Executive Review and the *Youngstown* Categories: Vulnerability of Environmental Regulations to Unbounded Executive Review

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[C]omprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country . . . .[1]

I. INTRODUCTION

The power of executive review remains imperfectly limited and defined—it therefore holds such potential dangers and advantages. By executive review I mean the power of the President to interpret the law and determine for himself whether a given law or provision is constitutional. Most commentators agree that this power exists legitimately in one form or another.[2] But some argue that it is

1. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

2. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 179 (2005); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); Stacy Pepper, *The Defenseless Marriage Act: The Legitimacy of President Obama's Refusal to Defend DOMA § 3*, 24 STAN. L. & POL'Y REV. 1 (2013); William H. Pryor, Jr., *The Separation of Powers and the Federal and State Executive Duty to Review the Law*, 65 CASE W. RES. L. REV. 279 (2014); Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073 (2001); *see also* Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 OP. O.L.C. 199,

virtually unbounded, save for the president's own sense of deference to the other branches and his self-interest to remain in office.[3] Such a comprehensive power surely is as dangerous as that of which Justice Jackson warns in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, if not more so. Moreover, if fully utilized, executive review would leave the judiciary with no authority, save over itself. Unbounded executive review could also be used as a tool to undermine well-established legal doctrines which underpin entire fields of regulation, especially with respect to environmental law, as discussed herein. If left unchecked by any means with real bite, executive review has the potential to turn the Executive[4] into a truly despotic branch.

This Note endeavors to determine the ambit of the validity of executive review, as well as to find such a means to delimit the power of executive review, hopefully without simultaneously removing from it all practicality. Part II provides some of the classic arguments supporting the validity of executive review, as well as a few of my own inspired by the methods that Professor Akhil Amar advances in his book, *America's Unwritten Constitution: The Precedents and Principles We Live By*. Part III outlines the different types of presidential action that rely on the power of executive review, and provides a framework for analyzing and scrutinizing the various uses and forms of executive review. While this Note does not systematically outline all of the arguments criticizing the validity of the power, to the extent that they attempt to refute the power altogether, they have been satisfactorily rebutted elsewhere.[5] However, this Note builds upon some of those critiques in Part IV, in arguing for the limitation of executive review. Part IV first evaluates Professor Michael Stokes Paulsen's arguments for essentially unbounded executive review. Next, it theoretically applies executive review in the environmental law context in order to highlight the need to limit the power, as it is perhaps the field

199 (1994) ("Let me start with a general proposition that I believe to be uncontroversial: there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional.").

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

4. Where capitalized, this Note uses the terms the "Executive" and the "President" interchangeably to refer to the office of the President of the United States, and in some cases those under the president's control.

5. *See* Easterbrook, *supra* note 2, at 916–22; Paulsen, *supra* note 3, at 292–320.

most vulnerable to the potential abuses of executive review. Part IV then looks to recent judicial precedent as a possible foundation for limiting the power, and addresses some practical considerations relevant to any such limitation. Finally, Part V provides a brief conclusion.

II. JUSTIFICATIONS FOR EXECUTIVE REVIEW

There are a variety of arguments which support the validity of executive review, ranging from the textual and structural, to the historical, to the purely pragmatic. Part II begins with the textual and structural arguments advanced and accepted by many authors as the strongest foundation for the power. This Part next offers a few of my own arguments, which build upon Amar's teachings on constitutional interpretation.[6]

A. Textual and Structural Support

The most compelling argument for executive review is that, borrowing some analysis from *Marbury v. Madison*, the Take Care Clause and the Supremacy Clause together establish that the President has a duty to execute the Constitution as supreme law. This obligation overrides his duty to execute other laws, which are necessarily subordinate to the Constitution. This duty entails the ability to engage in some form of review similar to that of the judiciary.

History has treated well Justice Marshall's argument for judicial review presented in *Marbury v. Madison*[7]—so much so that today it is taught as a structural constitutional reality. Briefly, the argument is that if the Constitution is to be paramount, it must control any other law contrary to it. The "essence of judicial duty" is to determine whether to apply the Constitution or the law with which it is in conflict.[8] Because the inherent purpose of a constitution is to be paramount, judges must interpret a law they find to be in conflict with it to be invalid.[9] Finally, the fact that judges take an

6. Many of the practical and historical arguments will be addressed throughout for additional support.

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

8. *Id.* at 178.

9. *Id.* at 173–80.

oath to uphold the Constitution also points to the fact that they should hold it as supreme.[10]

Building upon the foundation laid by the Supremacy Clause and the establishment of judicial review in *Marbury*, we can see that the Executive holds a somewhat similar obligation. The President has the duty to "take Care that the Laws be faithfully executed."[11] *Marbury* and the Supremacy Clause establish that the Constitution itself is a law.[12] Therefore, the President has the duty to take care that the *Constitution* be faithfully executed. When presented with the obligation to enforce a statute that would clearly violate the Constitution, the President cannot execute the statute while simultaneously executing the Constitution. Therefore, she must not execute the contrary statute, given that the Constitution is to take precedence over all other laws.[13]

As further evidence that the President should not violate the Constitution by executing a contrary law, he is required to take an oath to "'preserve, protect and defend the Constitution of the United States'" to the best of his ability.[14] As Justice Marshall asked with respect to the less demanding oath required of the judiciary: "How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?"[15]

Assuming then that the President should not execute laws which are contrary to the Constitution, how will she determine when they are in fact at odds with each other? Should she wait until the issue comes before the courts, all the while executing the statute she presumes to be unconstitutional?[16] It can take many years before

10. *Id.*; *see also* THE FEDERALIST NO. 78, at 237 (Alexander Hamilton) (Michael A. Genovese ed., 2009) ("A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.").

11. U.S. CONST. art. II, § 3.

12. *See* U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."); *Marbury*, 5 U.S (1 Cranch) at 176–80.

13. *See supra* note 10 and accompanying text.

14. U.S. CONST. art. II, § 1, cl. 8.

15. *Marbury*, 5 U.S (1 Cranch) at 180.

16. *See* Pryor, Jr., *supra* note 2, at 293 ("The executive sends a terrible message when he enforces a law that he believes violates the Constitution. That is, the executive tells the

the Court declares a law unconstitutional, sometimes even decades or more.[17] It follows that in order to fulfill her constitutional duties, the President should be able to engage in some form of executive review, at least until the Court passes its judgment.[18]

B. Techniques from *America's Unwritten Constitution*

In *America's Unwritten Constitution: The Precedents and Principles We Live By*, Akhil Amar offers various methods of interpreting the terse text of the Constitution through the prism of our "unwritten Constitution," which embodies the history, precedents, and traditions of the country.[19] Amar offers a variety of different approaches for reaching an informed understanding of the textual meaning of the Constitution, whether it be through, *inter alia*, importing legal first principles, or recognizing the prominence of the two-party system. Of course, neither of these methods are mentioned in the text itself. However, the text of the Constitution offers us nothing in the way of self-referential instructions for its interpretation; the value of Amar's approach then lies in providing those guidelines. This Part utilizes a few of Amar's methods to better understand how executive review can be considered a legitimate part of our constitutional system without being clearly enumerated anywhere in the text of the Constitution.[20]

person he injures that enforcing a defective law matters more than respecting the Constitution."); *see also* Dawn E. Johnsen, *What's a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 408 (2008) ("It . . . is not feasible within our system to instruct Presidents simply to implement judicial precedent and never to act upon their own interpretations.").

17. *See Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States*, JUSTIA, https://law.justia.com/constitution/us/acts-of-congress-helduncon stitutional.html [https://perma.cc/XH8X-ZYNJ] (last visited Jan. 21, 2018).

18. Paulsen employs essentially this same argument, but ultimately concludes that the Executive has coequal authority and responsibility of executive review, so that the President would not be bound even by an adverse Court decision, lest the Court exert dominance over the Executive. Paulsen, *supra* note 3.

19. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012).

20. While the provisions outlined in Part II.A offer strong support for executive review, they do not go so far as to make it a clearly enumerated power, such as the pardon power. *See* U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

1. "Following Washington's Lead"[21]

One of the techniques that Amar employs to elucidate the powers of the Executive outlined in the Constitution is to look to the actions of President George Washington. As evidence of the merit of this approach, many if not all of the United States' presidents since Washington have done the same.[22] One of the most immediate examples, of course, is the tradition that Washington established at the end of his time in office of the peaceful transfer of power after serving a maximum of two terms. Nevertheless, the text of the Constitution never stated a two-term maximum for presidents, at least not until after President Franklin Delano Roosevelt broke from this tradition by serving for over twelve years. Congress and the States later responded with the Twenty-Second Amendment, formally limiting the number of terms a president can serve.[23] To many, this amendment was not the creation of a new constitutional principle of the executive branch, but a codification of something that was already there, as laid down by Washington over 150 years earlier.[24] Therefore, if Washington exercised the power of executive review, there is a *prima facie* case for its validity. The case is even stronger where later presidents have followed suit, and stronger still where, as with the two-term tradition, many Americans considered it to be an unwritten rule.

The first veto that Washington ever issued—one of only two during his eight years in office[25]—was motivated by constitutional concerns.[26] Washington believed that the bill, which apportioned congressional representatives among the States, unconstitutionally

21. The headings in this Part are borrowed from the chapters of Amar's book from which I adopt his techniques, in order to credit his work. *See* AMAR, *supra* note 19, at 307.

22. *Id.* at 309 ("Over the ensuing centuries, the constitutional understandings that crystallized during the Washington administration have enjoyed special authority on a wide range of issues, *especially those concerning presidential power* and presidential etiquette.") (emphasis added).

23. *See* U.S. CONST. amend. XXII, § 1.

24. *See, e.g.*, Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 574 (1999) ("There seems to be something of a consensus among scholars that, starting with George Washington's refusal to run for a third term in 1796, a presidential two-term tradition was founded and continued uncontested until Roosevelt's reelection to a third term in 1940.").

25. *See Vetoes: Summary of Bills Vetoed, 1789–Present*, U.S. SENATE, http://www.senate.gov/reference/Legislation/Vetoes/vetoCounts.htm [https://perma.cc/NK9M-RLRN] (last visited Feb. 1, 2018).

26. *See* George Washington, Veto Message (Apr. 5, 1792), *in* 1 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 116, 116 (James D. Richardson ed., 1897).

overrepresented the smaller States.[27] While this veto may not necessarily imply that Washington would have supported executive review in its most contentious forms, it does provide convincing evidence that he believed that the President should be able to evaluate the constitutionality of statutes, independent of the judiciary. Thus, Washington implicitly believed that the President should be able to wield some form of executive review.[28] A great many presidents have followed in his footsteps by engaging in executive review in one form or another.

In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson described such practices as providing a legitimating "gloss" on the Constitution:

> The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II. [29]

The fact that Washington and many presidents after him implicitly endorsed the power of executive review thus lends strong support to the proposition that the power to engage in executive review is a valid constitutional power of the President. This does not, however, necessarily provide guidance on the question of when the power of executive review can be too far-reaching, if ever, to in turn become illegitimate. Such limits must be derived from elsewhere, both historically and theoretically.

27. *Id.*

28. As discussed below in Part III.B.1.ii., this action falls under what I term as Tier 1 Executive Review.

29. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (Jackson, J., concurring).

2. "America's Symbolic Constitution"[30]

Turning back to the initial question of the legitimacy of executive review, this Part looks to another one of Amar's techniques for further support. Amar argues that there is a core of canonical symbols that "set forth background principles that powerfully inform American constitutional interpretation."[31] This canon includes, at least, "the Declaration of Independence, Publius's *The Federalist*, the Northwest Ordinance, Lincoln's Gettysburg Address, the Warren Court's opinion in *Brown v. Board*, and Dr. King's 'I Have a Dream' speech."[32] Several of these symbols touch on or relate to the validity of executive review in varying degrees.[33] However, *The Federalist* offers the most germane perspective, and provides a compelling argument for the legitimacy of executive review.

While *The Federalist* does not explicitly posit that the executive branch as framed in Philadelphia would have the power of executive review, Publius surely warns against the judiciary holding all of that power independently: "[A] mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[34] The branches must have some ability to guard

30. AMAR, *supra* note 19, at 243.

31. *Id.* at 247.

32. *Id.*

33. For a discussion of civil disobedience as an analogue for executive review, see *infra* Part II.B.3. The Declaration of Independence might be considered to be a form of civilian review itself. Moreover, it certainly is intimately tied with the Boston Tea Party, a bona fide example of civil disobedience. In the same manner, Dr. King's "I Have a Dream" speech is closely related to his act of civil disobedience and civilian review. Finally, the Gettysburg Address is in large part a symbol of the Civil War and what Lincoln and the North sought to defend. Near the outset of that war Lincoln suspended the writ of habeas corpus. When Chief Justice Taney issued an order to produce Merryman, a prisoner the North had taken, Lincoln refused. *See Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861). This was possibly the most extreme instance of executive review in American history. *See also infra* Part III.B.3.ii. However, these examples are merely supplemental to the discussion of *The Federalist*.

34. THE FEDERALIST NO. 48, at 110 (James Madison) (Michael A. Genovese ed., 2009). For evidence that Publius supported the concept of judicial review, see *supra* note 10. There is one line in *The Federalist* which can be read to support the proposition that only the judiciary may engage in review: "The interpretation of the laws is the proper and peculiar province of the courts." THE FEDERALIST NO. 78, *supra* note 10, at 237 (Alexander Hamilton). On the whole, though, Publius seems to support executive review, at least in some instances and forms.

against the others gathering too much power for themselves. This is at once both an argument which supports executive review, and one that would necessarily limit it at a certain point.[35]

Moreover, it seems that Publius would have taken issue with the Supreme Court's dicta in cases like *Cooper v. Aaron*, which claim that the Court's rulings are law by which the Executive and the Congress are bound.[36] On that issue, Publius wrote that "[t]he several departments, being perfectly co-ordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."[37] Therefore, the Executive is not necessarily lacking in the power of executive review simply because the judiciary sometimes claims it to be.

Finally, Publius assured the people that:

> [T]he judiciary, from the nature of its functions, will always be the least dangerous [branch] to the political rights of the Constitution. . . . It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[38]

As Paulsen notes, Hamilton here says that the Court has "*merely* judgment."[39] This phrasing is important for two reasons. First, it emphasizes the fact that the judiciary relies on the Executive for the enforcement and efficacy of its judgments—a point which will become crucial in Part IV of this Note, below. Second, the fact that Publius recognizes that the judiciary holds the power of judgment does not necessarily imply that the executive branch does not also hold that power, especially when addressed within the context of the first point. Thus, this statement should not be read to imply that Publius believed that executive review was invalid.

In addition to Hamilton and Madison, it is worth briefly noting that James Wilson, another eminent framer and constitutional thinker who went on to serve as one of the original six Supreme

35. *See infra* Part IV.A.

36. Cooper v. Aaron, 358 U.S. 1, 18 (1958); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 864–69 (1992); United States v. Nixon, 418 U.S. 683, 704 (1974); Powell v. McCormack, 395 U.S. 486, 549 (1969); Baker v. Carr, 369 U.S. 186, 210–11 (1962).

37. THE FEDERALIST NO. 49, at 112 (Alexander Hamilton or James Madison) (Michael A. Genovese ed., 2009).

38. THE FEDERALIST NO. 78, *supra* note 10, at 236 (Alexander Hamilton).

39. Paulsen, *supra* note 3, at 221.

Court justices, also seemed to support the concept of executive review. On this topic, during the ratification debates in Pennsylvania, Wilson said that:

> [I]t is possible that the legislature . . . may transgress the bounds assigned to it, and . . . when [an act] comes to be discussed before the judges, when they consider its principles, and find it to be incompatible with the superior powers of the constitution, it is their duty to pronounce it void . . . . In the same manner the President of the United States could shield himself and refuse to carry into effect an act that violates the constitution.[40]

This lends strong support to the proposition that the Constitution, in the eyes of the framers, was certainly not inimical to the concept of executive review, and may very well have implicitly endorsed it so as to balance the powers—and power—of the separate branches.[41]

3. "America's Lived Constitution"[42]

As an additional technique for interpreting the Constitution, Amar claims that "we must take account of . . . how ordinary Americans have lived their lives in ordinary ways and thereby embodied fundamental rights."[43] He marshals the Ninth Amendment[44] in combination with established practices of the American people to show how various rights have come to be seen as fundamental over time, notwithstanding their lack of explicit inclusion in the text of the Constitution.[45] Examples include the right to engage in intimate relations in one's home and the right of

40. PENNSYLVANIA AND THE FEDERAL CONSTITUTION OF 1787–1788, at 304–05 (John Bach McMaster & Frederick D. Stone eds., 1888).

41. *See also* Paulsen, *supra* note 3, at 241 (quoting 1 THE WORKS OF JAMES WILSON 168 (Robert Green McCloskey ed., 1967)) ("[W]hoever would be obliged to obey a constitutional law, is justified in refusing to obey an unconstitutional act of the legislature. . . . [W]hen a question, even of this delicate nature, occurs, *every one who is called to act, has a right to judge.*"). This statement likely does not hold as much sway as the arguments in *The Federalist*, or Wilson's earlier statement in Pennsylvania, given that it comes from a lecture given after ratification of the Constitution. Nevertheless, it provides additional evidence of the Founders' view on the issue.

42. AMAR, *supra* note 19, at 95.

43. *Id.* at 97.

44. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

45. AMAR, *supra* note 19, at 97–138.

a criminal defendant to present evidence and testify in his own defense.[46]

While this technique can be used to lend some support to the concept of executive review, there are at least two reasons why it will not map on perfectly. The first is that although the President may retain his status as a part of the people in a private sense, executive review is clearly a governmental power and thus lies outside the ambit of the Ninth Amendment. Therefore, I will look to the idea of civil disobedience as a sort of civilian analogue to executive review. Secondly, civil disobedience is not so commonplace as to be completely ordinary, but it remains a core part of the American identity to be used when necessary, going at least all the way back to the Boston Tea Party.[47]

Perhaps one of the best-known instances of American civil disobedience in more recent times is that of Dr. Martin Luther King, Jr. and his refusal to obey the Birmingham parade ordinance. Dr. King violated a temporary injunction that an Alabama court granted to preclude members of the Southern Christian Leadership Conference from participating in peaceful protests in downtown Birmingham during the Easter shopping season on the grounds that it violated a local parade ordinance.[48] In addition to the fact that the order was clearly a mere pretense for racist local government employees to avoid the publicity of the protest, Dr. King believed the order was unconstitutional on the grounds that it was "vague and overbroad, and restrained free speech."[49] Therefore, he violated the injunction and was subsequently arrested for doing so.

While in jail he wrote a letter responding to white clergymen that opposed his actions. Dr. King wrote that:

> One who breaks an unjust law must do it openly, lovingly . . . and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the

46. *Id.*

47. Other prominent examples include Henry David Thoreau's imprisonment for refusing to pay a poll tax which he believed supported the Mexican-American war and the expansion of slavery, Harriet Tubman leading the underground railroad, and the many women who were arrested for disobedient action during the Women's Suffrage Movement.

48. *See* Walker v. City of Birmingham, 388 U.S. 307, 308–13 (1967).

49. *See id.* at 311.

> community over its injustice, is in reality expressing the very highest respect for law.[50]

In addition to garnering attention towards the injustice at hand, Dr. King's civil disobedience brought the potentially unconstitutional injunction before the courts. Dr. King ultimately lost the Supreme Court case challenging his imprisonment on the grounds that "no man can be judge in his own case."[51] However, there were several powerful dissents to Justice Stewart's majority opinion,[52] and Stewart probably changed few minds regarding the validity of Dr. King's actions.

Similarly, Amar notes that "a president's principled refusal to enforce a law that he in good faith and after careful consideration deemed unconstitutional could often be the vehicle for bringing an issue before the courts."[53] At this point we can draw a useful analogy from what we might call the power of civilian review, to that of executive review, in showing that the judiciary is not properly the only interpreter of our laws as to their constitutionality, at least in the first instance.

According to Amar, it is sometimes better to have the legislature bear the burden of bringing suit rather than a private party, which could be accomplished in many cases by executive nonenforcement.[54] Moreover, there does not seem to be any penalty involved when the Executive is the one that refuses to obey/enforce the law, at least when it does so merely in the first instance. Therefore, the use of executive review in some cases can

50. Martin Luther King, Jr., Letter From Birmingham City Jail (Apr. 16, 1963), *in* NEW LEADER, June 24, 1963, at 3, 7.

51. *Walker*, 388 U.S. at 320.

52. *E.g.*, *id.* at 338 (Brennan, J., dissenting) ("Under cover of exhortation that the Negro exercise 'respect for judicial process,' the Court empties the Supremacy Clause of its primacy by elevating a state rule of judicial administration above the right of free expression guaranteed by the Federal Constitution. And the Court does so by letting loose a devastatingly destructive weapon for suppression of cherished freedoms heretofore believed indispensable to maintenance of our free society. I cannot believe that this distortion in the hierarchy of values upon which our society has been and must be ordered can have any significance beyond its function as a vehicle to affirm these contempt convictions.").

53. AMAR, *supra* note 2, at 179. *But see* Pepper, *supra* note 2, at 17–20.

54. AMAR, *supra* note 2, at 179. However, Amar notes that "[i]n other situations . . . a president's refusal to enforce an unconstitutional statute might not be judicially reviewable," e.g., Jefferson's decision not to prosecute under the Sedition Act. *Id.* In other cases, such as issues that involve political questions, the Court might not have the ability to weigh in at all, regardless of the President's choice of enforcement. Executive review in such cases thus might serve as a useful substitute for judicial review, where necessary.

actually shift the burden to the party that is both responsible for the law and most able to shoulder the costs of litigation—Congress.[55]

III. TAXONOMY OF EXECUTIVE REVIEW

Turning now from the issue as to the validity of executive review, this Part provides a comprehensive taxonomy of the different forms of executive review and the types of Executive action it undergirds. I contend that there are ten essential ways in which it is possible for a President to engage in executive review:

1. Pardoning;
2. Vetoing legislation;
3. Proposing legislation that is out of sync with Court precedent;
4. Implementing a statute differently than Congress may have intended;
5. Declining to defend a law in court;
6. Challenging the constitutionality of a law in court;
7. Refusing to enforce a law;
8. Refusing to apply a holding in similar cases;
9. Refusing to heed the judgment of the Court as to a law's constitutionality; and
10. Refusing to comply with a judicial decree.[56]

Additionally, a President may engage in several of these actions simultaneously, for example, by refusing to defend a law while also refusing to enforce it.[57] This Part attempts to provide a framework for evaluating the relative propriety of these types of actions. To do this, it draws upon the tripartite framework established by Justice

55. *See infra* note 101 and accompanying text.

56. These are intentionally arranged in increasing order of concern. Judge Easterbrook addresses an additional type of action that he considers to be within the scope of executive review: taking additional steps which are not explicitly authorized by Congress in implementing a statute as the Constitution may require. Easterbrook, *supra* note 2, at 908–09. This power seems only incidentally related to executive review as I have defined it, but may in any event be folded into the framework outlined below. *See infra* note 89.

57. For a discussion of the appropriateness of this approach, see Pepper, *supra* note 2 (arguing that if a President determines it is appropriate to not defend a law, he must also not enforce it).

Jackson in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[58]

A. The *Youngstown* Categories

On April 8, 1952, in the face of an impending steel union strike, President Harry S. Truman issued an executive order seizing the steel mills in order to avoid a work stoppage and continue the supply of vital wartime materials in Korea.[59] Such action did not seem to be expressly authorized by Congress, but Truman believed, or at least the government argued, that he could find such a power embodied in certain clauses of the Constitution,[60] especially in the time of an emergency such as war. However, there was an alternative option available to President Truman pursuant to the Labor Management Relations Act of 1947.[61] This Congress-sanctioned option would have allowed him to postpone the strike for eighty days, among other measures. Furthermore, in the process of enacting that statute, Congress apparently considered and rejected the method of seizure in resolving labor disputes.[62] The Court ultimately found that Truman's executive order was invalid and, in the face of a conflicting statute, would have required the express permission of Congress to accomplish such a seizure.[63]

The case addressed head-on the powers of the President vis-à-vis the Congress. In his concurrence, Justice Jackson laid out a compelling framework for analyzing such disputes. In determining whether a President has the authority to take a specific action, Jackson said that courts should apply varying levels of scrutiny depending upon where the action falls within the following categories:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .

58. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

59. *See* Exec. Order No. 10,340, 17 Fed. Reg. 3,139 (Apr. 8, 1952).

60. *Youngstown*, 343 U.S. at 582 (majority opinion).

61. *See* Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. § 141–197 (2012).

62. *See Youngstown*, 343 U.S. at 586 (citing 93 CONG. REC. 3637–45, 3835–36 (1947)).

63. *Id.* at 582–89.

> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . . [A] claim to a power at once so conclusive and preclusive must be scrutinized with caution, for *what is at stake is the equilibrium established by our constitutional system.*[64]

Justice Jackson found that Truman's action fell within the third category, where the court could "sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress."[65] Under this heightened level of scrutiny, Jackson subsequently found the executive order to be invalid.[66]

B. Tiers of Executive Review

I propose that Justice Jackson's *Youngstown* framework can be tailored to serve as a guide for evaluating the President's authority vis-à-vis the Court's within the context of executive review. However, it is important initially to note a few caveats to this general framework. First, this structure primarily addresses the Supreme Court's authority, rather than the judiciary as a whole, given that lower courts may have varying authority to bind the Executive or preclude it from taking certain actions. For example, the fact that one Circuit Court of Appeals has held that the actions of a government agency are unlawful or unconstitutional does not mean that the agency must refrain from acting in such a way within the jurisdiction of other circuits that have not yet ruled on the issue. An agency may do so because the holdings of one circuit are

64. *Id.* at 635–38 (Jackson, J., concurring) (emphasis added).
65. *Id.* at 640.
66. *Id.* at 638–55.

not binding on the others.[67] Moreover, the Supreme Court is the closest analogue to the unitary voices of Congress and the Executive as the judiciary holds, so it is a more apt comparison.

Second, the modified executive review categories will not perfectly transpose the Court into the place of Congress. The Court's powers are different both in number and in kind to that of Congress. Congress has enumerated powers, as well as the power to "make all Laws which shall be necessary and proper for carrying [its enumerated powers] into Execution."[68] The Court on the other hand simply wields "[t]he judicial Power of the United States."[69] Therefore, for purposes of this analysis, this Note assumes that included within this "judicial Power," is the power of judicial review.[70]

Furthermore, while the *Youngstown* categories addressed explicit enumerated powers, Justice Jackson afforded the powers reasonable interpretations beyond their strict textualist reading.[71] Therefore, this Note also assumes that, at least to some extent, the President wields the power of executive review, even though it is not explicitly enumerated in any single clause of the Constitution.[72] With those caveats in mind, I propose the following categories, to which I will refer as the Tiers of Executive Review:

> Tier 1. When the President acts pursuant to an express or implied authorization of the Court, his authority is at its maximum, for it includes all that he possesses in his own right plus all that the Court has otherwise recognized.

67. *See* Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 113–14 (2000) (citing United States v. Mendoza, 464 U.S. 154 (1984) (refusing to apply the doctrine of non-mutual offensive collateral estoppel to the government)).

68. U.S. CONST. art. I, § 8, cl. 18.

69. U.S. CONST. art. III, § 1.

70. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (explicitly affirming the power of judicial review).

71. *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring) ("I did not suppose, and I am not persuaded, that history leaves it open to question, at least in the courts, that the executive branch, like the Federal Government as a whole, possesses only delegated powers. The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand. However, because the President does not enjoy unmentioned powers does not mean that the mentioned ones should be narrowed by a niggardly construction. Some clauses could be made almost unworkable, as well as immutable, by refusal to indulge some latitude of interpretation for changing times. I have heretofore, and do now, give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism.").

72. *See supra* Part II.

> Tier 2. When the President acts in absence of either a recognition or denial of authority by the Court, he can only rely upon his own independent powers, but there is a zone of twilight in which he and the Court may have concurrent authority, or in which its distribution is uncertain.[73]
>
> Tier 3. When the President takes measures incompatible with the expressed or implied will of the Court, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of the Court over the matter.[74]

As a President moves from Tier 1 to Tier 3, his actions should be examined by the Court, the Congress, and the people with increasing scrutiny, as his authority to engage in executive review becomes more suspect. The following Parts sort the various forms of executive review into these three Tiers of Executive Review and, where possible, provide historical examples of the respective actions.

1. Tier 1 Authority

    1. Pardoning
    2. Vetoing legislation
    3. Proposing legislation that is out of sync with Court precedent

I place the first three types of presidential actions together in Tier 1 because the powers of the President to pardon, veto, and propose legislation are explicitly enumerated in the Constitution.[75]

73. Given that Courts cannot pass judgment on matters that are not properly before them, or issue advisory opinions, there is less of a parallel here to the language regarding "congressional inertia, indifference or quiescence," unless of course the matter has come before the Court and it chose not to hear the case by denying certiorari. *See* Letter from the Supreme Court Justices to President George Washington, NAT'L ARCHIVES (Aug. 8, 1793), https://founders.archives.gov/documents/Washington/05-13-02-0263 [https://perma.cc/K56M-XGDY]. There may also be less of a parallel to the language on "imperatives of events and contemporary imponderables," though there will be other types of pragmatic considerations at play. *See infra* Part III.B.2.

74. I note that in an article discussing presidential non-enforcement, Peter Strauss also builds upon the *Youngstown* categories to create a model of his own. Strauss, *supra* note 67, at 118–19. I do not draw upon this model because the focus of Strauss' framework remains between the President and Congress, not between the President and the Court. Moreover, it analyzes only one type of executive review—non-enforcement—so it does not provide a taxonomy of executive review as a whole. Instead, it deals with the validity and propriety of non-enforcement on its own.

75. *See* U.S. CONST. art. II, § 2, cl. 1; *id.* art. I, § 7, cl. 2; *id.* art. II, § 3.

Furthermore, the Court has impliedly authorized the President to do so by not questioning that authority.[76] There is very little question that the President can wield these powers and there are no explicit qualifications as to his motivations for using them. This lack of qualifications may be why they are among those actions least questioned by commentators that oppose the power of executive review. Moreover, the Court does not have any sort of conflicting powers or meaningful judicial review over such actions. Therefore, these types of actions are deserving of the lowest level of scrutiny.

i. Pardoning

The paradigmatic example of a president exercising the pardon power on constitutional grounds is that of President Thomas Jefferson pardoning everyone convicted under the 1798 Sedition Act.[77] Presidential pardoning is probably the least controversial presidential action within the purview of executive review. While the pardon power itself does not necessarily entail the power of executive review, it does grant the President the power to excuse a person that the judiciary has determined to have violated a law that was duly enacted by the legislature.[78] If the President can do so indiscriminately where the law itself is constitutional, it follows *a fortiori* that there is no cogent reason that she cannot when she believes in good faith that the law is unconstitutional.

ii. Vetoing Legislation

Given the fact that there have been 2,574 total presidential vetoes in American history up to the date of this writing,[79] it is beyond the scope of this Note to evaluate each instance in which a veto was motivated, in whole or in part, by the President's view that the bill

76. This is to be distinguished from the case of Tier 2 where the Court has in fact questioned the President's authority as a matter of principle, but has not yet addressed the specific object of the executive review action at issue.

77. *See* Easterbrook, *supra* note 2, at 909 (quoting 8 THE WRITINGS OF THOMAS JEFFERSON 310-11 (P. Ford ed., 1897) (letter to Abigail Adams dated Sept. 11, 1804)) ("[N]othing in the Constitution has given [the judiciary] a right to decide for the Executive, more than to the executive to decide for them. . . . [T]he executive, believing the law unconstitutional, was bound to remit the execution of it; because that power had been confided to him by the Constitution."). Jefferson also refused to enforce the act by not prosecuting anyone for violating it—another form of presidential action relying upon executive review. Paulsen, *supra* note 4, at 255; *see also infra* Part III.B.2.iii.

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

79. *See Vetoes: Summary of Bills Vetoed, 1789–Present*, *supra* note 25.

was unconstitutional. However, as discussed previously, Washington issued the very first presidential veto on constitutional grounds.[80] President Andrew Jackson provided another notable example from the early years of the office when he vetoed the bill to renew the charter of the Second National Bank. Jackson vetoed the bill notwithstanding the fact that the Court had already determined, at least for itself, that the national bank was constitutional.[81] Within his veto message Jackson declared it his opinion that:

> The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.[82]

While many would question this principle in its application to other forms of executive review, like refusing to enforce a statute held to be constitutional, most would probably hold that it is a valid reason to veto a bill. Even those that disagree with the statement entirely in its application to a veto probably would not seriously contest the veto itself, given that the President has the authority to do so for seemingly any reason she likes. Therefore, vetoes are deserving of Tier 1 low-level scrutiny.

In cases where Congress overrides the President's veto, the President is not necessarily precluded from continuing to engage in executive review in other forms, for example, by refusing to defend that statute if challenged in court, or refusing to enforce it altogether.[83] However, such executive acts would fall under other

80. *See* Washington, *supra* note 26.

81. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738 (1824).

82. Andrew Jackson, Veto Message (July 10, 1832), *in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 26, at 1139, 1145.

83. Attorney General Benjamin Civiletti took the opposite position in an opinion of the Office of Legal Counsel in 1980 and claimed that the President would have to enforce legislation that he was unwilling to veto. *See* The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A OP. O.L.C. 55, 58 (1980) (citing Myers v. United States, 272 U.S. 52 (1926); Nat'l League of Cities v. Usery, 426 U.S. 833, 841

Tiers of Executive Review, discussed below in Parts III.B.2 and III.B.3.

iii. Proposing Legislation That Is Out of Sync with Court Precedent

President Franklin Delano Roosevelt provides an example of the final Tier 1 form of executive review—proposing legislation that is out of sync with Court precedent. Roosevelt disagreed with the premise behind the holding in *Lochner v. New York*, and proposed legislation to Congress that ran contrary to its findings.[84] Assuming that this was entirely intentional,[85] this, and similar presidential actions, implicate executive review in two ways. First, the President determines that a Court decision holding that a statute is unconstitutional is incorrect. Second, on some level the President must engage in executive review to determine that the law he is proposing is in fact contrary to that holding. Judge Easterbrook also recognizes this type of presidential action as a form of executive review, and groups it with presidential pardons and vetoes.[86] I do the same because the President has an enumerated power to recommend that Congress consider "such Measures as he shall judge necessary and expedient."[87]

To declare that the President cannot propose such legislation would be a rather contradictory view. It would hold that the President is constrained in his ability to propose new legislation that he determines to be contrary to established judicial precedent (a determination he necessarily made by engaging in executive review), because he does not hold the power of executive review at all. Or rather, that the President has the power but cannot use it.

n.12 (1976)). Nonetheless, Civiletti believed that the President was not required to enforce statutes that were "transparently inconsistent" with the Constitution. *Id.* It is difficult to reconcile the two positions, and in practice it might be impossible to draw the line between transparent inconsistency and non-transparent inconsistency.

84. *See* Easterbrook, *supra* note 2, at 908.

85. *See id.* at 908 n.13 (quoting Franklin D. Roosevelt, Proposed Speech on the Gold Clause Cases (Feb. 1935), *in* F.D.R.—HIS PERSONAL LETTERS 1928–1945, at 459–60 (Eleanor Roosevelt ed., 1950)) ("To stand idly by and to permit the decision of the Supreme Court to be carried through to its logical, inescapable conclusion would . . . imperil the economic and political security of this nation . . . .").

86. Easterbrook, *supra* note 2, at 908–09. Judge Easterbrook addresses them together "because they do not subvert the take care clause," and therefore "are not problematic." *Id.* at 908.

87. U.S. CONST. art. II, § 3.

If the President does have the power, then the logical remedy for an inappropriate application lies not in holding that he cannot propose the legislation, but in bringing the proposed legislation (assuming it eventually takes the form of enacted legislation) before the Court for an ultimate determination as to its constitutionality. In that case, any further contrary action by the President with respect to that legislation would be scrutinized under Tier 3.[88] Therefore, this type of executive review should be subject to the least demanding Tier 1 scrutiny.

2. Tier 2 Authority

4. Implementing a statute differently than Congress may have intended
5. Declining to defend a law in court
6. Challenging the constitutionality of a law in court
7. Refusing to enforce a law
8. Refusing to apply a holding in similar cases

Unlike the instances of executive review in Tier 1, above, in Tier 2 the Court will have some ability to scrutinize the law and the presidential action and pass its own judgment. Therefore, there is a "zone of twilight" where the distribution of power between the President and the Court is concurrent. Tier 2 essentially deals with executive review where the Court can also engage in judicial review, but has not yet done so with respect to the law or provision directly at issue, or at least not yet done so and come to a contrary conclusion.

i. Implementing a Statute Differently than Congress May Have Intended

If we assume that the President must engage in some form of executive review in order to implement any statute, i.e. that she must interpret a statute in order to apply it, it is readily possible that she may interpret it in a way that is not entirely germane to Congress' intentions. [89] This assumption need not entail that it

88. *See infra* Part III.B.3.

89. This type of action may also include what Judge Easterbrook refers to as "additions." *See* Easterbrook, *supra* note 2, at 908 ("If a statute says 'do at least X,' the President may decide to do more because he believes the Constitution requires more. This is a common

would be acceptable under such a guise to implement the antithesis of the statute and then claim that it was a reasonable interpretation—there are obviously bounds. But such action should be entitled to a good deal of deference so long as the interpretation is in fact a good-faith reading.

In *Chevron, U.S.A., Inc. v. NRDC, Inc.*, the Court espoused this very principle.[90] The Court held that if Congress' intent is unambiguous, then the Executive must implement the statute in that manner. When there is some level of uncertainty, however, the Executive is entitled to deference so long as the interpretation is reasonable.[91] The facts underlying *Chevron* itself offer a fitting example of this type of executive review. In implementing the Clean Air Act Amendments of 1977, the Environmental Protection Agency ("EPA"), i.e. the Executive, determined that it would permit States to treat pollution-emitting devices that were grouped together as if they were in a bubble, and would thus only be considered one source. The Court found that Congress had not expressed any intent with respect to this issue and that this interpretation was reasonable given that it allowed for economic growth—one of the core goals of the statute.[92]

This kind of approach provides the Executive with the ability to engage in executive review when necessary, and bounds its interpretations by reasonability. It allows the Executive to interpret a statute in the first instance and implies that the Court will be the ultimate arbiter in cases where deference is unwarranted.[93] Ultimately, it offers an ideal balance between the branches and fits perfectly within the framework advanced in this Note.

ii. Declining to Defend a Law in Court

Declining to defend a law before the courts is becoming an increasingly commonplace practice by the Executive.[94] The case of

response to procedural shortcomings."). This would likely be the least controversial form of this type of action, as well as of any within Tier 2.

90. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

91. *Id.* at 842–43.

92. *Id.* at 866.

93. Again, while it is possible that the President might choose to continue to enforce his own interpretation of the statute even after the Court has found it to be invalid, to the extent that the President's interpretation is found to be unconstitutional, this continued enforcement would move the action into Tier 3. *See infra* Part III.B.3.i.

94. *See* Waxman, *supra* note 2, at 1086 (noting its occurrence twelve times in a recent year).

United States v. Windsor provides one of the most prominent recent examples of the executive branch declining to defend a federal statute.[95] President Obama believed that the Defense of Marriage Act, enacted in 1996, was unconstitutional and directed the Department of Justice not to defend the law.[96] The Court ultimately agreed and found that the statute was unconstitutional on the grounds that its definition of marriage denied persons of their Fifth Amendment-protected liberty.[97]

Interestingly, while President Obama decided not to defend the statute, he did not directly challenge its constitutionality by bringing suit or even ceasing to enforce the statute.[98] Even though the Executive declined to defend the statute, meaning that the opposing parties were essentially in agreement with respect to the issue in the case, the Court found that it retained jurisdiction and was able to decide the case on the merits.[99] *United States v. Windsor* thus shows that this form of executive review does not preclude the Court from rendering a final decision, which is important because otherwise this exercise of Tier 2 Executive Review would effectively render the Executive's decision on the issue final, irrespective of the Court. Such an outcome would much more closely resemble Tier 3 Executive Review, discussed below.[100]

Ultimately, this type of executive review seems to represent a deference to the Court, and even somewhat of a deference to

95. United States v. Windsor, 570 U.S. 744 (2013). For another iconic example of a President deciding to decline to defend a statute as constitutional, see INS v. Chadha, 462 U.S. 919 (1983). For an argument that *Marbury v. Madison* was the first time a President declined to defend a statute on constitutional grounds, see The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, *supra* note 83, 60–61.

96. Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), https://www.justice.gov/opa/pr/statement-attorney-general-litigation-involving-defense-marriage-act [https://perma.cc/D8HN-LGPR].

97. *Windsor*, 570 U.S. at 774.

98. During oral argument, Chief Justice John Roberts Jr. chastised the Obama administration for continuing to enforce the statute while declining to defend it. *See* Transcript of Oral Argument at 12, *Windsor*, 570 U.S. 744 (No. 12-307) ("I would have thought your answer would be that the Executive's obligation to execute the law includes the obligation to execute the law consistent with the Constitution. And if he has made a determination that executing the law by enforcing the terms is unconstitutional, I don't see why he doesn't have the courage of his convictions and execute not only the statute, but do it consistent with his view of the Constitution, rather than saying, oh, we'll wait till the Supreme Court tells us we have no choice.").

99. *Windsor*, 570 U.S. at 755–63.

100. *See infra* Part III.B.3.

Congress by stopping short of challenging it openly. Moreover, it might not necessarily be the duty of the Executive to defend Congress' legislation.[101] Nonetheless, it retains the conviction that the President may pass some form of judgment as to the constitutionality of statutes. Declining to defend a statute, without more, does not take full advantage of the practicality of the power of executive review because it simply allows the Court to decide the issue in the usual course. The lack of further actions of executive review may "sen[d] a terrible message,"[102] or protect against "grave dangers"[103] depending upon the situation. However, in either case the propriety of declining to defend the statute before the Court has ruled it to be constitutional, in and of itself, is a relatively benign form of Tier 2 Executive Review and is not deserving of much scrutiny in most cases.

iii. Challenging the Constitutionality of a Law in Court

Openly challenging a statute before the Court is essentially a heightened version of declining to defend a statute. The first time the United States openly challenged a statute was in the case of *Myers v. United States*, where the Department of Justice sided with Postmaster Myers in arguing that the statute at issue was unconstitutional.[104] The statute required that the President receive Senate approval before removing postmasters. The Executive argued that it had the authority to appoint and therefore the authority to remove the postmaster, and so the statute unconstitutionally imposed upon the President's power—the Court ultimately agreed.[105]

While in principle challenging a statute is similar to the decision not to enforce a statute, in practice it may have different consequences.[106] However, from the perspective of the power of the President vis-à-vis the Court, challenging a statute is less

101. *See* Simon P. Hansen, *Whose Defense Is It Anyway? Redefining the Role of the Legislative Branch in the Defense of Federal Statutes*, Comment, 62 EMORY L.J. 1159, 1161 (2013) (arguing that "the duty to defend federal statutes in litigation should rest predominantly with the Legislative Branch").

102. *See* Pryor, Jr., *supra* note 2, at 293; *see also supra* note 16 and accompanying text.

103. *See supra* note 1 and accompanying text.

104. "'[T]he Government, through the Department of Justice, questions the constitutionality of its own act.'" Waxman, *supra* note 3, at 1085 (citation omitted).

105. Myers v. United States, 272 U.S. 52, 106 (1926).

106. *Cf.* Pepper, *supra* note 2, at 20–34 (discussing the differing impacts of the president's refusal to defend a law and the president's refusal to enforce a law).

concerning than nonenforcement. Without additional types of executive review action post hoc, this type of presidential action merely leaves review to the Executive in the first instance and implies that the Executive will abide by the Court's decision.[107] Otherwise, the Executive would have little incentive to expend resources on bringing litigation.[108]

iv. Refusing to Enforce a Law[109]

If a President believes that a law is unconstitutional, but it has not yet come before the Court on such grounds, he will sometimes choose not to enforce the law at all, or at least not enforce the provisions that he finds to be at odds with the Constitution. The actions of President George W. Bush provide an apt example of this scenario. Historically, the official policy of the United States was that it would not recognize any country as having sovereignty over Jerusalem.[110] In 2002, Congress passed the Foreign Relations Authorization Act, which required the Secretary of State to list the place of birth on the passport of a United States Citizen born in Jerusalem as Israel, upon request.[111]

President Bush signed the bill but claimed that if that section of the act were to be interpreted as mandatory it would be unconstitutional, so he declared that he would read it as advisory

107. In *Myers v. United States*, not only did President Woodrow Wilson challenge the statute in court, he chose not to enforce it in the first place. *Myers*, 272 U.S. at 106–08. This does not necessarily imply, though, that he would have continued to do so in the wake of an adverse ruling.

108. One potential, though perhaps tenuous, reason to do so might be that the Executive wishes to avoid a clear and public disagreement among the branches and he believes that the Court will also find the law to be unconstitutional. In that case, the President might view expending the resources on litigation as a sort of wager that the Court will agree, and such a public disagreement might be avoided.

109. Included within this type of action, but likely at the least controversial end of its spectrum, is the case where the President refuses to enforce a law that resembles one already held to be unconstitutional. For example, the Executive's non-enforcement of statutes with gender-based rules following such cases as Califano v. Westcott, 443 U.S. 76 (1979), and Califano v. Goldfarb, 430 U.S. 199 (1977).

110. *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2081 (2015). However, President Trump recently officially recognized Jerusalem as the capital of Israel. *See* Julian Borger & Peter Beaumont, *Defiant Donald Trump Confirms US Will Recognise Jerusalem as Capital of Israel*, GUARDIAN (Dec. 7, 2017, 7:20 AM), https://www.theguardian.com/us-news/2017/dec/06/donald-trump-us-jerusalem-israel-capital [https://perma.cc/J73T-QU6S].

111. *See* Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002).

and therefore not enforce it.[112] In *Zivotofsky v. Kerry*, the Court examined the issue and found that the President had the exclusive power to grant formal recognition to a foreign sovereign, and that Congress could not command the Executive to issue a formal statement that contradicts its earlier decision on the matter. Therefore, the Court found the provision to be unconstitutional.[113]

Refusing to enforce a law altogether, or at least some salient provision thereof, can begin to raise questions of validity. However, it is merely the President engaging in executive review in the first instance. Therefore, again assuming that the President later acquiesces to the Court's judgment should it be to the contrary, this form of executive review may serve as an important and expeditious check on congressional legislative power. Such presidential action should be scrutinized, both by the Court and the public, with more caution than simple vetoes, pardons and legislative proposals, but ultimately may stand as valid in many cases, as in the case of *Zivotofsky*.

v. Refusing to Apply a Holding in Similar Cases[114]

At the most dangerous side of the Tier 2 spectrum lies the refusal of the Executive to apply a previous Court holding in similar cases. There is a thin line between this type of action and ignoring the holding of the Court with respect to the particular matter directly before it—the hallmark of Tier 3 actions. However, because there is always some room for interpretation as to the similarity of future cases, and *stare decisis* is not an inexorable mandate, it does not quite rise to that level of concern.

President Abraham Lincoln provides an example of openly refusing to apply a Court holding in arguably similar contexts

112. *See Zivotofsky*, 135 S. Ct. at 2082. Such signing statements are now common practice. *See* Pepper, *supra* note 2, at 14 n.56 (quoting CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS xiii (1998))("[B]etween 1974 and 1996, Presidents Ford, Carter, Reagan, George H.W. Bush, and Clinton 'signed but objected to the constitutionality of approximately 250 laws.'"); *see also* Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 OP. O.L.C. 199, 202–03 (1994) ("In our view, the President has the authority to sign legislation containing desirable elements while refusing to execute a constitutionally defective provision.").

113. *Zivotofsky*, 135 S. Ct. at 2094–96.

114. This is essentially the mirror image of the case where a President chooses to apply a Court holding that a law is unconstitutional to similar statutes. It is therefore fitting that it also lies within Tier 2, but on the more dangerous end of the spectrum for actions of its kind. *See supra* Part III.B.2.iii.

going forward through his stance on the invidious *Dred Scott* opinion. Lincoln claimed that he accepted the ruling as binding on the parties, but believed it bound him no further.[115] Despite the holding that African-Americans could not be citizens, he ordered his Executive to treat them as such whenever possible, allowing African-Americans to obtain "passports, patents, and other recognition available only to citizens."[116]

There is clearly some tension here among basic legal principles, the realities of the Court, and real-world practicality. Technically, a Court decision is only binding upon the parties involved and upon the lower courts in future analogous cases. However, there is almost always room to argue that there is a meaningful difference in such a future case that justifies a departure. Although the principle of *stare decisis* motivates the Court to follow its own precedent in most cases,[117] ultimately the Court is not bound by itself.[118]

In reality, decisions most often serve as guiding precedent, which is desirable from a practical perspective both as a way to reduce information costs and create legal certainty. But does this mandate that the President be bound by the Court's holding in similar cases? In certain circumstances, such as the one addressed by Lincoln, contrary actions may be warranted and necessary, but they should clearly be subject to an exacting level of scrutiny.[119]

115. *See* Easterbrook, *supra* note 2, at 910 (quoting Abraham Lincoln, Sixth Lincoln-Douglas Debate at Quincy (Oct. 13, 1858), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 255 (R. Basler ed., 1953)) ("If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new Territory, in spite of the *Dred Scott* decision, I would vote that it should.").

116. Easterbrook, *supra* note 2, at 926 (citing THE WORKS OF CHARLES SUMNER 497-98 (D. Donald ed., 1880)).

117. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

118. *See, e.g.*, Adkins v. Children's Hosp. of the D.C., 261 U.S. 525 (1923), *overruled in part by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Paulsen argues that the fact that decisions may be overruled by later courts "decisively undermines any claim that judicial precedents are, in fact, *law*." Paulsen, *supra* note 3, at 274. However, such an argument would seem to imply that statutes are not law either, since they can be amended or repealed by later Congresses. For a discussion of the contrasting views of opinions as binding on future parties, including the Executive, versus merely the current parties, see generally Thomas W. Merrill, *Judicial Opinions As Binding Law and As Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993).

119. Any decision to disregard the Court if the law were to come directly before it would move the action into Tier 3.

3. Tier 3 Authority

9. Refusing to heed the judgment of the Court as to a law's constitutionality
10. Refusing to comply with a judicial decree

A President engages in Tier 3 Executive Review when he "takes measures incompatible with the expressed or implied will of the Court."[120] Thus, the President challenges head-on the authority of the Court as to either determining the ultimate constitutionality of a law or, in the most extreme form of executive review, the power to bind the Executive as a party to a case.

i. Refusing to Heed the Judgment of the Court as to a Law's Constitutionality[121]

If we accept that, at least for the case at bar, the Court's ruling is in fact binding law, it becomes extremely problematic for the President to act to the contrary. Of course, presidents must always execute the Constitution as a law first, but in these types of cases there are two clearly conflicting interpretations of what that entails. On the one hand, if we stress the importance of the oath clause, especially in light of its gravity during the time of the ratification, forcing the President to execute a law that he believes to be unconstitutional seems ironic and "immoral."[122] And yet on the other hand, "a President free to disregard the will of the Court and Congress is dangerously tantamount to a king."[123] In situations where the President refuses to enforce a law, passed by Congress and validated under scrutiny by the Court, he necessarily exercises just such a disregard.

120. *Supra* note 74 and accompanying text.

121. I have distinguished this form of executive review from a pure refusal to comply with a judicial decree, discussed below. It appears, though, there is no historical precedent for an action that falls directly in this category, as distinct from the more extreme category. *See* Easterbrook, *supra* note 2, at 926. I believe it is nonetheless possible, as well as logically distinct from an outright refusal to comply with a judicial decree.

122. *See supra* note 15 and accompanying text. For an argument based upon the Take Care Clause, see Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 400 (1987) ("As 'laws' . . . Supreme Court decisions surely fall within the ambit of the faithful-execution clause. The Presidential duty, therefore, becomes utterly clear—to faithfully execute those laws. Do not ignore them and do not seek to have them overturned in subsequent litigation: this seems to be the command of the Constitution.").

123. Pepper, *supra* note 2, at 11.

ii. Refusing to Comply with a Judicial Decree

The most extreme form of executive review is the refusal by the Executive to comply with a direct judicial decree. President Lincoln again supplies an example here—possibly the only one in American presidential history. During the Civil War, Lincoln suspended the writ of habeas corpus in cases of civil resistance along a key supply route. John Merryman, a secessionist supporter, was arrested and denied the right pursuant to Lincoln's order.[124] Chief Justice Taney issued an order to produce Merryman, but the order was refused, again pursuant to Lincoln's demand.[125] In such cases not only does the President disregard the findings of the Court as to the constitutionality of a matter properly before it, he decries the authority of the Court over the Executive when the Executive is itself a party to the case. This is the very pinnacle of the threat of tyranny of a single branch and the demise of our balanced system of government.[126] Thus, Tier 3 Executive Review is inherently suspect and deserving of the most exacting level of scrutiny by the Court, the Congress, and the people.

IV. LIMITING THE POWER OF EXECUTIVE REVIEW

To leave all forms of review exclusively in the hands of the judiciary would be both impractical and unwise. However, to place all power to interpret laws in the hands of the President would clearly be worse. As Paulsen notes, "[w]hoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them."[127] It would therefore effectively collapse all legislative and executive power into the hands of the

124. *See* Paulsen, *supra* note 3, at 278.

125. *See Ex parte* Merryman, 17 F. Cas. 144, 147–48 (C.C.D. Md. 1861).

126. Most commentators agree that executive review should not extend this far. *See, e.g.*, AMAR, *supra* note 19, at 429 ("[I]f the Supreme Court later rules against the president's constitutional objections and orders him to carry out the law as written, any continued presidential refusal to enforce the statute would be virtually unprecedented, and might well merit presidential impeachment and removal."); *see also* Easterbrook, *supra* note 2, at 916–26. *But see* Eisgruber, *supra* note 2, at 359 (arguing that "in very rare instances, the President's special competence with respect to national security issues *may* entitle him to substitute his judgment for the Court's, even to the extent of disobeying a mandate in a case to which he is a party").

127. Paulsen, *supra* note 3, at 220 (quoting Benjamin Hoadley, Bishop of Bangor, Sermon Preached Before the King of England (March 31, 1717)).

President. If the scope of executive review is so unbridled that it empowers the Executive to virtually rewrite the laws while simultaneously ignoring the reasoning and decisions of the Court, then the power would truly hold grave dangers for the country. We should reject this conclusion and heed the warnings of Publius, no less Montesquieu: "The accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[128]

Moreover, in such situations it seems that the Court is left with virtually no power whatsoever. After all, it relies on the Executive for the "efficacy of its judgments."[129] Paulsen argues that presidents are not bound by the Court on any matter because that would imply that the Court has power *over* the Executive—an unacceptable consequence for Paulsen.[130] While phrasing the situation in that light may make it seem undesirable or somehow antithetical to our tripartite system of government, is it not also antithetical to collapse that system into a bipartite system by excluding the judiciary altogether? Even that description would not quite go far enough though, given that the interpreter of the law is in a way the lawgiver.[131] If such is the case, we are left with only one, all-powerful branch.

128. THE FEDERALIST NO. 47, at 101 (James Madison) (Michael A. Genovese ed., 2009).

129. *See* THE FEDERALIST NO. 78, *supra* note 10, at 236 (Alexander Hamilton); *see also supra* note 38 and accompanying text. The refusal of the Executive to implement a judgment of the judiciary is not merely theoretical. For example, after Judge Ann Donnelly of the Eastern District of New York placed a temporary stay on President Trump's travel ban, the Department of Homeland Security issued a statement declaring that it would continue to enforce the travel ban in its entirety. Press Release, U.S. Dep't of Homeland Sec., Department of Homeland Security Response to Recent Litigation (Jan. 29, 2017), https://www.dhs.gov/news/2017/01/29/department-homeland-security-response-recent-litigation [https://perma.cc/X87B-PSDX] ("The Department of Homeland Security will continue to enforce all of President Trump's Executive Orders in a manner that ensures the safety and security of the American people. President Trump's Executive Orders remain in place—prohibited travel will remain prohibited, and the U.S. government retains its right to revoke visas at any time if required for national security or public safety."). There were also reports of border agents continuing to detain persons after the temporary stay was issued. *See* Edward Helmore & Alan Yuhas, *Border Agents Defy Courts on Trump Travel Ban, Congressmen and Lawyers Say*, GUARDIAN (Jan. 30, 2017, 3:57 AM), https://www.theguardian.com/us-news/2017/jan/29/customs-border-protection-agents-trump-muslim-country-travel-ban [https://perma.cc/TTT5-G37C].

130. Paulsen, *supra* note 3, at 228–92. Paulsen does claim that there may be some limited enumerated exceptions where the Executive is bound by juries and possibly judges in the criminal context. *Id.*

131. *See supra* note 127 and accompanying text.

A. Paulsen's Arguments for Unbounded Executive Review

According to Paulsen, we should not be so concerned about such a possibility for a few reasons, all of which I find to be ultimately unsatisfactory given the gravity of the situation.[132] As an initial matter, Paulsen argues, we can expect the President to exercise this discretion in good faith and give due deference to the other branches.[133] That is of course true, simply until it is not. We may hope and expect that this will be the case, but it is an odd reading of the Constitution to say that it establishes a system of limitations on the federal government, at least one of which relies upon the expectation that those who would be limited by it if they so choose would in fact always so choose. Ironically, Paulsen comes to a similar conclusion in arguing that undesirable consequences could flow from allowing the Court to bind the Executive.[134]

Paulson also argues that Congress retains a lot of power(s) in its own right, and can provide checks against such executive overreaching, whether it be through declining appointments, tightening the purse strings, or even impeachment if Congress determines that the presidential action in question constitute a high crime or misdemeanor.[135] I concede that these points are not nugatory, and may even in some cases provide sufficient incentive for the President not to engage in the conduct at all. However, it only addresses half of the potential problem—a point to which I will return momentarily.

Paulsen then uses game theory to argue that no two branches would ever collude and divide up the power of the other.[136] He claims that any time a single branch gains a majority of the power

132. *See infra* Part IV.B.

133. Paulsen, *supra* note 3, at 321. Paulsen argues for what he calls a "'reverse-*Chevron*' deference" whereby there is a presumption that the Court's interpretation is correct. *Id.* at 336.

134. *Id.* at 286 ("[T]he judiciary might, in its wisdom, not actually exercise all of the interpretive supremacy to which it logically could lay claim as a consequence of its authority to bind the other branches by its final judgments. . . . it might, as a matter of beneficence, bestow upon the executive a sphere of interpretive pseudo-autonomy in certain areas . . . . But it would be a mistake to confuse this with any actual limitation on judicial supremacy. . . . Any limitation exists only as a matter of judicial grace. And what the courts giveth the courts can taketh away.").

135. *Id.* at 321–22. Note that Congress also holds such impeachment power over federal judges but has never executed it for what it believed to constitute a misinterpretation of the Constitution. Pryor, Jr., *supra* note 2, at 295.

136. Paulsen, *supra* note 3, at 325.

through collusion, the other two branches will try and strike a better deal by carving up that power. If the Executive gains too much power, Congress and the judiciary will join together to take it back. Since all of the actors are expected to know that this is the case, or learn through repeated iterations of the game, they will not collude to try to gain more power.[137]

That solution may be true under those rules, but the game can be played in other ways. Paulsen only analyzes situations in which the Court has affirmed that a statute is constitutional and the President refuses to enforce it. In such cases the Executive is at odds with Congress and each actor arguably retains some self-interest to try to grab as much power as possible. But what about cases where the Court has determined that a law is unconstitutional, but the President wishes to continue to enforce it? Here, if we assume this sort of self-interest, Congress may actually side with the President, as joining forces with the judiciary would in fact decrease its own power. Moreover, there is no need to join forces to "carve up" the power of the judiciary[138] because the Executive *already has the power*—this is the consequence of allowing the Executive to disregard the Court.

In situations where partisan politics comes into play, and it is essentially Congress and the President against the Court, nothing remains of the Court's power. Congress need not take defensive measures against the President, and it will not give up its position to try to take more power from the President. The question, after all, is not one of the division of power between Congress and the President, but between Congress and the President acting cooperatively, and the Court. In such situations, it seems the only real recourse would be the ballot box.[139]

However, it is possible that the presidential action will quite often not serve as a deciding issue against the President in the next election. Perhaps even more important though, is the fact that the ballot box may have little to no effect on presidents if at the expiration of their term they either do not wish to run for office again or they will have exhausted their allowable time in the office

137. *Id.* at 325–31. Paulsen argues that this conclusion holds true "[a]s long as no one branch has a majority of the interpretive power." *Id.* at 326.

138. *Id.* at 325.

139. The fact that the President may in other cases be more accountable than the judiciary is a point in favor of executive review. However, even this accountability has its limits.

pursuant to the Twenty-Second Amendment.[140] Since the Twenty-Second Amendment became operative in 1951, five of the thirteen total presidents spent the last four years of their presidency (and the last two years in the case of President Truman) knowing that they would be unable to run again at the expiration of their second term.[141] Therefore, the ballot box would have been a completely ineffective tool for curbing the power of executive review during at least twenty-two of the last sixty-six years.[142] The ballot box thus cannot stand on its own as an effective limit against Tier 3 Executive Review—meaning that we are left with no effective limit whatsoever.

Moreover, it is worth noting that even under Paulsen's rules, where the President chooses not to execute a law which the Court has determined to be constitutional, Paulsen's argument only applies if fighting against such action is in Congress' own self-interest. However, this seems to assume either that each session of Congress would always wish to defend the statutes passed by previous sessions, an assumption which is obviously false in practice, or that even if the current Congress did not support the statute as a matter of policy, it would *always* seek to protect its legislative domain as a matter of principle. These are at best rather shaky grounds to constitute meaningful limitations of executive authority.

Finally, it might be argued that the paucity of historical examples of Tier 3 Executive Review may even lend support to Paulsen's relative lack of concern. However, it would be unwise to completely overlook so dangerous a tool simply because it has only been sparingly used in the past. The following Part thus seeks to instantiate the risks of unbounded Tier 3 Executive Review in the field of environmental law, in light of the particular vulnerability to abuse of such executive review in this field.

140. U.S. CONST. amend. XXII, § 1.

141. *See id.*; *Chronological List of Presidents, First Ladies, and Vice Presidents of the United States*, LIBR. CONGRESS, https://www.loc.gov/rr/print/list/057_chron.html [https://perma.cc/3ZDE-7MHC] (last updated March 22, 2017).

142. This view of the ballot box only encompasses the office of the Presidency, and thus may not apply to situations where the President is concerned with potential spillover effects to the party at large. Nevertheless, relying on presidential concern for the party as a structural limit on the power of the President is less than satisfying.

B. Applications of Unbounded Executive Review in Environmental Law

The dangers of the most extreme form of Tier 3 Executive Review—refusing to comply with a judicial decree—are readily apparent and need not be illustrated at length here. However, in order to fully appreciate the depth and breadth of the potential consequences of the President engaging in the less extreme form of Tier 3 Executive Review—refusing to heed the judgment of the Court as to a law's constitutionality—it is necessary to consider the scope of the laws and decisions that are at stake. Additionally, if it can be shown that the less extreme form of Tier 3 Executive Review is too problematic to be valid, then it stands to reason *a fortiori* that the more extreme form of Tier 3 Executive Review is also invalid.

Of course in theory, any and every law is vulnerable and subject to executive review if the President wishes not to enforce it. But it is more realistic to look at laws for which there is an arguably rational and reasonable basis for claiming that they are unconstitutional. At some point, the people will not stand for unilateral decisions by the President to take actions against laws with which she does not agree absent an arguably legal grounding. Eventually the power of ballot box, even acting alone, will be sufficient in some cases to curb the use of executive review.[143]

This is not to say, though, that Tier 3 Executive Review cannot be extremely dangerous from both a theoretical and a practical standpoint. If the law is arguably unconstitutional, the President may be able to use such power without sufficient checks and recourse. The field of environmental law is particularly vulnerable to the abuse of Tier 3 Executive Review because there are a variety of potentially viable foundations for claiming that environmental statutes are unconstitutional—many of which are laid out in the following Part. Additionally, the goals of environmental protection are almost ubiquitously characterized as being inimical to business and commercial interests[144] and/or private property rights.[145]

143. However, it is crucial to remember that the ballot box is in many cases structurally ineffective at curbing presidential overreaching. *See supra* Part IV.A.

144. Not only are environmental concerns often pitted against economic interests, but environmental values are often comparatively understated when analyzed in economic terms. *See* Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002); *see also* Sean M. Kammer & Sarah E. Christopherson, *Reserving a Place for Nature on Spaceship Earth: Rethinking the Role of*

These other interests can provide strong political motivations to restrict or even eliminate certain environmental laws.[146] Therefore, Tier 3 Executive Review has the potential to pose a real-world danger to the integrity of environmental laws. This Part outlines some of the potential constitutional arguments which could be used against a variety of environmental statutes regulating air and water pollution, wetlands protection, and endangered species habitat, in order to elucidate the importance of limiting executive review.

1. Lack of Commerce Clause Authority to Regulate

Congress most often regulates in the environmental arena by relying on its Commerce Clause authority.[147] Such power is often challenged when the object of the regulation is intrastate in nature, like land or certain bodies of water. Given that environmental statutes often regulate things that are intrastate in nature, they are often the subject of constitutional challenges on these grounds. The following Part addresses federal regulations which sometimes suffer from these challenges in the context of air and water pollution, endangered species, and wetlands protection; it then briefly evaluates non-federal intrastate regulations as a possible alternative.

i. Air and Water Pollution

In 1977, Congress passed the Surface Mining Control and Reclamation Act in order to "establish a nationwide program to protect society and the environment from the adverse effects of

Conservation Easements, 43 COLUM. J. ENVTL. L. 1 (2018) (outlining the undervaluing of ecological services in the context of conservation easements).

145. For example, the court in *Gibbs v. Babbitt* described the protection of the red wolf under the ESA as a matter "involv[ing] a rather traditional struggle between property owners on the one hand and environmentalists on the other." Gibbs v. Babbitt, 214 F.3d 483, 505 (4th Cir. 2000).

146. There was even a bill introduced in the House of Representatives in March of 2017, which sought to eliminate EPA entirely. H.R. 861, 115th Cong. (2017); *see also* Arthur Neslen, *Donald Trump 'Taking Steps to Abolish Environmental Protection Agency*,' GUARDIAN (Feb. 1, 2017, 8:13 PM), https://www.theguardian.com/us-news/2017/feb/02/donald-trump-plans-to-abolish-environmental-protection-agency [https://perma.cc/KB5N-H9LQ].

147. *See* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."); *see also* JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 74–75 (4th ed. 2014).

surface coal mining operations."[148] Before the Secretary of the Interior could enforce the act, the Virginia Surface Mining and Reclamation Association, some of its members, the Commonwealth of Virginia, the town of Wise, Virginia, and private landowners brought suit against him in his professional capacity.[149] The plaintiffs alleged that the act was unconstitutional on the grounds that it violated the Commerce Clause because its primary goal was the regulation of private lands that did not cross state lines.[150] The Court outlined an extremely deferential standard for review of such issues under which a rational finding by Congress that the activity affects interstate commerce will settle the matter.[151] The Court found that Congress had made such a rational finding,[152] and went on to state that "we agree with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State."[153]

If the President can validly exercise Tier 3 Executive Review, she may disagree with this proposition, however well-founded within the judiciary, and decline to enforce such laws as the Clean Air Act[154] ("CAA") and Clean Water Act[155] ("CWA"). Such a decision

148. 30 U.S.C. § 1202(a) (2012).

149. Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

150. *Id.* at 275. The plaintiffs also argued that the act violated the Tenth Amendment, the Just Compensation Clause of the Fifth Amendment, and Due Process Clause of the Fifth Amendment. *Id.* at 273–74. The Court rejected the takings issue as not yet ripe, the due process claim as unpersuasive and premature in part, and the Tenth Amendment claim as unfounded. *Id.* at 293, 297–304. For a more detailed discussion of the Tenth Amendment issue, see *infra* Part IV.B.4.

151. *Hodel*, 452 U.S. at 275–78; *see also* Peter F. Habein, Note, *Constitutional Challenges to the Surface Mining Control and Reclamation Act*, 43 MONT. L. REV. 235, 236–40 (1982) (discussing Justice Rehnquist's and Justice Marshall's differing articulations of review of Congress' Commerce Clause determinations).

152. *See* 30 U.S.C. § 1201(c) (2012) ("[M]any surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources.").

153. *Hodel*, 452 U.S. at 282.

154. 42 U.S.C. §§ 7401–7671q (2012).

155. 33 U.S.C. §§ 1251–1388 (2012).

could be devastating for the environment, and would go against the express intent of Congress and approval by the judiciary.[156] Nonetheless, the President could advance a constitutional argument for such a decision, and that is all that such power requires.

Since the Court's decision in *Hodel*, more recent cases have clarified and potentially narrowed Congress' authority pursuant to the Commerce Clause. In *United States v. Lopez*, the Court announced a tripartite framework for analyzing questions of Commerce Clause authority.[157] Under *Lopez*, Congress has the authority to regulate:

> [1] the use of the channels of interstate commerce . . .
>
> [2] the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities . . . [and]
>
> [3] those activities having a substantial relation to interstate commerce . . . *i.e.,* those activities that substantially affect interstate commerce.[158]

This new analysis may cast some doubt as to the Court's earlier holdings with respect to Congress' authority to regulate air and water pollution. It likely does so to an even greater extent though with respect to the other types of environmental protection laws discussed in the following Part.

ii. Land Use Laws

Environmental statutes that regulate the use of nonfederal land[159] may have even less of a firm grounding in the Commerce Clause, both because they affect decisions which have historically

156. While this is of course true for the Congress that passed these acts and the Court that approved of them, this might not always hold true and thus Paulsen's game theory argument might not apply. *See supra* Part IV.A. As a practical matter though, it may be unlikely that any Congress or Court would actually support such a drastic wholesale abandonment of these core environmental protection statutes on such grounds.

157. United States v. Lopez, 514 U.S. 549, 558 (1995).

158. *Id.* at 558–59; *see also* United States v. Morrison, 529 U.S. 598 (2000) (further clarifying the third *Lopez* category).

159. Where the activity takes place on federal lands, Congress may rely upon a different font of constitutional power—the Property Clause. *See* U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States").

been reserved for state and local governments, and because their link to interstate commerce is more attenuated.[160] For example, in some cases a species that would otherwise unquestionably be eligible for listing as endangered pursuant to the Endangered Species Act ("ESA")[161] is located entirely within a single state. In such cases, the decision of the Fish and Wildlife Service, or the National Marine Fisheries Service for marine species,[162] to place the species on the list can attract challenges from groups such as developers that are precluded from taking certain actions that would further endanger the species.

a. Endangered Species Act

In 1995 the National Association of Home Builders of the United States, among others, challenged the listing of the Delhi Sands flower loving fly on the endangered species list because its protection under the ESA affected the construction of a local hospital.[163] The parties alleged that there were fewer than 300 breeding flies remaining, and that their habitat was located entirely within an eight-mile radius near San Bernardino County, California.[164] The plaintiffs challenged the listing of the fly due to a lack of authority pursuant to the Commerce Clause because the species was entirely intrastate.

In a disjointed opinion, the three D.C. Circuit judges each independently applied the framework outlined in *Lopez* and came up with largely varying results. Judge Wald authored the plurality opinion and began by noting that the second *Lopez* category[165] was inapplicable to the case—seemingly the only point on which all

160. SALZMAN & THOMPSON, JR., *supra* note 147, at 75.

161. 16 U.S.C. §§ 1531–1544 (2012).

162. The ESA generally designates implementation authority to the Secretary of the Interior and the Secretary of Commerce. *See* 16 U.S.C. § 1532(15) (2012). That authority has subsequently been delegated to the Fish and Wildlife Service and the National Marine Fisheries Service, respectively. *See* 50 C.F.R. § 402.01(b) (2018).

163. Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997). The construction of the hospital would have violated the "take" provision of the ESA. *See* 16 U.S.C. §§ 1532(19), 1538(a)(1)(B) (2012). In addition to acts which intentionally injure or kill protected species, the Secretary of the Interior has validly construed the term "harm," which is included within the statutory definition of the word "take," to include "significant habitat modification or degradation where it actually kills or injures wildlife." Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 708 (1995).

164. *Nat'l Ass'n of Home Builders*, 130 F.3d at 1060.

165. *See supra* note 158 and accompanying text.

three judges agreed.[166] She went on to find that the action was justified under both the first and third *Lopez* categories.[167]

As to "the use of the channels of interstate commerce,"[168] Judge Wald found that "the prohibition against takings of an endangered species is necessary to enable the government to control the transport of the endangered species in interstate commerce . . . [and] falls under Congress' authority 'to keep the channels of interstate commerce free from immoral and injurious uses.'"[169] Judge Wald then argued that since the construction of the hospital used out-of-state materials, and it would employ workers from outside the state, Congress could use such a regulation to stop the taking of the fly.[170] Neither Judge Henderson nor Judge Sentelle endorsed this reasoning.[171]

Judge Wald also found that the Fish and Wildlife Service validly applied the ESA take provision to the fly because its taking would substantially affect interstate commerce. She supplied two primary justifications for this finding: the prevention of 1) the loss of biodiversity and 2) improper interstate competition.[172] Judge Wald claimed that biodiversity is an important source of medicine and genes, and that in the aggregate biodiversity will affect interstate commerce.[173] Her final argument in support of the provision's validity was that it would help to prevent States from adopting less stringent standards in order to attract development.[174]

Judge Henderson concurred with the result, thereby providing enough support for the provision to stand; however, she disagreed almost entirely with the reasoning supplied by Judge Wald.[175] Although Judge Henderson relied on biodiversity to find that the take would substantially affect interstate commerce, she rejected Judge Wald's argument regarding the anthropocentric valuing of the commercial medical or economic benefit of biodiversity, and instead argued that biodiversity is inherently valuable given the

166. *See Nat'l Ass'n of Home Builders*, 130 F.3d at 1046; *id.* at 1062 (Sentelle, J., dissenting).

167. *See id.* at 1046–57 (plurality opinion); *supra* note 158 and accompanying text.

168. United States v. Lopez, 514 U.S. 549, 558 (1995).

169. *Nat'l Ass'n of Home Builders*, 130 F.3d at 1046 (plurality opinion) (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964)).

170. *Id.* at 1048.

171. *Id.* at 1058 (Henderson, J., concurring); *id.* at 1063 (Sentelle, J., dissenting).

172. *Id.* at 1052 (plurality opinion).

173. *Id.* at 1052–54.

174. *Id.* at 1054–57.

175. *Id.* at 1057 (Henderson, J., concurring).

interconnected nature of ecosystems.[176] This argument may similarly be grounded in biodiversity, but it is otherwise entirely distinct from Judge Wald's interpretation.

In his dissent, Judge Sentelle argued that there was currently no connection whatsoever between the protection of the Delhi Sands flower loving fly and commerce (outside of its negative impacts on local infrastructure), let alone interstate commerce. He further argued that any argument that the fly might have some future economic value was far too speculative, and could be similarly marshalled to allow Congress to regulate virtually anything under the guise of the Commerce Clause.[177] There was therefore no single ground upon which the court relied in holding the take provision of the ESA and its application to the Delhi Sands flower loving fly to be a valid exercise of Congress' Commerce Clause authority, and only two of the judges found it to be valid at all.

The D.C. Circuit later addressed a similar case where the plaintiffs challenged Congress' authority to regulate the take of the arroyo southwestern toad, a species found only in California.[178] The D.C. Circuit reasoned that the intervening Supreme Court opinions of *United States v. Morrison*[179] and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*[180] did not alter the conclusions of its earlier decision in *National Association of Home Builders v. Babbitt*.[181] The court accordingly felt compelled to follow that decision and similarly invalidated the challenge.[182]

Importantly though, Chief Judge Ginsburg wrote a concurrence in which he noted that there is a logical boundary to the rationale relied upon to find that Congress has such authority under the

176. *Id.* at 1059 ("Given the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species (like the Delhi Sands Flower-Loving Fly) will therefore substantially affect land and objects that are involved in interstate commerce."). For an interesting discussion of the tension between anthropocentric methods of valuing nature and the inherent value of nature, as well as recent developments in granting legal rights to natural entities, see generally Gwendolyn J. Gordon, *Environmental Personhood*, 43 COLUM. J. ENVTL. L. 49 (2018).

177. *Nat'l Ass'n of Home Builders*, 130 F.3d at 1060–67 (Sentelle, J., dissenting).

178. *See* Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003).

179. United States v. Morrison, 529 U.S. 598 (2000).

180. Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).

181. *Rancho Viejo*, 323 F.3d at 1070–80.

182. *Id.* at 1080.

Commerce Clause.[183] Ginsburg stated that Congress only has that authority if "the take itself substantially affects interstate commerce."[184] He noted that Congress would not have the authority to prevent individuals, like hikers or landowners, from taking the toad.[185]

Since then several other Circuit Courts of Appeals have also addressed this issue and similarly upheld the protection of intrastate species under the ESA, but on slightly varied grounds.[186] However, a federal district court in Utah recently held that the ESA was unconstitutional as applied to the entirely intrastate Utah prairie dog on non-federal lands.[187] In that case, all of the parties agreed that neither of the first two *Lopez* categories applied, so the court only looked to the third category.[188] The court applied the four-part analysis from *United States v. Morrison*,[189] and held that the ESA's protection of the Utah prairie dog was not authorized under the Commerce Clause. The court differentiated the substantial effect of the *regulation* on interstate commerce from the lack of a substantial effect of the actual *take* of the prairie dog itself on

183. *Id.* (Ginsburg, C.J., concurring).

184. *Id.*

185. *Id.*

186. *See* San Luis & Delta–Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1172–77 (9th Cir. 2011) (upholding the ESA as applied to the delta smelt found only in California under the third *Lopez* category when combined with all other endangered species); Ala.–Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250, 1271–77 (11th Cir. 2007) (upholding the ESA as applied to the Alabama sturgeon found only in Alabama under the third *Lopez* category when combined with all other endangered species); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003) (upholding the ESA as applied to six species of subterranean invertebrates found only in Texas under the third *Lopez* category when combined with all other endangered species); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) (upholding the ESA as applied to a population of red wolf found only in North Carolina under the third *Lopez* category both independently and as part of a comprehensive federal scheme); *see also* Bldg. Indus. Ass'n of Superior Cal. v. Babbitt, 979 F. Supp. 893, 906–08 (D.D.C. 1997) (upholding the ESA as applied to fairy shrimp found only in California, seemingly under the third *Lopez* category). *Cf.* Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv., 827 F.3d 452, 475–78 (5th Cir. 2016) (upholding the ESA as applied to the designation of critical habitat in both Mississippi and Louisiana for the dusky gopher frog, at that time found only in Mississippi, under the third *Lopez* category). *But see GDF Realty Invs, Ltd.*, 326 F.3d at 641–44 (Dennis, J., concurring); *Gibbs*, 214 F.3d at 506–10 (Luttig, J., dissenting).

187. People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 57 F. Supp. 3d 1337 (D. Utah 2014) (finding that neither the Commerce Clause, nor the Necessary and Proper Clause granted Congress such authority), *rev'd and remanded*, 852 F.3d 990 (10th Cir. 2017).

188. *Id.* at 1344.

189. United States v. Morrison, 529 U.S. 598 (2000)

interstate commerce.[190] The court agreed that the take of the species might affect the ecosystem, but ultimately agreed with Judge Sentelle's reasoning in his opinion in the Delhi Sands flower loving fly case that "[t]he Commerce Clause empowers Congress 'to regulate commerce' not 'ecosystems.'"[191] Finally, the court found that there was not a substantial link to any commercial value that would justify the regulation.[192]

That case was recently reversed by the Tenth Circuit, which held that Congress did have the authority to regulate the take of the Utah prairie dog under the third *Lopez* category, finding it to be "an essential part of the ESA's broader regulatory scheme which, in the aggregate, substantially affects interstate commerce."[193] While the reversal by the Tenth Circuit certainly strengthens the case for the general constitutionality of Congress' regulation of purely intrastate species, the issue is not definitively settled. The Supreme Court has yet to address whether Congress has such authority, and it thus remains an open question in the several circuits that have not yet ruled.[194]

This case might provide the President with a reasonable footing to contend that the ESA is unconstitutional when applied to intrastate species on non-federal land.[195] Such a decision would have extreme consequences, given the fact that at the time the Utah district court ruled against application to Utah prairie dogs,

190. *People for the Ethical Treatment of Prop. Owners*, 57 F. Supp. 3d at 1344.

191. *Id.* (quoting Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1065 (D.C. Cir. 1997) (Sentelle, J., dissenting)).

192. *Id.* at 1345. *But see* Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause*, 36 GA. L. REV. 723 (2002) (arguing that all endangered/threatened species should be grouped in quantifying interstate commerce effects).

193. People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 852 F.3d 990, 1002 (10th Cir. 2017).

194. *See supra* note 67 and accompanying text. The First, Second, Third, Sixth, Seventh, and Eighth Circuits have not yet addressed the issue. These jurisdictions equate to over twenty-seven percent of the United States by land mass. *See Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. COURTS, http://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf [https://perma.cc/WRR4-8G5G] (last visited Mar. 24, 2018); *Size of States: States by Size in Square Miles*, STATE SYMBOLS USA, https://statesymbolsusa.org/symbol-official-item/national-us/uncategorized/states-size [https://perma.cc/HD2H-BS6N] (last visited Mar. 24, 2018).

195. Congress may rely on the Property Clause if the activity takes place on federal land. *See supra* note 159. However, "most endangered or threatened species are located on primarily non-federal land and thus not subject to protection under the Property Clause." Bradford, *supra* note 192, at 725.

sixty-eight percent of the species on the ESA endangered list were entirely intrastate.[196]

b. Wetlands Protection Under the Clean Water Act

In addition to constitutional challenges to statutes that are used to protect purely intrastate species, there are Commerce Clause challenges to statutes that are used to protect purely intrastate wetlands. In 1998, several municipalities in Illinois challenged the authority of the United States Army Corps of Engineers ("USACE") to exert jurisdiction over several permanent and seasonal ponds that were entirely intrastate and completely isolated from interstate waterways.[197] The USACE argued that it had such authority under the Migratory Bird Rule, of which Congress had purportedly impliedly approved.[198] Instead of reaching the question as to whether Congress, and the USACE by delegation, had the authority pursuant to the Commerce Clause to regulate such waters under section 404(a) of the CWA,[199] the Court decided that Congress never intended to exert such jurisdiction through the CWA in the first place.[200] The majority proceeded to declare that "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."[201]

In another wetlands case, Justice Scalia writing for a plurality of the Court clarified that the CWA confers jurisdiction only over relatively permanent bodies of water, and that wetlands can only be considered adjacent to navigable waters of the United States, and thus within the jurisdiction of the USACE, if they have a continuous surface connection to those waters.[202] While Justice Kennedy concurred in the judgment, he rejected the plurality's

196. *People for the Ethical Treatment of Prop. Owners*, 57 F. Supp. 3d at 1341.

197. Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 162–66 (2001).

198. Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986); *see also* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (holding that CWA jurisdiction extended to wetlands that are adjacent to navigable waters).

199. 33 U.S.C. § 1344(a) (2012).

200. *Solid Waste Agency of N. Cook Cty.*, 531 U.S. at 166–72. *But see id.* at 175–97 (Stevens, J., dissenting).

201. *Id.* at 174 (majority opinion).

202. Rapanos v. United States, 547 U.S. 715 (2006).

permanence requirement and outlined a different standard under which wetlands should be considered adjacent to navigable waters if they have a "significant nexus" to other jurisdictional waters.[203] In 2015, the Obama administration published a final rule incorporating the significant nexus test and expansively defining the waters of the United States.[204] The rule was designed in large part to clarify jurisdiction with respect to isolated waters, seasonal waters, and nearby wetlands.[205] In October of 2015, the Sixth Circuit Court of Appeals granted a stay of the rule pending a determination of its validity.[206] In a related case the Supreme Court granted certiorari to determine whether federal circuit courts can review the rule in the first instance pursuant to the CWA.[207]

In a recent executive order, President Trump directed EPA and the USACE to reevaluate the Obama administration's Clean Water Rule.[208] The order also declared that:

> In connection with the proposed rule described in section 2(a) of this order, the Administrator and the Assistant Secretary shall consider interpreting the term "navigable waters," as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*, 547 U.S. 715 (2006).[209]

Whether this may result in a new official rule or not is largely irrelevant for the purposes of executive review. If the President does not believe that the Commerce Clause grants the authority to Congress to regulate such waters under the CWA, he does not have to enforce such regulations. Moreover, if the President could engage in Tier 3 Executive Review, he would not even have to enforce the regulations with respect to waters that are adjacent to

203. *Id.* at 758–87 (Kennedy, J., concurring).

204. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015); *see also* U.S. ENVTL. PROT. AGENCY & U.S. DEP'T OF THE ARMY, ECONOMIC ANALYSIS OF EPA-ARMY CLEAN WATER RULE 53 (2015) ("[T]his rule is estimated to result in a 2.84 to 4.65 percent increase in waters found jurisdictional under the Clean Water Act.").

205. CLAUDIA COPELAND, CONG. RESEARCH SERV., R43455, EPA AND THE ARMY CORPS' RULE TO DEFINE "WATERS OF THE UNITED STATES" 3 (2017).

206. *In re* EPA., 803 F.3d 804 (6th Cir. 2015).

207. Nat'l Ass'n of Mfrs. v. Dep't of Def., 137 S. Ct. 811 (2017) (mem). The case was argued on October 11, 2017. *See* Transcript of Oral Argument, Nat'l Ass'n of Mfrs. v. Dep't of Def., 137 S. Ct. 811 (2017) (No. 16-299).

208. Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017).

209. *Id.* at 12,497.

the waters of the United States, as defined and expressly allowed in *United States v. Riverside Bayview Homes, Inc.*, even though that issue is settled within the judiciary.[210] Nor would he have to enforce the current CWA rule, even if it were determined to be constitutional. Such decisions would severely limit the scope of the protection of the CWA and leave vulnerable all waters that are not jurisdictional waters of the United States in their own right.

iii. Non-Federal Intrastate Environmental Regulation

Some might contend that it does not matter if the Executive chooses not to enforce these laws where the content of regulation is arguably intrastate. If the President determines that certain environmental laws are unconstitutional because they regulate purely intrastate resources or activities, there would of course be a strong argument that the States would instead have the authority to do so.[211] It is theoretically possible, then, that even if the Executive were to stop enforcing those environmental laws, the States could pick up the slack and there would be little de facto change.

However, from a practical standpoint this contention holds less weight. The probability that all fifty States would decide to address the regulatory lacuna is somewhat remote. Even if most States decided to regulate and impose stringent protections, it would then become economically beneficial for some States to impose less stringent regulations or not regulate at all.[212] Avoiding this race to the bottom, along with providing a coherent and consistent scheme of regulation,[213] are reasons that national regulations such as the

210. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985).

211. The authority to regulate some of these arguably intrastate resources and activities may also be concurrent in many cases. For example, many States have endangered species laws designed to similarly protect such species within their own borders. *See, e.g.*, The New Jersey Endangered and Nongame Species Conservation Act, N.J. Stat. Ann. §§ 23:2A-1–23:2A-15 (West 2017). However, state regulation is explicitly preempted unless it is at least as protective of endangered species as the ESA. 16 U.S.C. § 1535(f) (2012) ("Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.").

212. *See* Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1054–57 (D.C. Cir. 1997) (noting with respect to both the endangered species and surface mining regulations that "interstate competition provides incentives to states to adopt lower standards to gain an advantage vis-à-vis other states").

213. A desire for uniform standards also spurred enactment of the ESA: '[P]rotection of endangered species is not a matter that can be handled in the absence of coherent

Surface Mining Act, the ESA, and the CWA are vital to the protection of the environment. Even more vital though, is the requirement that the Executive enforce those laws, and not singlehandedly determine that they are somehow unconstitutional. Therefore, it is not a sufficient answer to the problem of executive review within the context of the Commerce Clause to say that States may have the authority to regulate concurrently or alternatively.

2. Physical and Regulatory Takings

In addition to challenging Congress' authority to promulgate environmental regulations pursuant to the Commerce Clause, such statutes are also vulnerable to attacks pursuant to the Takings Clause.[214] In particular, the two statutes discussed above in Part IV.B.1.ii—the ESA and the CWA—have been subject to attacks based on the Fifth Amendment. It is important to note, though, that in these cases the party challenging the action does not claim that the government lacks the authority to take the land, but rather that if the government chooses to do so it is then required to pay the party just compensation.

i. Endangered Species Act

In another case concerning the delta smelt,[215] California water users claimed that ESA regulations which imposed water use restrictions to protect the fish interfered with their property rights, constituting a physical taking.[216] Defendants argued that the activity was instead a regulatory taking and thus subject to the less demanding *Penn Central Transp. Co. v. City of New York* analysis.[217]

> national and international policies: the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded.'

Gibbs v. Babbitt, 214 F.3d 483, 502 (4th Cir. 2000) (quoting H.R. REP. NO. 93-415, at 5 (1974)).

214. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

215. *See also* San Luis & Delta–Mendota Water Auth. v. Salazar, 638 F.3d 1163 (9th Cir. 2011).

216. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 318 (2001). This case also involved the winter-run chinook.

217. *Id.*; *see* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124–25 (1978) (establishing a balancing test whereby courts look to three factors to determine if a regulatory taking has occurred: 1) "the extent to which the regulation has interfered with

The Court of Federal Claims agreed[218] and directed the federal government to pay for the water that it "takes."[219] In a similar case in California involving steelhead trout, the Federal Circuit Court of Appeals found that the government's action in diverting water to protect the species pursuant to the ESA should be analyzed as a physical *per se* taking.[220]

Adopting such reasoning, the President could decide to provide full compensation any time the ESA is used to restrict water rights, or other kinds of property rights for that matter. Admittedly, it would be an unusual decision to voluntarily expend more federal money, but if the President is sympathetic to private property rights it is not outside the realm of possibility. Moreover, such a large budget draw could incentivize and provide an arguable motivation for not enforcing the statute.[221]

ii. Wetlands Protection Under the Clean Water Act

Courts have also granted plaintiffs compensation on the grounds that actions by the USACE pursuant to the CWA have constituted a regulatory taking. In *Loveladies Harbor, Inc. v. United States*, the plaintiffs were denied a fill permit they sought in order to complete a real estate development project and brought suit against the USACE, which denied the permit.[222] The Federal Circuit Court applied the framework set out by the Supreme Court in *Lucas v. South Carolina Coastal Council*,[223] and found that since the action deprived the plaintiffs of nearly all of the economic value of the land—"99%"[224]—the permit denial constituted a regulatory taking.

distinct investment-backed expectations," 2) "the character of the governmental action," and 3) and the regulation's purpose).

218. *Tulare Lake*, 49 Fed. Cl. at 319 ("In the context of water rights, a mere restriction on use-the hallmark of a regulatory action-completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water.") (citing Eddy v. Simpson, 3 Cal. 249, 252–53 (1853)).

219. *Id.* at 324.

220. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1288–96 (Fed. Cir. 2008).

221. *See infra* note 254 and accompanying text. *C.f.* Kevin J. Lynch, *A Fracking Mess: Just Compensation for Regulatory Takings of Oil and Gas Property Rights*, 43 COLUM. J. ENVTL. L. 335, 366 (2018) (noting that "in the face of astronomical takings liability [with respect to oil and gas property rights], government will simply retreat from the business of regulation").

222. Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994).

223. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (holding there to be a categorical regulatory taking where the landowner is deprived of all of the economically viable use of their property).

224. *Loveladies Harbor*, 28 F.3d at 1178.

The court then affirmed the trial court's award of $2,658,000 plus interest.[225]

However, in 2001 the Supreme Court clarified that courts should only apply the categorical *Lucas* analysis when the deprivation of economic value is total. When the deprivation is only partial, courts should apply the balancing test outlined in *Penn Central*.[226] Nevertheless, if the President can engage in Tier 3 Executive Review, she is free to disregard this opinion and provide compensation for partial takings as well as total, without engaging in the balancing test. Moreover, if such action is challenged in the courts (not likely by the party receiving the compensation), and the court finds that compensation is not required pursuant to the *Penn Central* test, the President is free to disregard such an order.

3. Anti-Delegation Doctrine

The Constitution vests all of the legislative power of the federal government in Congress,[227] yet Congress often gives great latitude to administrative agencies to make rules and fill in the gaps left by the organic statutes. For example, the CAA directs the Administrator of EPA to set "[n]ational primary ambient air quality standards . . . [that] are requisite to protect the public health."[228] The Supreme Court explicitly held in *Whitman v. American Trucking Associations* that this does not constitute a delegation of legislative authority to EPA.[229] The Court there noted that it had only invalidated two statutes in its history on the basis of an unconstitutional delegation of legislative authority.[230]

This is not to say, though, that the delegation issue is entirely settled in all cases, environmental or otherwise. In an earlier Supreme Court decision, Justice Rehnquist expressed the view in a concurring opinion that Congress had improperly delegated its legislative authority to the Secretary of Labor to set benzene

225. *Id.* at 1173, 1183.

226. Palazzolo v. Rhode Island, 533 U.S. 606, 615–16 (2001).

227. *See* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

228. 42 U.S.C. § 7409(b)(1) (2012).

229. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–76 (2001).

230. *Id.* at 474 (citing Pan. Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[231]

If the President may engage in Tier 3 Executive Review, even in those cases for which the Court has explicitly determined that the statute does not unconstitutionally delegate legislative authority, the President may choose not to enforce the statute at his discretion. While environmental statutes are not the only type of laws that would be subject to such discretion, it is difficult to think of a single environmental statute that is not vulnerable, given the central role that administrative agencies play in the environmental field.

4. Commandeering

Finally, some environmental statutes are also challenged on the grounds that they commandeer the States' legislative processes. It is well established that Congress may incentivize States to regulate in a certain way using, for example, its authority under the Spending Clause[232] or a system of cooperative federalism pursuant to the Commerce Clause.[233] However, Congress engages in commandeering when it improperly *compels* States to "enact and enforce a federal regulatory program."[234] The Tenth Amendment ensures that the States retain whatever sovereignty has not been granted to the federal government under the Constitution.[235] Therefore, while Congress may regulate pursuant to its powers under Article I of the Constitution, it may not force the States to regulate on its behalf, as doing so would intrude on their sovereignty. Congress may not force the States to regulate in a given field even if Congress would otherwise have the authority to regulate in that field pursuant to Article I.[236]

In *Hodel*, the plaintiffs also claimed that the Surface Mining Control and Reclamation Act violated the Tenth Amendment on

231. 29 U.S.C. § 652(8) (2012); Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 671–88 (1980) (Rehnquist, J., concurring).

232. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987).

233. *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

234. *Id.* at 288; *see also* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

235. U.S. CONST. amend. X.

236. *See New York v. United States*, 505 U.S. at 166 ("We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.") (citations omitted).

the grounds that it constituted commandeering.[237] The act employed a system of cooperative federalism in which States could either submit their own surface coal mining regulations to the Secretary of the Interior for approval, or be preempted in that field by the act itself.[238] The Court found that under this system the States were not forced to regulate but could instead rely on the federal government to bear that burden. Therefore, the Court found that "there [could] be no suggestion that the [a]ct commandeers the legislative processes of the States."[239]

In *New York v. United States*, the State of New York challenged the constitutionality of several provisions of the Low–Level Radioactive Waste Policy Amendments Act of 1985, relying in part on claims of commandeering. New York challenged the validity of the act's three different incentive systems designed to encourage States to develop disposal facilities for low-level radioactive waste, or to enter into interstate compacts with States that had such facilities, by 1992. The Court upheld the first two incentives as a valid exercise of Congress' authority under the Spending Clause and Commerce Clause respectively.[240] The final incentive provided that if States refused to regulate in the manner provided by Congress, they would be forced to take title to all of "the low level radioactive waste generated within their borders and becom[e] liable for all damages waste generators suffer as a result of the States' failure to do so promptly."[241] The majority found that this provision "crossed the line distinguishing encouragement from coercion."[242] Essentially, Congress lacked the authority to impose either of the options standing alone, i.e. forcing a State to take title to radioactive waste or directing the State to regulate. Thus, there was no real choice for the States, and the majority held that the provision was invalid

237. *Hodel*, 452 U.S. 264. For a discussion of the plaintiffs' challenge under the Commerce Clause, see *supra* Part IV.B.1.i.

238. *Hodel*, 452 U.S. at 271–72.

239. *Id.* at 288.

240. *New York v. United States*, 505 U.S. at 171–74. Under the first incentive, States that achieved certain milestones on the way to developing disposal facilities, or entering into compacts with other States that had such facilities, would be given a portion of the surcharges collected by States with facilities. The second incentive authorized States with disposal facilities to increase the surcharges for accepting waste from other States over time, ultimately allowing them to refuse such waste after 1992. *Id.*

241. *Id.* at 174–75.

242. *Id.* at 175.

on the grounds that it improperly commandeered the States' legislative processes.[243]

More recently in a case challenging the validity of the Clean Power Plan ("CPP"), plaintiffs allege that section 111(d) of the CAA is unconstitutional to the extent that it authorizes the CPP, on the grounds that the CPP commandeers state legislatures.[244] Plaintiffs argue that the CPP leaves States no choice but to regulate in accordance with federal policy, as "States that decline to take legislative or regulatory action to ensure increased generation by EPA's preferred power sources face the threat of insufficient electricity to meet demand."[245] Tier 3 Executive Review thus provides a basis for declining to enforce the CPP even if it were ultimately found to be constitutional. Moreover, if the President may engage in Tier 3 Executive Review he could decline to enforce any sort of program pursuant to that provision of the CAA if he believed that it would constitute commandeering. This type of challenge is widely relevant within the environmental context as there are a variety of other environmental statutes that rely on the principle of cooperative federalism which could likewise be subject to such arguments and nonenforcement.[246]

C. Precedent for Limiting the Power of Executive Review

In addition to purely theoretical and pragmatic arguments, there seems to be some precedent, actually within the environmental context, to suggest the propriety of limiting executive review. The

243. *Id.* at 174–77.

244. *See* LINDA TSANG & ALEXANDRA M. WYATT, CONG. RESEARCH SERV., R44480, CLEAN POWER PLAN: LEGAL BACKGROUND AND PENDING LITIGATION IN WEST VIRGINIA V. EPA 23 (2017) ("[P]etitioners, including the 26 state petitioners opposing the CPP, claim that the CPP impermissibly invades traditional state police powers over the electrical grid and '*commandeers*' and 'coerces' states and their officials and legislatures.") (emphasis added); *see also* West Virginia v. EPA, No. 15-1363 (D.C. Cir. argued Sept. 27, 2016). However, EPA under the Trump administration has since put forward a proposed rule to repeal the CPP which, if effective and valid, would make reliance on executive review in this case unnecessary. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035-02 (proposed Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 60).

245. *See* TSANG & WYATT, *supra* note 244, at 23 (quoting Opening Brief of Petitioners on Core Legal Issues at 5–6, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Feb. 19, 2016)).

246. *See, e.g.*, *New York v. United States*, 505 U.S. at 167–68 (listing the CWA, the Occupational Safety and Health Act of 1970, the Resource Conservation and Recovery Act of 1976, and the Alaska National Interest Lands Conservation Act as environmental statutes that use cooperative federalism).

D.C. Circuit Court of Appeals has recently expressed approval of such a limit in dicta in a case involving the permitting process of Yucca Mountain.[247] In 2008, the Department of Energy submitted an application to the Nuclear Regulatory Commission (the "Commission") for the licensing of the site as part of the nuclear waste repository project.[248] The Department of Energy submitted this application pursuant to the mandate of the Nuclear Waste Policy Act, which requires that the Commission consider the application and render a final decision within three years.[249] The Department of Energy later withdrew its application, but the Commission found that it lacked the authority to do so.[250]

The Commission later decided to cease the technical review of the application, citing concerns with future funding allocations by Congress.[251] Aiken County, and the states of South Carolina and Washington, among other parties, then brought suit against the Commission in the D.C. Circuit seeking a writ of mandamus to force the Commission to continue with the licensing process. The court initially held the suit in abeyance in order to give Congress an opportunity to express its intent by either granting additional funding, or withdrawing the current funding for the project.[252] After Congress did neither, the court continued hearing the case.[253] On the issue of whether the Commission could unilaterally decide to suspend review, Judge Kavanaugh writing for the majority said the following:

> Our analysis begins with settled, bedrock principles of constitutional law. Under Article II of the Constitution and relevant Supreme Court precedents, the President must follow statutory *mandates* so long as there is appropriated money available and the President has no constitutional objection to the statute. So, too, the President must abide by statutory *prohibitions* unless the President has a constitutional

247. *In re* Aiken Cty., 725 F.3d 255 (D.C. Cir. 2013).

248. Letter from Edward F. Sproat, Dir., Dep't of Energy, Office of Civilian Radioactive Waste Management, to Michael F. Weber, Dir., Dep't of Energy, Office of Nuclear Material Safety and Safeguards, Yucca Mountain Repository License Application (LA) for Construction Authorization (June 3, 2008).

249. 42 U.S.C. § 10134(d) (2012).

250. *In re* U.S. Dep't of Energy (High-Level Waste Repository), 71 N.R.C. 609 (2010).

251. OFFICE OF PUB. AFFAIRS, U.S. NUCLEAR REGULATORY COMM'N, LICENSING YUCCA MOUNTAIN (2015).

252. *In re* Aiken Cty., No. 11-1271, 2012 WL 3140360, at *1 (D.C. Cir. Aug. 3, 2012) (Kavanaugh, J., concurring).

253. *In re* Aiken Cty., 725 F.3d 255, 259 (D.C. Cir. 2013).

> objection to the prohibition. If the President has a constitutional objection to a statutory mandate or prohibition, the President may decline to follow the law unless and until a final Court order dictates otherwise. But the President may not decline to follow a statutory mandate or prohibition simply because of policy objections. Of course, if Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward. But absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates and prohibitions.[254]

Although the decision at issue in the case may have been made by an independent agency, it is nonetheless analogous to many of the types of decisions that the President has the power to make with respect to other executive branch agencies over which he has more direct control.[255] Notably, the court proceeds with the analysis as though the decision was made by the President himself, and thus the reasoning is applicable for the purpose of this Note.

This example illustrates at least three crucial points on executive review. The first is that where the President, and the Executive acting under his command, does not believe that a statute is unconstitutional, they do not have discretion over whether to enforce it. When Congress passes a statute, it creates a command of execution for the Executive. This is the starting point assumption and any exceptions must be carved out of this principle. This is precisely why there must be a legitimate legal foundation in order for the President and the Executive to engage in executive review.[256]

Next, the court provides what it believes to be the two exclusive exceptions to this "bedrock" principle: the Executive need not execute the statute if 1) there is no funding for the project, or 2) the President believes that the statute is unconstitutional. The President may not, the court says, simply decline to enforce a statute because he does not agree with it; only a lack of funding or a question of constitutionality will do.[257] While the funding issue is not within the purview of this Note, the basic principle behind the

254. *Id.*

255. *See id.* ("Those basic constitutional principles apply to the President and subordinate executive agencies. And they apply at least as much to independent agencies such as the Nuclear Regulatory Commission.").

256. For a discussion of its legitimacy, see *supra* Part II.

257. *Aiken Cty.*, 725 F.3d at 259.

idea seems reasonable and intuitive.[258] However, the court also declares that "the President may decline to follow the law" if he finds it to be unconstitutional. The D.C. Circuit is thus saying in unequivocal language that it is an established principle that the President may engage in executive review.

Nevertheless, the court goes on to clarify that this power of executive review survives only so long as there is not a final Court order that dictates otherwise.[259] By this the D.C. Circuit seems to suggest that if the Court finds that the statute, or provision of a statute at issue is in fact constitutional, the President is bound by that judgment and must enforce the statute thenceforth. The D.C. Circuit thus appears to agree with the proposition advanced in this Note that the President should not have the authority to engage in Tier 3 Executive Review.[260]

On the facts of the case, the court found that the Commission did not rely on either of the acceptable bases for nonenforcement because the project was currently funded and the underlying statute was not questioned as unconstitutional. Therefore, the court issued a writ of mandamus ordering the Commission to continue with the licensing process.[261] In dissent, Judge Garland noted that issuing a writ of mandamus was an extreme measure and that the choice of whether to grant it remained discretionary.[262] Nonetheless, he did not dispute the reasoning of the rest of the court as to the issue of executive review. There is thus some precedent at the circuit level for the proposition that the President can validly engage in executive review, but only "unless and until a final Court order dictates otherwise," i.e. executive review is valid in some forms, but Tier 3 Executive Review is not.[263]

258. Whether this is a matter of constitutional theory or pure pragmatism is another question.

259. *Aiken Cty.*, 725 F.3d at 259.

260. While technically this language seems to only capture the less extreme type of Tier 3 power of refusing to heed the judgment of the Court as to a law's constitutionality, there is no reason to think that the court would come out differently as to the legitimacy of the more extreme case of refusing to comply with a judicial decree on the grounds that the President continues to believe that the law is unconstitutional. For example, if the Commission later refused to abide by the mandamus the court issued, it is extremely unlikely that the court would then have come to the opposite conclusion.

261. *Aiken Cty.*, 725 F.3d at 266–67.

262. *Id.* at 268–69 (Garland, J. dissenting).

263. *Id.* at 259 (majority opinion).

D. Practical Considerations

We have thus seen how unbridled Tier 3 Executive Review has the potential to wreak havoc just within the environmental sphere, and that there is some recent judicial precedent for recognizing its lack of validity. But what can actually be done with respect to providing some kind of limitation on this power which is not even directly enumerated anywhere in the law?

The most theoretically sound answer would be to expressly enumerate the power and provide direct limitations within the text of the Constitution itself. It would then be explicitly unconstitutional to engage in Tier 3 Executive Review, and thus it would be impossible for the President to argue that she would be executing the Constitution through any action that could be properly categorized as Tier 3 Executive Review. In this way, the President would have to turn the concept of executive review on its head in order to engage in Tier 3 Executive Review, and all theoretical justifications would be inapposite. In addition to a constitutional amendment being theoretically sound, it is probably the strongest deterrent for preventing circumvention. If the President is intentionally engaging in behavior that is explicitly unconstitutional, the text of the law has become irrelevant. However, from a practical perspective this solution seems nearly impossible. For one thing, most Americans have probably spent little time, if any, worrying about the dangers of executive review. It is unlikely that this will come to change unless the power is heavily abused. And even at that point, the prospect of a successful constitutional amendment is probably still less than slight.[264]

Alternatively, it is theoretically possible for Congress to pass a law making it illegal for the President to engage in Tier 3 Executive Review. It is manifest that passing such a law would be easier to accomplish than enacting a constitutional amendment—there are thousands of laws and fewer than thirty amendments. However,

264. Even proposed amendments that are widely supported and relatively uncontroversial often do not make it into the text of the Constitution. For example, the proposed Equal Rights Amendment, which seeks to eliminate certain types of sex-based discrimination, was first introduced in 1923. It eventually gained widespread bipartisan support, passed both houses of Congress in 1972, and was ratified by thirty-five States—just three States shy of the requisite three-fourths. However, the deadline for ratification has long since passed. *See* Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & L. 419 (2008). Even with widespread modern support for its principles, it remains unclear whether the Equal Rights Amendment will become a constitutional reality.

there is no reason that the President could not also use the power of executive review to declare, possibly correctly, that the law itself was unconstitutional. Moreover, there are obvious enforcement issues with such a law in this context. Therefore, what is gained in practicality is lost in both theoretical soundness and meaningful bite.

Along a similar vein, the President could issue an executive order declaring Tier 3 Executive Review to be unconstitutional or otherwise invalid. However, even absent the extensive reach of Tier 3 Executive Review, that order would be little more than an opinion and easily overridden by later presidents. Moreover, later presidents could use executive review to declare the order itself unconstitutional.[265] I would contend that at least until the order comes before a Court which finds otherwise, that is completely acceptable. However, if the Court finds the order to be constitutional, the President could, by definition, engage in Tier 3 Review and disregard that holding, even if in the form of a judicial decree. Perhaps at this point the argument is starting to seem too simple—Tier 3 Executive Review can be used as the President's panacea to all disagreements with other branches. However, that is precisely the case, and precisely the issue.

Whatever the answer to the issue of Tier 3 Executive Review, if there is to be one at all, it seems that the first step is to acknowledge that it is problematic. After all, if executive review is valid at all, its validity comes in large part from the consensus of the other branches of government and from the people.[266] Therefore, if the people, the Congress, and the judiciary do not recognize certain forms of executive review, they will lose much of their theoretical foundation. The next step will be to come to some sort of consensus on exactly which forms of executive review are problematic and invalid. From there it might be possible to create a legal solution that is both theoretically robust and practically possible.

265. This would fall into the Tier 2 category of declining to enforce a law, with the understanding that an executive order can be considered a form of a law, as might an administrative rule. However, where the "law" at issue is one promulgated by the executive branch, the Executive need not necessarily rely on any notion of executive review to change course and make new laws, subject in some cases of course to notice and comment procedures.

266. *See supra* Part II.

V. CONCLUSION

After evaluating the kind of damage and legal uncertainty[267] that Tier 3 Executive Review could render within the contexts of air and water pollution, wetlands protection, and endangered species regulation, I contend that such power is invalid in most, if not all, cases. In a sense, this is intuitive from the fact that the model claims that the Court, and the people, should scrutinize Tier 3 actions the most severely,[268] but in fact they may lie beyond meaningful scrutiny if the President can simply ignore those judgements (and votes) as well. Executive review should be used where the Court cannot review the constitutionality of a law at all, as well as, where appropriate, in the first instance in cases where the Court has such authority. However, beyond such cases, review of the constitutionality of laws should be reserved as the "proper and peculiar province of the courts."[269]

267. If the President can engage in Tier 3 Executive Review, even settled precedents on which people regularly rely may be overturned. Moreover, presidents may take different positions on these issues so that the Executive's position with respect to the laws may vacillate with the changing of the White House decor.

268. *See supra* Part III.B.

269. *See* THE FEDERALIST NO. 78, *supra* note 10, at 237 (Alexander Hamilton).