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## Constitutional Authority Statements in Congress

Hanah Metchis Volokh

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## CONSTITUTIONAL AUTHORITY STATEMENTS IN CONGRESS

*Hanah Metchis Volokh\**

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INTRODUCTION

*“Congress has the power to enact this legislation pursuant to the following: This bill is enacted pursuant to the power granted to Congress under Article I, Section 8, Clause 2 of the United States Constitution.”<sup>1</sup>*

*“Congress has the power to enact this legislation pursuant to the following: The Katie Sepich Enhanced DNA Collection Act is constitutionally authorized under Article I, Section 8, Clause 18, the Necessary and Proper Clause. The Necessary and Proper Clause supports the expansion of congressional authority beyond the explicit authorities that are directly discernible from the text. Additionally, the Preamble to the Constitution provides support of the authority to enact legislation to promote the General Welfare.”<sup>2</sup>*

*“Congress has the power to enact this legislation pursuant to the following: . . . Congress is within its constitutionally prescribed role to direct the Environmental Protection Agency, a body which regulates interstate commerce under the auspices of Congress, to appoint a member of the Science Advisory Board based on the recommendation of the Secretary of Agriculture.”<sup>3</sup>*

Statements like the ones quoted here are suddenly flowing through Congress at the rate of several hundred per month. For the first time in history, members of the House of Representatives who introduce a bill must provide a statement explaining which clause of the Constitution gives Congress the authority to enact that bill into law. Constitutional authority statements (CASs) offer a window into how members of

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1. 157 Cong. Rec. H1525 (daily ed. Mar. 2, 2011) (Constitutional Authority Statement for H.R. 877 introduced by Representative Clay).

2. 157 Cong. Rec. H1666 (daily ed. Mar. 9, 2011) (Constitutional Authority Statement for H.R. 988 introduced by Representative Schiff).

3. 157 Cong. Rec. H1843 (daily ed. Mar. 15, 2011) (Constitutional Authority Statement for H.R. 1104 introduced by Representative Stutzman).

Congress think about the Constitution—which often differs starkly from the judiciary’s approach.

Constitutional authority statements are the result of a rule change in the 112th House of Representatives. When each two-year session of Congress opens, the House re-adopts, with some changes, the rules governing its internal operations. At the opening of the 112th Congress in January 2011, the House of Representatives created a new rule requiring each bill or resolution introduced in the House to include a constitutional authority statement.<sup>4</sup> This statement must identify “the power or powers granted to Congress in the Constitution to enact the bill or joint resolution.”<sup>5</sup> The CAS does not go into the text of the bill, but is included in the Congressional Record, published on the Library of Congress’s THOMAS bill-tracking system, and printed on a cover sheet when the bill is distributed to Representatives. The Senate does not have a similar rule, but when a bill or joint resolution that was first passed in the Senate is brought to the House, the chair of the House committee with jurisdiction over the bill or resolution may introduce a CAS for the bill.<sup>6</sup>

This is the first time in our nation’s history that either house of Congress has required formal statements of constitutional authority for every bill its members introduce.<sup>7</sup> The rule was somewhat controversial, not for its content, but because of the partisan motivation driving its adoption.<sup>8</sup> The content is decidedly benign. The partisan zeal for

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4. H.R. Res. 5, 112th Cong. (1st Sess. 2011) (adopting rules for the 112th Congress, including the Constitutional Authority Statement requirement).

5. *Id.*

6. *Id.* at 2.

7. During the 105th through 111th Congresses (1997–2010), the House of Representatives required that most committee reports must “include a statement citing the specific powers granted to the Congress in the Constitution to enact the law proposed by the bill or joint resolution.” See H.R. Res. 5, Sec. 13, 105th Cong., at 1 (1st Sess., Jan. 7, 1997) (adopting rules for the 105th Congress). The rule applied only to bills that were reported out of committee, not to every bill that was introduced. The differences between the prior rule and the current one are discussed more fully in Subsection V.A.1. The committee report CAS rule was eliminated at the beginning of the 112th Congress. See H.R. Res. 5, 112th Cong. (2011) (adopting rules for the 112th Congress and striking the provision that previously required CASs in committee reports); *Adopting Rules for the 112th Congress, Section-by-Section Analysis*, H.R. Res. 5, 112th Cong. (2011), <http://rules.house.gov/Media/file/PDF/HRes%205%20Sec-by-Sec.pdf>, at 1 (explaining that the new rule “repeals the current requirement for a similar [constitutional authority] statement in committee reports”).

8. Democrats controlled both houses of Congress and the Presidency from 2008–10. One of the major complaints of the Republican opposition during this time was that the Democrats in government were ignoring the Constitution. Not only were they enacting controversial legislation that the Republicans claimed was unconstitutional, but they were brushing aside the Republicans’ constitutional arguments against the bills. A major incident was House Speaker Nancy Pelosi’s dismissive answer, “Are you serious?” when asked about the constitutionality of

adoption should not blind us to the potential long-term benefits of the measure.<sup>9</sup> Congress has certain powers under the Constitution, and in a democratic society under the rule of law, government officials are expected not to usurp power that has not been granted to them.<sup>10</sup> Various mechanisms, from elections to legislative debate to judicial review, help guarantee that government officials act within their proper authority. Constitutional authority statements in Congress are a simple and straightforward self-monitoring mechanism to add to this arsenal. Had the rule been adopted early in America's constitutional history<sup>11</sup> and survived to the present day, it would likely have been wholly uncontroversial the entire time.<sup>12</sup>

CASs are so unobjectionable that the main argument against them is that they will be useless. Opponents claim that the rule change was a meaningless piece of political theater that would waste time and money but change nothing.<sup>13</sup> Legislators can pluck out any old clause of the

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health care reform legislation. See Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L.Q. 193, 234 (2011) (discussing Speaker Pelosi's statement as an instigator and rallying cry of Tea Party organizers for constitutional discussion in Congress). Republicans won control of the House partially on the promise to take the Constitution seriously. See Republicans in Congress, *A Pledge to America: A new governing agenda built on the Priorities of Our Nation, the Principles We Stand for, & America's Founding Values*, <http://www.gop.gov/resources/library/documents/pledge/a-pledge-to-america.pdf>, at 33 ("We will require each bill moving through Congress to include a clause citing the specific constitutional authority upon which the bill is justified."). The CAS rule is one implementation of that promise. See Delivering Reform to Congress, <http://www.gop.gov/in-depth/pledge/reform> (citing the changes to the House of Representatives rules as fulfilling the election promise to "Adhere to the Constitution").

9. See Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499, 508 (2009) ("[G]ood-government reforms tend to be adopted either after spectacular failures . . . or as packages offered by political movements that organize support around a reasonably large reform agenda.").

10. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 727 (1986) (noting that "[t]he dangers of congressional usurpation of Executive Branch functions have long been recognized").

11. Despite the lack of a rule requiring an explicit statement of constitutional authority, early Congresses debated the constitutional authority for their actions regularly, as a "threshold question." See David P. Currie, *Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution, 1789–1861*, in CONGRESS AND THE CONSTITUTION 18, 20 (Neal Devins & Keith E. Whittington, eds., 2005).

12. An individual CAS may be controversial if it expresses a contested interpretation of the Constitution, but the idea of requiring the CAS does not thereby become controversial. In fact, differing interpretations of the Constitution reflected in CASs should lend additional credence to the practice of requiring the statements, because they help members of Congress and private citizens recognize and engage in important debates over the meaning of the Constitution.

13. See, e.g., Pete Kasperowicz, *Democrat: Citing Constitution Will Cost Taxpayers \$570K*, THE HILL'S FLOOR ACTION BLOG (Jan. 10, 2011, 1:07 PM), <http://thehill.com/blogs/floor-action/house/136995-democrat-citing-constitutional-authority-in-bills-will-cost-you> (reporting objections that the bill will waste money on administrative costs); Jackie Kucinich,

Constitution to attach to their dubiously constitutional bills, and trust that nobody will call them on it because politics and policy always trump constitutional objections.<sup>14</sup>

I disagree with this assessment. Constitutional authority statements alone may not change anything. I argue, however, that they are a useful tool for increasing Congress's deliberations about the Constitution.

Constitutional authority statements perform three important functions. First, they attempt to answer a fundamental question that should be asked about all legislation: whether Congress has the authority to enact a law on the subject. Second, they can trigger further discussions about constitutionality within Congress, which could help legislators make more robust and considered decisions. Third, they provide a window for judges, scholars, and others into what Representatives think about the Constitution.

The structure of this Article is as follows. Part I discusses Congress's authority and institutional capacity to interpret the Constitution. Part II situates constitutional authority statements within existing debates over constitutional interpretation outside the courts. Congress must necessarily make decisions about constitutional meaning when it legislates. Most scholars believe Congress has at least some independent authority to interpret the Constitution, while others think Congress should follow Supreme Court doctrine even when Congress disagrees.<sup>15</sup> Regardless of which theory is correct, Congress needs to consider constitutionality (however defined) when legislating. CASs increase Congress's capacity to do so by creating an institutional mechanism that prioritizes constitutional analysis.

Part III examines issues involving the substantive content of constitutional authority statements. The rule requires "specific" statements, but does not define "specific."<sup>16</sup> Nor is it clear how a Representative can cite authority that flows from the structure of the Constitution rather than from a textual provision. Additionally, this section examines enforcement of the rule to ensure that members follow its requirements.

Part IV turns to the question of judicial review. Now that Congress—at least, a portion of Congress—takes an official position

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*GOP Educating Members About New Constitutionality Rule*, ROLL CALL (Dec. 22, 2010, 12:01 AM), <http://www.rollcall.com/news/-201826-1.html> (reporting objections that the new rule "deal[s] with a problem that doesn't really exist"); Ben Weyl, *Parties Spar Over Interpretation of 'Constitutional Authority' Rule*, CQ TODAY (Feb. 15, 2011), 2011 WLNR 3393485.

14. See, e.g., Kasperowicz, *supra* note 13 (reporting objection that the statements will be largely ignored).

15. See *infra* notes 16 and 42 and accompanying text.

16. H.R. Res. 5, 112th Cong., at 1 (1st Sess. 2011).

about the constitutional basis of every single law it enacts, how should the courts treat this information? Should the courts give some amount of deference to Congress's constitutional statements? More importantly, should courts consider only Congress's cited constitutional authority, or may courts find an independent justification for upholding a law regardless of what the CAS has cited? This Article argues that CASs are a very weak form of legislative history, are for the most part not written with judicial interpretation in mind, and are therefore not particularly useful to courts. Judges should not, and probably will not, strike down statutes because of a CASs mistaken constitutional interpretations.

Part V examines several ways that Congress can, if it desires, strengthen the CAS requirement. Some of these reforms are aimed at making CASs better at what they currently do: enhancing congressional deliberation. Others attempt to make CASs into more authoritative statements that could be used in court interpretations. Both the House of Representatives and the Senate should evaluate the costs and benefits of a variety of ways of implementing a CAS rule.

Throughout this Article, I make various empirical statements about the actual constitutional authority statements that Representatives have written. These claims are drawn from a complete list of all the CASs for bills introduced from January through April 2011, the first four months that the rule was in effect, which I compiled and categorized. The database contains 1,653 bills and 56 joint resolutions. In some ways, this may be an unrepresentative sample. Compliance with the rule might be more zealous when it is first adopted, then fall off later. Or the other way around—compliance might improve as Representatives and their staffs become more familiar with constitutional analysis. Additionally, party leaders often choose to introduce the most important bills on their legislative agendas at the beginning of the session, and those bills might have different CAS attributes than more ordinary legislation (or more rushed legislation) introduced later. I gathered this data to provide preliminary information about what is happening, and I do not intend to make any strong claims about what CASs will universally look like. The goal of the present Article is not to reach empirical conclusions, but to explore theoretical questions with some real-world illustrations.

## I. CONSTITUTIONAL INTERPRETATION IN CONGRESS

Fundamentally, a constitutional authority statement is a congressional interpretation of the Constitution. To determine which part of the Constitution authorizes a bill, the author of the statement must reach some opinions about what the Constitution means. A preliminary question about the CAS rule, then, is whether Congress has the authority to interpret the Constitution at all. Further, does Congress have the capacity to interpret the Constitution correctly? This Part

summarizes the scholarly literature, which mainly argues that constitutional interpretation in Congress is important, but suggests a variety of reasons to justify it. This Part then argues that whatever the outermost limits of Congress's interpretive capacity are, writing constitutional authority statements is certainly within those limits. More importantly, the rule requiring sponsors to write CASs is itself an institution that enhances Congress's ability to interpret the Constitution.

### A. Congress's Authority to Interpret the Constitution

#### 1. Theories of Constitutional Interpretation in Congress

Most scholars believe that the Supreme Court is not the sole authorized interpreter of the Constitution.<sup>17</sup> A variety of theories claim, for different reasons and to different extents, that people other than judges have some responsibility for constitutional interpretation. Determining the correctness of these theories is far beyond the scope of this Article. A brief description of some of these theories—popular constitutionalism, departmentalism, and theories about the political question doctrine, the presumption of constitutionality, and the oath of office—shows that a wide range of people should be interested in constitutional authority statements from Congress.

*Popular Constitutionalism* is a broad and somewhat difficult to define<sup>18</sup> family of theories.<sup>19</sup> It argues, most basically, that constitutional interpretation should not rest solely in the hands of a judicial elite.<sup>20</sup> Popular constitutionalists believe that the Constitution should be interpreted in some way by the citizens themselves,<sup>21</sup> or by

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17. This scholarly consensus is relatively recent. In 1966, scholars recognized a consensus on the opposite theory, judicial supremacy. *See, e.g.*, DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 13 (1966).

18. *See* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1602, 1628 (2005) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (questioning whether the concept of “popular constitutionalism” can be defined in a noncontradictory way at all)); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2053 (2010) (“It can be difficult to get a firm grip on what people mean by ‘popular constitutionalism.’”).

19. For complete expositions of various theories of popular constitutionalism, see generally BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 6–32 (1999).

20. *See, e.g.*, TUSHNET, *supra* note 19, at 6–32 (1999); Alexander & Solum, *supra* note 18, at 1608 (characterizing Professor Kramer’s theory loosely as “the people themselves have an enemy, and that enemy is ‘judicial supremacy’”); Pozen, *supra* note 18, at 2055–56.

21. *See, e.g.*, Pozen, *supra* note 18, at 2057–58.

institutions that are closer and more responsive to citizens than appointed federal judges are.<sup>22</sup>

Congress's constitutional authority statements should interest popular constitutionalists because the legislature is a more representative institution than the judiciary.<sup>23</sup> Constitutional interpretation in Congress still differs significantly from interpretation by the people themselves, so some popular constitutionalists may view CASs as yet another elitist institution that removes power from the people. Others, however, will see more robust congressional attention to the Constitution as a step in the right direction, bringing the Constitution to a more democratically responsive institution than the federal judiciary.<sup>24</sup> Popular constitutionalists will be interested to investigate whether Congress's statements about the Constitution more closely track popular understanding than the Supreme Court's statements.

*Departmentalism*<sup>25</sup> is somewhat related to popular constitutionalism, in that it argues strongly for interpretive authority outside the courts.<sup>26</sup> However, instead of placing authority in the public, departmentalism places authority in all three branches of the federal government.<sup>27</sup> The allocation of interpretive authority among the branches might be equal or unequal. Each branch might have its own independent sphere of authority, or the branches might overlap and contest authority with each other.<sup>28</sup>

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22. See generally Pozen, *supra* note 18 (advocating judicial elections as an institution for implementing popular constitutionalism).

23. See MORGAN, *supra* note 17, at 29 (citing Congress's representative nature as one reason it should be good at handling constitutional questions). See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4–9 (1980) (discussing the problem that unelected judges pose to democratic theory).

24. See Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1031 (noting a possible criticism of judicial supremacy as “undermin[ing] the authority of the people’s representatives to determine the content of the Constitution”). See generally TUSHNET, *supra* note 19, at 17 (treating congressional constitutional interpretation as a form of popular constitutionalism).

25. For major works on the theory of departmentalism, see generally MORGAN, *supra* note 17, at 346; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270–72 (1996); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 219–27 (1994).

26. See Post & Siegel, *supra* note 24, at 1031–32 (noting that popular constitutionalism and judicial supremacy both advocate removing some of the Supreme Court's power to be the binding interpreter of the Constitution).

27. See Alexander & Solum, *supra* note 18, at 1609–10 (“The basic premise of departmentalism is that interpretive authority is shared by the three branches of government.”). See generally Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105 (Summer 2004).

28. See Alexander & Solum, *supra* note 18, at 1609–15 (describing several

Departmentalists focus heavily, though not entirely, on constitutional interpretation and decision making in the executive branch. This may be in part because the Executive Branch produces reasonably well-organized and accessible published statements about the Constitution (though not as organized, accessible, and thorough as the Supreme Court Reporter). The Office of Legal Counsel in the Department of Justice produces numerous analyses of constitutional issues, many of which are published either immediately or after a delay, allowing scholars to analyze these opinions easily.<sup>29</sup> Administrative agencies also publish constitutional analysis in rules and adjudications. Congressional materials are not nearly as well-organized or accessible as Executive Branch ones, and where Congressional materials are available, lawyers and scholars are often simply unaware that they exist.

Constitutional authority statements in Congress should obviously interest advocates of departmentalism. The balance in constitutional interpretation has shifted heavily toward the courts over the past two hundred years.<sup>30</sup> Any assertion of interpretive responsibility by Congress helps move the balance back in the departmentalist direction. Departmentalists will be interested in the specific details of how Congress should implement CASs, how CASs are used in further debate within Congress, and how the Executive Branch and courts treat Congress's statements.

*The Political Question Doctrine*<sup>31</sup> provides another reason to pay attention to Congress's interpretations of the Constitution. The Supreme Court has held that many questions of constitutional interpretation are textually committed to another branch of government and cannot be answered by the courts.<sup>32</sup> Congress thus frequently deals with issues

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departmentalist theories); Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1112–13 (2011) (arguing that “there is (sometimes) affirmative value in promoting the means for interbranch tension and conflict without any sort of superior body that can articulate a global, principled, final, and binding decision on the matter”).

29. See generally Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010) (analyzing published OLC opinions).

30. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 17–18 (1958) (declaring that the Supreme Court's interpretations of the Constitution are binding on Congress).

31. See, e.g., Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 330 (2002) (stating the importance of the political question doctrine).

32. See Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 725–27 (1985); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1278 (2001) (“Consider the large domain of constitutional decisionmaking over which the Supreme Court has essentially ceded control to the political branches by articulating deferential standards of review, limits on standing and justiciability, and the political-question doctrine. Impeachments and many issues involving electoral processes generally lie within this domain, and other questions do as well.”); *id.* at

over which the courts have no jurisdiction.<sup>33</sup> These questions include impeachment,<sup>34</sup> appointments, the accuracy of enrolled bills,<sup>35</sup> and expulsion or exclusion of the legislature's members.

On some of these questions, Congress is the final and only interpreter of the Constitution. On others, Congress shares interpretive authority with the President. Formal statements about Congress's understanding of the Constitution on these subjects, then, are most welcome. Statements that are intended to spark further debate if controversial are even more welcome.

*The Presumption of Constitutionality* doctrine tells judges that they should assume that Congress is complying with the Constitution.<sup>36</sup> The presumption of constitutionality is the doctrine that courts should "defer to or presume the correctness of the judgment of the legislative branch that a statute it enacts is constitutional."<sup>37</sup> The presumption can, of course, be overcome in court, but courts will go out of their way to look for a rational basis Congress might have relied on to justify the statute's constitutionality. The act of passing the statute, alone, is seen as a congressional statement that the statute is constitutional in Congress's opinion.

The presumption of constitutionality applies regardless of the level of discussion that took place in Congress. There may have been extensive constitutional debate about a bill, or the debate may have focused entirely on policy issues instead of constitutional ones, or the bill may have been passed in a stealthy manner with no recorded legislative history at all. The courts do not even look to legislative history to decide whether to apply the presumption of constitutionality; they simply apply it for every statute.<sup>38</sup> As some scholars have pointed

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1284–85 (listing constitutional questions the Supreme Court has declined to answer).

33. See MORGAN, *supra* note 17, at 11.

34. See *Nixon v. United States*, 506 U.S. 224, 232 (1993) (discussing the Senate's unreviewable power to create procedures for impeachment trials).

35. See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892) (holding that a bill signed by the Speaker of the House and the President of the Senate must be accepted by the courts as having passed both houses, regardless of evidence to the contrary).

36. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 151–52 (2004) (arguing that the presumption of constitutionality is inconsistent with the original meaning of the Constitution and advocating that it be replaced with a presumption of liberty). See generally F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447 (claiming that deference to legislatures about constitutional decisions makes more sense than deference to legislatures about facts); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (arguing that the power to determine whether a law is constitutional belongs to the legislature, not the judiciary).

37. BARNETT, *supra* note 36, at 151–52.

38. The level of discussion about a bill's constitutionality is not necessarily correlated

out, this can lead to a cyclical deference, in which nobody actually makes a decision about constitutionality: If Congress is avoiding the question in the belief that the courts should answer the question, but the courts then apply a presumption that Congress has already decided that a statute is constitutional, then nobody ever does an independent analysis.<sup>39</sup>

Constitutional authority statements can make Congress's constitutional deliberations more frequent and more transparent. Scholars concerned with the presumption of constitutionality should see this as a welcome development, and should be interested to see whether judges are more or less likely to accept Congress's explicit justifications, as opposed to its implicit ones.

*The Oath of Office* provides another potential reason to believe that constitutional authority statements in Congress are important. All federal and state government officials are constitutionally required to take an oath to support the Constitution.<sup>40</sup> It is not simply a formality.<sup>41</sup>

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with its constitutionality. Congress may choose not to discuss a bill's constitutionality because it is so obviously constitutional that it does not merit debate time, or because it is so obviously unconstitutional (but politically popular) that nobody dare bring it up, or because nobody cares whether it is constitutional or not. Some Members of Congress may also hold the view that decisions about constitutionality should be left to the Supreme Court. *See, e.g.,* MORGAN, *supra* note 17, at 3–10 (recounting evidence that a significant minority of Members of Congress think constitutional questions should be considered only by the courts, not by Congress itself). This view, combined with the presumption of constitutionality, could lead to a vicious cycle of deference in which each branch was deferring to another and no branch ever made an independent decision about constitutionality. *See id.* at 11 (“[I]t is hard to defend judicial presumption [that acts of Congress are constitutional] unless Congress itself deals conscientiously with constitutional questions.”).

39. *See* Randy Barnett, *Double Deference and the House GOP's Fair-Weather Federalism*, THE VOLOKH CONSPIRACY (May 22, 2011, 12:46 PM) <http://www.volokh.com/2011/05/22/double-deference-and-the-house-gops-fair-weather-federalism/> (“Thus does the Court defer to Congress, while the House Republicans—just like Congressional Democrats—defer to the Court's assessment of constitutionality.”); Randy Barnett, *Professor Jost Replies*, THE VOLOKH CONSPIRACY (Sept. 19, 2009, 9:37 AM), <http://www.volokh.com/2009/09/19/professor-jost-replies/> (“[I]f the Supreme Court adopts a ‘presumption of constitutionality’ by which it defers to the Congress's judgment of the constitutionality of its actions . . . and the Congress adopts [the] view that ‘unconstitutionality’ means whatever the Supreme Court says, then NO ONE EVER evaluates whether a act of Congress is or is not authorized by the Constitution.”); Randy Barnett, *This Is What Courts Defer to?*, THE VOLOKH CONSPIRACY (April 3, 2010, 12:25 PM), <http://www.volokh.com/2010/04/03/this-is-what-courts-defer-to/> (noting that the congressional “judgment” courts defer to is often either a prediction of what the courts are likely to do or a complete abdication of responsibility, not an independent decision); *see also* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 599 (1975) (arguing that Congress should apply stricter constitutional tests on itself because rational basis review implicitly delegates constitutional decision-making from courts to Congress).

40. *See* U.S. CONST. art. VI, § 3.

Some legislators have spoken about the oath as a serious factor in their decision making.<sup>42</sup>

Leaders in the House of Representatives themselves cited the oath of office as a justification for adopting the CAS rule. In a memo explaining the new rule to Members, the leadership stated, “While the courts have the power to overturn an Act of Congress on the basis that it is unconstitutional, Members of Congress have a responsibility, as clearly indicated by the oath of office each Members takes, to adhere to the Constitution.”<sup>43</sup>

Observers interested in the oath of office arguments should support constitutional authority statements because CASs are a way of making sure that legislators are not violating their oaths to uphold the Constitution.

Finally, anyone who believes that Congress should *not* be interpreting the Constitution in any authoritative way should be interested in constitutional authority statements. This group is relatively small, as most scholars think Congress has *some* interpretive responsibility.<sup>44</sup> Still, some highly respected scholars have come out in favor of strong judicial supremacy.<sup>45</sup> To people in this camp, Congress’s reassertion of its interpretive authority may be a sign of danger. Judicial supremacists, like departmentalists, will be interested to see how the courts treat these new constitutional authority statements.

41. See generally Louis Fisher, *supra* note 32, at 718–19; Steve Sheppard, *What Oaths Meant to the Founding Generation: A Preliminary Sketch*, 2009 CARDOZO L. REV. DE NOVO 273 (2009), [http://www.cardozolawreview.com/content/denovo/SHEPPARD\\_2009\\_273.pdf](http://www.cardozolawreview.com/content/denovo/SHEPPARD_2009_273.pdf).

42. See Sen. Russ Feingold, *Upholding an Oath to the Constitution: A Legislator’s Responsibilities*, 2006 WIS. L. REV. 1, 4 (noting several instances of amending legislation to make it constitutional as fulfillment of his oath of office).

43. COMM. ON RULES, U.S. HOUSE OF REPRESENTATIVES, *New Constitutional Authority Requirement for Introduced Legislation* (Jan. 5, 2011), <http://www.rules.house.gov/about/PolicyDetail.aspx?NewsID=72> [hereinafter *Rules Committee Memo*].

44. See Garrett & Vermeule, *supra* note 32, at 1306 (“Normatively, most mainstream theories of constitutionalism deem congressional review for constitutionality to be an affirmative good, regardless of the scope of subsequent judicial review.”).

45. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359 (1997); Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CAL. L. REV. 1045, 1066 (2004); see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (declaring that “the federal judiciary is supreme in the exposition of the law of the Constitution” and that federal and state legislators are bound to follow the Supreme Court’s interpretations); MORGAN, *supra* note 17, at 10 (laying out the principles of what he calls the “judicial monopoly” theory, but not endorsing it); Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT. 405, 408 (2003) (arguing that critiques of judicial supremacy “miss the mark” and that “advocates for changing longstanding practices bear the burden of persuasion for changing them”).

Before moving on, two things bear mentioning. First, this discussion has raised several large questions that a single article cannot answer, and the rest of this Article will continue to raise more questions. To name a few: whether Congress's interpretations are consistent with the Court's interpretations, whether Congress's interpretations are more consistent with popular understanding than the Court's interpretations are, whether CASs are discussed in Congress after they are written, how the Executive Branch and courts will treat constitutional authority statements,<sup>46</sup> and whether CASs make Congress less likely to accidentally or intentionally violate the Constitution. Constitutional authority statements provide a huge field for further research. I hope this Article can serve as a launching point for future discussions of these and other issues.

Second, a note about party politics is in order. Since 2008, Republicans have been loudly proclaiming that Congress, and the people themselves, should take the Constitution more seriously.<sup>47</sup> Some (but not all) Democrats, in response, have been claiming that the Constitution is the domain of the courts—that is, taking the judicial supremacy position.<sup>48</sup> This partisan alignment is a very recent development, largely in response to political circumstances.<sup>49</sup> And it is almost certainly a transient phenomenon. If Republicans gain undivided power again, constitutional arguments in Congress will come more often from Democrats. A study undertaken in 1999–2000, an era when the Constitution was less salient as a political issue, found no relationship between party affiliation and a Congressperson's views of congressional authority to interpret the Constitution.<sup>50</sup>

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46. This Article answers some questions about judicial use of constitutional authority statements in Part III, but the discussion is entirely theoretical because no court has discussed the statements yet.

47. See, e.g., Schmidt, *supra* note 8, at 235–36; see Republicans in Congress, *supra* note 8, at 33 (“We will require each bill moving through Congress to include a clause citing the specific constitutional authority upon which the bill is justified.”).

48. See, e.g., Kasperowicz, *supra* note 13 (“[Democratic Representative Corrine] Brown reiterated other Democratic arguments against the [CAS] rule, including that it is the job of the courts to decide when Congress has overstepped its bounds.”).

49. During the passage of the health care reform legislation, Democrats had a majority in the House of Representatives and a filibuster-proof majority in the Senate, making their legislative agenda almost unstoppable.

50. See Bruce G. Peabody, *Congressional Attitudes toward Constitutional Interpretation*, in CONGRESS AND THE CONSTITUTION 39, 50–51 (Neal Devins & Keith E. Whittington, eds., 2005).

## 2. Compliance (or Noncompliance) with Doctrine

A major question within this field is whether Congress should comply with Supreme Court doctrine on constitutional questions, or whether Congress should reach its own, independent decisions about constitutional meaning. Regardless of which view is correct, CASs are a helpful tool. They can be used to explore doctrine as well as to reach independent conclusions—and in fact, Congress has already been using them in both ways.

Even if Congress does assert independent authority in some situations, most of the time Congress wants laws to comply with the Supreme Court's understanding of the Constitution. Perhaps Congress thinks the Court is doing an excellent job of developing the right to equal protection, for instance, and wants to make sure that new laws comply with all of the Supreme Court doctrine on the subject. Or perhaps Congress fears it would lose an all-out battle with the Court on a particular constitutional issue, does not want to impose the costs of litigation on parties who would challenge the statute,<sup>51</sup> or prefers to maintain stability in the law rather than the uncertainty that would flow from a disputed interpretation. In those cases, Congress might choose to write a statute that accomplishes as much of its own agenda as possible while not running afoul of Court doctrine.

Congress's relationship to doctrine can sometimes be more complex than simply accepting or rejecting it. Take, for example, the issue of protests at military funerals. The Supreme Court recently decided in *Snyder v. Phelps*<sup>52</sup> that the First Amendment protects the speech of protesters at a military funeral when the protest complied with state law regulating the time, place, and manner of the protest. The protesters were therefore not liable to family members of the deceased for intentional infliction of emotional distress.<sup>53</sup> One proposed congressional response to this decision was to reduce the likelihood that emotional distress would occur without contradicting Supreme Court doctrine on the subject.<sup>54</sup> H.R. 961 proposes to increase the limits on funeral protests without banning them outright, and its constitutional authority statement summarizes the prevailing doctrine: "The First Amendment to the Constitution permits time, place and manner restrictions on free speech."<sup>55</sup> The sponsor of this bill clearly disagrees

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51. See BAMBERGER, RECKLESS LEGISLATION 49–50 (2000) (discussing the disruptive real-world effects of having a statute struck down); MORGAN, *supra* note 17, at 11 (stating that "sole reliance on court determination may present difficulties").

52. 131 S. Ct. 1207 (2011).

53. See *id.* at 1215–19.

54. Safe Haven for Heroes Act of 2011, H.R. 961, 112th Cong. § 2 (2011).

55. 157 Cong. Rec. H1620 (daily ed. Mar. 8, 2011) (Constitutional Authority Statement)

with the outcome of *Snyder*—that protesters were allowed to gather near a military funeral—but agrees with the general doctrine that led to that result.<sup>56</sup>

The Constitution and what the Court says about the Constitution are not the same thing, but people sometimes talk about them as if they were.<sup>57</sup> The requirement for a constitutional authority statement could be interpreted to include reference to court cases that are relevant to the issue being discussed. Several of the CASs in the database do in fact cite to Supreme Court cases<sup>58</sup> or mention court doctrine<sup>59</sup> in addition to citing provisions of the Constitution itself. Many (probably even most) others are surely citing portions of the Constitution in ways that accord with the Court’s interpretation of those provisions, though they do not cite the doctrine directly.

Interpreters of statutes routinely assume that Congress is not only aware of the statutory background against which it legislates,<sup>60</sup> but also

for H.R. 961 introduced by Representative Ruppertsberger).

56. See Md. Congressman Wants To Prevent Funeral Protests, WBAL TV, March 8, 2011, available at <http://www.wbalv.com/r/27118214/detail.html> (“Ruppertsberger’s aides said they think the Safe Haven for Heroes Act is constitutional because it does not directly challenge the Supreme Court’s free speech ruling.”); Press Release, Ruppertsberger Announces Legislation To Prevent Protests During Military Funerals (Mar. 8, 2011), available at <http://dutch.house.gov/2011/03/ruppertsberger-announces-legislation-to-prevent-protests-during-military-funerals.shtml>.

57. See generally BAMBERGER, *supra* note 51 (accusing legislators of ignoring “the Constitution,” by which he largely means Supreme Court doctrine).

58. See, e.g., 157 Cong. Rec. H1524 (daily ed. Mar. 2, 2011) (Constitutional Authority Statement for H.R. 869 introduced by Representative Denham) (citing U.S. CONST. art. I, § 8, cl. 3; *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940)); 157 Cong. Rec. H1525 (daily ed. Mar. 2, 2011) (Constitutional Authority Statement for H.R. 873 introduced by Representative Lewis) (citing U.S. CONST. art. I (“Article I of the United States Constitution . . . further clarified and interpreted by the Supreme Court of the United States.”)); 157 Cong. Rec. H1986 (daily ed. Mar. 17, 2011) (Constitutional Authority Statement for H.R. 1152 introduced by Representative Rangel) (citing U.S. CONST. art. I, § 8, cls. 12, 13 and 14; *Rostker v. Goldberg*, 453 U.S. 57 (1981)).

59. See 157 Cong. Rec. H2916 (daily ed. Apr. 15, 2011) (Constitutional Authority Statement for H.R. 1644 introduced by Representative Rivera) (mentioning the “Interstate Travel Regulation” of the Commerce Clause). This probably refers to “use of the channels of interstate commerce,” which is the first category of the Supreme Court’s doctrine regarding three categories of commerce regulation. See *United States v. Lopez*, 514 U.S. 549, 558 (1995). See also 157 Cong. Rec. H1620 (daily ed. Mar. 8, 2011) (Constitutional Authority Statement for H.R. 961 introduced by Representative Ruppertsberger) (“The First Amendment to the Constitution permits time, place and manner restrictions on free speech.”).

60. The *in pari materia* canon, which presumes that a legislature uses the same words consistently throughout statutes on the same subject, is one example of this assumption in statutory interpretation. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* § 39 (2012). Another is the canon against implied repeals, which assumes that a legislature intended its new statute to fit with prior law on the subject if possible, without asking whether the legislature even considered the prior statute. See *id.* § 55.

is aware of judicial interpretations of prior law.<sup>61</sup> Congress is assumed to legislate in light of all of that existing legal background. Many commentators have pointed out that these assumptions are clearly false.<sup>62</sup> The law is too big and too complicated for all of the effects of new legislation to be understood *ex ante*. Yet the assumptions remain. Constitutional authority statements can be thought of as a way of making these assumptions more accurate in fact. Congress is attempting to become aware of, and to comply with, a portion of the relevant existing law before it enacts new legislation—the portion that involves the Constitution and perhaps court interpretations of the Constitution.

When Congress does wish to challenge the Supreme Court's interpretation of a constitutional provision, a CAS can help make that challenge more explicit. A CAS might cite the contested provision of the Constitution and state that Congress's interpretation differs from the Court's. Or the differing interpretation might be only implied, but would be revealed through comparison of the statute and its CAS with existing doctrine.

The usefulness of CASs, then, does not depend on a belief that Congress should interpret the Constitution independently. CASs can be used either to comply with, to fight against, or to ignore Supreme Court interpretations. We should expect to find a combination of these approaches, as CASs are written by Representatives holding different views.

### B. *Congress's Capacity to Interpret the Constitution*

Scholars interested in Congress's authority to interpret the Constitution often find themselves arguing over Congress's institutional capacity to interpret the Constitution. If Congress is terrible at constitutional interpretation, departmentalism and the political question doctrine start to seem like really bad ideas. Not surprisingly, scholars differ over how capable Congress is at doing robust constitutional interpretation.

What does it mean to say that Congress does or does not have sufficient capacity to interpret the constitution? Problems of capacity can be divided into three categories. First, Congress might simply forget

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61. See, e.g., Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 375 (2010) (describing the "reenactment rule" canon, which holds that a legislative reenactment of a statute without changes incorporates prior judicial and administrative interpretations of the statute).

62. See Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609 (1983) ("[M]ost Supreme Court opinions never come to the attention of Congress.").

to consider constitutional questions.<sup>63</sup> If potential unconstitutionality is frequently overlooked, Congress will rarely have the opportunity to make constitutional decisions.

Second, Congress might lack the motivation to consider constitutional questions, or to consider those questions honestly. With a limited amount of time available for debate on each bill, members may choose to focus their attention on policy considerations and political maneuvering rather than questions of constitutionality.<sup>64</sup> Alternatively, members might make constitutional arguments only strategically to further their political goals, not out of actual concern for constitutionality.<sup>65</sup>

Third, members of Congress, their staffs, and support agencies may not have enough knowledge or expertise to analyze constitutional issues properly. Even if they make their best attempt to determine whether a bill is constitutional or not, they may get the answer wrong more often than not, or may simply be unable to reach a conclusion.

The exact limits of Congress's capacity to interpret the Constitution are difficult to quantify. Congress certainly has *some* capacity to analyze constitutional questions. Members can and do make constitutional decisions when important issues come to their attention. They take advantage of expert witnesses at hearings, their legally trained staff, constitutional experts at the Congressional Research Service, and other resources to help them make these decisions.<sup>66</sup>

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63. See, e.g., Garrett & Vermeule, *supra* note 32, at 1298 (discussing the “fire-alarm model” of constitutional monitoring, in which members of Congress do not consider constitutional problems with a bill unless an outside interest group brings those problems to their attention).

64. See BAMBERGER, *supra* note 51, at 66–69 (providing an example of how constitutional considerations can take a back seat in debates over hot-button political issues); Garrett & Vermeule, *supra* note 32, at 1300 (criticizing the “fire alarm model” of constitutional analysis in Congress); Mikva, *supra* note 62, at 587 (“For the most part, legislative debate does not explore the constitutional implications of pending legislation; and, at best, Congress does an uneven job of considering the constitutionality of the statutes it adopts.”).

65. See, e.g., MORGAN, *supra* note 17, at 21–24 (describing the interrelatedness of policy and constitutional questions and noting that “[t]he dynamism of the struggle for policy with its mood of urgency and immediacy makes the constitutional appeal seem at the least pointless, at the worst sheer treason”). But see Jeffrey K. Tulis, *On Congress and Constitutional Responsibility*, 89 B.U. L. REV. 515, 523 (2009) (“[A] separation of powers system [can] tie the ambitions of officeholders to the duties of the office in such a manner as to produce impressive arguments, however insincere or inauthentic. These arguments take on a life of their own, and far from being merely the cover or rationalization for private interest and ambition (of ‘real’ politics), they become the substance and action of politics itself.”).

66. See generally Fisher, *supra* note 32, at 730.

Further, changes to Congress's internal rules and institutional structures can enhance its capacity to interpret the Constitution.<sup>67</sup>

This Section argues that constitutional authority statements are within Congress's current interpretive capacity, and are themselves an institutional rule that enhances future capacity.

### 1. Requiring Consideration

The first two capacity problems—that Congress forgets or is not motivated to consider the Constitution—are reduced simply by making constitutional deliberation a requirement. This is exactly what the current CAS rule does. Sponsors can no longer forget to consider the constitutionality of a bill because at the time of introduction, they are required to include a CAS. If they forget to include the CAS, the bill will be rejected and the sponsor will have to reintroduce it with a proper CAS. Unlike a congressional requirement to read the text of each bill, another currently popular initiative aimed at increasing deliberative lawmaking, CASs can easily be required and enforced.<sup>68</sup>

Members other than the sponsor are more likely to notice constitutional issues as well. When the CAS is printed together with the bill, Members will notice it and might think of related constitutional issues as well. Simply putting the initial statement in front of them can increase the amount of thought and deliberation that occurs.

Lack of motivation is a more difficult problem to address. Members will be forced to comply with the CAS requirement to a certain extent, but there are ways to evade the spirit of the rule while complying with the letter. Nonspecificity, failure to mention anything in the actual Constitution, and simply ignoring the invitation to discuss the CAS during later deliberations will be continuing problems. Still, a requirement of a minimal amount of constitutional analysis overcomes some of the inertia.

Part of the motivation problem is that constitutional analysis in Congress is a public good produced by individuals, and therefore will be underproduced. Everyone benefits when Congress is presented with information about potential constitutional problems before a bill is finalized. But creating that information takes time away from a representative's other important tasks, including those that may have more effect on reelection or the enactment of the Representative's policy preferences.<sup>69</sup> Legislators thus have less incentive to research the

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67. See generally Garrett & Vermeule, *supra* note 32 (proposing institutional changes to enhance Congress's capacity to interpret the Constitution).

68. See Hanah Metchis Volokh, *A Read-the-Bill Rule for Congress*, 76 MO. L. REV. 135, 141–42 (2011).

69. Garrett & Vermeule, *supra* note 32, at 1301–02.

information themselves, but prefer when others produce the information for them.<sup>70</sup>

CASs also address this problem to a certain extent. They spread the cost of constitutional interpretation roughly equally among Representatives.<sup>71</sup> Some Representatives will choose to introduce more bills than others, raising their costs slightly, and some will introduce more constitutionally complex or controversial bills. But placing the initial burden of constitutional interpretation on the sponsor of the bill is a reasonably fair method.

## 2. Capacity for Constitutional Authority Statements

The third complaint, regarding lack of constitutional expertise among members of Congress and their staffs, is a serious one. Congress's current interpretive capacity is probably less than that of the courts, but it is hard to evaluate this with any accuracy.<sup>72</sup> For the purposes of this Article, however, we need not explore the limits of Congress's interpretive capacity. The amount of interpretation required for a CAS is small, and should be well within the limits of any member with a lawyer on his or her staff.

The current CAS rule does not require a full statement about every aspect of the constitutionality of a bill. It is quite easy to comply with. The sponsor needs to fill out a form with a citation to a provision of the Constitution. This can be extensive if desired, but need only be a single sentence or even less.

The rule requires only that the sponsor cite "the power or powers granted to Congress in the Constitution *to enact* the bill or joint resolution."<sup>73</sup> It does not require an analysis of all possible constitutional problems the bill might create.

The Constitution consists not only of power grants to Congress, but also of overlapping power grants to the President and the courts, affirmative limits on federal power over certain subjects, and structural features that can bar some types of legislation. There is a large universe of potential laws that would fall within one of the Constitution's power

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70. *Id.* at 1301 ("If constitutional deliberation is an individually supplied good, individual legislators do not internalize all of the benefits of constitutional deliberation, but do shoulder the costs. In such a system, constitutional deliberation will be underproduced."). *See also* BAMBERGER, *supra* note 51, at 150–51 (noting the importance of full and fair legislative hearings and lamenting that they don't always happen).

71. *See* Garrett & Vermeule, *supra* note 32, at 1301 ("[A]ll members would benefit from a system that requires lawmakers to allocate some of their scarce time to the consideration of constitutional issues . . .").

72. *See* Michael Gerhardt, *Judging Congress*, 89 B.U. L. REV. 525, 530–35 (2009) (listing knowledge gaps that prevent scholars from evaluating Congress's constitutional performance).

73. H.R. Res. 5, 112th Cong. § 2(a)(1)(c)(1) (1st Sess. 2011).

grants to Congress, but would violate some other provision or structural principle of the Constitution. For an obvious example, consider a law that bans interstate sales of religious books.<sup>74</sup> This is a straightforward regulation of interstate commerce, a power that is granted to Congress.<sup>75</sup> But any such law would blatantly violate the First Amendment.<sup>76</sup>

In the improbable event that a representative wanted to introduce such a bill, the CAS would fully comply with the rule by citing only the Commerce Clause, with no mention of the First Amendment. The Commerce Clause is “the power . . . granted to Congress in the Constitution to enact the bill.”<sup>77</sup> The rule says nothing about citing relevant limits on congressional power or explaining why the bill is not barred by those limits.

This aspect of the CAS rule creates some potential problems, which are discussed in Section III.D. But it has the advantage of making the *ex ante* task of constitutional analysis manageable. The sponsor is not expected to anticipate every possible constitutional objection to the bill under any circumstances that may arise. He or she is required only to address the question of Congress’s initial authority to enact legislation on the bill’s subject matter.

It also prevents Representatives from wasting time on useless constitutional analyses. Most bills raise no serious constitutional questions, so searching for potential problems would be futile. But the underlying question of Congress’s authority to enact a bill arises for *every* bill, not just a subset, and should be easily answered for most.

### 3. Increasing Capacity

In addition, constitutional authority statements build Congress’s interpretive capacity going forward. They force the production of preliminary information that can then be used in debates over whether to enact the bill. This explanation was part of the basis on which House leadership justified the CAS rule in an introductory memo:

Just as a cost estimate from the Congressional Budget Office informs the debate on a proposed bill, a statement outlining the power under the Constitution that Congress has to enact a proposed bill will inform and provide the

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74. For similar examples, see, for example, Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1017 (2011) (discussing a hypothetical law banning the interstate sale of news magazines).

75. 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 . . .”).

76. See *id.* amend. I.

77. H.R. Res. 5, 112th Cong. (1st Sess. 2011).

basis for debate. It also demonstrates to the American people that we in Congress understand that we have an obligation under our founding document to stay within the role established therein for the legislative branch.<sup>78</sup>

Information-producing regulations are popular both outside and inside Congress. A paradigmatic example is the National Environmental Policy Act (NEPA), which requires federal agencies to write environmental impact statements explaining the negative environmental effects of their proposals.<sup>79</sup> NEPA does not raise any substantive barriers to an agency's continuing with those projects. A federal agency is free to carry out its program after thoroughly explaining exactly how environmentally catastrophic it will be.<sup>80</sup> But many commentators have argued that NEPA is nonetheless effective because it increases the available information, allows outside groups to put pressure on the agency that is considering action, and encourages the agency to choose actions with fewer environmental consequences when possible.<sup>81</sup> And unlike NEPA's onerous reporting requirements,<sup>82</sup> the CAS rule does not create large costs or delay for Congress, since it is so easy to comply with.

Examples of information-producing regulations within Congress's own deliberations include the Congressional Budget Office cost estimates mentioned in the House memo, the Unfunded Mandates Reform Act of 1995,<sup>83</sup> and a recent proposal to require reports about the groups that will be harmed by certain types of legislation.<sup>84</sup> These regulations cannot actually stop Congress from doing something harmful if it wants to, but they are designed to draw attention to the potential harms in the hope that the information will influence Congress's deliberative process.

Constitutional authority statements serve the same type of function. An initial statement about the bill's constitutionality must be produced,

78. See *Rules Committee Memo*, *supra* note 43.

79. See National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2000).

80. *But see* Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 342–43 (2004) (presenting the view of some scholars that NEPA was intended to have substantive as well as procedural requirements).

81. See, e.g., Karkkainen, *supra* note 80, at 338–39 (describing the views of NEPA's “most ardent defenders”).

82. See, e.g., *id.* at 339–43 (describing the heavy burdens that NEPA can place on agencies).

83. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, § 423, 109 Stat. 48, 53–54 (1995) (requiring congressional committees to produce reports on unfunded mandates in bills that they approve).

84. See Anita S. Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. 1, 2–3 (2009).

with the hope that any controversial statements will be debated as the bill moves through the legislative process. Additional constitutional issues that are not mentioned in the bill's CAS may also be noticed once attention is directed toward constitutional deliberation in general. Requiring a CAS at introduction, as compared with later in the legislative process, is beneficial because it identifies potential constitutional difficulties at the outset of deliberations, not at a late stage where they may be impossible to correct.<sup>85</sup>

Constitutional authority statements lower the cost of constitutional deliberations during the legislative process because they provide an accessible starting point. Members and staff who might have neglected to think about constitutionality amid the clash of policy and interest group concerns are required to write a statement for their own bills, and see a statement in front of them for other bills. The added cost from the rule is small because writing the statements is a quick and easy task for the majority of bills. For the small number of bills that have less obvious constitutional authority, the increased time and deliberation is a highly desirable investment to avoid constitutional violations.

## II. THE CONTENT OF CONSTITUTIONAL AUTHORITY STATEMENTS

The CAS requirement is phrased in relatively vague terms, leaving lots of room for interpretation about how to write a constitutional authority statement. At the same time, it includes several hidden assumptions that have the potential to affect the content of CASs in unexpected and potentially harmful ways. The specific requirement of the CAS rule is: "A bill or joint resolution may not be introduced unless the sponsor submits for printing in the Congressional Record a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution."<sup>86</sup>

A disagreement broke out over the meaning of the CAS rule on February 11, 2011, in a committee markup.<sup>87</sup> The episode illustrates many of the substantive issues surrounding the interpretation of this

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85. See Garrett & Vermeule, *supra* note 32, at 1303 ("They need to know at an early stage when a proposal implicates a significant constitutional issue, and then they require analysis of the substance of the issue."). An even better rule would require a CAS at the beginning *and* at a later stage of the legislative process. See *infra* Section IV.B.

86. H.R. Res. 5, 112th Cong. § 2(a)(1)(c)(1) (1st Sess. 2011).

87. No transcript for this part of the subcommittee markup hearing has been published, to my knowledge. A video of the session, lasting approximately forty minutes, can be viewed at <http://democrats.energycommerce.house.gov/index.php?q=news/waxman-and-pallone-urge-up-ton-not-to-consider-hr-358-until-it-includes-citation-of-constitution>. All references to the events of the subcommittee markup hearing are taken directly from this video.

rule. The Subcommittee on Health, which is part of the Energy and Commerce Committee of the House of Representatives, was beginning a session about H.R. 358, the Protect Life Act. The highly controversial bill, sponsored by Representative Joseph Pitts (R-Pa.), would restrict federal funds for abortion and allow federally funded hospitals to refuse to perform abortions.<sup>88</sup> The bill was framed as an amendment to the Patient Protection and Affordable Care Act (PPACA), with the sponsor of the bill claiming that portions of the unamended PPACA are unconstitutional (presumably because they interfere with freedom of conscience). The constitutional authority statement for H.R. 358, in its entirety, reads as follows: “The Protect Life Act would overturn an unconstitutional mandate regarding abortion in the Patient Protection and Affordable Care Act.”<sup>89</sup>

When the hearing started, Representative Anthony Weiner (D-N.Y.) immediately raised a point of order under the CAS rule. He claimed that the bill was not properly before the subcommittee because its constitutional authority statement did not comply with the rule—and therefore that the bill should have been rejected at introduction for having an insufficient CAS. Throughout a forty-minute discussion, which became heated at times, Representative Weiner, Representative Frank Pallone (D-N.J.), and Representative Henry Waxman (D-Cal.) made a number of complaints about the bill’s CAS, while Representative Joe Barton (R-Tex.) and Representative Bob Latta (R-Ohio) defended the sufficiency of the statement. Several questions were directed to the committee’s counsel, to the House Parliamentarian, and to the House Rules Committee before the subcommittee chair ruled on the point of order.

The discussion proceeded in a rather confused and imprecise way, but several separate threads can be identified:

First, Representative Weiner objected that the CAS for H.R. 358 did not cite a specific section of the Constitution. Representative Waxman later joined this argument, reading the CASs for several other bills aloud and noting that they all reference specific sections or clauses of the Constitution by number (for example, Article I, Section 8, Clause 3) or by clause name (for example, the Commerce Clause). The CAS for H.R. 358, by contrast, does not mention or even allude to any specific section.

Second, Representative Weiner argued that to repeal a prior statute, a representative has to say something more than “the prior statute is unconstitutional.” She has to cite some provision of the Constitution

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88. H.R. 358, 112th Cong. § 2(b)-(c) (1st Sess. 2011).

89. 157 Cong. Rec. H396 (daily ed. Jan. 20, 2011) (Constitutional Authority Statement for H.R. 358 introduced by Representative Pitts).

that provides Congress with the power to enact the new statute, not just to repeal the prior one. Otherwise, the CAS rule would allow a representative to enact any bill simply by saying “I believe this bill is constitutional.” Representative Latta attempted to directly rebut this point, arguing that it is always constitutional to repeal an unconstitutional statute, and that no other statement of authority is necessary once the prior statute is claimed to be unconstitutional.

Third, Representative Pallone suggested that the reason the sponsor of H.R. 358 did not cite specific constitutional authority is because it would be impossible to do so—the bill is substantively unconstitutional because it infringes a woman’s right to privacy. Representative Pallone specifically referenced *Roe v. Wade*<sup>90</sup> as recognizing this right.

Fourth, Representative Barton tried to provide additional authority for H.R. 358 that was not cited in the bill’s CAS. He pointed to Article I, Section 1 of the Constitution, which states, “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,” as substantive authority for Congress to amend any prior statute.

Fifth, Representative Barton argued that all of the issues raised by Reps. Weiner and Pallone were irrelevant to the point of order under debate. The only requirement of the rule, he claimed, is that a CAS paper be filed with something written on it. The substantive content of the CAS is an important subject of debate in the committee, but insufficient content does not mean that the bill was not properly introduced in the first place. The fact that H.R. 358 had a CAS that Representative Weiner could read aloud meant that it was in compliance with the rule.

Ultimately, this fifth and final point prevailed. The Chair of the Subcommittee, acting on advice from the Parliamentarian and the Rules Committee, ruled that a point of order cannot be used to object that the content of a CAS is incorrect or insufficient. The fact that the CAS document was filed with something written on it is enough to fulfill the requirement in the House Rules.

#### A. Policing CAS Content

The decision not to enforce specific requirements about the content of a CAS is frustrating, but it does not destroy the rule’s usefulness. In the words of Representative Waxman, “You could say,

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90. 157 Cong. Rec. H396 (Constitutional Authority Statement for H.R. 358); *See* *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing, for the first time, a woman’s constitutional right to abortion and locating that right in the due process clause of the Fourteenth Amendment), *holding modified by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

‘Aboogaboogaboogabooga!’ and that’s enough to justify the constitutionality of the proposal.”<sup>91</sup> If the only requirement is that the sponsor write some random words on the form, unmotivated sponsors can flout the requirement without a second thought.

The subcommittee chair’s decision is consistent with the text of the rule, though the text is certainly open to a different interpretation as well. The rule does not lend itself to precise line-drawing, but some minimum limits of what sorts of things qualify as “powers granted to Congress in the Constitution” and “as specifically as practicable” could be formulated and enforced.

The decision is also consistent with the initial explanation by the House Rules Committee of how the CAS requirement would work. The introductory memo explaining the new requirement made it clear that the clerk of the House will not accept a bill with a blank CAS form, but he does not check to see whether the constitutional authority is accurate or complete.<sup>92</sup> The memo stated that “the adequacy and accuracy of the citation of constitutional authority is a matter for debate in the committees and in the House,” not something that would cause the bill to be rejected on procedural grounds.<sup>93</sup>

But even without strict procedural enforcement, CASs still serve two very important functions. First, even an incomplete CAS can spark debate about substantive constitutional issues, even ones that are not mentioned in the CAS at all. The shift in the subcommittee debate to the substantive constitutionality of abortion rights, abortion restrictions, and the health insurance mandate demonstrates that attention to one constitutional issue can spill over to give attention to others. Second, Representatives can encourage each other to take the rule seriously despite the lack of hard consequences for ignoring it. Representative Weiner’s objection to the CAS for H.R. 358 was partially intended to kill the bill, but it was also intended to shame the Republicans for evading a rule they themselves had created. And as the House Rules Memo pointed out, an inadequate or incorrect CAS can provide a reason to vote against a bill. To the extent Representatives believe the CAS requirement is a helpful legislative tool, they will follow the spirit of the requirement and encourage their colleagues to do so as well.

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91. Ben Weyl, *Parties Spar over Interpretation of ‘Constitutional Authority’ Rule*, CQ TODAY, Feb. 15, 2011.

92. See *Rules Committee Memo*, *supra* note 43 (“Under the rule, the clerk will not accept the bill [if it does not have a CAS] and it will be returned to the sponsor.”).

93. See *Rules Committee Memo*, *supra* note 43.

### B. *Specificity*

One of Representative Weiner's objections, though not his core objection, to the CAS for H.R. 358 was that it was not specific enough. Reading the CAS, he could not identify what constitutional power the bill's sponsor meant to rely on. The proper level of specificity in a CAS is unclear under the rule, but at a minimum, it should allow other members of Congress to clearly understand the claim of congressional power that is being made.

The rule asks Representatives to cite the constitutional authority for a bill "as specifically as practicable." Some CASs take this requirement very seriously, citing one or more individual clauses of the Constitution that authorize particular powers of Congress, such as the power to borrow money<sup>94</sup> or the power to grant patents and copyrights.<sup>95</sup> A few divide the provisions of the bill into different groups and identify the constitutional authority for each category.<sup>96</sup>

A handful of CASs engage in a thorough and highly detailed explanation of the constitutional ramifications of the proposed legislation. For example, the CAS for H.R. 922 includes several paragraphs of discussion about the Federalist Papers and Supreme Court doctrine as well as three particular clauses of the Constitution.<sup>97</sup>

Others are much less specific. In my database of all 1,709 signing statements introduced from January through April 2011, 142 statements cite Article I, Section 8 without further specificity. This section of the Constitution contains most of the powers granted to Congress, and these 142 CASs do not provide any further information about which of the eighteen clauses within Article I, Section 8 authorizes the bill.

Even worse, forty-four CASs cite simply Article I of the Constitution with no further specificity, and an additional seven cite Article I, Section 1, the section that vests Congress with legislative power. This is hard to understand as anything other than a protest against the rule, and indeed, all but two of these fifty-one CASs citing Article I or Article I, Section 1 were introduced by Democrats.<sup>98</sup>

Good-faith compliance with the CAS rule should in most cases mean citing at least one specific power-granting clause of the Constitution, or a short section that is not normally divided into clauses. The goal of the

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94. U.S. CONST. art. I, § 8, cl. 2.

95. *Id.* art. I, § 8, cl. 8.

96. *See, e.g.*, 157 Cong. Rec. H434 (daily ed. Jan. 24, 2011) (Constitutional Authority Statement for H.R. 397 introduced by Representative Herger).

97. *See* 157 Cong. Rec. H1576 (daily ed. Mar. 3, 2011) (Constitutional Authority Statement for H.R. 922 introduced by Representative Gosar).

98. By contrast, significant numbers of both Republicans and Democrats cited Article I, Section 8.

rule is for Congress to ensure that it is passing only legislation that falls within its enumerated powers. That goal is not served by a general wave of the hand, saying that it must be in Article I, Section 8 somewhere.

Certain broadly worded clauses of the Constitution raise a more difficult question. The Commerce Clause,<sup>99</sup> the Necessary and Proper Clause,<sup>100</sup> and the General Welfare Clause<sup>101</sup> have all been recognized as allowing Congress significant leeway to regulate in areas not specifically mentioned by the Constitution. Unsurprisingly, these are popular clauses to cite in a CAS, particularly when the subject of the bill is not covered by any of the more specific constitutional power grants.<sup>102</sup>

Some critics might say that citing these very general, open-ended clauses defeats the purpose of the rule. If Congress can claim that basically anything is justified under the Necessary and Proper Clause, it is not really being specific about its constitutional powers. Representative Scott Garrett of New Jersey, an early proponent of constitutional authority statements, has proposed banning citation to clauses like these.<sup>103</sup>

Yet, there is no denying that these broadly worded clauses do grant powers to Congress—lots of powers. Requiring Congress to identify the part of the Constitution that allows them to enact a bill, and then forbidding them to cite particular parts of the Constitution in response to the question, is ridiculous. If taken seriously, it would be almost equivalent to striking those clauses from the Constitution.

The concern behind Representative Garrett's proposal is real, however. Citing to general clauses reduces the impact of the rule. A representative could justify everything with reference to the General Welfare Clause and never engage in any more specific constitutional analysis about the particular subjects of the legislation he or she introduces.

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99. U.S. CONST. art. I, § 8, cl. 3.

100. *Id.* art. I, § 8, cl. 18.

101. *Id.* art. I, § 8, cl. 1.

102. In my January through April 2011 database, the Commerce Clause was cited alone 278 times, the Necessary and Proper Clause was cited alone 128 times, and the General Welfare Clause was cited alone 260 times. These clauses were also cited many times in combination with another clause, raising the overall specificity of the CAS.

103. See H.R. Res. 1754, 111th Cong. (2010); David A. Fahrenthold, *Congress Finds, and Lists, Meaning in Constitution*, WASH. POST, Sept. 16, 2011, available at [http://www.washingtonpost.com/politics/congress-finds-and-lists-meaning-in-constitution/2011/09/14/gIQA1VQzXK\\_print.html](http://www.washingtonpost.com/politics/congress-finds-and-lists-meaning-in-constitution/2011/09/14/gIQA1VQzXK_print.html) (“[Representative] Garrett had pressed for a more restrictive version of the rule, which would ban members from citing the ‘necessary and proper’ and ‘general welfare’ clauses.”).

Responsible legislators can deal with this problem in a much less drastic way, fortunately. CASs that cite these broad clauses should include a brief explanation why the bill's subject falls within the cited clause. This is not particularly important for CASs that cite specific clauses—it is obvious, for example, why a bill making changes to patent law is justified under the Patent Clause.<sup>104</sup> But the question of whether a bill setting physical education requirements for public schools is authorized by the clause that says, “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States?”<sup>105</sup> That is a more difficult question.

An explanation can make the sponsor's reasoning much clearer. For example, the CAS for H.R. 1201 cites the Necessary and Proper Clause, and then explains, “This [power] includes the ability to hire staff to assist in the execution of the foregoing powers and to define the salaries and benefits of those staff.”

### C. Textual vs. Structural Constitutional Authority

The crux of Representative Weiner's objection, though, was not that the CAS for H.R. 358 was too vague. It was that H.R. 358 did not attempt to cite a textual provision of the Constitution at all. It does not refer to anything “in the Constitution.” It only states that the bill would repeal a prior statute, and that the prior statute is unconstitutional. No part of the Constitution, Representative Weiner correctly pointed out, explicitly grants Congress the power to repeal unconstitutional statutes.

This objection brings to light a crucial question about the CAS rule. Does “citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill” mean that the bill's sponsor must point to an explicit, textual power grant in the Constitution?

Not all powers granted by the Constitution are apparent from the text alone. Even the most ardent textualist understands that some governmental powers arise out of the structure of the Constitution, without any textual authority that is directly on point.<sup>106</sup>

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104. The Leahy-Smith America Invents Act, a major piece of patent legislation that was enacted during the 112th Congress, cites the Patent Clause in its constitutional authority statement. See Constitutional Authority Statement, H.R. 1249, 112th Cong. (introduced by Representative Smith on Mar. 30, 2011) (citing U.S. CONST. art. I, § 8, cl. 8); see Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

105. See Constitutional Authority Statement, H.R. 422, 112th Cong. (introduced by Representative Baca on Jan. 25, 2011) (citing U.S. CONST. art. I, § 8, cl. 1).

106. See generally CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN

One example is the President's power to remove executive officers.<sup>107</sup> The Constitution is very specific how to appoint executive officers,<sup>108</sup> but does not make any mention of removing them except by impeachment.<sup>109</sup> Surely there must be some way to remove executive officers who are not doing a good job but have not committed an impeachable offense. After a near-crippling series of inter-branch disputes about *who* can exercise this power (not about *whether* it can be exercised at all), the Supreme Court reasoned from structural principles that the President can generally remove executive officers unless Congress gives them special protection in certain circumstances.<sup>110</sup>

Congress, too, may have constitutional powers that are rooted more in structure than in text. The sponsor of H.R. 358 seems to allude to one of these, though he does not state it explicitly. The CAS for the bill can reasonably be read as calling on a structural power of Congress to repeal unconstitutional statutes. It would seem strange to say that this power does not exist at all. If Congress passes an unconstitutional statute, it intuitively seems that Congress should be able to undo its own mistake. It should not have to wait for a Presidential veto, an executive decision not to enforce the statute, or a judicial ruling of unconstitutionality. Congress should be able to just repeal the statute.

For most repeals, there may be textual provisions that also justify the repeal bill. But in some cases—particularly those where the unconstitutionality arises from Congress exceeding its enumerated powers, rather than from violating a constitutional limit—there may be nothing other than the structural argument to justify the repeal bill.

I do not think the CAS rule forbids citation to structural powers. Despite not being explicit in the text, these powers are nonetheless truly in the Constitution. To serve the specificity requirement, a sponsor relying on a structural power should make it clear that the power is structural, and perhaps provide a brief explanation of the structural concerns that lead to the recognition of this power. Thus, my view is that the CAS for H.R. 358 could have been more clearly written, but that it fundamentally does comply with the rule because it refers to a legitimate structural power of Congress.

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CONSTITUTIONAL LAW (1969) (explaining the importance of structural reasoning in constitutional law).

107. *See Myers v. United States*, 272 U.S. 52 (1926).

108. *See, e.g.*, U.S. CONST. art. II, § 2.

109. *See id.* art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

110. *See Humphrey’s Ex’r v. United States*, 295 U.S. 602, 631–32 (1935); *Myers v. United States*, 272 U.S. 52 (1926).

#### D. Powers vs. Limits, Revisited

Up to this point, we have been assuming that the rule's focus on the powers of Congress means that a CAS need not address external limits that the Constitution places on any exercise of congressional power. While this interpretation of the rule has benefits, primarily in ease of compliance, it also has a significant drawback. It may encourage Congress to interpret its own powers even more broadly than it already does.

The goal of the CAS rule was to focus Congress's attention on its enumerated powers to prevent it from exceeding those powers. It was created as a response to what Republicans saw as congressional overreach under Democratic leadership. The result, however, is a large amount of attention to the Constitution's power grants with almost no attention to its limits on congressional power (or to limits on federal power in general). This could lead to Congress adopting an even more expansive view of its own powers than previously. Just as the Executive Branch has a tendency to interpret executive powers broadly, Congress is likely to interpret its own legislative powers broadly.<sup>111</sup> Every time a CAS cites the Commerce Clause as authority to enact a statute having limited effects on interstate commerce, it bolsters the broad interpretation of that clause.

One way to avoid this outcome is to require attention to constitutional limits. It's even possible to read the current CAS rule broadly to require a full discussion of constitutionality. One could argue that something is not within "the power or powers granted to Congress in the Constitution" if some other part of the Constitution prevents Congress from doing that thing.

But if the House of Representatives had intended to require a full statement of the constitutionality of each bill, it would most likely have used more natural language for that requirement, such as asking the sponsor to provide a "statement explaining why the bill is constitutional, with citations to specific constitutional provisions" or used something akin to the term coined by Elizabeth Garrett and Adrian Vermeule, a

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111. Congress also tends to adopt a broad view of its own oversight powers, particularly with respect to the administrative agencies. See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 273 (Autumn 1993) (noting that Congress continues to enact statutes with legislative veto provisions even after such procedures were held unconstitutional by the Supreme Court in *Chadha*); see, e.g., Constitutional Authority Statement, H.R. 1104, 112th Cong. (introduced by Representative Stutzman on Mar. 15, 2011) (expressing a broad view of Congress's "constitutionally prescribed rule to direct the Environmental Protection Agency, a body which regulates interstate commerce under the auspices of Congress").

“constitutional impact statement.”<sup>112</sup> Instead, the House chose to focus Representatives’ attention on the power to enact.

From the outset of adopting the rule, it has been explained as requiring citation to powers, not limits. The House Rules Memo states that a CAS should include “the Member’s name and signature, the title of the measure it accompanies, and a citation to the power or powers granted in the Constitution to enact the bill.”<sup>113</sup> Nothing is said about citing other relevant portions of the Constitution aside from power grants.<sup>114</sup> All but one of the examples given in the memo also follow this format, citing only power grants, not other constitutional provisions.<sup>115</sup>

Actual CASs in the 112th Congress have overwhelmingly tended to follow the example of the memo and cite only power grants, not limiting clauses. The majority of CASs cite only a single power-granting clause of the Constitution. Many cite a combination of power-granting clauses, for example a specific provision combined with the Necessary and Proper Clause or several of the military clauses<sup>116</sup> together. Mentions of individual rights are quite scarce. In my CAS database of 1,709 bills and resolutions, the First Amendment appears only six times, the Second Amendment also appears six times, the Fourth Amendment appears only three times, and sections of the Fourteenth Amendment (other than the explicit power grant in Section Five) appear only nineteen times.<sup>117</sup> Representatives are clearly focusing on power grants, not individual rights or other limits on power, when they write CASs.

Perhaps the deliberation-forcing aspect of CASs will counteract the initial focus on powers alone. If limits that are overlooked in a CAS are nonetheless discussed in the committee rooms and on the floor of the House, this concern would be significantly lessened. However, if the

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112. See Garrett & Vermeule, *supra* note 32, at 1310.

113. *Rules Committee Memo*, *supra* note 43.

114. See *id.*

115. See *id.* (presenting five sample CASs which cite (1) “the power of Congress to make rules for the government and regulation of the land and naval forces” (U.S. CONST. art. I, § 8, cl. 14); (2) the grant of congressional power to enforce the Fifteenth Amendment; (3) the Commerce Clause; (4) the General Welfare Clause and the Sixteenth Amendment (granting Congress the power to enact an income tax); and (5) a structural power to repeal federal laws by “return[ing] power to the States and to the people, in accordance with Amendment X of the United States Constitution.”). The last example, citing the Tenth Amendment, is somewhat different from the others in that the Tenth Amendment is a limit on federal power, not a power grant to Congress. However, the memo uses it as textual support for an affirmative structural power of Congress to repeal existing law (presumably including laws that are unconstitutional).

116. U.S. CONST. art. I, § 8, cl. 10–16.

117. Data on file with author.

focus on powers alone causes Congress to continually ignore its limits, requiring consideration of limits as well as powers might be appropriate.<sup>118</sup>

### III. CONSTITUTIONAL AUTHORITY STATEMENTS AND JUDICIAL REVIEW

Constitutional authority statements are published, publicly available, and attached to a large percentage of bills that become law, if not all of them.<sup>119</sup> Some of these laws will eventually be challenged as being unconstitutional. When that happens, how will courts treat the constitutional authority statements? This Part explains why courts should not, and most likely will not, treat them as binding on the court's decisions.

#### A. *Constitutional Authority Statements as Legislative History*

Congress's basic message in a CAS is that the bill under consideration will be constitutional if enacted into law. How should the courts treat this legislative determination?

As currently structured, CASs are a form of legislative history,<sup>120</sup> and a very weak form at that. Several factors can make items of legislative history more authoritative, but CASs exhibit few of these.

##### 1. Authoritativeness: Whom Does it Speak For?

CASs are not law. They are not included in the text of the bill, and they are not enacted by Congress through the Article I, Section 7 process. Thus, they cannot be binding on courts. Judges might choose to rely to some extent on a CAS for interpretive purposes, or they might find themselves in agreement with a CAS in a particular case, but they are not bound by the CAS that was attached to the bill. CASs are just another form of legislative history.

Courts weight different types of legislative history differently. In general, a piece of legislative history is most authoritative if it speaks

118. *See infra* Subsection V.A.2.

119. A CAS is mandatory for all bills that originate in the House of Representatives. Bills that originate in the Senate may or may not be assigned a CAS when they are introduced in the House of Representatives, at the discretion of the chair of the committee of jurisdiction over the bill in the House. *See* H.R. Res. 5, 112th Cong. (1st Sess. 2011) (adopting rules for the 112th Congress, including the Constitutional Authority Statement requirement).

120. A memo prepared by the House Rules Committee to instruct Members about how to comply with the new CAS requirement acknowledges that the statements will be legislative history. *See Rules Committee Memo, supra* note 43 ("To the extent that a court looks at the legislative history of an Act, the Constitutional Authority Statement would be part of that history. However, the courts have made clear that they will not uphold an unconstitutional law simply on the basis that Congress thinks that the law is constitutional.").

for a large portion of Congress. A committee report carries more weight than a floor statement in part because the report is approved by a majority of the committee while a floor statement is the remark of a single person.<sup>121</sup> A conference committee report also carries great weight because it is a document written by members of the House of Representatives and the Senate together, providing a view of at least some of the members of both houses.<sup>122</sup>

A constitutional authority statement is the statement of a single member of Congress. The sponsor of a bill writes the CAS at the time the bill is introduced. Perhaps every member of Congress might agree with the CAS, but it would be difficult for a judge to determine that. It is equally possible that everyone disagreed with the CAS but had no way of changing it.<sup>123</sup> A judge might turn to committee reports or floor debate to look for wider approval or disapproval of the CAS. If he does so, however, the judicial reliance is on the other statements as much as or more than on the CAS itself.

The CAS might be given slightly more authority by courts than the average floor statement, on the grounds that it is a statement by the sponsor of the bill. Sponsor statements are sometimes treated as more authoritative than statements of other supporters or of opponents to the bill.<sup>124</sup> A CAS written by the sponsor of a bill at the time of its introduction might be thought to be a particularly well-considered and researched statement, thus gaining more authority in the eyes of a court.

Even so, the CAS is a statement of a single member of the House of Representatives, one among the hundreds in that house and entirely unrepresentative of the views of the Senate. A CAS created in the way the House of Representatives currently requires them to be created is a very weak form of legislative history.

## 2. Usefulness: Does the CAS Make Legal Arguments?

Most CASs are fairly straightforward legal statements, of the type that would be recognized and understood by lawyers and judges. But a few are something quite different. This is best illustrated by example.

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121. There are many additional reasons that committee reports are seen as more authoritative, including the focused attention of the committee members on the bill, expertise, and thorough explication of the issues. *See* LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 162 (2008) (explaining why committee reports are generally seen as a more persuasive form of legislative history).

122. *See id.* at 162 (placing conference committee reports at the top of the legislative history persuasiveness hierarchy).

123. *See infra* Section V.A.

124. *See* JELLUM, *supra* note 121, at 163–64 (summarizing arguments for and against treating a sponsor or drafter's statement more favorably than the statements of others).

H.R. 1420, introduced by Representative Jesse Jackson Jr., is the Civil War Sesquicentennial Commission Act.<sup>125</sup> The bill would direct the Secretary of Interior to appoint a “Civil War Sesquicentennial Commemoration Commission”<sup>126</sup> composed of twenty-five members, including several specified government officials and a number of private citizens with relevant expertise.<sup>127</sup> The commission would “plan, develop, and carry out programs and activities appropriate to commemorate the sesquicentennial of the Civil War,”<sup>128</sup> and undertake various similar educational and celebratory activities.<sup>129</sup> The bill also deals with various financial matters regarding the Commission, including a general appropriation to carry out the Act,<sup>130</sup> travel expenses for official business,<sup>131</sup> and staff.<sup>132</sup>

A lawyer would look at this bill and immediately point out several relevant clauses of the Constitution: the Appointments Clause for appointing officers,<sup>133</sup> the General Welfare Clause for spending money on the project,<sup>134</sup> perhaps the clause that requires all appropriations to be made by law.<sup>135</sup> It would be prudent to throw in the Necessary and Proper Clause<sup>136</sup> as well, because not all of the Commission’s functions are squarely within Congress’s enumerated powers. One might also note a potential Incompatibility Clause<sup>137</sup> problem because the bill requires two Senators and two Representatives to be appointed to the Commission, but these types of ceremonial offices are rarely challenged.

Representative Jackson did not cite any of these clauses when he introduced the bill. Instead, he cited the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.<sup>138</sup>

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125. H.R. 1420, 112th Cong. § 1 (2011).

126. *Id.* § 3.

127. *Id.* § 4.

128. *Id.* § 6.

129. *Id.*

130. *Id.* § 10.

131. *Id.* § 9(b).

132. *Id.* § 9(c).

133. U.S. CONST. art. II, § 2, cl. 2.

134. *Id.* art. I, § 8, cl. 1 (“The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States;”).

135. *Id.* art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”).

136. *Id.* art. I, § 8, cl. 18.

137. *Id.* art. I, § 6, cl. 2 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased [sic] during such time . . .”).

138. 157 Cong. Rec. H2535 (daily ed. Apr. 7, 2011) (Constitutional Authority Statement

The Civil War Amendments are relevant to H.R. 1420 only in spirit, not in substance. The bill's provisions have nothing to do with preventing involuntary servitude;<sup>139</sup> with protecting the Fourteenth Amendment guarantees of privileges and immunities, due process, or equal protection;<sup>140</sup> or with guaranteeing the right to vote.<sup>141</sup>

But Representative Jackson's CAS nonetheless has an underlying appeal to it. The purpose of the bill is to remind the American public of how the Civil War Amendments came about and why they are important, and to commemorate the struggle that led to their creation. The amendments are relevant to the bill symbolically. It seems crass to say that Representative Jackson should not have cited them because they are not substantively relevant to the content of his bill. Perhaps it would be more fair to say that he should have cited them *along with* the legally relevant clauses, however.

Representative Jackson's signing statement exemplifies a category of aspirational signing statements.<sup>142</sup> While they are important for expressing the values and purposes behind legislative proposals, they are no help in defending a statute against constitutional challenges. The content of H.R. 1420 is constitutionally unobjectionable, so this particular CAS does not matter much. But one could imagine a similar CAS for a blatantly unconstitutional law (for example, banning all books containing racial slurs), or for a highly questionable law (for example, exempting minorities from paying income taxes). In those cases, an aspirational CAS would have no weight at all in court.

Congress's statements about the Constitution can legitimately be of a different style than judicial statements about the Constitution.<sup>143</sup> Judges speak about the Constitution in the course of deciding particular cases and controversies.<sup>144</sup> The question for a judge is whether a particular

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for H.R. 1420 introduced by Representative Jackson).

139. U.S. CONST. amend. XIII.

140. *Id.* amend. XIV.

141. *Id.* amend. XV.

142. *See, e.g.*, 157 Cong. Rec. H2571 (daily ed. Apr. 8, 2011) (Constitutional Authority Statement for H.R. 1457 introduced by Representative Luetkemeyer) (citing the religious protections in the First Amendment as authority for a bill to review Jewish WWI veterans for Medal of Honor awards); *see, e.g.*, 157 Cong. Rec. H1843 (daily ed. Mar. 15, 2011) (Constitutional Authority Statement for H.R. 1093 introduced by Representative King) (citing the Second Amendment as authority for a bill making detailed changes to the Bureau of Alcohol, Tobacco, Firearms, and Explosives).

143. *See* Garrett & Vermeule, *supra* note 32, at 1319 ("Congressional staff should be encouraged to analyze any judicial advice rigorously through the legislative lens, remembering that the legalistic approach of judges may not be as appropriate for Congress."); *see also* Brest, *supra* note 39 (arguing that Members of Congress should apply stricter tests of constitutionality than those used by courts).

144. *See* U.S. CONST. art. III, § 2, cl. 1.

piece of legislation, or a particular application of a law, or a particular executive action, violates the Constitution.<sup>145</sup> This has a tendency to result in narrow, legalistic holdings about particular discrete issues, though of course the courts occasionally speak more broadly about constitutional values or structure.

Congress attempts a much larger task. Yes, Congress should analyze whether each particular bill is within its powers and whether the bill violates an express prohibition in the Constitution. But Congress also creates legislation that changes the structure of government and of society. It creates legislation that rewards certain behavior and punishes other behavior. In doing so, Congress acts not only on the express power grants and limits in the Constitution, but also on the values that give it life.<sup>146</sup> When Representative Jackson cited the Civil War Amendments in his CAS, he did not mean that those clauses formally provided power grants for Congress to enact the legislation. He meant that the values of equality and freedom expressed in those amendments were what inspired his bill.

Aspirational statements about the Constitution are appropriate for Congress. They are not, however, helpful to the courts. If Congress intends to influence judicial interpretation with CASs, it will need to use styles of argument that the courts can engage with. But if Congress primarily intends CASs to be a tool for its own deliberations, aspirational statements are appropriate and even important.

### 3. Thoroughness: Does the CAS Address the Problem Presented to the Courts?

When a statute is challenged, the constitutional question presented to the court might not be addressed at all in the constitutional authority statement for that statute. Some CASs are quite thorough, but most cite only a single point of authority for the statute.<sup>147</sup> As discussed above,<sup>148</sup> the question of underlying constitutional authority may not answer all possible constitutional questions about a bill.

A particular CAS might correctly cite authority to pass a bill from the Commerce Clause or the Necessary and Proper Clause, while failing

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145. See Tulis, *supra* note 65, at 519 (“For a court, anything within a wide ambit of constitutionally permissible actions is legitimate, but legislators might responsibly oppose legislation on the ground that it did not advance constitutional purposes enough or at all.”).

146. *Id.* at 519 (“Whether a policy or a body of policies advances the constitutional aspirations of a people is a legitimate ground for a legislative decision, even though it would not be appropriate for a judicial decision.”).

147. In January through April of 2011, around two-thirds of CASs cited only a single clause of the Constitution.

148. See *supra* Subsection II.B.2 and Section III.D.

to mention due process or First Amendment issues that arguably prevent the bill from being applied in certain ways. Or the CAS might make no mention of the Appointments Clause in a bill that sets up a novel method for appointing officers, citing authority only for the basic subject of the bill rather than for each provision. While the Supreme Court does sometimes entertain enumerated powers challenges,<sup>149</sup> questions about less-central aspects of a bill are far more common.<sup>150</sup> Thus, in many cases, a bill's CAS will not even be relevant to the constitutional challenge brought against it.

Even where a CAS is relevant to the question presented to a court, it is likely to provide little information. A lawsuit might challenge the underlying content of a bill, such as by arguing that it exceeds Congress's powers under the Commerce Clause, or a bill with a more extensive CAS may be challenged on grounds mentioned in the CAS. But a CAS is not a legal brief. It usually provides only a bare statement that certain clauses of the Constitution provide authority. CASs with lengthy explanations of *why* or *how* the clause is relevant, or even any explanation at all, are few and far between.

Presented with a CAS alone, a court will essentially have the choice to defer to Congress or ignore the statement. The CAS may assert, for example, that the bill under consideration is authorized by the Commerce Clause and does not violate the First Amendment. It provides no reasoning, no rebuttal of arguments to the contrary, and no explanation. The conclusion is simply stated. And recall, this statement is not one explicitly affirmed by Congress as a whole, but by an individual member of the House of Representatives. For the court, it is no choice at all. It cannot defer to the CAS alone without engaging in further analysis.

Of course, the court might look to additional legislative history to seek out a more thorough explanation of the CAS and to find agreement by a larger number of members. But this is not reliance on the CAS, it is reliance on legislative history more broadly.

This is not meant to be an indictment of CASs. The fact is that they serve a different purpose. A CAS, as currently designed, is not intended

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149. *See, e.g., Gonzales v. Raich*, 545 U.S. 1 (2005) (reviewing the constitutionality of the Controlled Substances Act under the Commerce Clause); *United States v. Morrison*, 529 U.S. 598 (2000) (reviewing the constitutionality of the Violence Against Women Act under the Commerce Clause); *United States v. Lopez*, 514 U.S. 549 (1995) (reviewing the constitutionality of the Gun-Free School Zones Act under the Commerce Clause).

150. *See, e.g., Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138 (2010) (reviewing a law regulating interstate commerce solely for Appointments Clause violations); *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (reviewing a law regulating interstate commerce solely for First Amendment violations). Both of these statutes were passed before constitutional authority statements were required in the House of Representatives.

to be an authoritative statement of Congress. It is not meant to be a guide to judicial interpretation. It is meant to be a tool for Congress itself to use. When a bill is introduced and sent to committee, the CAS serves as a starting point for discussion about the constitutionality of the bill. It is meant to trigger further debate and analysis when necessary, not to be the end of the discussion. Courts should be able to recognize this and treat CASs accordingly.

### B. *Constitutional Estoppel*

In a small number of cases, a problem that might be called “constitutional estoppel” could arise. When a statute is challenged for lack of underlying congressional authority to enact it, and the CAS addresses one possible source of congressional authority but not another, the petitioners might argue that the law cannot be defended on the second ground because Congress did not cite it. The question is, should the courts be limited to the one or more clauses cited by Congress when assessing the statute’s constitutionality?

This type of controversy has arisen recently, with a statute that does not include a formal constitutional authority statement. The Affordable Care Act<sup>151</sup> that was enacted during the 111th Congress was passed before the House rules required CASs. Nonetheless, the bill text itself included a statement about the constitutionality of the bill, citing a Supreme Court case that held insurance to be a form of interstate commerce.<sup>152</sup> Supporters repeatedly justified the mandate as a regulation of interstate commerce under Article I, Section 8, Clause 3 of the Constitution,<sup>153</sup> against the fervent objections of opponents who claimed the Commerce Clause could not reach an individual’s decision to not purchase insurance. These same supporters, including President Barack Obama,<sup>154</sup> vigorously denied that the fines for not purchasing individual insurance were a tax, which would have been justified by Article I, Section 8, Clause 1 of the Constitution.<sup>155</sup> When the law was challenged in court and the argument that it violates the Commerce

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151. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

152. See Affordable Care Act § 1501(A)(3) (citing *United States v. Se. Underwriters Ass’n*, 322 U.S. 533 (1944)).

153. U.S. CONST. art. I, § 8, cl. 1, 3 (“The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

154. See, e.g., Jacqueline Klingebiel, *Obama: Mandate is Not a Tax*, ABC NEWS, Sept. 20, 2009, transcript of interview of Pres. Obama, available at <http://abcnews.go.com/blogs/politics/2009/09/obama-mandate-is-not-a-tax/> (“[F]or us to say that you’ve got to take a responsibility to get health insurance is absolutely not a tax increase.”).

155. U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises”).

Clause was seen to be stronger than supporters initially thought, lawyers began defending it as an exercise of Congress's taxing power.<sup>156</sup> The Supreme Court eventually upheld the statute on the grounds that it is a valid exercise of Congress's power to tax.<sup>157</sup>

The existence of constitutional authority statements could make this situation occur more frequently. In the past, Congress has not explicitly stated a constitutional justification when enacting most statutes. After the rule change, however, many statutes come with such a statement.<sup>158</sup> Should these statements be seen as binding, in the sense that if a statute cites improper constitutional authority, it is invalid regardless of whether another part of the Constitution would justify it?

A few members of Congress have shown concern about this possibility, and have attempted to address it in the CASs themselves. This can be done in several ways.

One simple way is to make the CAS as broad as possible, for instance by citing Article I of the Constitution without any further specificity,<sup>159</sup> or by citing the entirety of Article I, Section 8, which contains most of the individual power grants to Congress.<sup>160</sup> Of course, this approach reduces the CASs usefulness to Congress as a deliberative tool, as discussed above.<sup>161</sup>

A similar tactic, but one which requires more individual attention to the particulars of the bill in question, is to cite numerous clauses of the Constitution for the same bill. So, for example, one short bill (only

156. *See, e.g., Virginia v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (holding that the individual mandate exceeds Congress's Commerce Clause power and that it is not a tax) *vacated*, 656 F.3d 253 (4th Cir. 2011), *cert. denied*, 11-420, 2012 WL 2470098 (June 29, 2012); *see also* Ben Wilterdink, *The Individual Health Insurance Mandate: Is It a Tax or Not a Tax?*, WASH. EXAMINER, Feb. 1, 2011, *available at* <http://washingtonexaminer.com/the-individual-health-insurance-mandate-is-it-a-tax-or-not-a-tax/article/140265> (collecting conflicting government statements about whether the mandate is a tax or not).

157. *Nat. Fed. of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2593–2601 (2012).

158. Statutes that originate in the Senate may or may not acquire a CAS when introduced in the House of Representatives. *See* H.R. Res. 5, 112th Cong. (2011) (adopting rules for the 112th Congress, including the Constitutional Authority Statement requirement).

159. *See, e.g.,* 157 Cong. Rec. H397 (daily ed. Jan. 20, 2011) (Constitutional Authority Statement for H.R. 377 introduced by Representative Lee) (“The power granted to Congress under Article I of the United States Constitution and its subsequent amendments, and further clarified and interpreted by the Supreme Court of the United States.”).

160. Citations to Article I, Section 8 without further elaboration in CASs are too numerous to list. A representative example is 157 Cong. Rec. H396 (daily ed. Jan. 20, 2011) (Constitutional Authority Statement for H.R. 372 introduced by Representative Buchanan) (“The constitutional authority on which this legislation rests is the power of Congress enumerated in Article I, Section 8 of the Constitution.”).

161. *See supra* Section II.B.

about a page of text) has a CAS that cites nine separate clauses of the Constitution.<sup>162</sup>

Several legislators have included various forms of savings clauses in CASs. One states, “The authority to enact this bill is derived from, but may not be limited to, Article I, Section 8.”<sup>163</sup> Others cite one or more clauses and then append the disclaimer, “The specific Constitutional Authority cited here is not intended and should not be construed to be exclusive of any other general or specific Constitutional Authority that is otherwise applicable.”<sup>164</sup>

These are statements that clearly have judicial interpretation in mind. The legislators are citing the constitutional authority they believe to be appropriate, but stating the possibility that there might be other sources of constitutional authority as well.

Another type of statement is even more intriguing. One bill’s CAS cites some constitutional authority and then announces: “Further, this statement of constitutional authority is made for the sole purpose of compliance with clause 7 of Rule XII of the Rules of the House of Representatives and shall have no bearing on judicial review of the accompanying bill.”<sup>165</sup> This statement is not a hedge, but is an explicit instruction to courts that they should not use this piece of legislative history in further interpretation. Will the courts honor this statement? It remains to be seen. Statutory instructions of interpretive methodology are controversial enough;<sup>166</sup> legislative history instructions of

162. See 157 Cong. Rec. H2267 (daily ed. Apr. 1, 2011) (Constitutional Authority Statement for H.R. 1323 introduced by Representative Bartlett) (citing U.S. CONST. art. I, § 2; *id.* art. I, § 7, cl. 1; *id.* art. I, § 8, cl. 1, 12, 13; *id.* art. I, § 9, cl. 7; *id.* art. II, § 1, cl. 1; *id.* art. II, § 2, cl. 2; *id.* art. II, § 3).

163. 157 Cong. Rec. H1456 (daily ed. Mar. 1, 2011) (Constitutional Authority Statement for H.R. 862 introduced by Representative Murphy) The phrase “may not be limited to” can be read in two different ways. Representative Murphy may have been tentatively suggesting that other clauses of the Constitution might also authorize the bill he was introducing, or he may have been ordering the courts that they are not permitted to limit Congress’s justification for the bill to the section he cited.

164. 157 Cong. Rec. H1455 (daily ed. Mar. 1, 2011) (Constitutional Authority Statement for H.R. 845 introduced by Representative Rehberg); 157 Cong. Rec. H1455 (daily ed. Mar. 1, 2011) (Constitutional Authority Statement for H.R. 846 introduced by Representative Labrador).

165. 157 Cong. Rec. H552 (daily ed. Feb. 8, 2011) (Constitutional Authority Statement for H.R. 559 introduced by Representative Richmond)

166. See Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 99–100 (2003) (arguing that legislated statutory interpretation rules cannot bind future interpreters); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754 (2010) (examining legislated statutory interpretation rules in the states); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002) (advocating a federal system of legislated

interpretive methodology are likely to be either ignored or used only strategically.

#### IV. TOWARD A STRONGER CAS?

The primary criticism of adopting the CAS rule in the House was that the statements would be ineffective and useless. This Article has shown why that assessment is mistaken. However, the rule requiring CASs is not as strong as it could be. This Part discusses several ways that Congress could make CASs stronger, and also some problems that would arise under those stronger regimes.

The CAS rule currently exists only in the House of Representatives. Due to the low cost and good effects of the rule, the Senate would benefit from adopting some form of it as well. The considerations regarding several types of CAS rules discussed here apply equally to the House and the Senate.

The reforms discussed here fall into two general categories, though there is some overlap between the categories. The first category consists of reforms that require or encourage increased deliberation about constitutional issues within Congress: (1) requiring CASs at several stages of the legislative process, and (2) requiring discussion of constitutional limits as well as powers. Reforms of this type would be very beneficial to ensure that a CAS actually starts a constitutional discussion when serious issues are raised.

The second category consists of reforms that are designed to make constitutional authority statements more majoritarian and thus more influential with the courts: (1) requiring a separate floor vote on a CAS before the substance of the bill is voted on, and (2) putting the CAS in the text of the bill instead of legislative history. While these reforms would have some benefits, they also raise serious problems that counsel against their adoption.

##### A. *Deliberation-Increasing Reforms*

The current rule requires that the Representative who introduces the bill must include a CAS. What happens if, after introduction, other Representatives believe the CAS is incorrect? What if amendments to the bill change or add to its constitutional basis? What if opponents want to draw attention to constitutional limits that they believe make the bill unconstitutional, but that are not addressed in the CAS? The rule in its present form makes no provision for changing a CAS after a bill has been introduced.

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statutory interpretation rules).

A public and formal opportunity to change or object to a CAS would raise the incentives for constitutional deliberation.<sup>167</sup> The opportunity for debate already exists under the current rule, but the lack of ability to rewrite the CAS may discourage members from raising their objections. If they cannot affect the content of the CAS, they may feel no need to air their concerns. Allowing the opportunity to amend the CAS creates an incentive to debate and decide the constitutional questions. This section suggests several ways that Congress could modify the CAS rule to provide a greater opportunity for deliberation and change.

### 1. Require CASs at Multiple Stages of the Legislative Process

Prior to the adoption of the current CAS rule, the House of Representatives required that committee reports include a constitutional authority statement. This rule was adopted in the 105th Congress.<sup>168</sup> It was retained in the House Rules until the 112th Congress, when it was replaced by the rule requiring CASs for all bills and joint resolutions at introduction.<sup>169</sup>

The change from committee CASs to introduction CASs was portrayed as strengthening the Representatives' commitment to constitutional limits on government power.<sup>170</sup> In some ways, that is true. Requiring a CAS at introduction puts more eyes on the Constitution, because a larger number of people are tasked with writing them. It also forces the sponsor of every bill to take personal responsibility for the constitutionality of that bill, instead of leaving it for consideration later. Additionally, the introduction rule means that Congress is making more statements about the Constitution overall, because only a fraction of the bills introduced ever receive committee reports.

Most importantly, an introduction CAS means that a statement about the Constitution is available from the outset, and can be discussed and debated during committee meetings. By contrast, committee report CASs were probably often added by staffers *after* the bill was approved by the committee, without any prior discussion of constitutionality

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167. See Garrett & Vermeule, *supra* note 32, at 1304 (“[M]embers must be afforded an opportunity to raise constitutional issues and to deliberate about them fully.”).

168. See H.R. Res. 5, 105th Cong. § 13(4) (1997) (“Each report of a committee on a bill or joint resolution of a public character shall include a statement citing the specific powers granted to the Congress in the Constitution to enact the law proposed by the bill or joint resolution.”).

169. See H.R. Res. 5, 112th Cong. (2011) (adopting rules for the 112th Congress and striking the provision that previously required CASs in committee reports); H.R. Res. 5, Adopting Rules for the 112th Congress, Section-by-Section Analysis, <http://rules.house.gov/Media/file/PDF/HRes%205%20Sec-by-Sec.pdf>, at 1 (explaining that the new rule “repeals the current requirement for a similar [constitutional authority] statement in committee reports”).

170. Most commonly, the new rule was portrayed as completely unprecedented, with the committee CAS rule never mentioned.

among the Representatives. The new rule places the constitutionality of the bill on the agenda from the time that committee members begin their consideration. They may choose not to discuss it, but the CAS serves as a reminder that they should think about it.

In other ways, however, the rule change produces weaker constitutional authority statements. The introduction CASs are written by people with less expertise than those who wrote the committee CASs. The introduction CASs are thus less likely to be complete and accurate statements about the constitutionality of the bill.<sup>171</sup> Also, a bill can change substantially between introduction and adoption by the committee, and even a perfect CAS for the introduced bill may not match up with the bill as it emerges from the committee.

Committees and their staffs, in general, have a greater ability to write thorough CASs than individual members do. A committee has a larger staff than an individual Representative, and that staff is able to specialize in a particular subject matter of legislation. While various clauses of the Constitution may still be implicated in a single subject matter area, this narrows the field at least somewhat.<sup>172</sup> Committees also generally have a longer period of time to consider legislation, and most of the discussion and debate about a bill goes on in committee meetings.<sup>173</sup> Even more helpfully, committees frequently hold hearings in which experts, including experts on constitutional issues, can contribute to the deliberations.<sup>174</sup>

There is an easy solution to these problems: CASs should be required *both* at introduction *and* in the committee report. The introduction CAS preserves the benefits of having many eyes on the Constitution and placing a statement of constitutionality on the agenda for committee discussions. The committee report CAS takes advantage of a more expert staff and the deliberations that happened in committee

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171. This is not universally true. A number of introduction CASs under the new rule are highly detailed. *See, e.g.*, 157 Cong. Rec. H2107 (daily ed. Mar. 30, 2011) (Constitutional Authority Statement for H.R. 1255 introduced by Representative Womack) (breaking down the constitutional authority for the bill section by section); 157 Cong. Rec. H2604 (daily ed. Apr. 12, 2011) (Constitutional Authority Statement for H.R. 1474 introduced by Representative Duncan) (presenting extensive analysis and explanation of the constitutional authority for the bill, including the basis of an exemption for the postal service).

172. Garrett and Vermeule point out that specialized committees devoted to constitutional issues would do a better job of constitutional analysis than policy subject-matter committees. *See* Garrett & Vermeule, *supra* note 32, at 1319–22. That is certainly true. However, it would require a much larger change in the committee structure, and thus is less likely to be adopted. Reinstating the committee report CAS rule in addition to the introduction CAS rule requires no structural change to the committee system at all.

173. *See id.* at 1319.

174. *See id.* at 1304.

meetings to make the statement more thorough and lawyerly, incorporate any necessary changes after the bill is amended in committee, and put the full committee's stamp of approval on the statement.

Requiring two CASs does not mean there will be twice as much work. The vast majority of bills are obviously constitutional. If the introduction CAS for a clearly constitutional bill is sufficient, the committee staff can copy it directly into the committee report. Even if the introduction CAS has some problems or omissions, the committee staff has something to start with. Additionally, only a small fraction of bills that are introduced are ever approved by committees. Bills that die in committee will never receive a committee report CAS.

This is a case where the sum of the parts can be greater than the whole. Requiring both an introduction and a committee report CAS enhances both the opportunity and the incentives for constitutional deliberation in committees. If a CAS is required only at introduction, and is never formally changed, there is little incentive to discuss or object to it.<sup>175</sup> If it is required only in the committee report, then the constitutional questions may not be noticed or discussed until after the committee deliberation is complete. When both are required, the introduction CAS serves as a reminder to discuss the constitutional aspects of the bill and a starting point for that discussion. Deliberation within the committee is encouraged because another CAS will be required in the committee report, this time with the backing of all the committee members. This structure encourages the most thoughtful and complete discussion of the constitutionality of each bill that moves through Congress.

## 2. Discussion of Constitutional Bars to Legislation

The current CAS rule focuses Congress's attention only on its grants of authority, not on other clauses of the Constitution that set limits on the exercise of its powers. For a full debate of constitutionality, Congress must consider both.<sup>176</sup>

It would be difficult to require constitutional problems to be identified from the outset. The sponsor of a bill is usually quite enthusiastic about the policy proposal and has no interest in drawing attention to potential problems, even if she does notice their existence. She may be simply introducing a policy idea rather than a fully formed legislative proposal, counting on the committee process to turn the idea

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175. *See supra* Section IV.A.

176. *See supra* Section II.D.

into a legally functioning and constitutionally compliant bill.<sup>177</sup> And she probably is not an expert on constitutional doctrine that could cause problems for the bill, either.

Some scholars have suggested that the parliamentarians of the House and Senate should identify constitutional issues in pending legislation and alert members of Congress to those issues.<sup>178</sup> That would certainly be helpful, but as others have pointed out, even the most careful parliamentarian could easily miss some constitutional issues on an *ex ante* analysis.<sup>179</sup>

A better solution is to create a formal procedure for any member to raise potential constitutional problems with a bill. This could be done through an amendment proposal to the CAS, through a separate procedure of registering an objection to the constitutionality of a bill, or by making CASs subject to a point of order to raise additional constitutional questions. Opponents of the bill, not the sponsor, will be most likely to search for constitutional problems. They may seek to use constitutional objections as a delaying tactic, so the procedure should be designed to prevent frivolous complaints from derailing a bill.<sup>180</sup> But the primary advantage of allowing every member to raise formal constitutional objections is that it puts many eyes on the problem. Congress has a responsibility to act only within its limited power under the Constitution. Without constant attention to these limits, Congress is likely to overrun them.<sup>181</sup>

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177. For example, a representative may propose a bill to create a new regulatory body, leaving the institutional details of that body to be determined through committee deliberation. Some of those institutional details may raise constitutional questions. *See* Tushnet, *supra* note 9, at 506 n.32 (suggesting the Public Company Accounting Oversight Board as an example of this form of constitutional problem).

178. *See* Garrett & Vermeule, *supra* note 32, at 1308.

179. *See* Tushnet, *supra* note 9, at 505 (“Sometimes constitutional issues lurk in the details of a complex statute, and particularly in interactions among apparently unrelated provisions. Even an astute parliamentarian might miss a fair number of non-trivial constitutional issues that arise in these ways.”).

180. *See* Garrett & Vermeule, *supra* note 32, at 1304–05 (“[T]he congressional structure for the consideration of constitutional questions should reflect a balance between the need to improve legislative capacity to discharge Congress’s responsibility in this area and the need to enact legislation without undue delay or extreme difficulty . . . . [P]rocess can be used strategically by those unconcerned with constitutional issues to derail bills that they oppose on other grounds.”).

181. *See generally* Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 807–09 (2010) (arguing that in the absence of judicial review, members of Congress ignore legal limits on institutional behavior).

### B. Majoritarian Reforms

Another drawback of the current CAS rule is that a CAS is the statement of only a single member of Congress. Changes could be made to the rule that would turn CASs into statements of the entire House of Representatives or the entire Congress.

These proposals have certain advantages. They would require Congress as an institution to take a constitutional position, rather than simply requiring individual members to engage in some level of deliberation. That institutional statement would probably be given greater weight by the courts, even possibly increasing Congress's influence over the meaning of the Constitution relative to the other branches of government.

However, there are also serious drawbacks. Requiring majority agreement is likely to lead to watered-down statements about the Constitution, making the constitutional claims less specific in order to create majority approval. Additionally, the level of agreement necessary to accomplish a congressional statement about the Constitution is even greater than the level of agreement necessary for the Supreme Court to hold a statute constitutional. These concerns counsel against adopting strong majoritarian CAS reforms.

Not all majoritarian reform proposals are necessarily bad, however. The deliberation-increasing reforms discussed in the previous section also speak to some majoritarian concerns. Though they do not create a majority statement in favor of or against a CAS, they do draw a larger number of lawmakers into the constitutional deliberation and decision process.

#### 1. Floor Votes for CASs

One possible reform would be to require a procedural vote on adoption of a CAS immediately prior to voting on the text of a bill. To account for any amendments to the bill's text that are made on the floor, the CAS could be amendable on the floor and should not be voted on until the bill text is set.<sup>182</sup> If a bill is changed in conference committee, the committee could also make any necessary changes to the CAS and resubmit it for a vote along with the conference version of the bill. In the strongest form of this rule, the CAS vote would not be waivable.

Procedural votes are often used as "test votes" to measure support for a bill, or as ways of blocking legislation before it comes to a substantive vote. A vote on a bill's CAS might be used in these ways

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182. See Tushnet, *supra* note 9, at 505–06 ("Sometimes constitutional issues arise from amendments proposed on the floor of the House or Senate, after the standard committee processes have been completed.").

also, with all the positives and negatives inherent in those possibilities.<sup>183</sup> It is also easy to imagine this procedural vote becoming a mere formality, with nobody paying attention to the content of the CAS even as they vote to adopt it.

A more troubling problem with requiring a majority vote on a CAS is that people might agree that a bill is constitutional while disagreeing about exactly *why* it is constitutional. One sees these disagreements in courts all the time, with judges concurring in the judgment but providing different reasons for their decisions. The problem is likely to arise even more frequently in Congress because the membership of Congress is so much larger than any court.

Disagreement about reasons for constitutionality can lead to absurd results. Suppose that 40% of Representatives think that a certain bill is authorized as a regulation of interstate commerce and is not a tax, 40% think it is authorized as a tax and is not a regulation of commerce, and 20% think the bill is unconstitutional. If a majority must approve the same CAS, the bill will not be able to pass, even though 80% of the House believes it is constitutional.

One way of dealing with this problem would be to allow alternative CASs. No single clause can gain majority support, and nobody wants to vote for a CAS that endorses both clauses at the same time. Instead, Congress could allow two or more CASs to be voted on in the alternative, and as long as the votes in favor of the different options add up to a majority,<sup>184</sup> the bill can be passed.

Another possibility is to allow a bill to be enacted even if the majority disapproves of the CAS. This resolves a split-opinion situation like the one above without creating confusing procedural headaches. However, it also allows Congress to be irresponsible about the constitutionality of legislation. Congress could enact legislation that is preferred on policy grounds even when a majority believes it to be unconstitutional. It would not even have to be explicit about doing so, since it could always claim that a majority-unconstitutionality situation was actually a split-opinion one. Still, it forces members of Congress to take a position on the constitutional question separate from their position on the policy merits.<sup>185</sup> It also exposes members to public

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183. Cf. ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY* 230 (2007) (offering a “design principle” that mechanisms to increase constitutional deliberation in Congress should not “provid[e] opportunities for strategic action by coalitions seeking to derail bills that they oppose on other grounds”).

184. An individual representative may be allowed to vote for more than one CAS, for example if she thinks that the bill is *both* a tax and a regulation of commerce, but she would only count as a single vote toward the majority support for constitutionality.

185. Cf. Garrett & Vermeule, *supra* note 32, at 1330 (“We think a separate vote [on

criticism, right or wrong, for voting to enact a bill while denying its constitutionality. Courts could also factor the lack of a majority-adopted CAS into their decision making.

## 2. CAS in Bill Text

The strongest way for Congress to make its constitutional views binding and official is to put those views in the text of the bill. Textualists and nontextualists agree that the content of the statute itself is primary in statutory interpretation. It is a familiar aphorism that all interpretation must begin with the text of the statute.

Nothing prevents Congress from putting statements about the Constitution in a bill voluntarily, and it has done so from time to time.<sup>186</sup> This Subsection discusses the legal and practical issues surrounding a rule requiring Congress to do this for every bill it enacts. Such a rule has been proposed on numerous occasions,<sup>187</sup> but it would give rise to more problems than benefits.

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waiving constitutional points of order], which disaggregates the lawmaker's stand on the constitutional issue from her final vote and eliminates or reduces her ability to explain away a troublesome position on the constitutional matter as a necessary evil to passing an omnibus bill with numerous provisions that her constituents like, is sufficient protection.”)

186. The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb–2000bb4 (2006), is a prominent example, but there are many others. The Trade Act of 1974, for example, states that the fast track process for enacting trade legislation is “an exercise of the rulemaking power of the House of Representatives and the Senate, respectively” and notes “the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.” Trade Act of 1974, 19 U.S.C. § 2191 (2006). The Affordable Care Act also has a provision addressing its own constitutionality. *See* Affordable Care Act § 1501(a)(3) (citing *United States v. Se. Underwriters Ass'n*, 322 U.S. 533 (1944)).

187. Proposals for this kind of rule have been floated before, but none has been enacted. Representative John Shadegg of Arizona introduced an Enumerated Powers Act in every Congress from the 104th until his retirement after the 111th Congress. These bills would have made a constitutional authority statement part of the text of all legislation. *See* H.R. 2270, 104th Cong. (1995); Enumerated Powers Act, H.R. 292, 105th Cong. (1997); Enumerated Powers Act, H.R. 1018, 106th Cong. (1999); Enumerated Powers Act, H.R. 175, 107th Cong. (2001); Enumerated Powers Act, H.R. 384, 108th Cong. (2003); Enumerated Powers Act, H.R. 2458, 109th Cong. (2005); Enumerated Powers Act, H.R. 1359, 110th Cong. (2007); Enumerated Powers Act, H.R. 450, 111th Cong. (2009). *See also* Enumerated Powers Act, S. 3159, 110th Cong. (2008) (introduced by Sen. Tom Coburn); Enumerated Powers Act, S. 1319, 111th Cong. (2009) (same). One resolution, sponsored by Representative Scott Garrett of New Jersey, would have not only required a CAS in bill text, but banned reliance on the Common Defense Clause, General Welfare Clause, or Necessary and Proper Clause as a stand-alone authority. *See* H.R. Res. 1754, 111th Cong. (2010).

### a. Implementation

The first question is what form such a rule could take. Congress might try to implement it through a chamber rule, just like the current CAS rule and the two prior possibilities discussed. The rule would be implemented most smoothly if both the House and Senate adopted the same requirement, but even adopting the rule in a single house could work. If the House had a strong, nonwaivable requirement that the text of each bill include a CAS, and the Senate did not, then the House would have to amend any bill originating in the Senate to insert one.<sup>188</sup> But it is unclear whether a chamber rule can dictate what must appear in the text of a bill.

Another possibility is to enact a statute requiring a CAS to be included in every bill.<sup>189</sup> There is some precedent for this type of requirement. Title One of the U.S. Code places certain requirements on the form and text of laws. Title One U.S.C. § 101 states: “The enacting clause of all Acts of Congress shall be in the following form: ‘Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,’”<sup>190</sup> and § 103 dictates that these words should be used only in the first section of an Act.<sup>191</sup> However, it is unclear whether the courts would be willing to strike down a statute that did not have the proper enacting clause. No court has struck down a federal statute on the grounds of an absent enacting clause, but this is at least in part due to the fact that no statute has been challenged seriously on this ground.<sup>192</sup> Many states have a constitutional enacting clause requirement, and state courts have invalidated legislation that lacks the required clause.<sup>193</sup>

Even if § 101 is valid and binding, it is not completely analogous to a statutory CAS requirement. The enacting clause is purely formalistic and formulaic. It requires precise words that are identical for every

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188. In a weaker version of this rule, the House might only require a CAS for bills originating in the House.

189. See generally Aaron-Andrew Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 349–51 (2003) (discussion of the validity of statutes that dictate chamber rules).

190. 1 U.S.C. § 101 (2006).

191. *Id.* § 103 (“No enacting or resolving words shall be used in any section of an Act or resolution of Congress except in the first.”).

192. See, e.g., *United States v. Laroche*, 170 Fed. App’x 124 (11th Cir. 2006) (finding that defendant did not prove enacting clause was absent); *United States v. Petersen*, 2009 WL 3062013, at \*8 n.9 (D. Minn. 2009) (slip copy) (holding that enacting clauses need not be codified in the U.S. Code because 1 U.S.C. § 101 applies only to original Acts); *United States v. Ramanauskas*, 2005 WL 189708, at \*5 n.1 (D. Minn. 2005) (same).

193. See, e.g., *People v. Dettenthaler*, 77 N.W. 450, 453 (Mich. 1898) (concluding that law was invalid because enacting clause was inserted by clerk after it was passed).

statute passed by Congress. A CAS requirement would be more substantive and more variable, because different statutes draw authority from different parts of the Constitution. The statute would require substantive, individualized content to be included in each bill that becomes law, and would purport to prevent bills from becoming effective law without that content.

A stronger analogy is an express reference provision. Congress has attempted to protect certain statutes from being repealed by implication in later statutes. To accomplish this, Congress included a provision in the protected statute announcing that any repeal of the statute must reference it specifically by name or section number.<sup>194</sup>

Many scholars and judges take a skeptical view of Congress's ability to bind future Congresses through statutes.<sup>195</sup> Thus, even if Congress were to pass a statute requiring CASs in all future statutes, it would be questionable whether the requirement was truly binding. Suppose there was a statutory CAS requirement, and Congress subsequently passed a statute that, intentionally or unintentionally, did not include a CAS. The second statute complied with all of the constitutional Article I, Section 7 requirements for enacting laws, and was otherwise perfectly constitutional. Would that statute nonetheless be invalid because it did not include the CAS content? Or would the second statute be viewed as an implied repeal (or partial amendment) of the first one? A full exploration of these questions is well beyond the scope of this Article. I raise the issue here only to point out that one problem with a statutory CAS requirement is that despite taking the form of a statute, it may turn out to not be actually binding on Congress.<sup>196</sup>

Nevertheless, a statute requiring a CAS in all subsequent statutes could be beneficial in the way the enacting clause statute is: it provides an entrenched standard format that can be easily followed. Congressional compliance with the enacting clause requirement is so universal that there has never been an opportunity to seriously challenge it. Compliance with express reference requirements has been somewhat

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194. See, e.g., 42 U.S.C. § 407(b) (2006) (“No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.”).

195. See, e.g., *Lockhart v. United States*, 546 U.S. 142, 144–45 (2005) (holding that the phrase “[n]otwithstanding any other provision of statute,” satisfies an express reference requirement despite the lack of any specific mention of the statute being repealed); *id.* at 147–50 (Scalia, J., concurring) (arguing that express reference provisions are invalid because each new Congress has “the power to make its will known in whatever fashion it deems appropriate—including the repeal of pre-existing provisions by simply and clearly contradicting them”); Alexander & Prakash, *supra* note 165, at 99–100.

196. See generally Alexander & Prakash, *supra* note 165, at 107 (arguing that Congress cannot bind future Congresses).

lacking, partially due to the political benefits of repealing a popular statute without mentioning it and partially due to the difficulty of understanding all of the effects a new statute may have on prior laws.<sup>197</sup> On this dimension of comparison, a CAS requirement is more similar to the enacting clause requirement. It is a *pro forma* statement that would be required in every bill and need not refer to complex existing law. The enforceability of the CAS requirement is not relevant if Congress chooses to voluntarily comply, and there is every reason to think Congress largely would.

#### b. The Problem of the President

Further questions arise after resolving how to implement the rule. All of the problems discussed above, in the section about requiring adoption of CASs by a procedural vote,<sup>198</sup> apply equally if not more strongly when the CAS is put in the text of a bill. Additionally, the House and Senate will have to agree on the CAS in order to pass the bill.

A more problematic possibility is that the President may not agree with the CAS. The President's institutional position as head of the Executive Branch naturally leads him to take different constitutional views than Congress on some issues. A tumultuous history of inter-branch conflict attests to the likelihood of these disagreements. From the Bank of the United States, to military commissions for trying suspected terrorists, to the ban on using torture in interrogation, to the legislative veto, to the Defense of Marriage Act, presidents have frequently disagreed with Congress's constitutional decisions. The President will sometimes respond to this disagreement by vetoing legislation that he believes is unconstitutional. In recent decades, signing statements have become a prominent way for a president to sign legislation while simultaneously objecting to unconstitutional provisions or applications.<sup>199</sup>

As an example of things the President might object to because of his institutional position, consider the CAS that was attached to the Restoring Essential Constitutional Constraints for Libyan Action Involving the Military Act:

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197. See Volokh, *supra* note 68, at 141–42 (discussing the difficulties inherent in analyzing the effects of legislation *ex ante*).

198. See *supra* Subsection IV.B.1.

199. See Christopher S. Kelley, *The Law Contextualizing the Signing Statement*, 37 PRESIDENTIAL. STUD. Q. 737, 739–43 (2007) (recounting the development of the modern signing statement).

Article I, Section 8, of the United States Constitution states that Congress shall have the power “To declare War,” “To raise and support Armies,” “To provide and maintain a Navy,” and “To make Rules for the Government and Regulation of the land and naval Forces.” Although the Constitution’s Article II, Section 2 designates the President as “Commander in Chief,” that title does not empower the President to order congressionally unauthorized force when the United States has not been attacked or is not in imminent danger of attack. This bill reclaims Congress’s core constitutional prerogative to control when offensive military force is used.<sup>200</sup>

This is a view of the separation of war powers that is largely supported by scholars in the field, but it has been repeatedly challenged by other scholars and by the Executive Branch itself. A majority of Congress is likely to favor a CAS like this, but any President can be expected to disagree.

If a CAS is included in the text of a bill, will the President’s signature be read as an agreement with that CAS? Presumably it will, unless the President makes a statement objecting to the CAS. There are two different situations in which a President might disagree with a bill’s CAS. First, he might think that the bill is wholly or partially unconstitutional. Second, he might think that the bill is constitutional, but is justified under a different clause than the one(s) cited by Congress.

If a bill is entirely unconstitutional on its face, the President is obligated to veto it.<sup>201</sup> But if the bill is unconstitutional only in part or in some applications, a President will often choose to sign it into law anyway.<sup>202</sup> When a President chooses to sign a bill he believes is

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200. 157 Cong. Rec. H2037–38 (daily ed. Mar. 29, 2011) (Constitutional Authority Statement for H.R. 1212 introduced by Representative Amash).

201. See, e.g., Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81, 81 n.4 (2007) (“[I]f a bill is unconstitutional in all of its applications, the President must veto the underlying bill.”).

202. This has been the subject of extensive scholarly debate. See William Baude, *Signing Unconstitutional Laws*, 86 IND. L.J. 303, 304–05 (2011) (arguing that many bills have portions that are constitutionally required alongside portions that are unconstitutional, and that the President may sign such a bill); Prakash, *supra* note 201, at 81–82 (arguing that the President is obligated to veto a bill that has any unconstitutional part); Michael B. Rappaport, *The Unconstitutionality of “Signing and Not-Enforcing,”* 16 WM. & MARY BILL RTS. J. 113, 120–24 (2007) (arguing that if the President believes a provision of a bill should not be enforced because it is unconstitutional, the President must veto that bill); Michael B. Rappaport, *The President’s Veto and the Constitution*, 87 NW. U. L. REV. 735, 771–76 (1993) (arguing that the President violates the Constitution when signing an unconstitutional bill into law).

partially unconstitutional, there is a risk that he will be misunderstood as believing that the bill is completely constitutional. This misunderstanding can be problematic, because the Supreme Court often gives some amount of deference to the combined judgment of Congress and the President about constitutionality. Thus, it is important for the President to make his constitutional views known when they differ from Congress's.

Signing statements can accomplish this to some extent. However, judges have never given signing statements much weight in statutory interpretation,<sup>203</sup> despite the intent of the Office of Legal Counsel to promote signing statements as a counterweight to legislative history,<sup>204</sup> and the views of some scholars that they should be taken seriously.<sup>205</sup> The President is generally seen as being outside the legislative process,<sup>206</sup> even though he has a significant constitutional and practical role in crafting and enacting legislation.<sup>207</sup> Additionally, signing statements have been condemned as post-enactment legislative history, one of the least favored types of legislative history.<sup>208</sup>

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203. See Nicholas J. Leddy, Note, *Determining Due Deference: Examining When Courts Should Defer to Agency Use of Presidential Signing Statements*, 59 ADMIN. L. REV. 869, 871–72 (2007) (“When federal courts refer to signing statements, they often cite to them as a minor piece of legislative history or use them as one factor in analyzing a particular statute. Rarely, if ever, do courts use the signing statement’s interpretation of legislation as controlling.”).

204. See Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney Gen., Office of Legal Counsel to the Litig. Strategy Working Grp., *Using Presidential Signing Statement to Make Fuller Use of the President’s Constitutionally Assigned Role in the Process of Enacting Law*, (Feb. 5, 1986), available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf> (advocating the use of signing statements as a way to increase Executive Branch influence over statutory interpretation).

205. Compare Paul T. Stepnowsky, Note, *Deference to Presidential Signing Statements in Administrative Law*, 78 GEO. WASH. L. REV. 1086, 1098–1100 (2010) (arguing that signing statements should receive *Skidmore* deference), with Leddy, *supra* note 203, at 882–84 (arguing against deference to agencies that rely heavily on signing statements in their decision-making).

206. See generally Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363, 365–68 (1987) (objecting to signing statements largely on separation of powers grounds).

207. See Vasan Kesavan & J. Gregory Sidak, *The Legislator-In-Chief*, 44 WM. & MARY L. REV. 1, 4 (2002) (arguing that the Recommendation Clause, the State of the Union requirement, and the veto power give the President a significant legislative role).

208. See Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597, 606–08 (2006) (arguing that judges should not give much weight to signing statements in statutory interpretation). But see Laura McDonald, Note, *The Interpretive Worth of Presidential Signing Statements: A New Form of Legislative History*, 38 FLA. ST. U. L. REV. 179, 193–202 (2010) (taking a more favorable approach to signing statements as legislative history useful for judicial interpretation).

Signing statements are thus disfavored in comparison with legislative history. They are likely to be even more disfavored in comparison with constitutional statements that appear in the enacted bill text itself. And rightly so—statements that are approved through the constitutional process of bicameralism and presentment have legal authority, whereas the statements of a single branch of government are simply opinions.

Including CASs in the text of legislation, therefore, would increase Congress's influence over constitutional interpretation relative to the President. Of course, the President might be able to exert influence over the CAS during the process of negotiation over the pending bill. However, it would be surprising if the President put more emphasis on the CAS than on the substantive content of the bill, which is likely to have a larger practical effect, particularly in the short term. The President is unlikely to use his limited bargaining power to change a CAS rather than to change substantive content that he objects to.

### c. Costs and Benefits of a Statutory CAS

The major benefit of including a CAS in statutory text is that it becomes law. If Congress wants its statements about the Constitution to be as legal and binding as possible, putting them in statutory text is the way to accomplish that. However, the costs of putting CASs in statutory text are substantial, and probably outweigh the benefits.

First, a statutory CAS demands too much agreement. A majority of the House and a majority of the Senate must agree on the same constitutional authority for each bill, and then the President must agree when signing the bill into law (alternatively, two-thirds of each house could agree to pass it over the President's veto). But, as discussed above,<sup>209</sup> there is no reason to demand that everyone agree on precisely *why* a statute is constitutional. Judges routinely concur in the same judgment with different constitutional reasoning. There is no good reason to demand majority agreement in Congress, or agreement between Congress and the President, about what the precise constitutional authority for any given statute is. It is enough that they agree that *some* part of the Constitution authorizes the statute.

Second, requiring majority agreement on a CAS may actually dampen constitutional discussion instead of enhancing it. The truly important result of CASs is *discussion* about the Constitution, not *agreement* about the Constitution. That discussion gives life to our democratic process of constitutional government. Members of Congress

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209. See *supra* Section IV.B.

should be thinking actively about the Constitution while they do their jobs.

When Congress knows that it must reach agreement on a constitutional question in order to enact legislation that it desires on the merits, it is likely to adopt a general, non-controversial CAS. Instead of choosing a particular clause, Congress may choose to repeatedly cite Article I, Section 8, the source of most of the specific grants of congressional authority. Nobody who supports the legislation on its merits will have incentive to object, because disagreement on the CAS could derail passage of the desired legislation.

In contrast, if a CAS is only a legislative history statement and majority agreement is not required, a thousand flowers can bloom. There is no harm in a member of Congress coming to the floor to state, “The CAS for this bill says it’s a regulation of interstate commerce. I don’t believe the Commerce Clause stretches so far. I believe this bill is a tax, and it is justified under the congressional power to lay and collect taxes for the general welfare.”

Finally, courts might see statutory CASs as an affront to their own interpretive authority. If CASs are only in legislative history, the courts might use them or ignore them as they see fit. But if CASs are in statutory text, purporting to be binding on courts, the courts might begin to feel a bit defensive. Courts have frowned upon congressional disagreement with judicial constitutional interpretation in the past.<sup>210</sup> Congress could easily weaken its own position by pushing a confrontation with the Supreme Court on this issue. A better strategy for Congress is to build up its credibility as a constitutional interpreter by actively debating the Constitution during its own legislative proceedings.

#### CONCLUSION

This Article answered only a few of the many interesting questions raised by constitutional authority statements. The existence of CASs gives scholars, the public, and the courts a window into how members of Congress think about the Constitution. This window should not be closed; it should be opened further. Scholars should examine the content and effects of CASs. The House of Representatives should retain this

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210. See *City of Boerne v. Flores*, 521 U.S. 507, 519, 536 (1997) (striking down a statute that attempted to impose Congress’s own constitutional interpretation instead of the Supreme Court’s prior interpretation); *Cooper v. Aaron*, 358 U.S. 1, 17–18 (1958) (declaring that the Supreme Court is the supreme interpreter of the Constitution); Ira C. Lupu, *Statutes Revolving in Constitutional Orbits*, 79 VA. L. REV. 1, 82–83 (1993); Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 250–52 (1995).

rule in future sessions, preferably with some of the modifications suggested here. The Senate would do well to adopt a similar rule.

Constitutional authority statements are a form of constitutional interpretation outside the courts. Almost all commentators agree Congress has a responsibility to pay attention to the constitutionality of its enactments, though they disagree on whether Congress should analyze the Constitution for itself or heed the judgments of the Supreme Court. Under either definition, constitutional authority statements are a tool for ensuring the constitutionality of legislation.

CASs are primarily useful for Congress itself, in its internal deliberations. While the courts may choose to look at them to a certain extent, they are a decidedly weak form of legislative history, coming at the beginning of the legislative process and approved by only a single member. These features make them less useful for judicial interpretation, but much more useful for kickstarting deliberations within Congress. Having a statement of constitutionality available at the outset of discussions over a policy proposal reminds members that they should consider whether they agree or disagree with that statement. When a bill does present constitutional problems, members should be less likely to ignore it when a constitutional authority statement is presented to them before discussions begin.