is invalid, his defiance cannot be a breach of his Faithful Execution Clause duties, any more than a citizen's defiance of an unconstitutional law can be said to breach the citizen's civic duties.

The same conclusions obtain when the President defies statutes that infringe upon his constitutional powers or that require him to be complicit in a constitutional violation. When the President disobeys a statute that seeks to deprive him of his right to pardon individuals, he likewise has not violated the Faithful Execution Clause because the putative statute is no law at all. And the same logic holds true for statutes that call upon him to execute some unconstitutional scheme upon others, say a law that requires him to bar the doors of houses of

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82. We can distinguish Citizen Disregard from civil disobedience in that the former is a claim that some statute has no force because it is unconstitutional. Though Citizen Disregard is a subset of civil disobedience, civil disobedience often involves the flouting of an unjust law that many or all agree is constitutional.

worship.<sup>83</sup> Just as we might imagine that the militia could choose not to enforce unconstitutional laws on the rest of the people, so too may the President disregard unconstitutional laws.

Like the private citizen, the President will face consequences if others believe his constitutional conclusions are erroneous. The courts stand ready to hear cases accusing the President of disobeying a valid law (assuming, of course, that someone has standing). If the President loses, he not only will have to execute the court's judgment,<sup>84</sup> he will face the charge that he adopted a mistaken, even baseless, reading of the Constitution.

In particularly egregious cases, the chambers of Congress can impeach and convict a President whom they believe was mistaken about the unconstitutionality of a statute.<sup>85</sup> The grounds for the impeachment will be that the President has a duty to enforce constitutional statutes and has no power to disregard such statutes.<sup>86</sup> If the chambers conclude that a statute is unconstitutional, however, they cannot impeach and convict the President for failing to execute it, any more than judges can impose punishment on private citizens for defying an unconstitutional law. On the other hand, if one endorses the assertion that the President can never refuse to enforce a statute, one must confront the specter of a President being impeached, convicted, and removed from office for failing to enforce an old statute that the current Congress *concedes* is unconstitutional.

The notion that the President should be able to engage in "self-help" Executive Disregard is strengthened by the fact that Presidents cannot secure judicial relief to safeguard their official powers and duties. Although I do not think the question has been litigated, Presidents cannot seek a declaratory judgment or an

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83. The difference between the President and a citizen is that the President has a general duty to resist unconstitutional statutes, whereas the citizen may acquiesce to abrogation of his rights. The only time the President may acquiesce to an unconstitutional statute is when the only party affected is the President and it does not contradict any of his duties. For instance, if a President does not violate statutes that prohibit him from criticizing members of Congress and bar pardons, his adherence could be explained as a decision that the statute was unconstitutional coupled with a personal decision not to exercise his individual rights and constitutional powers. In contrast, he cannot acquiesce to a statute that calls upon him to abrogate the constitutional rights of others because the President has no ability to decide that others should not exercise their constitutional rights.

84. See *Baude*, *supra* note 35.

85. U.S. CONST. art. I, §§ 2–3 (granting the House the sole power to impeach and the Senate the sole power to try impeachments); U.S. CONST. art. II, § 4 (making clear that the President may be impeached). This is not to say that Congress must impeach and convict in this situation, only that it may. Most recognize that impeachment is a political process, where political judgments about the desirability of removing the President play a considerable role in deciding whether to impeach and remove. See generally THE FEDERALIST NO. 65 (Alexander Hamilton) (discussing the role that politics would likely play in impeachments).

86. The possibility that Presidents might be impeached and removed for reaching constitutional conclusions that Congress regards as erroneous might strike some as a lamentable and mistaken reading of what it means to commit a "high Crime[] and Misdemeanor[]." U.S. CONST. art. II, § 4. Yet if the President can avoid being removed merely because he has a good faith belief in the constitutionality of his actions, I am afraid that it will become very difficult (if not virtually impossible) for Congress to ever impeach the President. For Presidents will tend to convince themselves (with the help of their smart legal advisors) that what they are doing is constitutional.

injunction when a statute infringes upon presidential powers. There would be no standing because the President would be complaining about how the branch he controls might enforce an unconstitutional law. If the President believes that some statute infringes upon his constitutional powers, his only option is to defy the statute and seek its repeal. For similar reasons, there is no avenue of judicial relief when the President believes that a statute committed to his care is unconstitutional and hence ought to be disregarded. For instance, he cannot go to court and secure a judicial determination that a statute impinging upon free exercise rights is unconstitutional.<sup>87</sup> Accordingly, when a President engages in Executive Disregard, he often acts against a backdrop in which he cannot secure judicial intervention.

A second structural reason favoring Executive Disregard is that it ensures that there are multiple mechanisms that protect the Constitution. A duty to disregard statutes serves as an extra safeguard against unconstitutional laws. Rather than merely relying upon judicial review of existing statutes and congressional review at the time of passage, the nation benefits from having the President also gauge the constitutionality of the vast body of federal statutes. In this way, the Constitution adopts a belt, suspenders, and rope approach to safeguarding itself.

Finally, many of the structural arguments famously made by Chief Justice John Marshall in favor of judicial review also favor Executive Disregard: the written nature of the Constitution, the notion that Congress cannot change the Constitution by statute, and the idea that Congress cannot be the sole judge of the limits of its powers.<sup>88</sup> These considerations suggest Executive Disregard no less than they suggest judicial review.<sup>89</sup>

## 2. Structural Objections to the Duty To Disregard

Opponents of Executive Disregard have not been particularly attentive to these structural arguments that favor the duty of Executive Disregard. Instead, they have raised alternative structural claims that they believe militate against the theory. First, they rightfully note that the Constitution establishes a rule of law and not of men. The Constitution famously establishes a Supreme Law that binds all, the President included. Executive Disregard, however, supposedly

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87. From the nation's beginning, Presidents could not go to court in a bid to resolve legal questions that puzzled them. In 1793, George Washington famously sought legal advice from Supreme Court Justices about the meaning of various terms in a treaty with France. The Justices refused to give such advice. For a discussion of this episode of early executive advice-seeking (and others), see STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES* 77–170 (1997); Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123, 144–50. Whether the refusal of the Justices was proper (or consistent with the prior practice) is beside the point. The point here is that the President did not go to court afterward and seek to establish a case or controversy and force the judiciary to opine on these legal matters. Washington presumably did not file such a case because he understood that he could not.

88. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–80 (1803).

89. See Easterbrook, *supra* note 20, at 919–22; Paulsen, *supra* note 20, at 241–45.

ushers in the rule of a man and not of law.<sup>90</sup> The President unilaterally could decide when to follow federal law and when to pay no heed to it, effectively making his will the law. Second, some might believe that Executive Disregard makes the President something of a constitutional juggernaut. Armed with Executive Disregard, the President would be able to impose his constitutional vision on the rest of the country and overwhelm all other perspectives. The Congress, the courts, and the citizenry would be forced to abide by the President's constitutional readings. Third, and perhaps most ominously, the President might adopt dreadfully mistaken readings of the Constitution, thereby depriving the American people of their constitutional rights. Finally, taking a somewhat different tack, opponents of Executive Disregard might concede that the President can disregard unconstitutional laws but contend that he cannot decide for himself whether laws are unconstitutional. Instead, he must accept the constitutional viewpoints of Congress or the courts. In other words, he can disregard only those laws that other branches have found to be unconstitutional.

The rule of law objection may have rhetorical force, but it has no traction. Presidents who consider Executive Disregard as a duty are manifestly not claiming to be above the law. This is not a reprise of President Nixon's bizarre claim that "when the President does it, that means that it is not illegal."<sup>91</sup> Rather, Executive Disregard assumes that the Constitution is supreme over contrary federal statutes—something everybody agrees is true. The only extra claim necessarily entailed by the duty is that Presidents must disregard statutes that they believe are unconstitutional. This assertion, grounded as it is in the Constitution's text, is hardly incompatible with the rule of law. Indeed, judges engage in judicial review all the time and no one thinks that a system of judicial review, without more, establishes a rule of men and not a rule of law. If that is true for judicial review, it is no less true for Executive Disregard.

The juggernaut objection has merit only if one accepts its exaggeration of Executive Disregard's impact and its simultaneous minimization of accepted features of presidential power and duty. Many of the President's constitutional judgments are reviewable by the courts. In particular, when someone is injured by the refusal to execute a particular statute, she may seek judicial resolution. As Chief Justice John Marshall said, the federal judiciary can compel executive officers to attend to what he regarded as ministerial duties.<sup>92</sup> Such judicial orders are quite meaningful as a restraint on presidential power because modern

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90. See ABA TASK FORCE, *supra* note 10, at 5, 20, 25, 27 n.77, 28 (making repeated references to rule of law).

91. *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16.

92. See *Marbury*, 5 U.S. (1 Cranch) at 158–59. It is true that the courts will not entertain suits attempting to enjoin the President. See *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 500–01 (1866). But this poses no real obstacle to judicial review. Congress can write statutes that impose duties on executive officers rather than the President. The President may tell his executive officers not to enforce a law because he believes it is unconstitutional. But should a court conclude otherwise, it can order the official to execute the statute.

Presidents have shown no inclination to disregard judicial judgments.<sup>93</sup>

Furthermore, as noted earlier, *every* exercise of Executive Disregard can be subject to judicial review by the chambers of Congress in impeachment proceedings. Nothing prevents the chambers of Congress from exercising their respective impeachment jurisdictions to correct presidential overreaching. In the case of President Andrew Johnson, the chambers clearly engaged in a form of judicial review of Johnson's supposed exercise of Executive Disregard with respect to the Tenure in Office Act.<sup>94</sup> Seemingly contrary to the Tenure in Office Act, Johnson fired Edwin Stanton, the Secretary of War, without first securing the Senate's consent,<sup>95</sup> as the act seemed to require.<sup>96</sup> The House impeached Johnson and the Senate came within one vote of convicting him.<sup>97</sup>

Those who worry that Executive Disregard makes the President too powerful fail to appreciate how, even under conventional accounts of presidential power, the President can engage in limited but rather significant forms of Executive Disregard. If the President believes that a particular statute creating penalties is unconstitutional, the President arguably must pardon all those who have been convicted of violating the unconstitutional statute, thus removing any burdens imposed by virtue of a conviction. Moreover, in an attempt to prevent future constitutional wrongs, the President arguably must wield his pardon pen to issue pardons to all who might otherwise be subjected to eventual prosecution for acts occurring prior to the end of his administration. The President must pardon in these situations because he must defend the Constitution against the effects of unconstitutional statutes. Given his duty to defend the Constitution, he cannot stand idly by while people are being punished under unconstitutional laws. Nor should the President turn a blind eye to the admittedly more remote possibility that a future President will prosecute individuals for acts that took place during his presidency. Not knowing whether future Presidents will share his constitutional views, he ought to pardon all those acts that constitute violations of acts he regards as unconstitutional.

This duty to issue blanket pardons to prevent the imposition of punishment under an unconstitutional statute approaches the broad effects of an Executive Disregard duty. We have seen a governor empty death row recently<sup>98</sup> and there is no doubt that the President could do the same if he believed that the federal

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93. Modern Presidents have adopted the proper understanding of the President's relationship to judgments. See Baude, *supra* note 35.

94. See MAY, *supra* note 5, at 57–64.

95. See *id.*

96. An Act Regulating the Tenure of Certain Civil Offices § 1, 14 Stat. 430, 430 (1867) (repealed 1887).

97. See MAY, *supra* note 5, at 61. For a discussion of why the impeachment was justified, see MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* (1973). For a more sympathetic portrayal of Johnson, see generally WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992).

98. See Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at A1.

death penalty was unconstitutional. Indeed, as discussed later, Thomas Jefferson freed all prisoners convicted of violating the Alien and Sedition Acts on the grounds that they could not be lawfully punished under the auspices of an unconstitutional law. In any event, the point is that much of what opponents of Executive Disregard fear can be accomplished even if one rejects the duty to disregard.

The other objection borne of fear—that the President might make grievous mistakes of constitutional law as he fulfills his duty to disregard—has undoubted merit. The President certainly will make constitutional errors in the course of deciding whether the Constitution permits him to enforce particular statutes. But that hardly means that the President lacks a duty to disregard statutes he regards as unconstitutional. That the courts may make, and indeed have made, constitutional errors does not detract from the claim that the Constitution authorizes judicial review. Likewise, that the Congress may act upon erroneous understandings of the Constitution does not mean that members should not consider the Constitution as they enact laws and as they decide whether the Executive Branch and the courts have committed an impeachable offense. Human errors are an inevitable part of every system of constitutional defense; such errors do not supply sound reasons for rejecting Executive Disregard.

Finally, consider the seemingly reasonable claim that while the President may engage in Executive Disregard, he cannot act on his own constitutional judgments. Instead, perhaps the President must accept the Congress's implicit judgment that the laws it passes are constitutional. Or, more plausibly, maybe the President must enforce all federal laws except for those that a court has declared unconstitutional. With respect to only those laws that a court declares unconstitutional, the Faithful Execution duty no longer applies.

Such arguments suffer from a host of difficulties. The idea that the President must accept the constitutional judgments of Congress essentially makes it impossible for the President to disregard any statutes and thereby negates all the advantages of Executive Disregard. Most imagine that Congress only passes statutes that a majority of members in both chambers thinks is constitutional. Given this common hypothesis about congressional constitutional sincerity and given the claim that the President can only disregard those statutes that Congress regards as unconstitutional, the President cannot engage in Executive Disregard at all. More importantly, nothing in the Constitution requires the President to accept Congress's constitutional views. The President is no more obliged to accept congressional views about the meaning of the Constitution than are the courts bound to accept the same. In short, the Constitution nowhere forces the President to adopt and implement the constitutional perspectives of Congress.

The idea that the President must wait for the constitutional interpretations of the courts suggests that the President is somehow disqualified from reaching his own constitutional conclusions. This too is untenable. Suppose a peacetime

President wishes to indefinitely imprison someone. When critics complain that this is unconstitutional, he replies “it is not unconstitutional until a court concludes as much. Until that time, my actions are not unconstitutional.” This response is surely unconvincing and highlights the flaw in the argument that the Faithful Execution duty applies to unconstitutional statutes until a court declares them unconstitutional. Statutes, like presidential actions, can be unconstitutional even in the absence of any judicial determination confirming as much.

The more fundamental problem is that the Constitution never says that the President not only must agree with a court’s constitutional conclusions but also must refrain from acting on his constitutional understandings prior to receiving any judicial wisdom on a particular legal point. Such a theory exalts every federal and state court and constitutionally infantilizes the President. More precisely, it supposes that the President must treat the Constitution as no law at all even though the Constitution declares that it is part of the “supreme Law of the Land.”<sup>99</sup>

Such passivity on the part of the Chief Executive has never been this nation’s practice. To the contrary, early constitutional interpretation was utterly dominated by the Executive and Legislative Branches, with the Judiciary playing a minor, episodic role. The great early constitutional questions—the Decision of 1789, the Bank of the United States, and the Alien and Sedition Acts—were all initially decided by Congress.<sup>100</sup> Paralleling the actions of Congress, the President and his cabinet reached significant constitutional conclusions without any thought that they ought to refrain from making decisions until a court opined. Washington’s decision to sign the act creating the first Bank of the United States,<sup>101</sup> his conclusion that executive officers served at his pleasure,<sup>102</sup> and his veto of an apportionment bill<sup>103</sup> were three of many constitutional decisions made without any notion that Washington should wait until a court opined. Moreover, Thomas Jefferson issued pardons in Sedition Act prosecutions and halted ongoing prosecutions even though courts previously had upheld the Act’s constitutionality.<sup>104</sup> Similarly, President Andrew Jackson vetoed the third Bank

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99. U.S. CONST. art. VI, cl. 2.

100. For a discussion of these (and many other constitutional episodes) in the early Congresses, see DAVID CURRIE, *THE CONSTITUTION IN CONGRESS, THE FEDERALIST PERIOD: 1789–1801* (1997).

101. Washington famously received opinions on whether to sign or veto the Bank Bill. *See, e.g.*, Alexander Hamilton, Opinion on the Constitutionality of the Bank (Feb. 23, 1791), in 3 *THE FOUNDERS’ CONSTITUTION* 245, 245–47 (Philip B. Kurland & Ralph Lerner eds., 1987); Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), in 3 *THE FOUNDERS’ CONSTITUTION*, *supra*, at 247, 247–50.

102. For a discussion of Washington’s conclusion that executive officers served at his pleasure, a decision informed by the Decision of 1789 but not dictated by it, see Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779 (2006).

103. *See* George Washington, Veto Message (Apr. 5, 1792), in 1 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897*, at 124, 124 (James D. Richardson ed., 1896) [hereinafter *PRESIDENTS COMPILATION*].

104. *See infra* notes 217–44, 247–58 and accompanying text.



of the United States on the grounds that the Bank was unconstitutional,<sup>105</sup> *M'Culloch v. Maryland*<sup>106</sup> notwithstanding. Both Jefferson and Jackson raised constitutional objections as the basis for their actions, unmistakably rejecting the idea that the Executive Branch owed a slavish adherence to the constitutional wisdom emanating from the courts.<sup>107</sup>

Lastly, no one supposes that the President cannot interpret and execute statutes in the absence of a judicial determination of their meaning. Every day, the President and others in the Executive Branch carry out the laws without the benefit of prior judicial interpretation. If the President can interpret statutory law in the absence of judicial wisdom, why would we conclude that he may not interpret the Constitution? The Judiciary no more has a monopoly on constitutional interpretation than it does on statutory interpretation.

In sum, once one concedes that the Faithful Execution Clause does not extend to unconstitutional statutes, there are no sound reasons to think that the President cannot make an independent and meaningful judgment as to whether a statute is constitutional. The Constitution never says that the President is generally barred from interpreting the Constitution and acting on his interpretations. Nor does it suggest that when it comes to statutes in particular, the President must refrain from making constitutional judgments. Finally, the Constitution never requires the President to accept the constitutional conclusions of his co-equal branches.

All told, the textual and structural claims against Executive Disregard ask us to read too much into the Constitution and imagine that the President must be barred from acting on his own constitutional judgments. But that has never been our practice and it eliminates one of the Constitution's sound checks on unconstitutional laws.

In contrast, the claim that the Constitution's text and structure requires the President to disregard unconstitutional statutes has quite robust support. Having no power to enforce unconstitutional laws, the President must disregard them. Moreover, the President's oath to "preserve, protect and defend the Constitution"<sup>108</sup> and his Faithful Execution duty actually require him to refrain from violating the Constitution, including abstaining from enforcing statutes that violate the Constitution itself. If the President enforces unconstitutional statutes, he endangers, attacks, and assaults the Constitution and is quite unfaithful to it.

#### C. DISTINGUISHING EXECUTIVE DISREGARD FROM JUDICIAL REVIEW

Having drawn some parallels between Executive Disregard and judicial review, perhaps a more focused consideration of their similarities and differences is in order. The obvious resemblance is that both the Judiciary and the

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105. See Andrew Jackson, Veto Message (July 10, 1832), in 2 PRESIDENTS COMPILATION, *supra* note 103, at 576.

106. 17 U.S. (4 Wheat.) 316, 425 (1819).

107. See Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 17, at 57; Jackson, *supra* note 105, at 582.

108. U.S. CONST. art. II, § 1, cl. 8.

Executive must avoid doing constitutional harm. Neither can participate in the implementation of unconstitutional schemes, including the execution of unconstitutional laws. Any such participation in a constitutional violation would be a breach of their respective constitutional oaths.

But there are vital differences that should not go unnoticed. In some ways, Executive Disregard is broader than judicial review. The President can decide to disregard a particular federal statute without any need for a case or controversy.<sup>109</sup> In particular, the justiciability issues that constrain a federal court's ability to decide cases—standing, mootness, ripeness, opposing parties, and so forth—do not apply. The President can conclude that a law is unconstitutional without even a murmur of citizen concern or protest. This coheres with the general intuition that, as compared to the courts, the President is not as tethered to an agenda created by others.

Relatedly, because there may not be opposing parties, there may not be a clash of viewpoints, as there would be in the context of a case. Within the Executive Branch, the President's advisers may happen to agree that a particular statute is (or is not) unconstitutional, thus depriving him of a robust airing of different viewpoints. If one believes that robust debates enable constitutional truths to come to the surface, the lack of such clashes may make the Executive's constitutional judgments less worthy of confidence.

In other ways, Executive Disregard will have a narrower scope than judicial review. To begin with, the courts have a broader constitutional jurisdiction and hence a more encompassing duty. The federal and state courts can hear cases involving the alleged unconstitutionality of federal and state laws and federal and state actions. For instance, a private party might argue that a particular state practice is unconstitutional and a court might agree after engaging in judicial review. In contrast, the President cannot engage in Executive Disregard when it comes to the constitutionality of state statutes or actions. Executive Disregard has no role to play in these contexts because mere disregard of unconstitutional federal statutes obviously will not prevent state legislatures and executives from violating the Federal Constitution.

Because Executive Disregard only can apply to federal statutes, satisfaction of the duty will have the tendency to constrain the reach of federal power and not expand it. The President will disregard federal statutes that he believes go beyond the scope of Congress's enumerated powers and that violate the individual rights of Americans. Yet unlike the courts, he will have no occasion to disregard state statutes that invade federal authority or that violate individual rights. Hence, while judicial review can curtail the reach of both federal and state power, Executive Disregard will tend to curtail federal authority only.<sup>110</sup>

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109. See U.S. CONST. art. III, § 2, cl. 1 (noting that judicial power granted in Article III, Section 1 extends to several classes of "Cases" or "Controversies").

110. Executive Disregard cannot be used as a means of expanding federal legislative power because like judicial review, Executive Disregard cannot force Congress to enact expansive federal statutes. The

Executive Disregard also will be more circumscribed than judicial review because there are some federal laws not requiring any federal execution, such as laws dealing with state inspections and elections.<sup>111</sup> When Congress enacts federal statutes that override state law, the states enforce the resulting laws. Obviously, Executive Disregard will have no effect on such federal laws because no executive enforcement of them is necessary. Judicial review of such statutes, however, is clearly possible.

The phenomena of independent agencies also may make Executive Disregard less consequential. As is well-known, Congress has confined the civil execution of certain laws to various independent agencies, such as the Securities and Exchange Commission's execution of the federal securities laws. The courts can hear challenges to the constitutionality of such laws. For instance, if the Securities and Exchange Act ordered the Commission to seize all records of public companies, courts could adjudicate cases challenging such seizures as a violation of the Fourth Amendment bar against unreasonable searches and seizures.

In contrast, the President may not be able to influence enforcement of such statutes. If the President agrees with the common (but contested) claim that Congress can insulate law execution from presidential control,<sup>112</sup> Executive Disregard will have no effect on laws committed to the care of independent agencies. For instance, should a statute permit the Federal Election Commission to seek an injunction to enjoin certain political speech that the President feels is constitutionally protected, the Executive's duty to disregard would do nothing to thwart the agency's abridgment of the freedom of speech. In a sense, Presidents already pay little or no heed to these laws, essentially obeying Congress's command to leave their execution to the independent agencies. Further presidential disregard of them will not enable the President to defeat whatever unconstitutional measures these statutes contain. Given that independent agencies control the enforcement of numerous and significant federal laws, the President may be unable to engage in any meaningful Executive Disregard over a considerable fraction of federal law.<sup>113</sup>

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President cannot use his duty to disregard unconstitutional statutes as a means of convincing Congress to enact statutes curtailing civil liberties or to enact statutes embracing a broad view of the commerce power. Because Executive Disregard is a duty and not a power, the President cannot use the duty as a bargaining chip that might be used to convince Congress to enact statutes that expand federal power.

111. See U.S. CONST. art. I, § 4, cl. 1 (permitting Congress to override state election laws relating to elections of federal legislators); U.S. CONST. art. I, § 10, cl. 2 (permitting Congress to revise state tariffs on exports and imports).

112. For skepticism about such claims, see generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994); Prakash, *supra* note 64.

113. The only way that Executive Disregard could matter with respect to the statutes committed to the independent agencies is if the President concluded that it is unconstitutional for Congress to vest law execution power with independent agencies. One can imagine such a President assuming control of independent agencies and commanding their officials to refrain from enforcing those provisions that the President believes are unconstitutional. Alternatively, the President might conclude that the Congress would have wanted an entire regulatory scheme rendered a nullity if either a court or the President

One of the greatest differences between Executive Disregard and judicial review might be the justifications that typically accompany a decision to refuse to enforce. On the one hand, judges write opinions explaining their refusal to enforce unconstitutional statutes. On the other hand, there is no requirement that the Executive Branch produce similar opinions when it refuses to execute a statute it regards as unconstitutional.

Yet this difference is more apparent than real. The Constitution implicitly requires the courts to adjudicate cases by issuing judgments. It does not require the courts to issue opinions that explain those judgments.<sup>114</sup> Though such opinions often accompany judgments, courts sometimes issue judgments that lack opinions. One reason why courts voluntarily attach opinions to judgments is because the parties (and perhaps the public) expect some explanation of the reasons that led to the judgment.

In the same way, the public might expect and demand that Presidents who engage in Executive Disregard explain and justify their constitutional reasoning. Presidents who regularly engage in Executive Disregard without a public airing of their constitutional analysis may well find themselves facing withering public scrutiny and condemnation, in much the same way that courts would be condemned if they struck down federal or state statutes without explaining their exercises of judicial review.

In any event, there is no constitutional requirement that judges explain their constitutional decisions. Opinions accompany judgments because judges recognize that issuing explanatory opinions generates benefits for the judiciary. Presidents hopefully will come to the same realization, leading them to issue careful and detailed opinions and thus making Executive Disregard more closely resemble judicial review. In short, there is no reason to think that explanatory opinions ordinarily will not accompany exercises of Executive Disregard.

### III. THE EARLY HISTORICAL RECORD

Besides raising textual and structural claims against Executive Disregard, sophisticated critics have claimed that the lessons of English history supply strong reasons for rejecting Executive Disregard.<sup>115</sup> English law specifically forbade the power to disregard laws and hence the Crown lacked any Executive Disregard power.<sup>116</sup> According to critics, if the Crown lacked any Executive Disregard power, the President must lack it as well. As Alexander Hamilton

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concluded that the underlying independent agency was unconstitutional. Having concluded that independent agencies are unconstitutional and that Congress would have wanted the entire statutory scheme rendered inoperative if such a decision was made, the President would bar the execution of any portion of such statute. Obviously, this decision would end the enforcement of the laws that the President regards as unconstitutional.

114. See Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126–29 (1999).

115. See MAY, *supra* note 5, at 3–8.

116. Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.).

argued in *The Federalist No. 69*, the Constitution makes the President, in numerous ways, the constitutional inferior of the English Crown.<sup>117</sup> For some, it follows, as night follows day, that the Constitution simply could not have given the President any power to disregard statutes.

Critics also cite the supposed fact that no President until James Buchanan ever claimed the power to disregard unconstitutional statutes.<sup>118</sup> Moreover, attorneys in Thomas Jefferson's administration purportedly disclaimed the power on the grounds that the President could not suspend the execution of the laws.<sup>119</sup> Because early practice is better evidence of original meaning than later practice, the views of Buchanan and modern Presidents are misguided, or so the argument goes.

These arguments are flawed. A discretionary suspension power is quite different from a mandatory duty to disregard, especially in a constitutional system of limited powers where the legislature is clearly not regarded as supreme. Confirming the different nature of the American Constitution, early American history supports the idea that Presidents must disregard unconstitutional laws. First, early Americans came to believe that unconstitutional statutes were never valid law. Given this premise, neither the President nor anyone else could enforce such texts as if they were law. Second, the Constitution perhaps reflects this American conception when it imposes upon the President the express duty to preserve, protect, and defend the Constitution. At a minimum, this duty requires the President to ensure that he neither violates the Constitution himself nor implements the unconstitutional measures of others. Third, the President's duty to enforce the law, imposed via the Faithful Execution Clause, includes a duty to enforce the Constitution itself, thereby barring the President from enforcing unconstitutional statutes. Finally, the claims about early presidential practices are mistaken. Thomas Jefferson, and not James Buchanan, was the first to refuse to enforce a statute on the ground that it was unconstitutional. As we shall see in section C of this Part, Jefferson was quite confident that unconstitutional "laws" were not laws at all, that the Faithful Execution Clause did not apply to such laws, and that his duty to defend the Constitution affirmatively precluded the enforcement of such laws.

#### A. PAGES FROM ENGLISH HISTORY

Before discussing the founding era and its immediate aftermath, consideration of the English prohibition on suspensions and dispensations is in order. The generic relevance of English history as a guide to understanding the Constitution should be obvious. The Constitution was written against the backdrop of, among other things, the English Constitution. Not surprisingly, many

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117. See generally THE FEDERALIST NO. 69 (Alexander Hamilton).

118. See, e.g., MAY, *supra* note 5, at 127.

119. See *id.* at 37–38 (quoting the government's argument, which was adopted by the court in *United States v. Smith*, 27 F. Cas. 1192 (C.C.N.Y. 1806) (No. 16,342)).

phrases found in the Constitution are from English common law and statutes that helped form the English Constitution.<sup>120</sup> Understanding this, the Supreme Court has not hesitated to look toward English understandings and practices when they might serve as a useful guide in deciphering the American Constitution.<sup>121</sup> Hence a careful consideration of the English prohibitions on suspensions and dispensations is in order.

### 1. The Story of Suspensions and Dispensations

In the seventeenth century, the English Crown exercised dispensing and suspending powers.<sup>122</sup> The dispensing authority was a power to issue “license[s] to transgress” the law.<sup>123</sup> The Crown would issue a document (a dispensation) to particular individuals or corporations that permitted the recipients to do things that were otherwise unlawful.<sup>124</sup> In effect, a dispensation made some action perfectly legal even though a statute prohibited such action. The dispensing power differed from the related pardon authority in that a dispensation could be issued before any act occurred and could be used for any number of contemplated “violations” of the law; in contrast, pardons could only be issued after some act occurred and had to describe the antecedent acts being pardoned.<sup>125</sup>

Suspensions were of broader applicability because they were not issued to particular individuals.<sup>126</sup> Rather suspensions made a law wholly inapplicable until the suspension was lifted.<sup>127</sup> For instance, in 1672, Charles II issued his famous Declaration of Indulgence which suspended various laws discriminating against Catholics and other non-Anglicans.<sup>128</sup> Less than a year later, Charles withdrew his Declaration and hence withdrew his suspension.<sup>129</sup> Later, James II issued his own Declaration of Indulgence.<sup>130</sup> Such suspensions did not actually repeal any statutes; they merely suspended their operation, often doing so for

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120. See generally C. ELLIS STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES: CONSIDERED IN RELATION TO COLONIAL AND ENGLISH HISTORY (2d ed. 1894); see also *infra* notes 156–59 and accompanying text (discussing the British origins of the Constitution).

121. See, e.g., *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266–67 (1989) (drawing upon the meaning of the English Bill of Rights to illuminate the meaning of the Excessive Fines Clause of Eighth Amendment); *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (drawing upon English law to discern scope of pardon power).

122. MAY, *supra* note 5, at 3–4.

123. Carolyn A. Edie, *Tactics and Strategies: Parliament's Attack upon the Royal Dispensing Power 1597–1689*, 29 AM. J. LEGAL HIST. 197, 198 (1985).

124. *Id.*

125. MAY, *supra* note 5, at 5.

126. See F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 302–03 (1908).

127. See *id.*

128. See MAY, *supra* note 5, at 6–7.

129. See FRANK BATE, DECLARATION OF INDULGENCE, 1672: A STUDY IN THE RISE OF ORGANISED DISSENT 123 (1908) (describing how Charles II withdrew his Declaration of Indulgence, which had suspended certain laws).

130. MAY, *supra* note 5, at 7.

lengthy periods of time.<sup>131</sup>

After Charles II and James II were thought to have abused these powers, a Convention drew up the English Bill of Rights which barred suspensions and dispensations.<sup>132</sup> The Bill of Rights declared that “the pretended Power of suspending of Laws, or the Execution of Laws, by regal Authority without Consent of Parliament, is illegal” and that “the pretended Power of dispensing with Laws, or the Execution of Laws by regal Authority, as it hath been assumed and exercised of late, is illegal.”<sup>133</sup>

## 2. The Relevance (and Irrelevance) of English History

Jump ahead about a century, and cross the Atlantic, and this distaste of suspensions and dispensations remained prevalent. Several state constitutions drafted during the Revolution contained these precise prohibitions.<sup>134</sup> Other constitutions had precursors to the Faithful Execution Clause.<sup>135</sup>

The Federal Constitution, drafted in 1787, lacks an express prohibition on suspensions and dispensations. Nonetheless, many modern scholars believe that the Faithful Execution Clause bars suspensions and dispensations.<sup>136</sup> The origins of this view are unclear and its merits uncertain. In fact, the Vermont Constitution had both a faithful execution precursor<sup>137</sup> and a bar on suspensions and dispensations,<sup>138</sup> suggesting that the former provision might not have anything to do with the latter prohibitions. After all, why would a constitution contain both provisions if faithful execution clauses were simply understood as bars on suspensions and dispensations?

Whether the Faithful Execution Clause bars suspensions and dispensations is of no moment, however, because it seems fair to say that nothing in Article II grants the President either power. The Constitution obviously contains no specific grant of suspension and dispensation power. The grant of executive power—a grant of all executive power<sup>139</sup> save for those allocated elsewhere or checked by another institution—evidently excludes a suspension or dispensation power because by 1789, no one familiar with history would have supposed that the English phrase “executive Power,” as used for a century after the English Bill of Rights, encompassed either a dispensation or suspension power.

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131. See BATE, *supra* note 129. The fact that suspensions could be withdrawn necessarily meant that the previously suspended law could then be executed. Indeed, the very word “suspension” implies a temporary measure.

132. Edie, *supra* note 123, at 228, 230.

133. Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.).

134. MAY, *supra* note 5, at 23.

135. See Sai Prakash, *Take Care Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 222, 222 (2005) (discussing the state antecedents in New York and Pennsylvania).

136. See, e.g., *id.* at 16; ABA TASK FORCE, *supra* note 10, at 19.

137. See VT. CONST. ch. I, § 20.

138. See *id.* § 15.

139. U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

If it is true that the President lacks any constitutional source of authority to suspend or dispense with laws, then it is clear that he cannot exercise either kind of power, at least as a matter of the Constitution itself. Hence whatever the basis of the bar on suspensions and dispensations—whether it results from an express constitutional prohibition or from the lack of affirmative presidential power—the end result is that the President has no power to suspend or dispense.

What does the bar on suspensions and dispensations mean for Executive Disregard? Critics of Executive Disregard claim that the bar on suspensions and dispensations means that the President cannot engage in Executive Disregard.<sup>140</sup> Hence the Constitution prohibits Executive Disregard because it bars suspensions and dispensations. Christopher May intimated in the title of his book, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, that presidential defiance of unconstitutional laws is nothing less than the revival of a royal prerogative laid to rest in the late seventeenth century.<sup>141</sup> Or as the recent ABA Task Force on Signing Statements put it—perhaps relying upon Professor May’s research—Presidents should not “emulate King James II” and claim the authority to suspend the operation of laws, even on the grounds that such statutes are unconstitutional.<sup>142</sup>

The alleged resemblance between Executive Disregard and dispensations and suspensions is illusory. Consider dispensations first. Dispensations are licenses given to certain individuals to act contrary to particular statutes.<sup>143</sup> Everyone else must continue to comply with these statutes because dispensations leave the underlying statutes in force. In contrast, when the President declares that some statutory provision is unconstitutional, he cannot enforce that provision at all. Each and every statutory provision that is unconstitutional is null and void for everybody, not just for those whom the President wishes to shower with favor. Hence dispensations are quite different from exercises of Executive Disregard because the latter has far broader consequences.

The supposed resemblance between Executive Disregard and suspensions might seem more genuine. If Executive Disregard were a discretionary power to disregard statutes that the President regarded as unconstitutional, then there would be some merit to the argument. Executive Disregard would consist of a discretionary power that a President might choose to invoke to disregard unconstitutional statutes. This would be a very narrow version of a suspending power, a power that could be exercised only when the President first believed a statute was unconstitutional.

But, the duty of Executive Disregard defended in this Article, and actually exercised by Thomas Jefferson and subsequent Presidents, differs in crucial respects from the English Crown’s suspending power. First, Executive Disre-

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140. See MAY, *supra* note 5, at 16.

141. See *id.* at 3.

142. See ABA TASK FORCE, *supra* note 10, at 19.

143. See *supra* text accompanying notes 123–25.



gard, properly conceived, is a duty and not a power. The President does not have any discretion once he concludes that a law is unconstitutional; as far as the Constitution is concerned, he cannot enforce such statutes. In contrast, the suspending prerogative was a discretionary power.<sup>144</sup> The Crown exercised tremendous discretion, choosing when to issue suspensions. Indeed, it was commonly described as a power.<sup>145</sup> One commentator described the suspension power as consisting of the right “to tear to pieces acts of parliament at pleasure.”<sup>146</sup> Another author said that exercise of the dispensation and suspending powers naturally suggested that the whole legislative authority rested with the Crown, making it the real legislative power.<sup>147</sup>

Second, the duty of Executive Disregard is limited to situations where the President believes that a statute is unconstitutional. If the Executive concludes that a statute is constitutional, he cannot invoke Executive Disregard, no matter how much he might despise the statute. In this scenario, Executive Disregard will provide the President no relief from his enforcement obligations. In contrast, the Crown could issue suspensions for any reason. To be sure, the Crown's objections were sometimes couched in constitutional terms, complaining that certain statutes impinged upon the Crown's prerogatives.<sup>148</sup> But the Crown also issued suspensions for policy reasons. Given English constitutional history, in which Parliaments continually reduced the Crown's powers,<sup>149</sup> often with the Crown's acquiescence,<sup>150</sup> English monarchs certainly did not consistently regard themselves as constitutionally obliged to safeguard regal power.

Third, the duty of Executive Disregard can exist only in the context of a Constitution which is regarded as supreme over inconsistent statutes. This concept of a Constitution that limited legislative power did not exist in England by the eighteenth century. In that century, Parliament could change the English

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144. See Edie, *supra* note 123, at 209 n.25 (classifying the suspending power as discretionary).

145. See, e.g., WILLIAM EDWARD HEARN, *THE GOVERNMENT OF ENGLAND: ITS STRUCTURE AND ITS DEVELOPMENT* 44 (2d ed. 1886) (describing how Charles II had used the suspending power to suspend the Navigation Acts, laws related to vehicles, and other matters of “minor importance,” thereby indicating that the Crown had discretion).

146. EDGAR SANDERSON, *A HISTORY OF THE BRITISH EMPIRE* 249 (1882); see also *id.* at 263 (describing James II as claiming the right to “null all penal statutes that he chose”).

147. 2 JAMES MACKINTOSH, *Review of the Causes of the Revolution of 1688*, in *THE MISCELLANEOUS WORKS OF THE RIGHT HONOURABLE SIR JAMES MACKINTOSH* 1, 161–62 (new ed. 1854) (“[T]he King . . . must have resolved on altogether suspending the operation of penal laws relating to religion by one general measure . . . . But every exercise of the power of indefinitely suspending a whole class of laws which must be grounded on general reasons of policy, without any consideration of the circumstances of particular individuals, is evidently a more undisguised assumption of legislative authority.”).

148. See MAY, *supra* note 5, at 5–6, 8.

149. *Id.* at 19 (listing events like the Magna Carta, the Petition of Right, and the Bill of Rights).

150. For instance, William and Mary agreed to the Bill of Rights and the Act of Settlement, each of which limited the Crown's powers in various ways. See *History of the Monarchy: The Stuarts—Mary II and William III*, <http://www.royal.gov.uk/output/page100.asp> (last visited Feb. 29, 2008).

Constitution merely by passing a new statute.<sup>151</sup> Given that the duty of Executive Disregard simply could not have existed in eighteenth century England, it is impossible to read English history as if it repudiated such a duty. Any argument that English history repudiates an executive duty to protect the Constitution would be akin to the claim that the Constitution does not authorize judicial review merely because judicial review may not have existed in eighteenth century England.

Consider the same point from a different perspective. No one supposes that the judiciary may suspend or dispense with the laws. Nonetheless, few doubt that the Constitution authorizes judicial review of federal statutes. There is no contradiction here because a discretionary power to suspend or dispense with statutes for any reason is quite different in kind from a narrow claim that the Constitution imposes a duty to pay no heed to unconstitutional statutes. If we can make this distinction between powers and duties in the context of judges, we should make the same distinction with respect to the President.

Fourth, and perhaps most importantly, the Constitution contains language absent from the statutes forming the English Constitution. The presidential oath uniquely requires the President to safeguard the U.S. Constitution.<sup>152</sup> Moreover, the President has a duty to faithfully enforce the law, including the Constitution.<sup>153</sup> New duties naturally imply a departure from the English Constitution. For instance, the English Crown was under no obligation to safeguard the rights of Englishmen from legislative infringement.<sup>154</sup> If Parliament sought to do away with certain rights and the Crown agreed that such legislation was expedient, the Crown's acquiescence would not violate the English Constitution.<sup>155</sup> In contrast, the President has a duty to thwart such encroachments because of his oath to safeguard the Constitution and because of his Faithful Execution duty. Arguing that the U.S. Constitution necessarily precludes a duty

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151. See 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 432 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter ELLIOT, DEBATES] (noting the comments of James Wilson that "[t]he British constitution is just what the British Parliament pleases" and that "[t]he idea of a constitution, limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain. There are, at least, no traces of practice conformable to such a principle.").

152. See U.S. CONST. art II, § 1, cl. 7.

153. See *id.*

154. See Coronation Oath Act, 1688, 1 W. & M., c. 6 (Eng.) (including no language in the Coronation Oath similar to the U.S. President's duty to "preserve, protect and defend the Constitution").

155. Although the Coronation Oath Act states that the monarch must "maintaine . . . the People and Inhabitants . . . in their Spirituall and Civill Rights and Properties," *id.*, in a system of Parliamentary supremacy, the Crown was supposed to safeguard the spiritual and civil rights of citizens, as laid down by *Parliament*. Indeed, this language was preceded by a requirement "to maintaine the Statutes Laws and Customs of the said Realme." *Id.* Moreover, the actual oath included this latter phraseology and pointedly required the Crown to protect the rights and privileges of Anglicans. *Id.* (swearing to govern "according to the Statutes in Parlyament Agreed on" and to "maintaine the Laws of God the true Profession of the Gospell and the Protestant Reformed Religion Established by Law"). These rights came at the expense of others, such as Catholics and other Protestants.

to disregard unconstitutional laws merely because the English Constitution barred arbitrary suspensions and dispensations ignores the significant textual differences between the two Constitutions.

As important as they are, the English prohibitions on suspensions and dispensations are not germane to the question of whether the U.S. Constitution imposes a duty of Executive Disregard. The English prohibitions arose as a result of opposition to a discretionary, sweeping power and not as a reaction to monarchs who claimed that the English Constitution somehow prohibited certain statutes from ever having the force of law. As discussed below, the duty of Executive Disregard arises from textual obligations to defend and enforce the Constitution and from a distinctly American sensibility that unconstitutional laws are not laws at all and hence are nullities.

#### B. THE STATUS OF UNCONSTITUTIONAL LAW IN AMERICA

As compared to the unwritten English Constitution of the late eighteenth century, the American Constitution represents both continuity and change. The continuity comes in the form of constitutional provisions that trace their lineage to fundamental English documents and statutes.<sup>156</sup> The pardon power,<sup>157</sup> the grant of good behavior tenure for judges,<sup>158</sup> the privileges accorded members of Congress<sup>159</sup>—each of these had famous English antecedents. The change comes in the form of features of the U.S. Constitution that clearly were not traceable to the English Constitution. There were no British analogues to the doctrine of enumerated powers and provisions like Article V of the U.S. Constitution.<sup>160</sup> Given parliamentary supremacy and the accompanying ability to amend the British Constitution at will, there could be no place for limited legislative powers and no place for separate provisions spelling out how to amend the British Constitution.

Three features of early American constitutional thought represented departures from the English Constitution and also support the idea of a duty of Executive Disregard. First was the American notion that unconstitutional laws were not laws at all, but were void *ab initio*. As discussed below, this claim was made regarding British statutes that colonials regarded as unconstitutional. Americans concluded that they could do more than just petition and protest—they could ignore these pretend statutes and urge others to do the same. Because

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156. See generally STEVENS, *supra* note 120.

157. U.S. CONST. art. II, § 2, cl. 1; see *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (noting that the English Crown had the pardon power and drawing upon English law and treaties to discern the scope of the pardon power).

158. See U.S. CONST. art. III, § 1. For a discussion of the meaning of good behavior tenure and its English origins, see Saikrishna Prakash & Steven D. Smith, *How To Remove a Federal Judge*, 116 *YALE L.J.* 72, 88–128 (2006).

159. See U.S. CONST. art. I, § 6, cl. 1. For the English origins of the Speech and Debate Clause, see 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 159–61 (1765).

160. See *supra* note 151 and accompanying text (discussing how Parliament could change the British Constitution simply by statute).

unconstitutional statutes could have no force, there was no reason to treat them as legitimate laws at all. Americans owed no allegiance or duty towards unconstitutional laws.

Famously, this notion of the status of unconstitutional laws became one of the bases of judicial review.<sup>161</sup> As we shall see, it was also a basis for Executive Disregard. If some putative law was no law at all because it was unconstitutional, the Executive could not enforce it. More generally, anyone in society might claim that their actions contrary to a statute were legal if the statute itself was unconstitutional. Hence Executive Disregard might be seen as a narrow aspect of a broader revolutionary sentiment that resistance to unconstitutional laws is entirely appropriate and legal. Neither the Executive nor anyone else has a duty to implement or to abide by texts that purport to be law when such texts are actually unconstitutional.

A second original feature of American constitutional law supporting Executive Disregard stemmed from the Constitution's text, namely the President's oath. Per the Coronation Oath Act, English Monarchs were to govern "according to the Statutes in Parlyament Agreed on."<sup>162</sup> This wording, coming close on the heels of the English Bill of Rights and its barring of suspensions and dispensations, reinforced the notion that the Crown could no longer dispense with or suspend laws. Parliament's laws were obligatory, whatever post hoc objections the monarch might have.

The Presidential Oath, in contrast, imposes no similar obligation. It never references congressional statutes. Rather, the President "solemnly swear[s] (or affirm[s]) 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>163</sup> The only way that the oath could be read to require the President to enforce unconstitutional statutes is if the Constitution (say, the Faithful Execution Clause) otherwise imposed that obligation. As noted earlier, the case for such an obligation is very weak. Moreover, early Presidents understood the obligation to defend the Constitution as encompassing, among other things, a duty to refrain from enforcing unconstitutional statutes. As Thomas Jefferson argued with great clarity and conviction, to execute unconstitutional statutes was to violate the Constitution and not to preserve, protect, and defend it.<sup>164</sup>

The third feature of American constitutional law that supports Executive Disregard is the intersection of the Faithful Execution and Supremacy Clauses. The first requires faithful execution of the law and the second makes clear that the Constitution is law. Hence, Presidents must disregard unconstitutional laws

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161. See generally Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003).

162. See Coronation Oath Act, 1688, 1 W. & M., c. 6 (Eng.). This oath was incorporated by the Act of Settlement, 1700, 12 & 13 Will. 3, c. 2, § 2 (Eng.).

163. U.S. CONST. art. II, § 1, cl. 7.

164. Letter from Thomas Jefferson to Abigail Adams, *supra* note 16, at 275.

as part of their efforts to honor the Constitution's famous claim that it is law. Of course, there was no British counterpart to the Supremacy Clause's claim about the legal status of the British Constitution.

### 1. The Colonies and States

Larry Kramer has argued that in early America, anyone could decide whether a statute was unconstitutional and then act on his or her belief. Hence, there were many famous protests and revolts in which Americans defied laws on the grounds that they were unconstitutional and therefore were not laws at all.<sup>165</sup>

Two circumstances led Americans to argue that unconstitutional statutes were null and void. First was the famous struggle over Parliament's legislative authority. In their struggle against England, colonials famously took the position that Parliament had little or no jurisdiction over the colonies. Repeatedly, as Parliament passed statutes taxing Americans, Americans justified their resistance to such laws on the grounds that the Acts were unconstitutional and therefore void. Thomas Jefferson argued that, because "the British Parliament has no right to exercise authority over" America, Americans could "declare [Parliament's] acts void."<sup>166</sup> Another American railed that laws designed to introduce a standing army in America were "null and void."<sup>167</sup> Patrick Henry insisted that Virginia colonials could ignore Parliament's tax laws because only the local assembly could tax Virginians.<sup>168</sup> Resolutions of New London, Connecticut made the same point.<sup>169</sup>

Second, a prolonged concern for individual rights also led Americans to deny that unconstitutional statutes were law at all. As early as 1761, in the *Writs of Assistance Case*, James Otis argued that a law made "against the Constitution is void."<sup>170</sup> Later in his *Rights of the British Colonies*, Otis claimed that when Parliament violated natural laws and thereby violated "truth, equity, and justice," the resulting laws were "consequently void."<sup>171</sup>

Americans did not stop making such arguments when they gained independence from England. When early state legislatures adopted laws that abridged the rights guaranteed by state constitutions or the natural rights of Englishmen,

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165. See generally Kramer, *supra* note 39 (arguing that the people were active in defending their constitutional rights).

166. THOMAS JEFFERSON, *A Summary View of the Rights of British America*, in THE ESSENTIAL JEFFERSON 3, 7 (Jean M. Yarbrough ed., 2006).

167. 2 AMERICAN ARCHIVES: A DOCUMENTARY HISTORY, FOURTH SERIES 883 (Peter Force ed., 1846); see also *id.* at 884.

168. TRACTS OF THE AMERICAN REVOLUTION, 1763–1776, at xxxi (Merrill Jensen ed., Hackett Publ'g Co. 2003) (1966).

169. *Id.*

170. JOSIAH QUINCY, JUNIOR, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATUR OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 474 (Samuel M. Quincy ed., 1865).

171. James Otis, *The Rights of the British Colonies Asserted and Proved*, in 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750–1776, at 408, 454 (Bernard Bailyn ed., 1965). Strangely enough, Otis thought that Americans were nonetheless bound to obey these "void" laws. See *id.* at 448.

state courts refused to enforce such laws on the grounds that they were void. The North Carolina Supreme Court, in *Bayard v. Singleton*, noted that an unconstitutional act must stand “as abrogated and without any effect.”<sup>172</sup> Similarly, in the *Symsbury Case*, a Connecticut court concluded that a state law “could not legally operate” because it was unconstitutional.<sup>173</sup> And in Virginia’s *Case of the Prisoners*, numerous judges and counsel understood that unconstitutional laws were nullities.<sup>174</sup>

## 2. The Founding

Participants in the framing and ratification debates well understood that unconstitutional laws were void. At Philadelphia, future Supreme Court Justice Oliver Ellsworth “contended that there was no lawyer, no civilian who would not say that ex post facto laws were void of themselves.”<sup>175</sup> Other delegates spoke of judges who would declare laws null and void,<sup>176</sup> a locution that implied the judges were merely declaring what was already true and not making the laws unconstitutional by virtue of their declaration.

During ratification, the same claims were voiced in ratification conventions across America. Discussing the Supremacy Clause, the North Carolina governor said that laws repugnant to the Constitution “will be nugatory and void.”<sup>177</sup> Oliver Ellsworth told the Connecticut Convention that if the United States “make[s] a law which the Constitution does not authorize, it is void.”<sup>178</sup> Patrick Henry, who opposed the Constitution, agreed that should Congress “depart from the Constitution,” their “laws in opposition to the Constitution would be void.”<sup>179</sup> Massachusetts delegate Theophilus Parsons (who would later become the chief justice of the state supreme court) noted that should Congress pass a law interfering with a state’s taxation power, the law would be “usurpation, and void.”<sup>180</sup>

Besides generally averring that unconstitutional statutes would not be law at all and could not be enforced, participants in these debates occasionally referenced the role the President would play in defending the Constitution against legislative encroachment. Speaking before the Pennsylvania Convention, James Wilson observed that the President “could shield himself, and refuse to carry into effect an act that violates the Constitution.”<sup>181</sup> Wilson’s point was that the

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172. 1 N.C. (Mart.) 5 (1787).

173. 1 Kirby 444 (Conn. Super. Ct. 1785).

174. See *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782) (noting that unconstitutional laws were void, while finding the act in question constitutional). See generally William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491 (1994) (discussing the *Case of the Prisoners* as evidencing early acceptance of judicial review).

175. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 76, at 376.

176. See *id.* at 78, 92, 93, 440.

177. 4 ELLIOT, DEBATES, *supra* note 151, at 188.

178. 2 *id.* at 196.

179. 3 *id.* at 539–41.

180. 2 *id.* at 93.

181. *Id.* at 446 (emphasis omitted).

President could refuse to enforce unconstitutional statutes and thereby avoid having to violate his duties to protect and execute the Constitution.<sup>182</sup> Similarly, Parsons noted at the Massachusetts Convention that, should Congress “infringe on any one of the natural rights of the people by this Constitution,” the “act would be a nullity; and could not be enforced.”<sup>183</sup> His claim that such acts could not be enforced was not merely a comment on the Judiciary. Rather his claim spoke to enforcement generally and, hence, addressed the President’s ability to enforce as well. He seemed to argue that no one could enforce an unconstitutional law. Parson’s claim here is wholly consistent with his earlier claim that unconstitutional laws would be void.

In *The Federalist No. 44*, James Madison similarly noted that the “success” of a congressional usurpation would “depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts.”<sup>184</sup> Madison was evidently speaking of judicial review and Executive Disregard. Both the Executive and the Judiciary could resist unconstitutional acts by refusing to execute them.<sup>185</sup>

It certainly is true that references to judicial review during the Constitution’s creation substantially outnumber references to a President’s duty to disregard unconstitutional statutes.<sup>186</sup> Yet, because of the general sense that unconstitutional laws were not laws at all, that fact should matter little. Once it is understood that anyone might have disobeyed a law on the grounds that it was unconstitutional, it follows that the President had the same ability. When one also notes that the President had no power to enforce unconstitutional laws and that the Constitution imposed upon him a duty to avoid violating the Constitution and a duty to execute the Constitution, the case for Executive Disregard becomes complete.

### C. EARLY PRESIDENTIAL CONCEPTIONS AND PRACTICES

In keeping with the general understanding of the era, President George Washington seemed to believe that unconstitutional legislative actions were no laws at all and that no one owed an obligation to them. Furthermore, he clearly

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182. The ABA Task Force colorfully referred to Wilson’s statement as a “vagrant remark.” ABA TASK FORCE, *supra* note 10, at 18. If by “vagrant,” the Task Force meant “isolated,” the Task Force is well off the mark. As we have seen, numerous people were of the view that unconstitutional laws would be null and void. Moreover, Wilson was one of the most learned lawyers of his day and would become a Supreme Court Justice. Wilson may have been mistaken, but it is wrong to dismiss his statement so casually.

183. 2 ELLIOT, DEBATES, *supra* note 151, at 162.

184. THE FEDERALIST NO. 44, at 131 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981).

185. Madison’s statement makes no sense under a premise that the Executive must enforce unconstitutional laws. If the Executive had to enforce unconstitutional laws, the success of the congressional violation of the Constitution clearly *would not* depend on the Executive at all. The success of the usurpation would depend on nothing more than the passage of an unconstitutional law, with Executive enforcement following automatically.

186. *See generally* Prakash & Yoo, *supra* note 161.

thought that he had a duty to resist what he regarded as unconstitutional legislative usurpations.

First, Washington viewed unconstitutional actions as nullities having no legal force or effect. A judicial nomination he made illustrates his stance. A day after he nominated Senator William Paterson to the Supreme Court, Washington “declare[d] that [he] deem[ed] the nomination to have been null by the Constitution.”<sup>187</sup> The Constitution bars sitting Senators and Representatives from being appointed to an office they created or whose salary they augmented.<sup>188</sup> Because Paterson was a sitting Senator when Congress created the office of “Associate Justice,” Paterson could not serve as Associate Justice.

Evidently, Washington thought the Constitution itself rendered his nomination a nullity because he believed that actions contrary to the Constitution could have no legal effect.<sup>189</sup> He did not withdraw his nomination because no such withdrawal was necessary. Importantly, Washington did not wait for the courts to adjudicate the constitutional question (assuming that it was justiciable). Instead, he decided the constitutional merits himself, implicitly (but nonetheless clearly) rejecting any notion that the courts had a monopoly on constitutional interpretation.<sup>190</sup>

Second, and relatedly, Washington likely did not regard unconstitutional laws as binding. On several occasions, he referenced the obligation of “constitutional laws,” thus distinguishing them from unconstitutional federal laws. In his famous Thanksgiving Proclamation of 1789, Washington beseeched God that public officers provide a “government of wise, just and *constitutional* laws, discretely and faithfully executed and obeyed.”<sup>191</sup> Here, Washington seemed to reference his Faithful Execution Clause duty and apparently limited it to constitutional laws. In his 1791 State of the Union address, Washington noted that there should be “a steady and firm adherence to the *constitutional* and necessary acts of Government.”<sup>192</sup> In 1792, Washington sent a letter to the Governors of North Carolina, Pennsylvania, and South Carolina urging them to promote “a due obedience to the *constitutional* laws of the Union.”<sup>193</sup> The references to “constitutional” laws in each of these documents likely under-

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187. Letter from George Washington to the Senate (Feb. 28, 1793), in 32 THE WRITINGS OF GEORGE WASHINGTON 362, 362 (John C. Fitzpatrick ed., 1939).

188. GLENN A. PHELPS, GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM 137 (1993) (citing U.S. CONST. art. I, § 6, cl. 2).

189. *Id.*

190. There is no reason to suppose that Washington believed that his unconstitutional actions were uniquely null and void. Rather his statement suggests that unconstitutional actions were null and void, whatever their origin.

191. George Washington, Thanksgiving Proclamation Address to Regional Meeting of Quakers (Oct. 3, 1789), in GEORGE WASHINGTON: A COLLECTION 534, 534–35 (W.B. Allen ed., 1988) (emphasis added).

192. George Washington, Third Annual Address, Address to Congress (Oct. 25, 1791), in 1 PRESIDENTS COMPILATION, *supra* note 103, at 103, 105 (emphasis added).

193. See Circular from George Washington to the Governors of Pennsylvania, North Carolina, and South Carolina (Sept. 29, 1792), in 10 THE WRITINGS OF GEORGE WASHINGTON 533, 533 (Jared Sparks ed., 1855) (emphasis added).



scored that the obligations of citizens and of the Executive only extended to constitutional laws. Had Washington thought that citizens had to obey unconstitutional laws and that he had to enforce such laws, he would have omitted the adjective “constitutional.”

Lastly, Washington believed he was obliged to defend the Constitution against legislative infraction. For instance, when some voiced constitutional objections to the bill establishing the Bank of the United States, Washington wrote that it was “more particularly my duty to examine the ground on [which] the [constitutional] objection is built.”<sup>194</sup> Evidently, Washington felt he was obliged to consider the constitutional objections to the bill and veto it if he deemed them valid. Indeed, one of Washington’s two vetoes was based entirely on constitutional objections.<sup>195</sup>

Washington’s resistance to what he regarded as unconstitutional legislative action is seen most clearly in his refusal to turn over documents relating to the Jay Treaty.<sup>196</sup> While considering appropriations necessary to implement the Jay Treaty, the House enacted a resolution requesting the President turn over treaty-related documents.<sup>197</sup> Washington refused.<sup>198</sup> He had always sought to accommodate the House, but only so far as his “obligation” to “‘preserve, protect, and defend the Constitution’ [would] permit.”<sup>199</sup> Giving the House the papers would be to concede the House’s generic right to them.<sup>200</sup> “[A] just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbid[s] a compliance with your request.”<sup>201</sup>

Washington did not object to the form of the House’s demand—that it was a one-house request rather than in the form of a statute. Given his insistence that it was “essential to the due administration of the government, that the boundaries fixed by the Constitution between the different departments should be preserved,”<sup>202</sup> it is unlikely that Washington would have complied even if the information request was made part of a statute.<sup>203</sup> He regarded himself as defending features of the structural Constitution that neither a chamber nor

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194. Letter from George Washington to Alexander Hamilton (Feb. 16, 1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 50, 50 (Harold C. Syrett & Jacob E. Cooke eds., 1965).

195. PHELPS, *supra* note 188, at 152, 154.

196. *Id.* at 176–77.

197. *Id.* at 176.

198. *Id.*

199. 2 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, BEING THE FIRST SESSION OF THE FOURTH CONGRESS: BEGUN AND HELD AT THE CITY OF PHILADELPHIA, DECEMBER 7, 1795, at 488 (1826) [hereinafter JOURNAL OF THE HOUSE].

200. See PHELPS, *supra* note 188, at 177. Washington agreed that had the House requested the papers in their impeachment capacity, they would have had every right to the papers. *Id.*

201. 2 JOURNAL OF THE HOUSE, *supra* note 199, at 489.

202. *Id.*

203. In a previous article, I suggested that Washington might have complied with the House’s request had a statute commanded him to turn over the documents. See Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1180 (1999). Reexamining the episode, I now think that previous suggestion was in error.

Congress itself could alter or efface.

Considered separately, each of these aspects of Washington's thinking suggests that he would have endorsed the duty to disregard. He saw unconstitutional actions as nullities; he believed that citizens and the President only had obligations towards constitutional laws; and he thought that the Executive had to defend the Constitution against legislative infringement and encroachment. Taken together, these beliefs indicate that Washington would have agreed that the Constitution bars the President from enforcing unconstitutional laws.

Yet, Washington never actually refused to enforce a statute on the grounds that it was unconstitutional. Several factors explain why Washington never engaged in Executive Disregard. To begin with, Washington entered office with a clean statutory slate. Since the Constitution made it clear that pre-constitutional statutes were not part of the "supreme Law of the Land,"<sup>204</sup> every statute that Washington had to enforce was enacted under his watchful eye. Whenever there were constitutional doubts about legislation presented to him, Washington sought the opinions of his assistants, as he did in response to the Bank Bill.<sup>205</sup> If he concluded that a bill was unconstitutional, he vetoed it as he did with an apportionment bill.<sup>206</sup> Hence the only way Washington would have faced the possibility of enforcing an unconstitutional statute is if he had second thoughts or entertained fresh constitutional doubts about a statute that he previously had permitted to become law. Apparently, this never happened. In any event, the absence of any exercise of Executive Disregard during the Washington administration likely stems from the fact that the President evidently did not encounter any laws that he believed were unconstitutional.

However, had Congress enacted a statute overriding a veto issued on constitutional grounds, Washington likely would have refused to enforce the resulting law. Or had the Congress passed a statute barring the President from removing executive officers, Washington likely would have disregarded this unconstitutional statute.<sup>207</sup> Washington would have realized that such a law was no law at all and that his oath to preserve, protect, and defend the Constitution and his duty to faithfully execute the Constitution would have barred him from enforcing the supposed law.

For similar reasons, there is no instance of President John Adams refusing to enforce a statute on the grounds that it was unconstitutional. To be sure, posterity has roundly criticized Adams for signing and enforcing the Sedition Act. But Adams regarded the Act as constitutional and hence he had no reason to disregard it.<sup>208</sup> As with Washington, it seems fair to say that Adams never

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204. U.S. CONST. art. VI, cl. 2.

205. See PHELPS, *supra* note 188, at 162–63.

206. See *id.* at 152.

207. For an extended discussion of why the President has a power to remove executive officers, see Prakash, *supra* note 102, at 1815–45.

208. See Letter from John Adams to Benjamin Rush (Dec. 25, 1811), in CORRESPONDENCE OF JOHN ADAMS AND THOMAS JEFFERSON, 1812–1826, at 26, 27 (Paul Wiltach ed., 1925).

faced the question of whether to enforce a federal statute that he believed to be unconstitutional.

Still, Adams's earlier writings rather clearly evince the view that unconstitutional laws are null and void. In his autobiography, Adams recounted how a 1765 Boston town meeting decided to present a petition to the governor and council requesting that they "order the Courts of Justice to proceed without Stamped Papers, upon the principle that the Stamp Act was null because unconstitutional."<sup>209</sup> He went on to state that this "Principle was so congenial to my Judgment that I would have staked my Life on the question."<sup>210</sup> At Boston's behest, he argued for this principle before the governor and council, hoping to persuade them to defy the Stamp Act.<sup>211</sup> He argued that the Stamp Act was "utterly void, and of no binding Force upon us; for it is against our Rights as Men."<sup>212</sup> Adams thereby pressed the governor to ignore unconstitutional laws on the grounds that they were null.

More famously, in the same year Adams helped pen the *Instructions of the Town of Braintree to Their Representative*.<sup>213</sup> Those instructions repeatedly denounced the Stamp Acts as unconstitutional and enjoined the town's Representative "to comply with no measures or proposals for countenancing the same, or assisting in the execution of it, but . . . to oppose the execution of it."<sup>214</sup> The instructions evidently regarded the Acts as void and countenanced active opposition to their enforcement. Once again, Adams's argument was premised on the notion that unconstitutional laws were not laws at all.

Finally, writing as "Novanglus" in 1774, Adams argued that if the Tea Act were unconstitutional, then the "act of parliament is null and void, and it is lawful to oppose and resist it."<sup>215</sup> Thus, on the eve of the Revolution, Adams believed that unconstitutional laws should be ignored and opposed on the grounds that they were not laws at all.

There is no reason to think that Adams's views on this question changed during or after the Revolution. As we have seen, courts and commentators around the time of the founding agreed with Adams. Moreover, the advent of the Constitution itself changed nothing because it contained little suggesting

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209. 3 JOHN ADAMS, *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 283 (L.H. Butterfield ed., 1962). The Stamp Act required numerous documents (including newspapers, legal documents, and playing cards) to carry a tax stamp. For a discussion of the Stamp Act, see generally EDMUND S. MORGAN & HELEN M. MORGAN, *THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION* (new revised ed., Collier Books 1963) (1953).

210. 3 ADAMS, *supra* note 209, at 283.

211. *Id.* at 283–84.

212. See MORGAN & MORGAN, *supra* note 209, at 182.

213. John Adams, *Instructions of the Town of Braintree to Their Representative*, BOSTON GAZETTE, Oct. 14, 1765, at D2, reprinted in 3 JOHN ADAMS, *THE WORKS OF JOHN ADAMS* 465, 465 (Charles Francis Adams ed., 1851).

214. *Id.*, reprinted in 3 ADAMS, *supra* note 213, at 465, 467.

215. John Adams, *Novanglus No. VI*, BOSTON GAZETTE, Feb. 27, 1775, reprinted in JOHN ADAMS & JONATHAN SEWALL, *NOVANGLUS AND MASSACHUSETTENSIS* 62, 70 (1819) (writing in response to Massachusetts, who was initially believed to be Jonathan Sewall, but later determined to be Daniel Leonard).

that it meant to depart from the background view that unconstitutional laws were not laws at all. To the contrary, it requires the President to preserve, protect, and defend the Constitution and requires him to faithfully execute it. Hence, even though President Adams never refused to enforce a statute on the grounds that it was unconstitutional, there is a good deal of evidence indicating that he would have disregarded unconstitutional laws had he the sorry occasion to confront such supposed federal laws. Having so counseled the Massachusetts governor earlier in his career, it seems fair to say that President Adams would have followed the same advice.

Though Jefferson and Adams were political rivals, Jefferson subscribed to Adams's view of unconstitutional laws—they were null and void. As noted earlier, Jefferson's pre-revolutionary view was that Parliament did not have the authority to enact laws for the colonies and hence those putative laws were actually void.<sup>216</sup> Jefferson's post-constitutional views about the status of unconstitutional laws first came into focus when he drafted the Kentucky Resolves of 1798.<sup>217</sup> Resolution 3 provided that because of the First Amendment and because Congress had no power to regulate speech or the press, the Sedition Act, which "abridge[d] the freedom of the press, [was] not law, but [was] altogether void, and of no force."<sup>218</sup> Jefferson made the same claim—that unconstitutional laws were null and void—with respect to other federal laws.<sup>219</sup> As Akhil Amar relates, the Kentucky Resolves were "banners under which" Republicans mobilized, and the Resolves helped define the 1800 election debate.<sup>220</sup>

Upon taking office, Jefferson faced two decisions relating to the Sedition Act. First, and more famously, he had to decide what to do with those who had been successfully prosecuted for having violated the Sedition Act. As is well known, Jefferson pardoned those convicted during the Adams administration.<sup>221</sup> No one regards the issuance of pardons as a violation of the President's duty to take care that the laws be faithfully executed even though pardons preclude the execution of laws that would otherwise continue to apply.

Second, and just as important, Jefferson had to decide what to do with existing Sedition Act prosecutions. By its terms, the Sedition Act expired on March 3, 1801,<sup>222</sup> the day before Jefferson took office.<sup>223</sup> Yet the Act expressly provided that its expiration would "not prevent or defeat a prosecution and

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216. See JEFFERSON, *supra* note 166, at 7.

217. See *Kentucky Resolutions of 1798 and 1799*, in 4 ELLIOT, *DEBATES*, *supra* note 151, at 540, 540–41 (noting that the original draft was prepared by Jefferson).

218. *Id.* at 541.

219. *Id.* at 540–42.

220. Akhil Reed Amar, *Kentucky and the Constitution: Lessons from the 1790s for the 1990s*, 85 Ky. L.J. 1, 3 (1997).

221. See Letter from Thomas Jefferson to Edward Livingston, *supra* note 17, at 57–58.

222. Alien and Sedition Act of 1798, ch. 74, § 4, 1 Stat. 596, 597 (1798).

223. See PETER S. ONUF & LEONARD J. SADOSKY, *JEFFERSONIAN AMERICA* 33 (2002) (noting that Jefferson took office on March 4, 1801).

punishment of any offence against the law, during the time it shall be in force.”<sup>224</sup> This meant that the Sedition Act was still good law as to offenses that took place prior to its expiration. In other words, the Act’s expiration did not terminate ongoing prosecutions. Moreover, by expressly denying that the Act’s expiration would “prevent . . . a prosecution,”<sup>225</sup> the Act seemed to contemplate new prosecutions of sedition offenses that occurred prior to its lapse.

Would Jefferson continue ongoing Sedition Act prosecutions? Would he go further, instructing his district attorneys to bring new prosecutions for offenses that occurred prior to the Act’s expiration? In light of Jefferson’s previous denunciations of the Act, neither prospect would have been acceptable. Either would have put Jefferson in the awkward position of executing the very Act he had denounced as unconstitutional.

Fortunately, there were more palatable options. Jefferson might have argued that limited prosecutorial resources should not be expended on violations of an expired statute. Prosecutions under continuing statutes ought to be given priority. The drawback of this argument is that critics might have condemned him for breaching his Faithful Execution duty in the guise of allocating resources. More promising, Jefferson could have issued a general pardon to all those who might have violated the Sedition Act. This would have terminated the existing prosecutions and precluded new ones. This option would have been most promising because Jefferson likely would not have been attacked for violating his Faithful Execution duty.

The President chose none of these options. Instead, he embraced an option that, to some modern sensibilities, must seem the most controversial of all. Jefferson ordered his district attorneys—whom he regarded as subject to his control—to enter *nolle prosequi* for all existing Sedition Act prosecutions.<sup>226</sup> In other words, he told them to discontinue the prosecutions, to take care that the Sedition Act *was not* faithfully executed.

In a number of letters, Jefferson justified his non-enforcement without any trace of self-doubt. In 1801, Jefferson observed that “whenever in the line of my functions I should be met by the Sedition law, I should treat it as a nullity. That therefore, even in the prosecution recommended by the Senate [the prosecution of William Duane], if founded on that law I would order a *nolle prosequi*.”<sup>227</sup> Later that year, Jefferson further justified his *nolle prosequi* in William Duane’s Sedition Act case.

The President is to have the laws executed . . . I found a prosecution going on against Duane for an offence against the Senate, founded on the sedition act. I affirm that act to be no law, because in opposition to the constitution;

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224. Alien and Sedition Act of 1798, ch. 74, § 4, 1 Stat. 596, 597 (1798).

225. *Id.*

226. See Letter from Thomas Jefferson to William Duane (May 23, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 17, at 54, 55.

227. *Id.* at 55.

and I shall treat it as a nullity, wherever it comes in the way of my functions. I therefore directed that prosecution to be discontinued . . . There appears no weak part in any of these positions or inferences.<sup>228</sup>

In a draft message to the Senate, Jefferson similarly observed that he had the Duane prosecution discontinued because the Sedition Act “was contrary to the very letter of the Constitution . . . and consequently it was void.”<sup>229</sup>

Anticipating possible arguments against his decisions, Jefferson observed that the Faithful Execution Clause did not oblige him to execute unconstitutional laws. Because “the sedition law was unconstitutional and null . . . my obligation to execute what was law, involved that of not suffering rights secured by valid laws, to be prostrated by what was no law.”<sup>230</sup> In these letters, Jefferson enunciated an attractive principle: because the Sedition Act was null and void, the Faithful Execution Clause could not be read as requiring him to enforce the Act.

Other correspondence took the argument one step further. Jefferson not only argued that the Faithful Execution Clause never obliged him to enforce the Sedition Act, he insisted that the Constitution actually compelled him to disregard the Act. In a letter, Abigail Adams had complained that Jefferson had “‘liberated a wretch who was suffering for a libel against [John] Adams.’”<sup>231</sup> Jefferson replied:

I discharged every person under punishment or prosecution under the Sedition law, because I considered and now consider that law to be nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image; and that it was as much my duty to arrest [its] execution in every stage, as it would have been to have rescued from the fiery furnace those who should have been cast into it for refusing to worship their image. It was accordingly done in every instance, without asking what the offenders had done, or against whom they had offended, but whether the pains they were suffering were inflicted under the pretended Sedition law.<sup>232</sup>

Speaking of why he barred enforcement of the Sedition Act, Jefferson observed that he had done so because of the “obligations of an oath to protect the constitution, violated by an unauthorized act of Congress.”<sup>233</sup> Given his earlier reference to duty and his invocation of his oath, Jefferson evidently believed that his oath prohibited him from enforcing a statute that he regarded as unconstitutional.

228. Letter from Thomas Jefferson to Edward Livingston, *supra* note 17, at 57–58.

229. Message from Thomas Jefferson to the Senate, in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 17, at 57–58 n.1 (also noting that the message may never have been transmitted to the Senate).

230. Letter from Thomas Jefferson to Wilson Cary Nicholas (June 13, 1809), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 17, at 253, 254 (1898).

231. Letter from Thomas Jefferson to Abigail Adams, *supra* note 16, at 275.

232. *Id.*

233. *Id.* at 276.

In another letter, Jefferson denied that “it devolved on the judges to decide on the validity of the sedition law” for all three branches.<sup>234</sup> The President, “believing the law to be unconstitutional, *was bound to remit the execution of it*; because that power has been confided to him by the constitution.”<sup>235</sup> The only way the Executive could be “bound” to halt the execution of the Sedition Act is if his oath or his Faithful Execution duty required him to defend and enforce the Constitution against unconstitutional acts. Moreover, Jefferson was evidently speaking of both the pardon power and the distinct power to stop prosecutions as two powers that had to be exercised to defend the Constitution, for he exercised both to stop the execution of the Sedition Act.

Even after he left office, Jefferson regarded his dismissal of these prosecutions as a duty. In 1814, Jefferson recounted that “the sedition law was contrary to the constitution and therefore void,” that he had treated it as a “nullity” in the course of his duties, and that he had ordered “*nolle prosequis* in all the prosecutions.”<sup>236</sup> These prosecutions, Jefferson said, “were to be dismissed as a matter of duty” precisely because they were founded on an unconstitutional law.<sup>237</sup> Once again, Jefferson spoke of a duty to disregard unconstitutional statutes.

Perhaps the most masterful explanation of his decision to disregard the Sedition Act and to halt prosecutions under it comes from a passage omitted from his first annual address. Basing his argument on constitutional structure, Jefferson established the principle of independent constitutional interpretation, both interbranch and across time: “[O]ur country has thought proper to distribute the powers of [its] government among three equal & independent authorities, constituting each a check on one or both of the others, in all attempts to impair [its] constitution.”<sup>238</sup> For each branch to serve as a check, each “must have a right in cases which arise within the line of [its] proper functions” to decide on the constitutionality of an act “according to [its] own judgment, & uncontroled by the opinions of any other department.”<sup>239</sup> While uniformity of views, for a period of time strengthened by the public, might cement an interpretation, Jefferson also had the view that “[s]ucceeding functionaries have the same right to judge of the conformity or non-conformity of an act with the constitution, as their predecessors who past it. [F]or if it be against that instrument it is a perpetual nullity.”<sup>240</sup>

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234. Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 1 THE ADAMS-JEFFERSON LETTERS, *supra* note 16, at 278, 279.

235. *Id.* (emphasis added).

236. Letter from Thomas Jefferson to Gideon Granger (Mar. 19, 1814), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 17, at 454, 456–57 (1898).

237. *Id.* at 457.

238. The Paragraph Omitted from the Final Draft of Jefferson’s Message to Congress, December 8, 1801, in 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL app. A at 605, 605 (1919) [hereinafter Paragraph Omitted].

239. *Id.*

240. *Id.*

Upon hearing “reclamations against the Sedition act,” he considered whether the Act was constitutional.<sup>241</sup> He concluded “under the tie of the solemn oath which binds me to [the public] & to my duty, I do declare that I hold that act to be in palpable & unqualified contradiction to the constitution.”<sup>242</sup> Because it was a “nullity,” he “relieved from oppression under it those of my fellow-citizens who were within the reach of the functions confided to me.”<sup>243</sup> Though Jefferson decided against including this long explanation in his annual address, he clearly adhered to its principles and expressed them repeatedly.<sup>244</sup>

Jefferson made similar claims about his duty to defend the Constitution with respect to other issues. In 1801, Jefferson wrote that “[i]f a monarchist be in office anywhere, and it be known to the President, the oath he has taken to support the constitution imperiously *requires* the instantaneous dismissal of such officer; and I should hold the President highly criminal if he permitted such to remain.”<sup>245</sup> Jefferson said this to justify his removal of some “monarchists” whom he claimed formed a faction in the Federalist party.<sup>246</sup> In any event, the logic of his claim applies to unconstitutional statutes as well, as Jefferson himself understood.

Interestingly, Jefferson never regarded his non-enforcement as constitutionally troublesome. In particular he never seemed to think that others might regard the President as having an absolute duty to enforce all statutes. His discussion with Abigail Adams was about whether the Executive had to accept the conclusion of several courts that the Sedition Act was constitutional.<sup>247</sup> Not once did he doubt either his ability to disagree with Congress’s judgment that the Sedition Act was constitutional or his duty to act on that disagreement in compliance with his constitutional oath. He was confident that “[t]here appears to be no weak part in any of [his] positions or inferences” regarding the duty to disregard.<sup>248</sup>

Some may conclude that his decision to pay no heed to the Sedition Act was not an exercise of Executive Disregard. First, some might be tempted to say that Jefferson merely decided not to enforce an expiring statute. This confuses the principle that Jefferson actually defended with some narrow, unarticulated rationale. As noted earlier, under the Sedition Act, existing and future prosecu-

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241. *Id.*

242. *Id.* at 605–06.

243. *Id.* at 606.

244. Jefferson decided against using the passage because it was “‘capable of being chicaned, and furnishing the opposition something to make a handle of.’” DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 269 (1994) (noting that Jefferson wrote this sentence on the margin of his Paragraph Omitted, *supra* note 238); *see also* JEREMY D. BAILEY, *THOMAS JEFFERSON AND EXECUTIVE POWER* 229 (2007).

245. Letter from Thomas Jefferson to Levi Lincoln (June 1, 1803), *in* 8 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 17, at 233, 238 n.1 (emphasis added).

246. *See id.*

247. *See supra* note 234 and accompanying text.

248. Letter from Thomas Jefferson to Edward Livingston, *supra* note 17, at 58 n.1.



tions were permitted for offenses that occurred during the life of the Sedition Act.<sup>249</sup> In light of this, Jefferson's failure to continue existing prosecutions and his failure to consider new prosecutions is an evident non-enforcement decision, especially when we consider what Jefferson actually said about his actions. Under the argument which condemns Executive Disregard, Jefferson had a Faithful Execution duty to enforce the Sedition Act. Jefferson rejected this mistaken conception of duty, understanding that the Constitution forbade him from enforcing the Act.<sup>250</sup>

Second, some might argue that Jefferson essentially pardoned all those facing actual and potential Sedition Act prosecutions. After all, the Constitution clearly permitted him to pardon all those who were or might be prosecuted.<sup>251</sup> By entering *nolle prosequis* in ongoing prosecutions, Jefferson effectively pardoned the victims of those prosecutions. Hence Jefferson did not engage in Executive Disregard so much as he pardoned people.

This argument unsuccessfully attempts to exalt substance over form. It assumes that *nolles* and pardons are equivalent. But there is a real difference between the two. *Nolle prosequis* do not bar future prosecutions<sup>252</sup> while pardons most certainly do. Hence the *nolle prosequi* would not have barred Jefferson from reinstating prosecutions had his understanding of the Constitution changed. Moreover, while the President has the unlimited power to pardon, he has no generic power to suspend the execution of a statute. If opponents of Executive Disregard read the Constitution as if it permitted Jefferson to suspend the execution of a penal statute, they have to embrace the idea that the President can suspend at least some types of statutes. Yet suspension is the very power that they would deny the President as a means of rejecting Executive Disregard. Any argument that explains away Jefferson's disregard of the Sedition Act on the grounds that he could have pardoned them becomes an unwitting argument for an executive suspension power.<sup>253</sup>

Unaware that Jefferson was the first President to explain and invoke the Executive's duty to disregard, some scholars have cited arguments made by Jefferson administration officials as evidence that the Constitution was understood as forbidding that duty. In *United States v. Smith*, the defendants argued that the President had authorized them to violate the Neutrality Act and attack Spanish territory.<sup>254</sup> The district attorney for New York maintained:

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249. See *supra* text accompanying notes 222–25.

250. That Jefferson affirmatively decided not to enforce the Sedition Act is confirmed by analogy. Suppose a benefit statute provides that anyone who gets a college degree is entitled to \$1000. And suppose the statute specifically provides that everyone who meets the eligibility requirements before the statute expires is entitled to the benefit. Even after the statute expires, the law requires the Executive to disburse the funds. He cannot decline to disburse the funds on the grounds that the statute has expired, for the statute continues to have lingering and significant effects.

251. See U.S. CONST. art. II, § 2, cl. 1.

252. See Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 579 & n.336 (2005).

253. See *supra* section III.A.1 (discussing English suspensive power).

254. 27 F. Cas. 1192, 1203 (C.C.N.Y. 1806) (No. 16,342).

[The defense's argument] proceeds altogether upon the idea that the executive may dispense with the laws at pleasure; a supposition as false in theory as it would be dangerous and destructive to the constitution in practice. The defendant is indicted for a breach of a positive statute of the United States. Does his counsel seriously contend that the president dispensed with the law in this instance? Where will they find an authority of this nature vested in the president? For unless they show this, they gain nothing by their argument. Among the powers and duties of the president, declared by the constitution, he is expressly required 'to take care that the laws be faithfully executed.' They will not venture to contend that this clause gives the president the right of dispensing with the laws. Does the president derive such a power from his legislative character? Certainly not? He has a qualified veto, before the law passes. If he approves a bill, he shall sign it; but if not, he shall return it, with his objections, and the bill may be passed into a law, without his consent. When it has become a law, according to the forms of the constitution, it is his duty to take care that it be faithfully executed. He cannot suspend its operation, dispense with its application, or prevent its effect, otherwise than by the exercise of its constitutional power of pardoning, after conviction.<sup>255</sup>

In his opinion, Justice William Paterson agreed that neither the law nor the Constitution granted a dispensing power to the President, making the President's alleged authorization of their actions irrelevant.<sup>256</sup>

Too much has been made of statements that are tangential to the question of whether the President has a duty to disregard unconstitutional statutes. Both the district attorney and Paterson denied that the President had a discretionary dispensation power. Both were right. For good reason, no President has claimed a generic power to permit citizens to violate the law. But this has nothing to do with Executive Disregard. The case and these discussions were not about the possibility that the President might have a very different duty to decline to enforce unconstitutional statutes. There was no allegation that the Neutrality Act was unconstitutional or that Jefferson saw it as such. Indeed, had Jefferson regarded the Act as unconstitutional he would have told the U.S. Attorney to terminate the prosecution under the pretended statute. After all, he would have been under a duty to "arrest" *all* proceedings meant to enforce unconstitutional laws including the very prosecutions at issue in the *Smith* case.

While the *Smith* case is a red herring, there actually may be some evidence suggesting that Jefferson was not entirely consistent in his support for a duty of Executive Disregard. Though Jefferson earlier had opined that the Bank of the United States was unconstitutional,<sup>257</sup> he took no serious steps to oppose it when he took office. He apparently did not push for the Act's repeal and he did not resist the Bank's actions. He said he wanted to bring the bank to "perfect

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255. *Id.*

256. *Id.* at 1230.

257. See THOMAS JEFFERSON, *Opinion on the Constitutionality of a National Bank*, in 5 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 17, at 284–89 (1895).

subordination," but this was rhetorical.<sup>258</sup>

What explains his failure to resist the Bank?<sup>259</sup> Perhaps Jefferson regarded the Bank law as not something implicating his law-execution duties. For instance, Jefferson might have seen the Bank as an autonomous entity. If so, Jefferson might have believed that the duty to disregard was irrelevant because execution of the Bank's functions was not committed to the President. Indeed, Jefferson spoke of resisting statutes that came within *his* functions.<sup>260</sup> If the Bank did not come within his functions, then Jefferson's failure to resist the Bank is consistent with his theory of Executive Disregard.

Perhaps the better explanation rests with a politician's failure to live up to principle, coupled with a bitter resignation that the bank was a fixed feature of the economy. While Jefferson believed that the Bank was not strictly necessary within the meaning of the Necessary and Proper Clause, he certainly regarded it as convenient, as his 1791 opinion to Washington indicated<sup>261</sup> and as experience had proved. Indeed, Jefferson said that "[w]hat is practicable must often controul what is pure theory; and the habits of the governed determine in a great degree what is practicable."<sup>262</sup> While he may have opposed the Bank at some level, he never took any steps to end its existence.<sup>263</sup>

Does Jefferson's failure to obstruct the execution of the act creating the Bank of the United States cast doubt on the theory of Executive Disregard? Not at all. Viewed in the best light, Jefferson regarded himself as duty-bound to pay no heed to unconstitutional laws, which perhaps he did in the case of the Bank. At worst, Jefferson's failure to obstruct the Bank was an understandable lapse in judgment. Rare is the person who stays steadfastly true to perceived duty. The pressures to deviate from duty, to bow to political realities, are sometimes just too strong to consistently resist.<sup>264</sup>

In any event, Jefferson's possible failings do not detract from his clear decision not to enforce the Sedition Act, a statute that he saw as unconstitu-

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258. MAYER, *supra* note 244, at 209.

259. What might have Jefferson done to impede the operations of the Bank? He might have withdrawn all federal funds, as Andrew Jackson did. See RICHARD H. TIMBERLAKE, *MONETARY POLICY IN THE UNITED STATES* 43 (1993). Or Jefferson might have tried to have the Bank's stock sold to the public, thus privatizing the Bank, as Jackson proposed. See Jackson, *supra* note 105, at 577 (suggesting that Congress sell all stock in the Bank of the United States). Finally, Jefferson might have taken more extreme measures, such as using marshals to shut down branches.

260. Letter from Thomas Jefferson to Edward Livingston, *supra* note 17, at 58 n.1 ("I affirm that act to be no law, because in opposition to the constitution; and I shall treat it as a nullity, wherever it comes in the way of *my* functions." (emphasis added)); Letter from Thomas Jefferson to William Duane, *supra* note 226, at 55 ("[W]henever in the line of *my* functions I should be met by the Sedition law, I should treat it as a nullity." (emphasis added)).

261. See JEFFERSON, *supra* note 257, at 288.

262. See MAYER, *supra* note 244, at 209.

263. *Id.*

264. As noted earlier, the Kentucky Resolutions denounced several statutes as unconstitutional. See *supra* text accompanying notes 217–19. I know of no evidence that Jefferson's administration either enforced or did not enforce the statutes that Jefferson had previously denounced as unconstitutional and therefore void.

tional. The very first President to confront the question of whether to enforce an unconstitutional statute treated the statute as no law at all and read the Constitution as affirmatively prohibiting him from enforcing it. Jefferson publicly defended his non-enforcement precisely on this basis. He never defended it as a series of phantom pardons or on the basis that the Sedition Act was expiring and therefore unworthy of execution.

#### D. THEORIES OF EXECUTIVE DISREGARD RECONSIDERED

Having considered text, structure, and history, this is a fitting point for reconsidering the theories of Executive Disregard introduced earlier. While one can imagine a constitution that provided that chief executives must execute unconstitutional laws, the actual Federal Constitution provides otherwise. As we have seen, there is nothing in the Constitution requiring the President to execute unconstitutional laws. Moreover, history suggests that at the Founding, unconstitutional laws were not regarded as enforceable or binding. Thomas Jefferson, John Adams, and others articulated the view that unconstitutional statutes were not law at all. Hence, the President could no more enforce unconstitutional laws than he could enforce his personal whims.

In contrast, there is no evidence of anyone from the founding era arguing that Presidents had an absolute duty to enforce all statutes, no matter how unconstitutional they might be. Apparently, no one claimed that the Faithful Execution Clause required Presidents to enforce statutes that they regarded as unconstitutional. Likewise, no one seems to have insisted that presentment was the only stage at which the President could raise constitutional issues or objections. Given that there is no historical evidence to support the notion that the President must execute statutes he believes are unconstitutional and there is considerable textual and historical support for a duty to disregard, the evidence is decidedly in favor of a duty to disregard.<sup>265</sup>

Theories of Executive Disregard that require a judicial opinion as a necessary precondition likewise lack an originalist foundation. The Constitution's text betrays no hint that Executive Disregard is somehow appropriate (or required) only when some court has held a statute unconstitutional. The President's duty to avoid aiding and abetting constitutional violations does not spring into existence merely because a court has opined first. Likewise, early constitutional history supplies no evidence for the proposition that anybody had to wait until a

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265. In 1980, Attorney General Benjamin Civiletti claimed that "available evidence concerning the intentions of the Framers lends no specific support to the proposition that the Executive has a constitutional privilege to disregard statutes that are deemed by it to be inconsistent with the Constitution." *The Attorney General's Duty To Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. Off. Legal Counsel 55, 58 (1980) (memorandum from Attorney General Benjamin R. Civiletti). Civiletti was unaware of much of the evidence discussed in this Article. Moreover, Civiletti spoke of a privilege rather than a duty. Thus Civiletti was searching for evidence for the wrong proposition. Finally, the question is not whether there is tremendous evidence for a duty to disregard. The question is whether the evidence favors that proposition over a proposition that apparently has *no* early evidence in its favor.

court decided that a statute was unconstitutional before ignoring it. Americans disregarded statutes long before any court might hear the merits of a dispute. Indeed, neither Adams nor Jefferson claimed that unconstitutional laws had to be honored and enforced until such time as a court held them unconstitutional.

To the contrary, Jefferson disregarded the Sedition Act even though no court ever held the Sedition Act unconstitutional. In fact, Jefferson's non-enforcement occurred in the teeth of numerous courts that had judged the Act constitutional.<sup>266</sup> Notwithstanding these contrary judicial conclusions, Jefferson disregarded the Sedition Act because *he* did not regard it as a valid law. Rather than reflecting the Constitution's original understanding, theories that privilege the Judiciary's constitutional readings better mirror the modern view that the Judiciary has some special claim on constitutional interpretation.

The theory of Defensive Executive Disregard also lacks a solid foundation. The Constitution's text does not require the President to be extra vigilant when it comes to invasions of executive power. Moreover, as a matter of history, people treated all manner of laws as void, whether or not they related to executive power. Finally, Jefferson's arguments as to why the Sedition Act was unconstitutional sounded in individual rights and federalism.<sup>267</sup> Jefferson was not defending executive powers as much as he was staying true to his understanding of a limited Constitution.

The multi-factor balancing test first enunciated by Walter Dellinger<sup>268</sup> and ably defended by several other scholars<sup>269</sup> merits extended consideration. Recall that the Dellinger theory basically has two components.<sup>270</sup> First, apply a multi-factor balancing test to determine when the President can invoke the Executive Disregard power. Second, if the multi-factor test suggests that disregarding the unconstitutional law is permissible, make a discretionary decision whether to disregard the unconstitutional law. The multi-factor theory does not purport to be grounded in the Constitution's original meaning, making the lack of early historical support for it irrelevant. Still the theory can be evaluated on its textual foundations and the extent to which it offers a coherent and desirable framework for the interaction of legislative, executive, and judicial powers.

The textual support for the multi-factor theory is rather weak, to say the least. As we have seen, there are plausible textual arguments for the claim that the President must disregard unconstitutional laws, and there are plausible textual arguments for the claim that the President must enforce all laws. But there is no textual grounding for the claim that the Constitution grants the President the

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266. Letter from Thomas Jefferson to Abigail Adams, *supra* note 16, at 275 (noting that just because courts had judged Sedition Act constitutional did not mean that the President had to come to same conclusion).

267. See Kentucky Resolutions of 1798 and 1799, *supra* note 217, at 541.

268. See Presidential Authority, *supra* note 11, at 200.

269. See generally Barron, *Constitutionalism*, *supra* note 20; Johnsen, *supra* note 20; Posting of Barron et al., *supra* note 20.

270. See *supra* section I.E.

discretionary power to enforce unconstitutional statutes. As we have seen, no grant of power in Article II can plausibly be read as granting the President the power to enforce unconstitutional statutes.<sup>271</sup> Indeed, what is notable about the Dellinger memo is its failure to make any claim that the multi-factor test has any relationship to the constitutional text. To be sure, the Dellinger memo's first principle is that the President's powers "are created and bounded by the Constitution."<sup>272</sup> Yet the Dellinger memo never says which of the Constitution's terms grant the President a discretionary power to enforce unconstitutional laws or which terms limit that discretion to situations where the multi-factor test suggests that disregarding a law is permissible.

Apart from the lack of a textual grounding, the multi-factor test also suffers from structural difficulties. The test's principal problem is its unwarranted exaltation of the Supreme Court. If the President must ask whether the Supreme Court would agree that some statute is unconstitutional, the President becomes something of a lower court, asked to apply Supreme Court doctrine to determine if he can choose to disregard a federal statute that the President already believes is unconstitutional. Yet the Constitution never makes the President the constitutional second fiddle to the Supreme Court; nor does it suggest that the only way the President can raise constitutional objections is through constitutional filters and doctrines announced by the Judiciary. It is one thing to consult and respectfully consider the constitutional wisdom offered by another branch; it is another to tether the President (or Congress) to the Judiciary's constitutional pronouncements. When we ask the President to start using the Court's constitutional doctrines as a means of understanding the Constitution, we eliminate one of the best features of separation of powers, namely the possibility that multiple branches will come to *different* constitutional conclusions and then act upon them.

Of course, the modern predilection of Congresses and Presidents is to dispense with independent constitutional thought and merely ask "what would the Supreme Court do" with respect to some statute or action. As noted earlier, this tendency runs counter to the early American tradition of robust and independent constitutional interpretation emanating from all three branches. Frameworks like the multi-factor test which reduce coordinate branches to a subordinate rank by asking them to mimic the views of the courts only exacerbate the lamentable modern tendency.

The only theory of Executive Disregard borne out by the consideration of text, structure, and history is the theory that supposes that the Constitution requires the President to disregard all statutes that he believes are unconstitutional. Only an Executive Disregard duty is consistent with the prevailing eighteenth-century American sense of the status of unconstitutional laws and the President's duties to execute and safeguard the Constitution.

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271. See *supra* section II.A.

272. Presidential Authority, *supra* note 11, at 200.

## IV. IMPLEMENTING A DUTY TO DISREGARD

If one concludes that the President has a duty to disregard, a number of practical questions arise. First, what steps should or must the President take to fulfill this obligation? One extreme is to suppose that the President must continuously judge the constitutionality of federal legislation committed to his execution. Another extreme is to imagine that the President may elect to raise constitutional objections to laws when it is expedient to do so. Second, what steps should the President take to ensure that he receives diverse viewpoints about the constitutionality of some law? Third, what deference, if any, should the President pay to the constitutional conclusions reached by other branches. Finally, what may Congress do if it regards the President as having made a mistake in constitutional interpretation? Sometimes the chambers of Congress will conclude that a particular constitutional interpretation is either so misguided or so transparently pretextual that it will wish to sanction the President.

## A. THE PROBLEM OF LIMITED RESOURCES

Some, convinced that there is a duty of Executive Disregard, might suppose that the duty must take precedence over all else. There perhaps is no more significant obligation, suggesting that the President must continuously consider the constitutionality of every statute committed to his execution. Every statute, no matter how trivial, must be carefully scrutinized, lest the President inadvertently compound the Congress's constitutional violation with one of his own. He can never excuse his shortcomings as a defender of the Constitution by saying he was distracted by other matters, such as partisan politics or foreign policy disputes.

This conception of the duty to disregard is unrealistic. If the President had infinite resources, both mental and monetary, satisfaction of his oath might require nothing less than his unremitting attention coupled with perfection. But the President clearly lacks infinite resources. Even if he committed himself and his administration to a single-minded defense of the Constitution, he would still have to make choices. Should he spend more time considering the constitutionality of a statute making supposedly benign racial classifications or on a law limiting political advertising on the eve of elections? His oath, as meaningful as it is, does not begin to answer such questions.

Of far more significance, the President has several competing obligations, preventing him from being obsessed with constitutional questions to the exclusion of all else. To begin with, he also must ensure the faithful execution of the laws. The President must not allow himself (and his branch) to be preoccupied with whether particular statutes are constitutional, for he also must expend time and resources to execute laws that he regards as constitutional. Obviously, resources exhausted on law execution are resources that cannot be spent on considering the constitutionality of statutes. Moreover, the President also has to

faithfully execute the presidential office.<sup>273</sup> Although this is hardly an express feature of the duty, presumably this duty requires the use of his various presidential powers not only to fulfill his other constitutional duties but also to act in a manner that serves the nation's best interests. Satisfaction of the presidential oath requires him to prosecute successfully a declared war, even though his war efforts surely will divert his attention away from defending the Constitution. Likewise the President must appoint to hundreds of offices, thus necessitating some consideration of the fitness of candidates.

Given that the President has multiple duties, there will be inevitable competition for his limited time. It follows that the President cannot act as if his only objective was to assure that his administration never executed an unconstitutional statute. As odd as this may sound (especially to constitutional law professors), the Constitution bars the President from mounting a monomaniacal defense of the Constitution. Instead, the President must make prudential judgments about the allocation of resources.

However the President allocates resources, errors will be inevitable. To begin with, making choices about which constitutional questions to examine more keenly will lead to uneven treatment and will inevitably generate interpretational mistakes. He necessarily will reach constitutional conclusions that he would have rejected had he allocated resources differently. Likewise, the decision to allocate resources towards things besides the Constitution's defense means that sometimes the President will enforce statutes that the President might have regarded as unconstitutional had more time been spent on the interpretational question.

A second and different resource issue potentially arises at the enforcement stage, after constitutional conclusions have been reached: what to do when one imagines that courts will consistently disagree with the President's constitutional conclusion. First, consider the situation where the President concludes some statute is unconstitutional and where judicial review of the President's non-enforcement is available. If the President decides not to enforce the statute and consistently loses in court, the President will, at some point, justifiably conclude that continuing to disregard the relevant provisions is a waste of resources. Given his limited institutional resources, it would be far better to spend more time and money in an attempt to fulfill other aspect of his presidential duties. For instance, it would be better to enforce constitutional laws that the courts will find constitutional rather than continuously disregarding a statute, defending that decision in court, and then repeatedly being compelled to execute it. Imagining that the President must stubbornly refuse to enforce a statute that the courts eventually will compel him to enforce is silly and will waste resources that might be used to satisfy other aspects of presidential duty (for instance, law enforcement or other more meaningful actions meant to defend the Constitution).

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273. See U.S. CONST. art. II, § 1, cl. 7.



Second, consider the situation when the President concludes some statute is constitutional but where the Judiciary consistently concludes that the statute is unconstitutional. In this situation, some may suppose that the President is obliged, under the Faithful Execution Clause, to enforce the statute because it is constitutional (in his mind, at least). Yet obstinately enforcing this statute in the face of strong and implacable judicial opposition is a waste of resources and an utter distraction from his other law enforcement and constitutional obligations. Once again, imagining that the President must try to enforce a statute that the courts simply will not permit him to execute misapprehends the complicated obligations imposed by the Faithful Execution and Presidential Oath Clauses. To satisfy his various constitutional duties, the President does not need to, in the manner of Sisyphus, regularly undertake tasks with little or no chance of success.

The general point is that the duty implied by the Presidential Oath is not reducible to a simple formula. Ensuring that his administration never executes a federal statute that violates the Constitution, at the expense of all else, may sound ideal to the constitutional scholar. Likewise, it may seem ideal for the Executive to do its utmost to enforce statutes that the Executive believes are constitutional even in the face of a hostile and predictable judicial invalidation of such statutes. But thankfully, nothing in the Constitution comes close to imposing these impractical standards upon the President.

This more realistic and complicated picture of executive duty is not meant to suggest that anything goes. The President cannot use resource constraints and competing obligations as a means of regarding Executive Disregard as a discretionary power, something to be exercised as convenience warrants. The President, consistent with his oath, cannot enforce statutes he regards as unconstitutional. While many things undoubtedly will constrain his ability to reach constitutional conclusions, once he has reached particular conclusions, nothing in the Constitution permits him to toss aside the Constitution in favor of a partisan policy or campaign contributors. Nor can the President ignore constitutional considerations out of a fear that, should he consider the constitutional merits of a statute, he might be forced to desist from enforcing a statute he favors. Finally, while the President must consider the likelihood that his principled stand will win out in the face of judicial opposition, he may not quietly assume that the Judiciary will oppose his constitutional view whenever he would rather, as a policy matter, act in a manner inconsistent with his best interpretation of the Constitution. There is a difference between making a decision about how to best allocate scarce resources in a manner that satisfies multiple duties and choosing to turn a blind eye to the potential constitutional infirmities of a law.

#### B. ADVICE AND JUSTIFICATION

The Executive ought to take certain steps to increase the chance that the public will view Executive Disregard in much the same way the public gener-

ally regards exercises of judicial review. The public tends to approve of judicial decisions because, among other things, the courts hear and consider diverse viewpoints on the constitutionality of legislation and because the courts provide a public justification for their decisions.

To the extent possible, the Executive Branch ought to invite commentary on the constitutionality of putative laws as a means of ensuring that there is a clash of viewpoints presented to the President. In much the same way that agencies invite comments on proposed regulations and thereby improve the quality of the eventual regulations, the Executive Branch might invite comments on whether bills and statutes are unconstitutional and thereby improve the quality of constitutional interpretation in the Executive Branch.

Another way to generate more clashing viewpoints that might then serve to edify the President is to do away with the Office of Legal Counsel's quasi-monopoly on difficult legal questions.<sup>274</sup> Rather than asking for a single opinion from the Office of Legal Counsel on the constitutionality of some statute, modern Presidents ought to emulate the practices of early Presidents who received multiple opinions on questions of law, including questions of constitutional law. Demanding constitutional opinions from numerous department heads makes it much more likely that the President will receive conflicting advice about the constitutionality of federal statutes in much the same way that early Presidents received conflicting legal and policy advice. Hearing multiple points of view will make the eventual conclusions reached by the President less vulnerable to attack because the President will have heard and considered many of the complaints likely to be voiced against his eventual constitutional conclusion.

Though the President is under no constitutional obligation to explain his decision to disregard a constitutional statute, there are many sound reasons for publicly revealing the bases of his decision. In particular, the same reasons that lead courts to write opinions in constitutional cases often will lead the President to do the same. Chief Executives will want to justify to their fellow citizens why some statutes are unconstitutional as a means of dispelling the notion that the President's true disagreements with some statute are policy-based rather than constitutionally driven. Moreover, Presidents also will hope to influence future presidential, legislative, and judicial thinking on the constitutional matter in dispute.<sup>275</sup> Giving reasons provides something that future Presidents, Con-

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274. See WALTER E. DELLINGER ET AL., PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL 1 (2004), available at [http://www.acslaw.org/files/2004%20programs\\_OLC%20principles\\_white%20paper.pdf](http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf) (noting that OLC opinions are considered binding on the Executive Branch).

275. Of course, nothing said here precludes the President from silently disregarding statutes on the grounds that they are unconstitutional. In many cases, however, such disregard may be possible to detect, as when prosecutions of a particular statute are discontinued for no stated reason. Saying nothing in such a context will invite suspicion and hence it makes little sense for the President to disregard silently in this situation. Where it is difficult or impossible to detect whether the Executive Branch has chosen to ignore a statute, Presidents might choose to engage in Executive Disregard without any announcement and the attendant publicity. But regardless of whether the Constitution

gresses, and courts can consult in making their own decision about the constitutionality of some statute. In contrast, a mere decision to disregard, without more, is likely to receive less respectful consideration in the future precisely because the basis for the decision will be somewhat unclear. Finally, the discipline resulting from a public justification of decisions to disregard will tend to strengthen the President's ultimate constitutional conclusions. A written justification often brings to the surface areas of uncertainty and weakness, leading the writer to explore the issue further and either strengthen the opinion or abandon the claims altogether. For all these reasons, Presidents have good reason to supply public explanations of their decisions not to enforce statutes that they regard as unconstitutional.<sup>276</sup>

### C. INTERPRETATION AND DEFERENCE

One recurring story from the nation's early history is the scene of a President reaching different conclusions from those held by the other two branches. Early practice makes clear that Presidents need not feel self-conscious in the least if they adopt constitutional conclusions that might put them into conflict with Congress or the courts. Indeed, Executive Disregard will occur precisely in those situations when the President disagrees with the judgment of a current or past Congress and possibly the views of one or more Presidents. Likewise, Executive Disregard may even occur in the face of contrary lower court and Supreme Court precedent. If the President is confident enough in his constitutional interpretations, the President should be unafraid of disagreeing with one or both of the other branches.

What constitutes good grounds for presidential confidence? Ideally, Presidents should emulate Washington, Adams, and Jefferson and consider constitutional questions themselves. When Presidents are unable to reach their own constitutional conclusions, however, they should disregard congressional statutes only when they conclude that there are reasons to believe that they would agree with others who have advised them that a statute is unconstitutional. More precisely, the President must have good reason to conclude that advice to

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requires Executive Disregard, Presidents have the practical ability to surreptitiously ignore some statutory provisions. That is to say, if the public cannot tell whether an administration is honoring a statutory command, a President already has the practical ability to flout that statutory command. The duty to disregard provides no additional cover in this situation. Put simply, Executive Disregard does not make it easier to avoid detection when a President chooses to disregard a statutory provision; it merely provides a potential legal excuse for presidential non-enforcement of some statutory provision.

276. Presidents might be most tempted to silently disregard statutes that they regard as unconstitutional where doing so will enable them to better execute other statutes or better fulfill other duties. A President who believes that some statute limiting his enforcement options is unconstitutional may well choose to disregard the statute silently for fear that highlighting his constitutional disagreement and disregard will bring unhelpful attention to the enforcement methods and mechanisms that will be useful in ensnaring alleged criminals. Yet, when the President declines to shed light on his decision to disregard and that decision comes to light, he invites more fierce second-guessing about his motives and about the wisdom of his decision.

disregard a statute is sound either because the President preliminarily reached the same conclusion or because, on a range of other legal questions, the President regards the interpreter as closely mirroring his own constitutional views.

Indeed, if deference arises from a sense that particular presidential advisers actually reflect the President's approach to constitutional and legal matters, this quasi-delegation of interpretational authority makes sense. In much the same way, professors might assume the correctness of a theory or claim advanced by another professor they trust and generally find simpatico. This type of deference is quite useful as the President avoids having to devote his rather limited resources to every constitutional question under the sun.

Yet, if the President has no good reason to defer to those who advise him to disregard a statute on the grounds of its supposed unconstitutionality, the case for second-guessing Congress's constitutional conclusions becomes non-existent. Just because some official in his administration concluded that a statute is unconstitutional cannot be reason enough to disregard the statute because it is almost certainly true that another official in the administration would come (or has come) to the opposite conclusion. Put another way, modern Presidents should not disregard statutes on the grounds that they are unconstitutional merely because someone in their administration has concluded as much. Such a standard of presidential inquiry into the constitutionality of a statute is much too weak to justify overcoming the considered views of Congress or the courts. In such circumstances, modern Presidents would do well to heed the advice of Thomas Jefferson. Jefferson counseled Washington about the Bank of the United States, noting that "if the pro and the con h[u]ng so even as to balance his judgment [on the constitutionality of the bank bill], a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion."<sup>277</sup>

#### D. CHECKING THE DUTY

Three entities may check the exercise of Executive Disregard. Voters may sanction a President whose constitutional readings the public finds distasteful. Incumbent Presidents can lose reelection bids based on their constitutional readings—this arguably happened to John Adams because of his vigorous enforcement of the Sedition Act.<sup>278</sup> Jefferson himself adverted to this possibly when he wrote of a "change of the persons exercising the functions of those departments" that adopt constitutional readings that the public opposes.<sup>279</sup> Moreover, the legislative and policy agendas of incumbent Presidents can be

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277. See JEFFERSON, *supra* note 257, at 289.

278. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 71 (2004) (noting that Sedition Act harmed Federalists and helped Republicans).

279. MAYER, *supra* note 244, at 270.

damaged when the public disagrees with the President's constitutional vision. Hence, even if a President cannot or will not run for another term, he must be aware that the public perception of his decision to disregard statutes will affect his power and influence on the margin.

Congress can check Executive Disregard as well. Congress has always faced the question of what to do about presidential non-enforcement. Sometimes such non-enforcement comes from resource-allocation decisions. Faced with resource constraints, the President might choose to enforce statutes A through S and give short-shrift to statutes T through Z. Other times, non-enforcement arises from a misreading of a statute. For instance, the President may read an environmental statute as not regulating a particular pollutant, even though a majority of Congress believes to the contrary.

In these situations, the chambers of Congress use a host of techniques designed to cajole and chasten the Executive. Appropriations, committee hearings and investigations, and informal meetings all serve to give voice to congressional displeasure. In the extreme, the chambers of Congress can use their respective impeachment powers. The House can impeach and the Senate may convict executive officers for their failings.

All these tools are likewise available in situations where Congress believes that the President has mistakenly concluded that some statute is unconstitutional and should be disregarded. Indeed, President Andrew Johnson was impeached for his alleged failure to abide by a statute. As noted earlier, the House impeached Andrew Johnson for removing his War Secretary in supposed contravention of the Tenure in Office Act.<sup>280</sup> Among other things, Johnson believed that the Act was unconstitutional.<sup>281</sup>

The Judiciary stands as a more readily available check on Executive Disregard. A plaintiff with standing may sue to have the President enforce a statute the President regards as unconstitutional. For instance, if the President denies a subsidy on the grounds that the statute authorizing the disbursement of funds is unconstitutional, those with standing may challenge the denial. Likewise, those entitled to the protections of particular laws might have standing to challenge non-enforcement, at least where the enforcement statute requires particular benchmarks of the Executive. In each case, if the plaintiff succeeds, the Judiciary will issue a judgment in favor of the plaintiff.

Under both traditional and modern understandings of judicial power, the President will enforce (and not ignore) such judgments.<sup>282</sup> Whether this pattern of enforcement arises from a sense that the Constitution requires Executives to enforce judgments or whether it comes from a sense that the public demands executive enforcement of judgments irrespective of what the Constitution actually provides, it really does not matter. The point is that when a court issues a

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280. MAY, *supra* note 5, at 57–59.

281. *Id.* at 59.

282. *See* Baude, *supra* note 35.

judgment that is based upon a decision about the constitutionality of a federal statute, the President permits the enforcement of the judgment even when the President disagrees with the court's underlying constitutional conclusions. Indeed, he abides by the judgment even in those cases when the Executive Branch was the losing party in the case. This entrenched and historically sound practice will tend to give the Judiciary the final word in many disputes about the constitutionality of statutes.

These various checks are not perfect in the sense that there still will be instances when individuals will conclude that the President has wrongfully disregarded some statute that those individuals believe is constitutional and where the external checks will not operate to dissuade the President from continuing to disregard the statute. Indeed, it seems clear that there certainly will be cases where those upset with particular decisions to disregard will themselves be supporters of the claim that the Constitution imposes an Executive Disregard duty.

Such grievances are inevitable in much the same way that supporters of judicial review inevitably complain about the outcomes of particular cases involving the constitutionality of legislation. In a world with diverse viewpoints about what the Constitution permits or requires and in a world where mistakes are inevitable, Presidents necessarily will adopt constitutional conclusions that some or many will reject as downright wrongheaded. This inescapable fact no more condemns Executive Disregard than it condemns judicial review.

#### CONCLUSION

Executive Disregard strikes many as improper, even dangerous. As a matter of text, it seems to violate the Faithful Execution Clause. Structurally, Executive Disregard appears to make the Presidency too muscular an institution because the President can bar the enforcement of many beneficial and worthwhile laws merely by asserting that they are unconstitutional. But perhaps the biggest perceived drawback is that Executive Disregard—as it has been exercised in recent decades—looks like some sort of discretionary power to be wielded rather opportunistically to slice and dice statutes.

This Article counters such claims. There are considerable textual, structural, and historical arguments to be made on behalf of the notion that the Constitution requires the President to disregard unconstitutional statutes. Textually, the duty of Executive Disregard arises from the President's express obligation to preserve, protect, and defend the Constitution and from his parallel Faithful Execution obligation to execute the Constitution. These obligations preclude him from violating the Constitution himself or implementing the unconstitutional measures of others.

Structurally, the duty of Executive Disregard does not greatly augment presidential power. To the contrary, the President becomes obligated to consider the constitutionality of statutes and must desist from enforcing those he regards as unconstitutional. Sometimes the President will be forced to cease enforcing

statutory provisions that he prefers on policy grounds because he concludes that they are unconstitutional. Other times the President will be forced to regard an entire statute as unenforceable, either because Congress included an inseverability clause or because the President concludes that the Congress would not have enacted the rest of the statute in the absence of the provisions that the President has chosen to treat as a nullity. Hence, in many cases, Executive Disregard actually will frustrate the Executive's policy preferences. The constraining, self-abnegating nature of Executive Disregard has been obscured by the unfortunate tendency to consider Executive Disregard as a discretionary power and not as a duty. Little wonder that Executive Disregard has come to be seen as a weapon to be used to aggrandize presidential power and further presidential preferences.

As a matter of history, Thomas Jefferson was the first President who felt compelled to cease enforcement of a statute he regarded as unconstitutional. Believing that the Sedition Act was unconstitutional, Jefferson ordered his prosecutors to cease all existing Sedition Act prosecutions. Jefferson felt constitutionally obliged to arrest the execution of unconstitutional laws. He also concluded that his Faithful Execution duty did not extend to unconstitutional laws because the latter were null and void. He was confident in his conclusions, believing there was "no weak part in any of these positions or inferences."<sup>283</sup>

Concluding that the President has a duty to disregard unconstitutional statutes hardly ends the debate about Executive Disregard. Perhaps more so than the Judiciary's constitutional readings, the President's constitutional interpretations and interpretive method will become the subject of fierce debates. Indeed, any presidential duty becomes the basis for criticism, either that the President is not properly attending to the duty or that the President is using the duty as a pretext to advance his political agenda. Whether justified or not, such criticism is fitting, for although the Constitution requires the Executive to defend the Constitution against unconstitutional laws, it also assumes that the people and Congress will hold him accountable for his decisions to disregard statutes he believes are unconstitutional.

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283. Letter from Thomas Jefferson to Edward Livingston, *supra* note 17, at 58 n.1.